OA 10-3-94

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Petitioner,

vs.

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

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

INITIAL BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION

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INTRODUCTION

Amicus Curiae, American Insurance Association ("AIA"), files this brief in support of the position of the petitioner, Holmes County School Board ("School Board").

STATEMENT OF THE CASE

AIA adopts and incorporates herein by reference the Statement of the Case as recited by the School Board in its Initial Brief. AIA further states that it filed its Motion for Leave to Appear as Amicus Curiae on July 27, 1994, and requested an extension of time to file its amicus brief to and including August 4, 1994. The Court granted AIA's Motion by Order dated July 29, 1994.

STATEMENT OF THE FACTS

AIA adopts and incorporates herein by reference the Statement of the Facts as recited by the School Board in its Initial Brief as well as those facts contained in the opinion of the First District Court of Appeal in Holmes County School Board v. Duffell, 630 So.2d 639 (1st DCA 1994).

Respondent Terry Duffell ("Duffell") was employed by the School Board as a custodian. Duffell was injured at work when a school bus driver employed by the School Board negligently allowed his school bus to roll forward, pinning Duffell against another vehicle.

Duffell filed a civil suit for damages against the School Board and also claimed the right to benefits under Florida's Workers' Compensation Act. (Chapter 440, Fla. Stat.)

The School Board sought a Summary Judgment in its favor in the civil suit for damages claiming immunity under Chapter 440, Florida Statutes (1991). The trial court denied the Motion.

Duffell thereafter entered into a settlement of his workers' compensation claim with the School Board pursuant to the provisions of §440.20(12)(a), Fla. Stat. (1991). In the settlement agreement, Duffell specifically stipulated that "all compensable accidents, injuries and occupational diseases are contemplated and settled," except for medical expenses. Duffell and the School Board also stipulated that Duffell "suffered an accident arising out of and in the course of his employment when he injured his back and pelvis in an automobile accident." The School Board and Duffell further agreed as follows:

> "It is one of the expressed conditions and specific inducements for the instant compromise settlement that any claims of this employee arising out of the accident or accidents suffered while in the employment of the employer prior to the date of this stipulation and accompanying Joint Petition **shall be disposed of, within the provisions of the Florida Workers' Compensation Act**, and the **employer/carrier shall be relieved and discharged from all liability** from compensation, death benefits, rehabilitation benefits and past-incurred medical and medically-related expenses, penalties, interest, attorney's fees and costs, save for future medical expenses in accordance with the provisions of said Act. (emphasis supplied).

AIA adopts and incorporates herein by reference the position of the School Board as to the effect of Duffell's settlement.

Even though Duffell had entered into a settlement agreement with the School Board wherein he waived any further rights or actions against the School Board (the employer), and even though Duffell accepted the benefits that he was entitled to under the Workers' Compensation Act, the First District Court of Appeal ruled that Duffell could, in addition to receiving the worker's compensation benefits, proceed with a civil action against the School Board for damages. The District Court's decision was predicated upon an interpretation of §440.11(1), Fla. Stat. (1991) when read in pari-materia with the provisions of §768.28(9)(a), Fla. Stat. (1991) and its reliance upon the court's decision in Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991).

The effect of the District Court's decision is to open the **governmental employer** to civil liability in addition to its workers' compensation obligations where the claimant is a public employee who is negligently injured by a fellow-employee while in the scope of his employment under circumstances which would allow the claimant to bring a civil action for damages against the negligent fellow-employee under §440.11(1), Fla. Stat.

As such, even though the public employer has provided workers' compensation benefits to the injured public employee, and the public employer did not cause the injury to the public employee, the public employer is being held accountable to the public employee to redress the public employee's injuries by not only

providing workers' compensation benefits to that employee, but also answering to that employee in a civil action for damages in total derogation of the purpose and intent of Florida's Workers' Compensation Act to limit the liability of an employer for injuries to its employees to the workers' compensation benefits provided under Chapter 440, Fla. Stat.

SUMMARY OF ARGUMENT

If a private or public employee claims and receives workers' compensation benefits for injuries received in the scope of his employment, that employee will be found to have elected such compensation as the exclusive remedy against his employer where there is evidence of a conscious choice of remedies by the employee.

Section 768.28(9)(a), Fla. Stat., when read in pari-materia with §440.11(1), Fla. Stat., does not create a civil cause of action for damages against the public employer. The provisions of §768.28 governing waiver of sovereign immunity in tort actions does not create a new cause of action but provides an additional remedy for causes of action which otherwise exists. No separate cause of action for damages exists against a public employer that is providing workers' compensation coverage.

