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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

INITIAL BRIEF OF PETITIONER HOLMES COUNTY SCHOOL BOARD

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A. (1) Terry Duffell's conscious election of workers' compensation remedies makes his election exclusive; (2) the Koch decision does not allow tandem pursuit of remedies; (3) Terry Duffell agreed to forego any other claims against the School Board when he entered into his workers' compensation settlement. 6

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STATEMENT OF THE CASE AND FACTS

Statement of the Case: Petitioner Holmes County School (School Board) petitions the Supreme Court of Florida for relief from the decision rendered by the First District Court of Appeal in Holmes County School Board v. Duffell, 630 So. 2d 639 (Fla. 1st DCA 1994). The School Board was the appellant in the district court and the defendant in the trial court. Respondents are Terry Duffell and his wife Linda Duffell and will be referred to by name.

The First District decision below affirmed the trial court's denial of the School Board's motion for summary judgment. The motion for summary judgment generally sought to enforce the School Board's immunity or exclusive liability under the Workers' Compensation Act and specifically sought to enforce its right to avoid civil liability in light of Mr. Duffell's conscious election to obtain workers' compensation benefits.

Statement of the Facts: The essential facts of this case are undisputed. The School Board employed Terry Duffell as a custodian. On February 8, 1990, Mr. Duffell assisted in a school bus emergency evacuation drill by standing at the rear of a bus and helping students from the emergency exit door to the ground. During this exercise, another of the School Board's employees, a bus driver, allowed his bus to roll forward and pin Mr. Duffell against the bus from which he was extracting students.[1] Mr. Duffell was injured as a result of this workplace incident.

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[1]Since this case arrived at this Court on the denial of a motion for summary judgment below, the parties necessarily rely upon the pleadings of record to establish the statement of facts.

Mr. Duffell filed a civil complaint against the School Board in October 1990.[2] Mr. Duffell's complaint alleged that he and the bus driver "were assigned to unrelated works" for the School Board. He alleged that the bus driver negligently operated or maintained the school bus so that it struck him.

Meanwhile, Mr. Duffell sought and received workers' compensation benefits and medical care for his injuries arising out of the bus accident. The School Board provided the benefits and care to Mr. Duffell through its servicing agent Gallagher Bassett Services, Inc. Mr. Duffell ultimately hired an attorney to represent him in the workers' compensation matter and on September 11, 1991 he entered into a Joint Petition and Stipulation for the Entry of a Compensation Order Approving a Lump Sum Settlement, Not Subject to Modification or Review. On October 9, 1991, a Judge of Compensation Claims approved the joint petition. The workers' compensation settlement served to wash out claims arising from an earlier board-lifting accident as well as the subject bus accident. Pursuant to the terms of the settlement, the School Board paid Mr. Duffell $34,100 and continues to provide medical treatment as necessary.

In the settlement, Mr. Duffell specifically stipulated that "all compensable accidents, injuries and occupational diseases are contemplated and settled," except for medical expenses. Mr. Duffell and the School Board also stipulated that Mr. Duffell "suffered an accident arising out of and in the course of his employment when

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[2]His wife, Linda Duffell, also joined as a plaintiff seeking damages sounding in loss of consortium.

he injured his back and pelvis in an automobile accident." The School Board and Mr. Duffell further agreed as follows:

> It is one of the express 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 for 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 provision of said Act.

Following the workers' compensation settlement, and following the amendment to Florida Rule of Appellate Procedure 9.130(a)(3)(c) allowing appeal from a non-final order determining that a party is not entitled to workers' compensation immunity as a matter of law, the School Board sought to immediately enforce its right to immunity under the Workers' Compensation Act, and under principles of election of remedies.[3]

The trial court denied the School Board's motion finding that it does not enjoy workers' compensation immunity under the specific facts of this case. The trial court also found that the acceptance of workers' compensation benefits did not affect Mr. Duffell's right to bring an additional civil action.

The First District affirmed with an opinion.[4] As to the election of remedies

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[3]The School Board filed the settlement agreement between it and Mr. Duffell in support of its motion.

[4]The district court opinion states that the bus driver "negligently" allowed the bus to roll forward. However, the appealed trial court order below merely noted that the lawsuit was based on alleged negligence of the bus driver and made no specific

argument, the First District cited cases such as this Court's decision in Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992)(a claimant who claims and receives 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) and, without explanation, flatly announced that it did not find such cases controlling.

As to the question of whether the School Board generally enjoyed immunity under the Workers' Compensation Act, the First District denied any immunity to the School Board relying on its decision in Department of Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA), review denied, 592 So. 2d 679 (Fla. 1991). Koch allowed a public employee injured in the workplace to sue his governmental employer in a civil action because the co-employee tortfeasor worked in a job unrelated to the injured employee as contemplated by Section 440.11(1), Florida Statutes, and because, as a public employee, the sovereign immunity waiver statute required the employer to defend and pay.

