OA 10394

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Petitioner,

SUPREME COURT CASE NO. 83,283
DISTRICT COURT NO. 93-917

vs.

TERRY DUFFELL and LINDA DUFFELL,

Respondents.

_____/

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
IN ACCORDANCE WITH THE DISCRETIONARY JURISDICTION OF
THE SUPREME COURT OF FLORIDA

BRIEF OF FLORIDA DEPARTMENT OF INSURANCE AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES Page

STATUTES

CONSTITUTION AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

This brief is submitted by the Florida Department of Insurance as Amicus Curiae. The Department of Insurance has a substantial interest in sovereign immunity and workers' compensation issues. This court granted the Department's motion for leave to appear as Amicus Curiae on July 8, 1994.

PRELIMINARY STATEMENT

Petitioner, Holmes County School Board, shall be referred to herein as Petitioner or School Board. The School Board was the defendant in the trial court and the appellant in the district court. Respondents, Terry and Linda Duffell, shall be referred to as Respondents or by their individual names. All references to Florida Statutes herein refer to Florida Statutes (1989).

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as set forth in Petitioner's Initial Brief is hereby adopted.

SUMMARY OF ARGUMENT

The First District Court erred by relying on its decision in DOC v. Koch, 582 So. 2d 5 (Fla. 1st DCA), review denied, 592 So. 2d 679 (Fla. 1991), to allow Respondent to maintain a civil action for negligence against the School Board based upon the "unrelated works" exception to coemployee immunity under workers' compensation. In Koch, the issue of "unrelated works" was not before that court, as the parties did not dispute that point. Different job descriptions cannot be what the Legislature intended "unrelated works" to mean. Accordingly, the application of the "unrelated works" exception when the coemployees are employed by the same governmental entity in the same location is erroneous.

The First District Court also erred by not strictly construing section 768.28(9)(a) to bar this type of action. Sovereign immunity has not been unequivocally waived for civil actions against a governmental employer based upon the "unrelated works" exception to workers compensation. Absent an express waiver of sovereign immunity, the courts may not imply a waiver to allow public employees to maintain civil actions against a public employer.

ARGUMENT

The Workers' Compensation Law, Chapter 440 of the Florida Statutes, provides that an employer's liability for injuries compensated under that chapter is exclusive and limited. Mandico v. Taos Constr., Inc., 605 So. 2d 850 (Fla. 1992). The immunity granted to the employer is an essential element of workers' compensation.[1] As this Court noted soon after the enactment of the Workers' Compensation Law:

> In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial tort judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation.

Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363 at 366 (Fla. 1972), appeal dismissed, 411 U.S. 944, 93 S. Ct. 1923, 36 L. Ed. 2d 406 (1973). Almost all of the states grant immunity from civil suit for negligence to coemployees as well as employers.[2] In Florida, the employer's immunity from civil suit for workplace injuries also extends to fellow employees, subject to certain

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[1] "The workers' compensation system in Florida is based on the mutual renunciation of common law rights and defenses by employers and employees alike." §440.015 Fla. Stat.

[2] Nine jurisdictions grant immunity from civil suit to only the employer: Alabama, Arkansas, Maryland, Minnesota, Missouri, Rhode Island, South Dakota, Vermont, and the Federal Employees Compensation Act. Larson's Workmen's Compensation Law §72.11, at 14-85 (1993).

exceptions. The pertinent part of the Workers' Compensation Law provides:

> (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 any third-party tortfeasor and to the employee. ... The same immunity 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 compensation 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, 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. (emphasis supplied).

Section 440.11, Fla. Stat.

I. The "unrelated works" exception to the exclusivity of remedy provision of the Workers' Compensation Law was improperly applied to allow a public employee injured by a coemployee to maintain a civil action based upon the coemployee's alleged negligence.