Under the provisions of §440.11(1), Fla. Stat., the public employer enjoys absolute immunity from civil actions for damages initiated by employees of that employer who are negligently injured

by a fellow-employee during the scope of his/her employment unless the employer fails to secure payment of compensation as required under the Workers' Compensation Act. This immunity is absolute, except for certain court created exceptions, which are not applicable to this case. Section 768.28(9)(a), Fla. Stat., cannot and does not abolish this immunity and does not create a separate cause of action for damages against a public employer who provides workers' compensation benefits.

Pursuant to the provisions of §440.11(1), Fla. Stat., a private or public employee injured while in the scope of his employment by a fellow-employee whose job is unrelated to the job of the injured employee, may receive workers' compensation benefits from the employer and also bring a civil action for damages against the negligent fellow-employee. However, pursuant to the provisions of §768.28(9)(a), a public employee cannot be held personally liable in tort or named as a party defendant in any action for any injury or damages suffered by another and caused by the public employee while in the scope of his employment. Under §768.28(9)(a), Fla. Stat., the exclusive remedy for injury or damages suffered as a result of an act or omission of a public employee (if the cause of action exist), shall be an action against the public employer. However, where a public employer provides workers' compensation benefits for its injured employees, the public employer enjoys absolute immunity from such civil actions

for damages pursuant to the provisions of §440.11(1). Under such circumstance the public employee has no cause of action for damages against the public employer.

The exclusive remedy of a public employee injured while in the scope of his employment by a fellow-employee working in unrelated jobs, is the workers' compensation benefits provided under the provisions of Chapter 440, Fla. Stat.

Section 768.28(9)(a), Fla. Stat., was not intended to abolish the absolute tort immunity of a public employer providing workers' compensation benefits in favor of a public employee having a separate cause of action for damages in addition to workers' compensation benefits. The effect of the First District Court's decision in Holmes County School Board v. Duffell, supra. is to eliminate entirely the exclusive remedy protection for a public employer in case of co-worker suits. This was not the intent of the legislature by the enactment of §768.28(9)(a), Fla. Stat.

ARGUMENT

A PUBLIC EMPLOYER PROVIDING WORKERS' COMPENSATION BENEFITS TO ITS EMPLOYEES ENJOYS ABSOLUTE IMMUNITY FROM A CIVIL ACTION FOR DAMAGES INITIATED BY AN EMPLOYEE WHO WAS NEGLIGENTLY INJURED BY A FELLOW-EMPLOYEE.

The Legislature's intent when enacting Florida's Workers' Compensation Law, and the purpose behind said act, is found within §440.015, Fla. Stat. This provision provides in pertinent part as follows:

> "It is the intent of the Legislature that the Worker's 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.** It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. **The workers' compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike."...**(emphasis supplied).

It is, therefore, clear that the manifest intent of Florida's Workers' Compensation Act is to assure to an employee the full benefits provided by the act and to the employer that the benefits so prescribed shall mark the limit of the employer's liability. Urda v. Pan Am World Airways, 211 F.2d 713 (1954). The purpose of the Workers' Compensation Act is to limit the liability of the contributing employer to compensation benefits secured and in return for accepting vicarious liability for all work-related

injuries and for surrendering traditional defenses, the employer is allowed to treat compensation as a routine cost without exposure to tort litigation and, likewise, the employee relinquishes his tort remedies against the employer for a system of compensation sparing him the cost, delay, and uncertainty of litigation. Chorak v. Naughton, 409 So.2d 35 (Fla. 1981).

It is clearly intended that workers' compensation is the exclusive remedy available to an injured employee as to any negligence on the part of that employee's employer. Eller v. Shova, 630 So.2d 537 (Fla. 1993).

This concept is embodied within the provision of §440.11(1), Fla. Stat., which provides in pertinent part:

> "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 legal representative thereof, husband or wife, parents, dependents, next of kin, 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, or the legal representative thereof in case death results from the injury, 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.**"... (emphasis supplied).

Under this statutory provision, an employer who provides the workers' compensation benefits to an injured employee is immune from all other liability, regardless of the employer's fault, if any. This immunity applies to anyone who, except for the

provisions of §440.11(1), would otherwise be entitled to recover damages from such employer at law or otherwise.

For many years, however, co-workers' did not enjoy such immunity and an employee injured as a result of the negligence of a fellow-employee could, in addition to receiving workers' compensation benefits under the workers' compensation law from the employer, sue the fellow-employee in a civil action for damages.

In 1978, however, the Florida legislature amended the provisions of §440.11, Fla. Stat., to provide for the immunity of co-employees with the enactment of Chapter 78-300, Laws of Florida. Effective July 1, 1978, 440.11(1) was amended by the addition of the following language:

> "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 employee's business but they are assigned primarily to unrelated workers' within private or public employment" (emphasis supplied).**"

Accordingly, under most circumstances, effective July 1, 1978, employees enjoy the same immunity from tort liability as does the employer except in certain defined circumstances. Of special interest to this case is the exception to the employee immunity

allowing an injured co-worker to sue a fellow-employee in tort where an employee is injured by a fellow-employee and the fellow-employee works in a job unrelated to the job of the injured employee.