Petitioner's brief on jurisdiction pointed out particularly the conflict between the First District's decision in Duffell and this Court's holding in Mandico.

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finding of negligence. Moreover, the issue of negligence was not presented to the trial court.

SUMMARY OF ARGUMENT

The respondent's conscious election of workers' compensation remedies make his election exclusive under this Court's decision in Mandico. As a result, the First District erred in failing to apply the dictates of Mandico. The First District also erred in relying on its own decision in Koch which does not allow tandem pursuit of both workers' compensation and civil remedies and which does not allow the principle of election of remedies to be ignored. Moreover, respondent agreed to forego any other claims against the School Board when he entered into his workers' compensation settlement.

The First District has further erred by reading the exclusivity provisions of the Workers' Compensation Act in conjunction with the sovereign immunity waiver statute to allow respondent tandem pursuit of remedies in both workers' compensation and civil arenas. It is clear the Legislature did not intend for governmental employers to be peculiarly exposed and neither is it in accord with general principles of statutory construction that the two statutes be read to abrogate the immunity a governmental employer normally enjoys under the Workers' Compensation Act.

ARGUMENT

WHETHER RESPONDENT IS ENTITLED TO BRING A CIVIL NEGLIGENCE CLAIM AGAINST THE SCHOOL BOARD WHEN HE CONSCIOUSLY ELECTED TO RECEIVE WORKERS' COMPENSATION BENEFITS AND ENTERED INTO A SETTLEMENT WITH THE SCHOOL BOARD ON WORKERS' COMPENSATION CLAIMS BASED ON THE SAME ACCIDENT.

A. (1) Terry Duffell's conscious election of workers' compensation remedies makes his election exclusive; (2) the Koch decision does not allow tandem pursuit of remedies; (3) Terry Duffell agreed to forego any other claims against the School Board when he entered into his workers' compensation settlement.

The First District Court of Appeal below failed to apply this Court's dictates in Mandico. Mandico holds that "one who claims and receives 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." Id. at 853. The First District recognized that Mr. Duffell had claimed and received workers' compensation benefits. Indeed, Mr. Duffell settled the indemnity portion of his workers' compensation claim for over $34,000. Mr. Duffell has never disputed that he consciously chose to pursue workers' compensation benefits. Neither does he dispute that, with the benefit of counsel, he consciously entered into a settlement with the School Board. On such facts, application of Mandico would appear inescapable.

Nevertheless, the First District wrote that it did not find Mandico controlling. Instead it applied its earlier decision in Koch not only allowing Mr. Duffell to avoid the School Board's immunity under the Workers' Compensation Act, but also allowing Mr. Duffell to avoid the common law principle of election of remedies.

The common law principle of election of remedies embraced by the Mandico decision is not superseded by a "loophole" that is perceived to exist in the workers' compensation immunity provisions when read in conjunction with the sovereign immunity waiver statute. The First District in Duffell below described the "loophole" to governmental employer liability as follows: "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." Duffell, 630 So. 2d at 640.

Implicit in the First District's decision below is that the "loophole" espoused in its earlier decision in Koch was available to Mr. Duffell regardless of his conscious election to pursue and obtain remedies under the Workers' Compensation Act. There are at least two errors inherent in the First District allowing an injured employee's civil claim against a governmental employer in addition to his conscious collection of workers' compensation benefits from the same employer.

First, regardless of the merit vel non of the Koch decision, nothing in the Koch decision permits tandem causes of action or tandem pursuit of remedies in both workers' compensation and in civil court, forcing the governmental employer to defend dual litigation on the same nucleus of operative facts. On its face, the Koch decision merely allowed the survivors of a state employee to sue the state based on the happenstance that the death was the result of a coemployee who worked in a job that was unrelated to the deceased's job. It does not appear from the Koch opinion that workers' compensation benefits were pursued or obtained by the survivors.

Thus, neither Koch nor the "loophole" to immunity perceived in Koch explicitly allows an injured employee to subject his governmental employer to tandem litigation.

Second, the perceived "loophole" to governmental employer immunity is not superseded by the well established common law principle of election of remedies which forecloses Mr. Duffell's civil claim. The election of remedies principle stems from fundamental notions of judicial economy and fairness. See generally S & W Motors v. Mack Trucks, Inc., 198 So. 2d 70 (Fla. 1st DCA 1967). The courts cannot say on the one hand that an injured employee who consciously elects workers' compensation remedies is limited to those remedies, Mandico, but allow another similarly situated employee to make a conscious election, reap the rewards of such election, and then pursue additional civil remedies. This is particularly offensive in Mr. Duffell's case because the First District has allowed him to ignore established supreme court precedent on election of remedies on the mere fortuity (1) that he was injured by a coemployee in unrelated works and (2) that he was employed by a governmental employer. Such results in a profoundly unjustifiable and uneven-handed treatment of governmental employers as well as the emasculation of the election of remedies principle. The First District offered no rationale for such a result and there is no sound rationale available.

