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CLERK, SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Petitioner,

vs.

TERRY DUFFELL and LINDA DUFFELL,

Respondents.
_____/

SUPREME COURT CASE NO. 83283
DISTRICT COURT NO. 93-917
CIRCUIT COURT NO. 90-338-CA

PETITION TO ESTABLISH DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT BASED ON THE EXPRESS AND DIRECT CONFLICT BETWEEN A DECISION OF THE SUPREME COURT AND *THE HOLMES COUNTY SCHOOL BOARD V. DUFFELL* DECISION OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER HOLMES COUNTY SCHOOL BOARD

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PRELIMINARY STATEMENT

The petitioner is Holmes County School Board and is referred to as the School Board. Respondent is Terry Duffell and is referred to by name.

ARGUMENT

The District Court of Appeal decision in *Holmes County School Board v. Duffell*[1] directly and expressly conflicts with a decision of this Court by misapplying or failing to apply this Court's decision in *Mandico v. Taos*.[2]

In *Duffell* the district court misapplied or simply failed to apply the election of remedies principle which in *Mandico* this Court requires to be applied under circumstances the *Duffell* case presents. *Mandico* requires application of the election of remedies principle where, as in *Duffell,* an employee files a civil lawsuit against his employer in addition to receiving workers' compensation benefits on the same work place incident which is the subject of the civil lawsuit.

The holding of *Mandico* with which the district court decision creates discord is as follows: "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 850.

In the underlying case, Terry Duffell was injured while on his job with the School Board. He is a custodian but he was helping children off the back of a school

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[1]The district court opinion is attached at appendix tab no. 1. The reporter citation of the decision is as follows: Holmes County School Board v. Duffell, 19 Fla. L. Weekly D83 (Fla. 1st DCA Jan 6, 1994).

[2]The Mandico decision is attached at appendix tab no. 3. The reporter citation of the decision is as follows: Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992).

bus during an evacuation drill when the bus behind him, driven by a co-employee, rolled into him. It is undisputed that Mr. Duffell claimed and received workers' compensation benefits in the form of a settlement in excess of $34,000.00 in indemnity benefits with future medical care to be provided by the School Board. In addition to his workers' compensation claim and settlement, Mr. Duffell also filed a civil claim which resulted in the underlying district court decision.[3] On page 2 of the district court's slip opinion in *Duffell*, the district court cited the *Mandico* decision (indeed, it referred to one of its own decisions as well) and parenthetically referred to the remedy election principle set out above. The district court brushed *Mandico* aside writing that "[w]e do not find these cases controlling." *Duffell*, Slip Op., p.3.[4] In other words, despite Mr. Duffell consciously electing and receiving workers' compensation benefits, the district court did not apply *Mandico* to disallow Mr. Duffell's additional civil negligence lawsuit.

The district court went on to find that its decision in *Department of*

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[3]Procedurally, the School Board was denied summary judgment and the order appealed pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi) which allows appeal of a non-final order holding that a party is not entitled to workers' compensation immunity as a matter of law. The district affirmed relying on *Koch, infra*.

[4]Leading to the *Mandico* cite, the district court characterizes the School Board's argument as follows: "The Board argues that the trial court order appealed herein improperly allows Duffell to repudiate his previous position that he was injured in the course and scope of his employment in order to obtain further remuneration from the Board in a civil action." Slip Op. p.2. This argument was actually the School Board's secondary argument. The School Board's primary argument was that Mr. Duffell's negligence claim was precluded because he consciously elected and received workers' compensation benefits in the form of a lump sum settlement plus continued medical care.

Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA), *review denied*, 592 So. 2d 679 (Fla. 1991), allowed Mr. Duffell to proceed with his civil negligence lawsuit against the School Board. The district court summarized the *Koch* holding 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 work place, so long as the injured employee does not work in a job related to the tortfeasor's job." Slip Op. p.3. The *Koch* decision emasculates the immunity a governmental employer normally enjoys under the Workers' Compensation Act when one of its employees is injured by another employee who does not work in a related job. But that is as far as *Koch* goes. The district court's *Duffell* decision expands application of *Koch* to further emasculate a governmental employer's immunity under the Act even though the injured employee has consciously elected and received workers' compensation benefits. This is contrary to the dictates of *Mandico*.

To be sure, the facts in *Duffell* present some similarity to the facts in *Koch*. However, the facts in *Duffell* differ from those in *Koch* in at least one key respect. It does not appear from the *Koch* opinion that *Koch* involved a litigant who had additionally pursued a workers' compensation claim or, indeed, settled a workers' compensation claim. As a result, the instant case is not governed by *Koch*. It is governed by *Mandico*. If Mr. Duffell had not consciously elected to pursue a workers' compensation remedy, his civil lawsuit may have been permissible in light of the *Koch* decision. But since he did pursue a workers' compensation remedy, the district court's decision below directly and expressly conflicts with the election of remedy

principle entailed in *Mandico*. And on the facts presented in the instant case, the *Koch* decision does not provide Mr. Duffell a *Koch* escape valve allowing him to continue two courses of litigation. Thus the district court decision allowing just this collides with *Mandico* in a manner which is irreconcilable.

Mr. Duffell elected and received workers' compensation benefits consciously. That is all it takes for *Mandico's* remedy election principle to preclude Mr. Duffell from pursuing a civil lawsuit. The *Koch* decision may allow an illogical loophole for governmental employees to sue their governmental employers which would otherwise enjoy immunity under the Workers' Compensation Act, but *Koch* does not allow an end run of the remedy election principle and it does not allow what the district court decision below does now -- the pursuit of ***both*** a workers' compensation claim and a civil negligence claim against the same governmental employer for the same injury.