It was pursuant to this provision that Duffell ultimately brought an action for civil damages against the School Board, even though Duffell was injured during the scope of his employment by a fellow-employee and Duffell consciously elected to receive the workers' compensation benefits that he was entitled. Duffell sued the School Board as the named defendant in his civil action for damages because of the provisions of §768.28(9)(a) which provide absolute immunity from personal liability in tort for employees of state agencies, unless such employee had acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

In the present case, the employee causing the injury was not alleged to have acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, and, accordingly, was immune from personal liability in a tort action pursuant to the provisions of §768.28(9)(a). However, where the employee is immune from tort liability, §768.28(9)(a) provides a remedy for the injured party by authorizing the injured party to bring his action against the governmental entity employing the employee who caused the accident.

Section 768.28(9)(a) is a very broad and general provision granting immunity to state employees from personal liability for

tortious conduct, but still providing a remedy to an injured party by allowing that injured party to bring his tort action against the governmental entity employing the employee who caused the accident. However, §768.28(9)(a), Fla. Stat. does not create a new cause of action, but provides an additional remedy for causes of action which otherwise exists. Airport Sign Corp. v. Dade County, 400 So.2d 828 (Fla. 1981); State Office of State Attorney for Thirteenth Judicial Circuit v. Powell, 586 So.2d 1180 (2nd DCA 1991), review denied 598 So.2d 77.

The effect of the decision of the First District Court in Holmes County School Board v. Duffell, supra., is to construe §768.28(9)(a) to create a new cause of action for an injured co-employee where no cause of action otherwise exist. The employer, whether public or private, has been granted absolute immunity from tort liability in actions brought against the employer by employees of that employer, pursuant to the provisions of §440.11(1), Fla. Stat., except where the employer has failed to provide the required workers' compensation benefits. The courts have judicially created certain other exceptions to the employer's, absolute immunity from tort liability i.e. when an employer deliberately injures its employee. Eller v. Shova, 630 So.2d 537 (Fla. 1993); Fisher v. Shenandoah Gen. Constr. Co., 498 So.2d 882 (Fla. 1986); Lawton v. Alpine Engineered Prods., Inc., 498 So.2d 879 (Fla. 1986); Elliott v. Duggar, 579 So.2d 827 (1st DCA 1991). The effect of the **Holmes** decision is to entirely eliminate exclusive remedy protection for a public employer in case of co-employees suits.

Since §768.28(9)(a) provides immunity from tort liability to a public employee (except as heretofore discussed), but provides that the person injured by the tortious conduct of the State employee may bring his action against the governmental entity employing the employee causing the injury, the provisions of §768.28(9)(a) presuppose that the person injured has a pre-existing cause of action. Since no pre-existing cause of action would exist against the public employer under any theory of agency or respondent superior, or otherwise, because of the unqualified immunity of a public or private employer from tort actions initiated by employees under the provisions of §440.11(1), Fla. Stat., a public employee, in consideration for the absolute immunity from tort action provided to that public employee under the provisions of §768.28(9)(a) has foregone any right he may have to sue a co-employee in tort under the provisions of §440.11(1), Fla. Stat. This construction is entirely consistent with the concept and purpose behind the workers' compensation law as heretofore discussed.

Accordingly, when the provisions of §440.11(1) are read in pari-materia with the provisions of §768.28(9)(a), Fla. Stat., and the purpose and intent behind the workers' compensation law is considered, the only conclusion is that a public employee injured in the scope of his employment by a fellow co-worker whose job activities are unrelated to the job activities of the injured employee, has foregone his right to bring a tort action against the co-employee as long as the injured public employee is entitled to

workers' compensation benefits under the provisions of Chapter 440, Fla. Stat. In these circumstances, workers' compensation benefits become the exclusive remedy of the public employee, who, himself, under the provisions of §768.28(9)(a) has been granted immunity from tort liability from any person, co-employee or not, as long as the public employee's action which caused the injury occurred during the scope of his employment. Otherwise, the exclusive remedy protection provided to public employers under §440.11(1), Fla. Stat., has been effectively eliminated in co-employee suits.

The legislature's intent in authorizing co-workers to bring tort actions against each other under the workers' compensation law regardless of the injured employees receipt of workers'compensation benefits was never intended to create a cause of action against the employer. Likewise, the provisions of §768.28(9)(a), Fla. Stat., were never intended to create a separate cause of action against a public employer immune from tort liability under the provisions of §440.11(1), Fla. Stat.

