IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Petitioner,

vs.

TERRY DUFFELL and LINDA DUFFELL,

Respondents.
_____/

CASE NO. 83,283

First District Court of Appeal
Case No. 93-917

**ANSWER BRIEF OF Respondents,
TERRY DUFFELL and LINDA DUFFELL**

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PRELIMINARY STATEMENT

Respondents, Terry and Linda Duffell, shall be referred to herein as Respondents or by their individual names. Petitioner, Holmes County School Board, shall be referred to as Petitioner or School Board. All references to Florida Statutes herein refer to Florida Statutes (1989), unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

Respondents, TERRY DUFFELL and LINDA DUFFELL, do not disagree with the facts as set forth by Petitioner. However, certain facts need to be expounded upon and set forth more clearly.

On February 8, 1990, TERRY DUFFELL was employed by the Holmes County School Board as a custodian when he was helping students exit the rear of a school bus in an evacuation drill. Robert Guy Lewis, a school bus driver employed by the Holmes County School Board, negligently allowed his bus to roll forward, pinning Mr. Duffell between Mr. Lewis' bus and the one in front of it. As a result, Mr. Duffell suffered serious injuries, including a fractured sacrum, pain in his pelvis, and back pain.

Mr. Duffell filed a civil complaint against the School Board in October, 1990, alleging, among other things, that Robert Guy Lewis "negligently operated or maintained" his vehicle, and that Mr. Lewis and Mr. Duffell were "assigned to unrelated works within the public employment of the Holmes County School Board".

On January 11, 1991, Petitioner filed a Motion for Summary Judgment claiming Workers Compensation immunity, and alleging the absence of any genuine issues of material fact. Among the arguments made by the School Board were the following:

1. Section 440.11(1) Florida Statutes (1989) did not permit a suit against an employer, based upon the negligence of a co-employee engaged in "unrelated" works.
2. Mr. Duffell and Mr. Lewis were not engaged in unrelated works within the meaning of Section 440.11(1), Florida

Statutes.

3. By accepting Workers Compensation benefits, Mr. Duffell was precluded from filing a civil suit.

The Circuit Court, per Judge Russell Cole, denied the motion, ruling that Mr. Duffell and Mr. Lewis were working at "unrelated jobs" and that the Sovereign Immunity Statute transferred Mr. Duffell's cause of action to his employer instead of Mr. Lewis.

After a motion for rehearing was denied, Petitioners took an appeal to this Court, which was dismissed as untimely. Subsequently, Mr. Duffell entered into a settlement of his Workers Compensation claim "pursuant to Section 440.20(12)(a) and (c), Florida Statutes, and Rule 4.131, Florida W.C.R.P." This settlement released the School Board from all further liability for Worker's compensation benefits except for future medical expenses.

The School Board again moved for Summary Judgment on December 8, 1992 claiming that Mr. Duffell's acceptance of worker's compensation benefits, and his settlement of his worker's compensation claim precluded a civil suit. The Circuit Court again denied the School Board's motion, reincorporating the provisions of its first order denying summary judgment. The School Board again appealed, under the authority of Florida Rule of Appellate Procedure 9.130(a)(3)(c)(vi).

The First District Court of Appeals affirmed the trial court, holding that worker's compensation is not the exclusive remedy as to liability of a fellow employee "when each is acting in furtherance of the employer's business but they are assigned

primarily to unrelated works within private or public employment." Holmes County School Board v. Duffell, 630 So.2d 639, 640 (Fla. 1st DCA 1994). The Court further held that "in the case of a public employee, the government employer steps into the shoes of the liable fellow employee" pursuant to Section 768.28, Florida Statutes, and therefore it is not inconsistent for Terry Duffell to bring a civil action and seek worker's compensation benefits. Id.

Petitioner requested this Court to exercise discretionary jurisdiction, alleging conflict with the case of Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992).