Moreover, not only did Mr. Duffell elect workers' compensation remedies consciously but he entered into a settlement agreement, with the assistance of counsel, in which he agreed that "any claims of this employee arising out of the accident or accident 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 . . . ." Both the First District and the trial court chose to overlook the terms of this settlement agreement, without explanation. Thus not only did Mr. Duffell consciously elect his remedies and therefore is legally bound by them, but he consciously entered into a written agreement with the School Board in which he agreed to forego "any claims."[5]

Accordingly, the School Board respectfully requests this Court invoke its dictates set out in Mandico and reverse the decision below by finding that Mr. Duffell's conscious election of workers' compensation remedies precludes a civil lawsuit against the School Board regardless of any perceived loopholes in the School Board's immunity under the Workers' Compensation Act.

B. There is no "loophole" to governmental employer immunity from civil liability under the Workers' Compensation Act.

As already pointed out, the First District's decision in Duffell ignores the terms of the settlement agreement between Mr. Duffell and the School Board, it misplaces reliance on Koch which does not allow dual pursuit of remedies or dual litigation, and primarily, it fails to apply this Court's dictates in Mandico because Mr. Duffell consciously chose workers' compensation remedies and therefore those remedies are exclusive. The Duffell decision below also endorses the notion that there exists a "loophole" to workers' compensation immunity a governmental employee

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[5]Except that the agreement allowed Mr. Duffell to continue to obtain medical benefits from the School Board, as needed.

should normally enjoy. The First District's reliance on the perception that a "loophole" exists is also erroneous.

This Court recently set out the history of immunity under the Workers' Compensation Law in Eller v. Shova, 630 So. 2d 537 (Fla. 1993), which need not be recounted here. But fundamental to the legacy of workers' compensation immunity or exclusiveness of remedy is the concept of quid pro quo. As perhaps best stated by this Court's opinion in Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972), the concept of immunity or exclusivity of remedy embodied in Section 440.11, Florida Statutes,

> appears to be a rational mechanism for making the compensation system work in accord with the purposes of the Act. 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 adverse 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.

With the "loophole" perceived by the First District in Duffell and Koch government employers are faced with relinquishing the rational mechanisms of the workers' compensation system and can no longer treat workers' compensation as a routine cost of doing business as budgeted for through the process of appropriating tax dollars. Moreover, no longer can government employers rely on being able to avoid substantial adverse tort judgments (at least up to the statutory cap or insurance limits) in return for participation in the workers' compensation system. By comparison, the employee trades nothing and gains an additional remedial avenue at

the expense of his government employer. Certainly the legislature could not have intended such results.[6] Thus, although there may be an argument that a "loophole" to governmental employer immunity appears to exist when reading the workers' compensation exception to exclusivity in conjunction with the sovereign immunity waiver statute[7], it cannot be argued that the Legislature intended such a "loophole."

But even the perception of a "loophole" is not appropriate to indulge. Although Section 768.28(9)(a) clearly requires a governmental employer to defend and pay on claims against its employees based on simple negligence, that requirement only arises under facts such as presented by Duffell and Koch when the plaintiff happens to also be a government employee performing a job unrelated to that of the tortfeasor's job. Such an unusually detailed circumstance on which governmental employer liability is premised should not logically and legally be upheld to defeat the workers' compensation employer immunity that the governmental employer pays for and should enjoy. In other words, if the aim of the plaintiff's lawsuit is truly the governmental employer and not the tortfeasor who happens to be engaged in unrelated works, the courts should recognize the ill-begotten intentions and uphold the employer immunity afforded by the Workers' Compensation Act.

Accordingly, the School Board respectfully requests the Court reverse the decision below on the ground that the Workers' Compensation Act and the sovereign

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[6]Indeed, there is a dearth of information regarding what the Legislature intended when it included the "unrelated works" provision among the exclusivity exceptions to the Workers' Compensation Act.

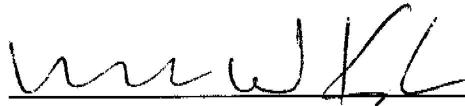
[7]Specifically, Section 768.28(9)(a), Fla. Stat.

immunity waiver statute read *in pari materia* do not render the conclusion that exclusive governmental employer liability is abrogated by circumstances such as the instant case presents.

CONCLUSION

Petitioner Holmes County School Board requests the Court reverse the decision below and remand with directions that summary judgment be entered in the School Board's favor.

FULLER, JOHNSON & FARRELL, P.A.



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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, postage prepaid, to

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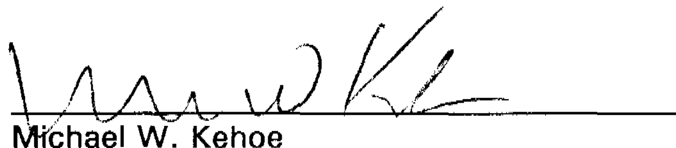
this 28th day of June, 1994.



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