Respondent relies on the "unrelated works" exception to maintain a cause of action against the School Board.[3] Although the "unrelated works" exception has been the law of Florida since 1978, there exists little or no information as to the Legislature's

[3]The lower court held that section 768.28, Florida Statutes, read in pari materia with section 440.11 operates to convert a cause of action for negligence against a state employee into an action against the state agency employer, based upon Department of Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA), review denied 592 So. 679 (Fla. 1991). We contend that this holding was erroneous. This issue is more fully addressed in the second argument in this brief, beginning on page 12.

intended meaning of this phrase. The few cases that have interpreted this provision offer little insight into the legislative intent behind the "unrelated works" exception, but they do provide some indication as to what is sufficiently related work to avoid this exception.

The text of the statute does not define "unrelated works." The legislative history is also conspicuously absent of any definition or discussion of "unrelated works." See SUMMARY: COMMITTEE SUBSTITUTE FOR SB 636 WORKMEN'S COMPENSATION (Commerce Committee), at 1 (1978)[4]; See also SECRETARY OF THE SENATE, SENATE FLOOR DEBATE, Tape #2 of 3, June 8, 1978. A survey of workers' compensation laws across the nation does not reveal any other similarly worded "unrelated works" exception to coemployee immunity.[5]

In general, courts must give a statute its plain and ordinary meaning. Holly v. Auld, 450 So. 2d 217 (Fla. 1984). When the Florida Legislature enacted section 440.11, Florida Statutes, it chose to use the word "works", as opposed to "work" or "job" or "employment". Webster's Dictionary defines "works" as "a place where industrial labor is carried on: plant, factory." Webster's

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[4]SB 636 was one of the original Senate Bills that would have granted coemployee immunity and also outlined the exceptions to that immunity. This bill failed during the regular session. The actual bill that became part of Section 440.11(1) was Senate Bill 3-D, which passed during the special session in summer 1978.

[5]"Florida has what appears to be a unique exception to the workers' compensation exclusive remedy provision." Larson's Workmen's Compensation Law §72.21, at 14-126 (1993).

Third New International Dictionary (1966). Black's Law Dictionary 1606 (5th ed. 1979), defines "works" as: "Sometimes, a mill, factory, or other establishment for performing industrial labor of any sort; also, a building, structure, or erection of any kind upon land." The American Heritage Dictionary defines "works" as "a factory, plant, or similar building or system of buildings where a specific type of business or industry is carried on." American Heritage Dictionary 1474, (New College Edition 1969, 1981). These definitions indicate that "works" is something more significant than merely a type of job. Accordingly, the Legislature must have intended that the phrase "unrelated works" requires something much more significant than different job descriptions.

Only a few courts have considered what constitutes unrelated works for the purposes of an exception to coemployee immunity. In Johnson v. Comet Steel Erection. Inc., 435 So. 2d 908 (Fla. 3d DCA 1983), the court held that a general contractor's common laborer who was injured by the alleged negligence of a welder employed by a subcontractor on the same job site, was not engaged in unrelated works from the welder within the meaning of the Workers' Compensation Law. The Third District Court of Appeal appears to construe the "unrelated works" exception to require that the suable coemployee be working on an entirely distinct project, rather than merely performing different functions on the same project.

Lake v. Ramsay, 566 So. 2d 845 (Fla. 4th DCA 1990), involved a claim by a maintenance employee against a supervisory construction employee employed by the same company. While the

court recognized that there may be a vast difference between Lake's maintenance work and the coemployee's construction supervisory work, it specifically noted that "both types of work could be involved in the same construction job." Id. at 848. The district court remanded the case to determine this issue. Id. at 848. Thus, the Fourth District Court of Appeal uses a similar analysis to that of the Third District; that is, to examine not only the particular job duties of the two employees, but to scrutinize whether the duties of the two employees are integral to the same "project." When the duties of two employees are integral to the same project, both the Third and the Fourth District Courts would not permit a civil action against a coemployee based upon the "unrelated works" exception.