SUMMARY OF ARGUMENT

Neither Terry Duffell's acceptance of worker's compensation benefits nor settlement of his worker's compensation claim preclude the instant civil action. Mr. Duffell's claim is, in effect, a claim against a negligent co-worker; a claim which is clearly permitted under Section 440.11, Florida Statutes, which allows for civil suits against a fellow employee "when each is acting in furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment." Sec. 440.11(1), Fla. Stat. (emphasis added).

Because the co-worker is a public employee, the Sovereign Immunity Statute transfers the negligent party's liability to the state. Section 768.28, Florida Statutes, requires that any claim which Terry Duffell may have against his co-employee be brought against the School Board:

> "The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an . . .employee . . .of the State or any of its subdivisions. . . shall be a suit against the governmental agency. . . ."
>
> Sec. 768.28(9)(a), Fla. Stat.

Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991), rev. den. 592 So.2d 679 (Fla. 1991), which this Court declined to review, is precisely on point. In Koch, the court held that an employee of the state or a political subdivision could bring a civil action against his governmental employer, where he was injured as a result of the negligence of a co-employee, and where the co-employee was "assigned primarily to unrelated works."

In the instant case, Terry Duffell, a custodian, was injured as a result of the negligence of Robert Guy Lewis, a school bus driver. The trial court properly determined that Mr. Lewis and Mr. Duffell were assigned primarily to unrelated works, and that as such, summary judgment for the School Board based on Worker's Compensation immunity was improper.

Contrary to Petitioner's assertion, Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992) does not apply to the case at bar. Mandico involved an injured worker who collected worker's compensation benefits as an "employee" and then brought suit against his employer alleging that he was not a statutory "employee" for purposes of worker's compensation. This Court held that the plaintiff had made an election of remedies by choosing to accept worker's compensation benefits.

In the instant case, Mr. Duffell did not elect one remedy over another by seeking worker's compensation benefits. The doctrine of "election of remedies" or estoppel applies only in cases where such remedies are inconsistent. This is not the case here, where Respondents have never made inconsistent allegations, and clearly, both remedies are available to Mr. Duffell, despite claiming and receiving worker's compensation benefits, and, in fact settling his worker's compensation claim.

The decision of the First District Court of Appeal is based on a clear reading of the statutory language involved, and should therefore be upheld.

ARGUMENT

I.

THE SCHOOL BOARD IS RESPONSIBLE FOR THE NEGLIGENCE OF AN EMPLOYEE, WHEN SUCH NEGLIGENCE RESULTS IN INJURY TO A CO-EMPLOYEE WHO IS "ASSIGNED PRIMARILY TO UNRELATED WORKS".

A. Section 440,11(1), Florida Statutes, provides Terry Duffell a cause of action in tort against his negligent co-employee.

Section 440.11(1), Florida Statutes provides as follows, in pertinent part:

> 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.

When initially passed, the Worker's Compensation Act provided tort immunity to employers, but did not provide "fellow-employee" immunity. Section 440.11(1), cited above and enacted in 1978, extended tort immunity to co-employees of the same employer in certain circumstances, but retained the injured employee's right to sue his co-employee under other circumstances.

In its present form, the statute provides for co-employee immunity from suit in simple negligence cases, but also provides that such immunity does not extend 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." Sec. 440.11(1), Fla. Stat.

It is under this "unrelated works" exception that Respondent Terry Duffell brought the instant cause of action. At the time of his injury, Terry Duffell was engaged in "public employment" with the Holmes County School Board, as was his fellow employee, Robert Guy Lewis. Mr. Duffell was assigned primarily to the job of cleaning and maintaining the school facilities. As a bus driver, Mr. Lewis was assigned primarily to the task of transporting children to and from school. Indeed, in this appeal, the School Board does not even argue that Mr. Lewis and Mr. Duffell were not "assigned primarily to unrelated works within . . . public employment" under the terms of Section 440.11(1).