Even if §768.28(9)(a), when construed in pari-materia with the provisions of §440.11(1), Fla. Stat., can be said to authorize (or at least not prohibit) an injured public employee, who was injured by a co-employee in an unrelated job during the scope of their employment, to sue the public employer as a substitute defendant, the injured employee has no cause of action against the public employer where the injured employee has consciously applied for and accepted the workers' compensation benefits he/she is entitled under Chapter 440, Fla. Stat. In such case, the public employee

who has claimed and received workers' compensation benefits will be found to have elected such compensation as an exclusive remedy where there is evidence of a conscious choice of remedies. This is clearly the status of the law in Florida today. Mandico v. Taos Const., Inc., 605 So.2d 850 (Fla. 1992); Ferraro v. Marr, 490 So.2d 188 (Fla. 2nd DCA), review denied 496 So.2d 143 (1986); Ferraro v. Marr, 467 So.2d 809 (Fla. 2nd DCA 1985); Velez v. Oxford Development Co., 457 So.2d 1388 (Fla. 3rd DCA 1984), review denied 467 So.2d 1000 (Fla. 1985); Chorak v. Naughton, 409 So.2d 35 (Fla. 1981).

The First District Court chose to ignore this precedent and to rely upon its decision in State, Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991). In **Koch** the court determined that the sovereign immunity statute did not abolish the common law right of recovery upon which the unrelated works exception to the workers' compensation act is based. Instead §768.28(9)(a), Fla. Stat., transferred the employee's liability to the state. The Court opined in the **Koch** decision that it could find no legislative intent in §768.28(9), Fla. Stat., to abolish causes of action against a negligent co-worker.

Even if this analysis is correct (which amicus has strenuously argued is not correct) the Koch decision did not consider the circumstance where the injured employee has consciously elected his workers' compensation benefits. While §768.28(9)(a) may not, under the First District Court's analysis, abolish the right of a co-worker to bring an action against his fellow employee who caused

the injury, and substitute in place of the co-worker the agency employing the worker who caused the injury, such analysis, nonetheless, does not apply where the injured public employee has consciously elected to receive his workers' compensation benefits. Under no circumstances may an employee, whether private or public, bring a civil action for tort damages against an employer, whether public or private, where that employer has provided workers' compensation benefits and there is no evidence or allegation that the employer deliberately intended to injure the employee.

Under the existing law, a private employee is forever precluded from bringing a tort action against his employer where the employer provided workers' compensation benefits and the other enumerated exceptions heretofore discussed do not apply. Under the First District Court's decision in Holmes County School Board v. Duffell, supra, a public employee is nonetheless allowed to maintain a civil action for tort liability against the public employer even though the injured public employee has consciously elected to receive the workers' compensation benefits he is entitled and the employer has willingly provided same. The effect of the Holmes decision is to eliminate the exclusive remedy protection for a public employer in case of co-employee suits. This is error as a matter of law and the court's decision in **Holmes** should be reversed.

The **Holmes** decision results in the abolishment of the unqualified immunity of a public employer from tort liability even where the public employer is providing workers' compensation

benefits and the injured employee has accepted these benefits, in favor of providing the public employee with a separate cause of action in tort. In the court's zeal to give the public employee his right to sue a fellow-employee in tort, the court abolishes the unqualified immunity from such tort actions provided to the public employer under §440.11(1), Fla. Stat. Yet, the public employee, pursuant to §768.28(9)(a), enjoys essentially unqualified immunity from tort action, whether the action is brought by a fellow-employee or a member of the public.

Section 768.28(9)(a), Fla. Stat., is a very broad statute that cannot be read to have abolished the unqualified immunity of public employers from tort actions under §440.11(1), Fla. Stat., in co-employee suits. The public employee in these circumstances has a remedy. That remedy is workers' compensation benefits. The sole remedy of a public employee for injuries suffered as the result of the actions of a fellow-worker is workers' compensation benefits. This is a fair trade-off when it is considered that the public employee enjoys unqualified immunity from tort actions, whether from the public or a fellow-employee, under §768.28(9)(a), Fla. Stat.

CONCLUSION

For the reasons heretofore espoused, the decision of the First District Court of Appeal in Holmes County School Board v. Duffell, supra, must be reversed. No employee, whether private or public,

has a cause of action against an employer in tort where the employer provides workers' compensation benefits, unless a judicial or statutory exception is applicable. The exclusive remedy of a public employee for injuries received in the scope of his employment is workers' compensation benefits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail and via fax this 4th day of August, 1994 to Michael W. Kehoe, Esq., Fuller, Johnson and Farrell, Post Office Box 12219, Pensacola, Florida 32581, Barry Gulker, Esq., 1637-B Metropolitan Boulevard, Tallahassee, Florida 32308, Michael S. Davis, Esq., Assistant County Attorney for Dade County, 111 NW First Street, Suite 2810, Metro-Dade Center, Miami, Florida 33128.

J. Riley Davis

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