Applying this analysis to the instant facts, the duties of a bus driver and a custodian (particularly a custodian assigned to assist bus drivers during evacuation drills) should definitely be considered related work so as to preserve coemployee immunity. Like the maintenance worker and the supervisory construction employee, the duties of a bus driver and a school custodian are involved on the same job site, and in furtherance of the same employer's interest - the operation of an educational facility. That their job descriptions are different is of no consequence, they served the same interest of the same employer at the same location. Certainly, their job duties are as closely related as a welder and a laborer or a maintenance worker and a supervisory construction employee. Their duties were not so unrelated as to permit the

abrogation of coemployee immunity from civil suit under the Workers' Compensation Law.

Department of Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA), review denied 592 So. 2d 679 (Fla. 1991), was a wrongful death suit against the Department of Corrections (DOC) for the alleged negligence of a DOC employee. The DOC employee picked up a truck from the Department of Transportation (DOT) yard. When leaving the yard, the DOC employee struck the DOT employee who happened to be crossing the street on his way to work. Id. at 6.

The lower court's reliance on Koch as the basis for its opinion in the instant case is misplaced. The Koch decision does not provide authority on the issue of the "unrelated works" exception because the Koch court specifically noted that it was undisputed in that case that the coemployees were engaged in "unrelated works." The statements of that court about "unrelated works" are mere dictum. Furthermore, the facts in Koch were not sufficiently developed to give any guidance as to the court's interpretation of the meaning of "unrelated works."

Thus, the lower court in this case erroneously interpreted the Koch decision to affirm the denial of the School Board's motion for summary judgment. Holmes County School Bd. v. Duffell, 630 So. 2d 639 (Fla. 1st DCA 1994). This is most evident in the lower court's explanation of Koch contained in the opinion: "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" (emphasis supplied). Id. at 640. From this explanation, it appears that the court below interpreted "unrelated works" as meaning simply different job descriptions. For the reasons argued above, Koch offers no support for this conclusion.

To allow an employee to seek both workers' compensation benefits and a civil judgment against a coemployee, merely because their job descriptions are different, would result in a deluge of litigation arising out of workplace injuries. In addition to receiving workers' compensation benefits, injured employees will be tempted to look for coemployees to blame so as to seek a potentially more lucrative personal injury award.

In the instant case, Respondent was injured while assisting in the removal of children from school buses during an evacuation drill. Initial Brief of Petitioner at 1. Their respective assigned duties required these employees to be working in the same workplace on the same task - the evacuation drill. Workers' compensation is intended to provide the exclusive remedy for all workplace injuries, including injuries caused by coemployees. §440.11 Fla. Stat. But this exclusion clearly is not intended to apply to the situation where it is only happenstance that the person causing an injury is a coemployee. For example, suppose a delivery truck driver employed by the foods division of a large corporation is involved in an automobile accident with a fellow employee of that corporation that works in textiles who is traveling to a seminar. In such a situation the "unrelated works' exception could be properly applied to abrogate the coemployees

immunity from civil suit.[6]

In the instant case, the School Board assigned the employees to perform the specific task that brought them into contact. Since the duties assigned to them by the same employer required them to perform their jobs at the same place of business, the "unrelated works" exception should not be applied to the instant facts. To allow civil actions against coemployees, merely because the tortfeasor has a different job description than the injured worker, would completely eviscerate the Workers' Compensation Law.

Indeed, to consider "unrelated works" for the purposes of this statute as merely being different job descriptions would lead to arbitrary results. For example, consider the result if an attorney dropped a banana peel outside the Attorney General's office, and another attorney slipped on the banana peel and was injured. Under this interpretation of unrelated works, the attorney could collect only Workers' Compensation benefits and would be precluded from filing a civil action based upon the coemployee exception. Now consider if it was a computer technician who dropped the banana peel and an attorney fell and was injured. Since their job descriptions are different, the attorney could collect workers' compensation benefits and she would also be able to file a civil action under the coemployee exception to workers' compensation immunity. To permit civil suit against a coemployee, solely on the grounds that the coemployees have different job descriptions cannot

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[6]Absent any expression of legislative intent, we submit that this rationale is the basis for the Legislature's enactment of the "unrelated works" exception under section 440.11, Florida Statutes.

be the outcome that the Legislature intended the "unrelated works" exception to produce.