By including the final words quoted above regarding "public employment", the legislature retained for public employees, as well as their private-sector counterparts, the right which they had always enjoyed--the right to sue in tort when a co-employee negligently causes injury. The legislature could have passed a more ambiguously worded statute, applying to co-workers assigned "primarily to unrelated works" without stating more. However, the legislature, when drafting this law, specifically chose to include the phrase "in private **or public employment**." This language is

clear and unambiguous, and gives an injured public employee the right to bring an action against his co-employee for simple negligence provided the two are "assigned primarily to unrelated works."

The rules of statutory construction dictate that each and every word of a statute must be given force and effect. The only way for this court to adopt the position of the School Board (that worker's compensation is the only remedy for all public employees injured by a negligent co-worker) is to ignore the specific mandate of the legislature, in clear and unambiguous language. In so doing this Court would be holding that the final three words of the statute quoted above are a nullity, with no meaning whatsoever.

By its clear terms, the statute undeniably gives a cause of action to an injured employee to sue his negligent co-employee for a work-related injury, if they are "assigned primarily to unrelated works." This cause of action exists "within private or public employment." § 440.11(1), Fla. Stat. Therefore, the statute applies to Terry Duffell's injury as a result of the negligence of his co-worker, and gives Mr. Duffell the right to bring a civil action in addition to claiming Worker's compensation.

B. Section 768.28, Florida Statutes, requires that causes of action against public employees for job-related claims be brought against the public employer.

It is clear from the provisions of Section 440.11(1), Florida Statutes, that the Legislature intended to provide a civil remedy for private and public-sector employees who are injured by the

negligence of fellow employees in unrelated works. That remedy is a suit against the fellow employee. In the case of Mr. Duffell, this would mean a suit against Robert Guy Lewis, his fellow School Board employee.

However, when a cause of action involves a public employee, one must look to the provisions of Section 768.28, Florida Statutes, which reads, in pertinent part:

> [N]o . . .employee. . .of the State 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. . .."
>
> Sec. 768.28(9)(a), Fla. Stat.

Had Terry Duffell filed suit directly against Mr. Lewis, he would have run squarely against the above-cited provisions of Section 768.28(9)(a), Florida Statutes. This portion of the statute seems to give public employees immunity from suit for any acts of negligence which are committed in the scope of their employment. How, then, could Respondents maintain their cause of action against Mr. Duffell's co-worker, a cause of action clearly permitted by Section 440.11(1), Florida Statutes?

The two statutes are seemingly in conflict; they must be harmonized. Petitioner (and amici) suggest that the only way to interpret these statutes is to assume that the legislature did not intend to give a right of action to public employees when it amended Section 440.11(1), despite the specific language applying to "public employment." They suggest that Worker's compensation is Mr. Duffell's only remedy for this accident.

However, the Petitioner's interpretation ignores remainder of Section 768.28(9)(a), Florida Statutes, which further provides as follows:

> "The **exclusive remedy** for injury or damage suffered as a result of an act, event, or omission of an . . .employee . . .of the State or any of its subdivisions. . . **shall be a suit against the governmental agency. . .."**
>
> Sec. 768.28(9)(a), Fla. Stat. (emphasis added).

Thus, Section 768.28 does not abolish causes of action against public employees, but operates to transfer the liability of the public employee to the public agency for which she works. In White v. Hillsborough County Hospital Authority, 448 So.2d 2 (Fla. 2d DCA 1983), the court interpreted the effect of Section 768.28:

> 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. . . for the individuals who could have been sued.. . . Thus, appellant's cause of action has not been destroyed but has been converted to an action against a state agency.
>
> White, 448 So.2d at 3 (citations omitted).

In Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991), review denied 592 So.2d 679 (Fla. 1991), the First District Court of Appeal considered the same issues as those present in the instant case. Koch involved the death of an employee (Koch) of the Department of Transportation (DOT) as a result of the negligence of an employee of the Department of Corrections (DOC). Koch's family sued the DOC alleging that the tortfeasor was not a co-employee, (because the DOT and DOC were

separate agencies) and in the alternative, that the "unrelated works" exception applied and allowed a suit against the DOC. The court held that Koch and the tortfeasor were co-employees of the same employer (the State of Florida), and that the "unrelated works" provision of Section 440.11 allowed a suit against the co-employee. The court further indicated that the trial court "properly transferred liability from the employee to the state in accordance with Sec. 768.28, Florida Statutes." Koch, at 8.

Petitioners have made no attempt to distinguish Koch from the case at bar. This is because the facts of these two cases are indistinguishable. Here, as in Koch, the injured party and the tortfeasor are fellow employees of the same public employer; here, as in Koch, the injuries arose out of the course and scope of public employment; and here, as in Koch, the plaintiff and the negligent employee were engaged in unrelated work.

Petitioners have suggested that in the instant case, a distinction might be made based on Mr. Duffell's acceptance of Worker's compensation benefits (the election of remedies argument will be addressed later). Petitioner argues that "nothing in the Koch decision permits tandem causes of action or tandem pursuit of remedies. . .. It does not appear from the Koch opinion that worker's compensation benefits were pursued or obtained by the survivors." Initial Brief of Petitioner, p.7. However, according to the appellate record in Koch, Mr. Koch's family did receive Worker's compensation death benefits. (Department of Corrections v. Koch, Florida First District Court of Appeal Case no. 90-1705,

Initial Brief of Petitioner, p.1). Obviously, the First District Court of Appeals did allow "tandem remedies" in both Koch and the instant case.

Petitioner has argued that the Respondents are attempting to make a recovery in this case based upon a "loophole." It is suggested that Respondents are attempting to create a new cause of action under Section 768.28 to allow Terry and Linda Duffell to recover in excess of Worker's compensation. However, it has been held that Section 768.28, Florida Statutes does not create a new cause of action, but provides an additional remedy for causes of action which otherwise exist. Airport Sign Corp. v. Dade County, 400 So.2d 828 (Fla. 1981).

In the instant case, Respondents are not attempting to create a cause of action under Section 768.28; the cause of action already existed under Section 440.11(1). When the legislature enacted Section 440.11(1) in 1978, public employees were not afforded the same immunities from suit as they are now provided under Section 768.28, Florida Statutes, and Terry Duffell could have brought suit directly against his fellow employee. In fact, prior to 1980, he would have had several options: he could have sued his co-employee and the school board jointly; he could have sued only the school board; or, as mentioned above, he could have sued his co-employee only. See District School Board of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980) (discussing pre-1980 public employee immunity).

In 1980, the legislature amended Section 768.28 to provide that the "exclusive remedy" for suits against public employees "shall be a suit against the governmental agency." This amendment was made after the adoption of Section 440.11(1). It cannot be rationally argued that by amending Section 768.28, the legislature intended to repeal by implication the "unrelated works" provisions of Section 440.11(1) as to public employees, but that is precisely the result that Petitioners suggest. It is well settled in Florida that repeal by implication is not favored unless there is a clear legislative intent to do so. Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987); State v. Dunmann, 427 So.2d 166 (Fla. 1983).

To adopt the School Board's position would give public employees a different status than their private sector counterparts, leaving them without a remedy. While private employees could sue fellow employees, government employees could not.

The School Board has asked this court to reverse the decision of the First District Court of Appeal. However, it can give no sound legal or public policy basis for doing so. To adopt the position espoused by Petitioners would abolish a right of recovery for public employees, without providing a reasonable alternative, a result not intended by the legislature. Therefore, the decision of the First District Court of Appeal should be upheld.

II

SINCE A CIVIL ACTION AGAINST THE SCHOOL BOARD AND SETTLEMENT OF A WORKER'S COMPENSATION CLAIM ARE NOT INCONSISTENT REMEDIES, THE ELECTION OF REMEDIES DOCTRINE DOES NOT APPLY.