II. Sovereign immunity has not been waived for negligence suits against governmental employers based upon the unrelated works exception to the Workers' Compensation Law.

Even assuming arguendo that the "unrelated works" exception applies, an injured employee could sue only the tortfeasor coemployee and not the governmental employer because sovereign immunity prohibits suit against a governmental employer.[7] The court below held that sovereign immunity has been waived for negligence actions against a public employer based upon the "unrelated works" exception. Duffell, 630 So. 2d at 640; See Koch, 582 So. 2d at 8. This holding was in error. This Court has

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[7]In pertinent part, section 768(9)(a), Florida Statutes, provides:

> No officer, employee, or agent of the state or any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage 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 damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the 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.

definitively stated the various special factors to consider when determining sovereign immunity issues:

> Inasmuch as immunity for the state and its agencies is an aspect of sovereignty, the courts have consistently held that statutes purporting to waive the sovereign immunity must be clear and unequivocal. Waiver will not be reached as a product of inference or implication. The so-called "waiver of sovereign immunity statutes" are to be strictly construed. This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. It is enforced as a protection of the public against profligate encroachments on the public treasury.

Spangler v. Florida State Turnpike Authority, 106 So. 2d 421, 424 (Fla. 1958).

Sovereign immunity is the rule in Florida, not the exception. Pan-Am Tobacco v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). Any waiver of sovereign immunity must be strictly construed in favor of the state and against the claimant. Tampa-Hillsborough Cty. v. K.E. Morris Alignment Serv., 444 So. 2d 926 (Fla. 1983). Section 768.28(1), Florida Statutes, provides that a state subdivision is only liable for negligent actions of employees to the extent that a private person would be liable. A private employer is not liable to an employee for the employee's injuries that have been compensated through workers' compensation. §440.10, Fla. Stat.; Mandico, 605 So. 2d at 853. Since a private employer is not liable for the negligent actions of a coemployee that injured another employee engaged in related work, then neither can a governmental employer be liable in such a situation.

Any waiver of sovereign immunity must be clear and unequivocal. Rabideau v. State, 409 So. 2d 1045 (Fla. 1982). In

enacting section 768.28(9)(a), the Legislature did not specifically waive sovereign immunity for negligence actions based upon the "unrelated works" exception to workers' compensation. This section grants state employees immunity from suit for negligent actions within the scope of their employment. Section 768.28(9)(a) does not specifically allow a public employee to maintain a civil action against a state agency or subdivision for the negligent acts of a governmental coemployee, pursuant to the "unrelated works" exception. "Inference and implication cannot be substituted for clear expression." Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977). This section does not include an express waiver of sovereign immunity that permits a public employee to maintain an action against a governmental employer in these particular circumstances. Accordingly, a government employee may not utilize the "unrelated works" exception in section 440.11 to maintain a civil action against a governmental employer.

The rule of statutory construction, in pari materia, should only be applied when the statutes in question relate to the same subject matter and the statutes are ambiguous. Singleton v. Larson, 46 So. 2d 186 (Fla. 1950). The subject matter of section 440.11, Florida Statutes, is limited to workers compensation. Section 768.28(9)(a) waives sovereign immunity in certain limited circumstances, and exceptions to workers' compensation immunity are not included. These statutory provisions are not concerned with the same specific subject matter, and thus may not be read in pari materia. Without reading these provisions in pari materia, a party

cannot maintain a civil action against a governmental entity based on the "unrelated works" exception.

The Legislature had full knowledge of the existence of the "unrelated works" exception to workers' compensation law when it enacted section 768.28(9)(a). Section 440.11, Florida Statutes, became effective on July 1, 1978. Ch. 78-300, §§2, 25. Laws of Fla. Section 768.28(9)(a) became effective June 30, 1980. Ch. 80-271, §6, Laws of Fla. Both coemployee immunity and the immunity of state employees for negligent actions within the scope of their employment are statutorily granted. §§440.11 and 768.28(9)(a) Fla. Stat.; See Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982). Neither a party nor the court should be permitted to elect which immunity should be applied or overcome in a particular situation. Article X, Section 13 of the Florida Constitution states: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." (emphasis supplied). This provision does not appear to contemplate that the sovereign immunity of the state may be abrogated as a result of construing a series of general laws to obtain a policy decision, but rather only by a single act of the Legislature. Section 768.28, in and of itself, is the sole provision that may be invoked to waive sovereign immunity, according to this section of the Florida Constitution. This statute does not waive sovereign immunity for civil suits based on the "unrelated works" exception, and the courts may not infer such a waiver.

The principle of expressio unius est exclusio alterius also

supports this position. The Legislature did not include "coemployee" within the definition of employee in section 768.28. By expressly including only the term "employee" in section 768.28(9)(a) and not including the term "coemployee" within the definition of employee, it can be inferred that the Legislature must have intended to exclude coemployees from the scope of section 768.28(9)(a). To do otherwise would be to open a significant avenue of liability of the state that is impermissible and could not have been intended by the Legislature.

In addition, to allow a state coemployee to initially collect both workers' compensation benefits, and then to maintain a civil action would lead to inequitable results. The injured employee would be able to subvert the underlying legislative policy of the Workers' Compensation Law because the employee could accept workers' compensation benefits without any of the trade-offs. The employee is guaranteed compensation for workplace injuries, then is permitted to roll the dice for a further recovery through a negligence action. The governmental employer would lose all of the protection of workers' compensation. All governmental employers would be forced to defend a civil action for every workplace injury that could have even possibly been caused by a state coemployee's negligence. In effect, the exception would swallow the rule. To imply a waiver of sovereign immunity in this situation would be to create tremendous liability for public employers, from defense costs of frivolous civil suits to administrative processing of claims to the payment of additional judgments for injuries already

compensated by workers' compensation. The Legislature cannot have intended these results when it enacted the "unrelated works" exception.[8]

Accordingly, the "unrelated works" exception was improperly applied to allow Respondent to maintain a civil action against the School Board. Respondent has received workers' compensation benefits for his injuries and should not be permitted to overcome the exclusivity provisions of the Workers' Compensation Law to maintain a civil action for negligence against the School Board based upon this exception, particularly when respondent and the tortfeasor are coemployees assigned to the same task at the same workplace. The First District Court of Appeal erred by applying the "unrelated works" exception to allow a public employee maintain a civil action against a governmental employer when that employee was injured by a coemployee serving the same purposes of the same governmental employer at the same workplace.

The First District Court also erred by implying a waiver of sovereign immunity for the purpose of civil actions against a governmental employer based on this exception. Because any waiver of sovereign immunity must be clear and unequivocal, the decision below should be reversed.

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[8]"It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer." §440.015 Florida Statutes.

CONCLUSION

Based on the foregoing arguments and authorities, the order denying partial summary judgment for the School Board should be reversed.

Respectfully submitted,

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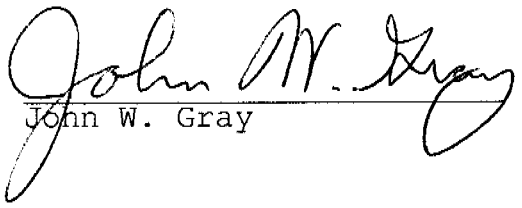
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 28th day of July, 1994, postage prepaid, to **Michael W. Kehoe, Esquire**, Fuller, Johnson & Farrell, P.A., 316 South Baylen Street, Suit 560, P.O. Box 12219, Pensacola, FL 32581; **Barry Gulker, Esquire**, Caminez & Walker, 1637 Metropolitan Blvd, Tallahassee, FL 32308; **Michael S. Davis, Esquire**, Dade County Attorney's Office, 111 N. W. 1st Street, Suite 2810, Metro-Dade Center, Miami, FL 33128; **J. Riley Davis, Esquire**, Katz, Kutter, Haigler, Alderman, Marks & Bryant, P.A., Highpoint Center, Suite 1200, 106 East College Avenue, Tallahassee, Fl 32301.



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