A. Because the instant action does not allege a theory of relief inconsistent with a Worker's Compensation claim, the holding in Mandico v. Taos Construction does not apply.

At all times during this action, Respondents have contended that Terry Duffell's injuries occurred as a result of an on-the-job accident. Mr. Duffell has consistently maintained that both he and Mr. Lewis were acting in the course and scope of their employment when this accident occurred. Respondents' position has been that the civil action is essentially a third-party action, clearly permissible under the provisions of the Worker's Compensation Act. The only unusual feature of this case is that due to the operation of the Sovereign Immunity statute, the action against the negligent party is transferred to the School Board, who happens also to be Mr. Duffell's employer.

The School Board attempts to argue the doctrine of "election of remedies"; that is, that by seeking Worker's compensation (Comp) benefits, Mr. Duffell has waived the right to file a civil lawsuit. However, this doctrine is inapplicable where the remedies sought are not inconsistent.

In support of its "election of remedies" theory, Petitioner relies heavily on Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992). Indeed, this Court's basis for accepting jurisdiction is an asserted conflict between this case and Mandico. However,

the facts of Mandico are so dissimilar, and the principle of law so inapplicable to the instant case that there can be no conflict between the two decisions.

The issue facing this Court in Mandico was whether an independent contractor, who is normally exempted from the required coverage under section 440.21, Florida Statutes (1983), can bring a suit for negligence against a general contractor, where the general contractor has provided worker's compensation coverage. In Mandico, the plaintiff argued that his worker's compensation premiums were taken out of his earnings against his will, "over protest." Nevertheless, he applied for and received worker's compensation benefits when he was injured on the job. The court held that even though the plaintiff was not a statutory "employee" for purposes of worker's compensation, he could be brought within the provisions of the worker's compensation law if a contract of worker's compensation insurance has been secured for his benefit (and his employer could enjoy immunity from common law liability). Mandico, at 852.

Petitioner relies on two sentences in Mandico to support his position:

> [O]ne who claims and receives worker's compensation benefits will be found to have elected such compensation as an exclusive remedy where there is evidence of a conscious choice of remedies. See Ferro v. Marr, 490 So.2d 188 (Fla. 2d DCA 1986) rev. den. 496 So.2d 143 (Fla. 1986); Ferro v. Marr, 467 So.2d 809 (Fla. 2d DCA 1985); Velez v. Oxford Development Co., 457 So.2d 1388 (Fla. 3d DCA 1984) rev. den. 467 So.2d 1000 (Fla. 1985); see also, 2A A. Larson, Workmen's Compensation Law, Sec. 67.32, 67.35 (1990 & Supp. 1991).

> Likewise, such an individual is estopped from bringing a civil suit against an employer where the elements necessary for an estoppel are present. See State Dep't. of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); State ex rel Watson v. Gray, 48 So.2d 84 (Fla. 1950); Velez v. Oxford Development Co., 457 So.2d at 1391.
>
> Mandico, at 853, (citations omitted)

The first sentence in Mandico deals with the principle of election of remedies, a principle which Petitioner correctly states "stems from fundamental notions of judicial economy and fairness." In Encore, Inc. v. Olivetti Corp. of America, 326 So.2d 161 (Fla. 1976), the Florida Supreme Court explained:

> The election [of remedies] doctrine is founded on the premise that a party should not in the course of litigation be permitted to occupy inconsistent positions. . . . [T]he doctrine of election of remedies applies only where the alternative remedies are repugnant and inconsistent. . . . It does not preclude the use or pursuit of consistent remedies in proper circumstances.
>
> Encore, 326 So.2d at 163. citations omitted.

In the instant case, the election of remedies doctrine simply does not apply, because the remedies sought are not "repugnant and inconsistent." Indeed, the provisions of Section 440.11(1), as discussed above, specifically allow such an action to be brought. Terry Duffell is merely pursuing "consistent remedies in proper circumstances."

In contrast to the instant case, in Mandico, the injured worker's remedies were inconsistent; he had to make different

factual claims in order to pursue each claim. In order to receive worker's compensation benefits, he had to be a statutory "employee," but then he repudiated this position in order to bring a civil action. In addition, it is clear that the Mandico opinion also dealt with inconsistent remedies; a review of the cases cited by the Mandico Court above reveals that all of the plaintiffs had to repudiate earlier positions (positions which allowed for collection of worker's compensation benefits) in order to maintain civil suits. See Ferro v. Marr, 490 So.2d 188 (Fla. 2d DCA 1986) rev. den. 496 So.2d 143 (Fla. 1986); Ferro v. Marr, 467 So.2d 809 (Fla. 2d DCA 1985); Velez v. Oxford Development Co., 457 So.2d 1388 (Fla. 3d DCA 1984) rev. den. 467 So.2d 1000 (Fla. 1985).

Many other cases also involve plaintiffs who alleged that their injuries occurred during work in order to collect Comp, and then repudiated their positions and claimed that they were not in the course and scope of their employment at the time of injury in order to file civil actions. See, Wishart v. Laidlaw Tree Service, 573 So.2d 183 (Fla. 2d DCA 1991); Ferguson v. Elna Electric Co., 421 So.2d 805 (Fla. 3d DCA 1982).

However, Terry Duffell is not repudiating a previously-held position in order to maintain the instant action. He is alleging the same claim that he has all along. The difference is that the civil claim is based upon the negligence of his co-employee, and the worker's comp claim is based upon his status as an employee.

It is also important to note that in many instances, a worker injured on the job may have a remedy in addition to Worker's

compensation, and does not have to "elect" a remedy. For example, a worker injured by a defective product on the job may bring a products liability action against the manufacturer of the product, and still claim worker's compensation benefits. Or, a worker in private employment who is engaged in "unrelated works" may sue his co-employee who negligently causes a car accident, and still collect worker's compensation benefits. Neither of these employees will be found to have made a "choice of remedies" because their remedies are not exclusive of one another. In fact, the Worker's Compensation Act provides for just such actions in Section 440.39:

> (1) If an employee, subject to the provisions of the Worker's Compensation Law is injured or killed in the course of his employment by the negligence or wrongful act of a third-party tortfeasor, such injured employee may . . . accept compensation benefits under the provisions of this law, and at the same time such injured employee . . . may pursue his remedy by action at law or otherwise against such third-party tortfeasor.
>
> Sec. 440.39, Fla. Stat.

In the instant case, Terry Duffell's civil action, although being brought against the Holmes County School Board by name (because of the provisions of Section 768.28(9)), is essentially a third-party action, just like the examples cited above. This action is not breaching the worker's compensation immunity of the School Board. The School Board is not being sued in its capacity as Terry Duffell's employer, based upon actions taken as his employer; the school board is being sued as a surrogate defendant, based on actions committed by one of its employees. The school board is, in essence, wearing "two hats."

Turning to the second cited sentence in Mandico, the Mandico Court also held that an individual who consciously elects Worker's compensation benefits "is estopped from bringing civil suit against an employer where the elements necessary for an estoppel are present." Mandico, at 853 (emphasis added). However, the elements necessary for an estoppel are not present in the case at bar.

Like election of remedies, estoppel requires inconsistent positions. In McCurdy v. Collis, 508 So.2d 380 (Fla. 1st DCA 1987) the court explained: "The doctrine of estoppel provides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position . . .." McCurdy, at 384.

Similarly, in State Dep't. of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981), cited by the Court in Mandico, the Court set forth the three elements of an estoppel, the first of which is: "a representation as to a material fact that is contrary to a later-asserted position." Anderson, 403 So.2d at 400.

As noted previously, Respondents have never asserted any "contrary position" to that asserted in the instant complaint. Respondents have maintained that Terry Duffell was injured by the negligence of a fellow employee of the Holmes County School Board while both were acting in the course and scope of their employment; both were assigned primarily to unrelated works within their public employment. Because no inconsistent allegations have been made, the doctrines of election of remedies and estoppel do not apply.

B. Settlement of the Worker's Compensation Claim did not affect any claims other than those for Worker's Compensation benefits.

While Petitioner has brought forth no legal basis to support it, the School Board has suggested that Terry Duffell's worker's compensation settlement disposes of all potential claims Mr. Duffell might have due to the injuries arising out of the bus accident upon which he is now suing. As stated previously, and argued throughout this brief, Mr. Duffell's acceptance of Worker's compensation benefits does not preclude a separate, civil action based upon the negligence of his co-employee. Similarly, his settlement of the worker's compensation claim does not affect any civil action.

The language of the worker's compensation settlement agreement itself clearly indicates the release of the worker's compensation claim only:

> WHEREFORE, the parties petition the Judge of Compensation Claims to approve this Stipulation and issue an order approving the settlement under the terms set forth herein, absolving the employer and the carrier from any and all further liability under F.S. 440 et seq. for disability and wage loss benefits other than medical benefits. . ..
> . . .
>
> It is expressly understood that, upon approval of this Petition and Stipulation, no further benefits of any nature whatsoever under F.S. 440 et seq., other than for medical benefits, will be claimed by the employee or his heirs or successors.

Clearly, the references to the provisions of section 440 et seq., Florida Statutes release only the Worker's compensation claim, and nothing more. Indeed, the order entered by the Judge of

Compensation Claims refers to the "joint petition and stipulation for settlement pursuant to Section 440.20(12)(a) and (c), Florida Statutes, and Rule 4.131, Fla. W.C.R.P. . . . ." Obviously, all third-party claims such as the instant one are left open, since the Judge of Compensation Claims does not even have jurisdiction over the third-party tort claim which is the subject of the case at bar.

If Petitioners are suggesting that somehow respondents will receive a double recovery by settling the worker's compensation claim and receiving a settlement or judgment in the civil action, these concerns are misplaced. Section 440.39, cited above, which provides for concurrent acceptance of worker's compensation benefits and civil actions against third-party tortfeasors, also provides for the rights of subrogation of the worker's compensation insurer, to preclude any "double recovery" by the claimant:

> [T]he employer or carrier shall recover from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit are deducted, 100 percent of what it has paid and future benefits to be paid . . . ."
>
> Sec. 440.39(3)(a), Fla. Stat.

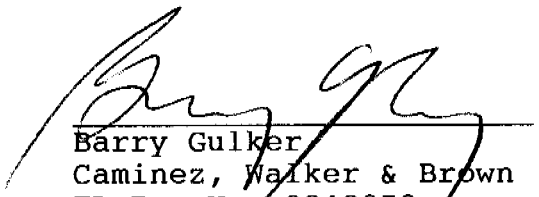
Thus, the Worker's Compensation Act clearly provides for acceptance of worker's compensation benefits while at the same time, a civil action is pending. A right of subrogation is provided to insure that worker's compensation benefits are refunded to the employer or carrier in the event of a tort settlement or judgment. In the instant case, should Terry Duffell recover a judgment against the School Board, the monies he received in worker's compensation benefits will be credited back to the School

Board pursuant to the Section 440.39, Florida Statutes, cited above. Therefore, his settlement has no effect upon the third-party liability claim, and should not be a factor in the outcome of this appeal.

CONCLUSION

For the reasons set forth herein, Respondents, Terry Duffell and Linda Duffell respectfully request this court to enter an order AFFIRMING the decision of the First District Court of Appeal.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the following addressees this 16th day of August, 1994:

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