Stated differently, the *Koch* decision may allow circumnavigation of a governmental employer's workers' compensation immunity, but it does not overcome the dictates of *Mandico* that the conscious election of a workers' compensation remedy precludes a civil action. The election of remedies principle stems from fundamental notions of judicial economy and fairness. It is an absolute principle and in the instant case serves as a complete foreclosure of Mr. Duffell's additional civil lawsuit. Accordingly, the election of remedy principle that should have governed the district court's decision below was not superseded by application of the *Koch* decision. *Koch* provides a governmental employee a loophole or exception to a

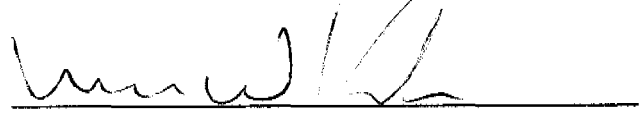
governmental employer's immunity whereas *Mandico* closes the otherwise available loophole under facts as presented in the instant case because Mr. Duffell did not solely choose the *Koch* loophole; he chose the route of a workers' compensation remedy and he completed his journey.

In sum, *Koch* does not obviate the remedy election principles espoused in *Mandico* and thus the district court misapplied or failed to apply *Mandico* to the instant case. And since *Koch* does not serve to avoid the governing principle of *Mandico*, *Mandico* and the instant decision cannot be reconciled and thus this Court has the foundation on which its conflict jurisdiction is and should be established.

CONCLUSION

Petitioner Holmes County School Board respectfully requests the Supreme Court exercise its discretionary jurisdiction pursuant to Article V, Section 3(b), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to review the decision of the First District Court of Appeal below.

FULLER, JOHNSON & FARRELL, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice has been furnished to Barry Gulker, Esquire of Caminez, Walker and Brown, 1637 Metropolitan Boulevard, Tallahassee, FL 32308, by regular U. S. Mail this 4th day of March, 1994.

Michael W. Kehoe

INDEX TO APPENDICES

Appendix Part 1

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Appellant,

v.

TERRY DUFFELL and
LINDA DUFFELL,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 93-917

Opinion filed January 6, 1994.

An Appeal from the Circuit Court of Holmes County.
Russell A. Cole, Judge.

Michael W. Kehoe of Fuller, Johnson & Farrell, P.A., Tallahassee, for appellant.

Barry Gulker of Caminez, Walker & Brown, Tallahassee, for appellees.

PER CURIAM.

The Holmes County School Board (Board) appeals from a non-final order of the trial court denying its motion for summary judgment. We have jurisdiction, Florida Rule of Appellate Procedure 9.130(a)(3)(c)(vi), and affirm.

Appellee Terry Duffell was employed by the Board as a custodian. Duffell was injured at work when a school bus driver, Robert Lewis, negligently allowed his school bus to roll forward,

pinning Duffell against another vehicle. Duffell filed a civil suit against the Board, which sought summary judgment claiming immunity under Chapter 440, Florida Statutes (1991) (the Workers' Compensation Act). The trial court denied the motion, and the Board's appeal of that ruling was dismissed as untimely filed.

Duffell thereafter entered into a settlement of his workers' compensation claim against the Board, pursuant to section 440.20(12)(a), Florida Statutes (1991). The settlement was approved by the Judge of Compensation Claims, and released the Board from all further liability for workers' compensation benefits except future medical expenses. The Board again moved for summary judgment in the civil suit, citing Duffell's acceptance of workers' compensation benefits and the settlement of his claim. The trial court again denied the motion, holding that "[b]ecause this is essentially a third-party action predicated upon the negligence of Robert Lewis, an employee of [the Board,] the acceptance of workers' compensation benefits does not affect [Duffell's] right to bring this action."

The Board argues that the trial court order appealed herein improperly allows Duffell to repudiate his previous position that he was injured in the course and scope of his employment, in order to obtain further remuneration from the Board in a civil action. See Matthews v. G.S.P. Corp., 354 So. 2d 1243 (Fla. 1st DCA 1978); 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). We do not find these cases controlling.

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

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

Based on the foregoing, the order of the trial court denying the Board's motion for summary judgment is affirmed.

ZEHMER, C.J., LAWRENCE, and DAVIS, JJ., CONCUR.

APPENDIX PART 2

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

February 8, 1994

CASE NO: 93-00917

L.T. CASE NO. 90-338-CA

Holmes County School Board	v. Terry Duffell and Linda Duffell
Appellant(s),	Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, clarification and certification, filed January 21, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Karen Roberts
Deputy Clerk

Copies:

Michael W. Kehoe

Barry Gulker

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Appellant,

vs.

CASE NO. 93-917
CIRCUIT COURT NO. 90-338-CA

TERRY DUFFELL and LINDA DUFFELL,

Appellees.

_____/

MOTION FOR REHEARING, CLARIFICATION, AND CERTIFICATION

Appellant **HOLMES COUNTY SCHOOL BOARD** (the Board) moves the court for certification and clarification pursuant to Florida Rule of Appellate Procedure 9.330 and states as follows:

Certification: The Board respectfully requests the Court certify to the Florida Supreme Court the following questions as being of great public importance:

> (1) Whether, despite the exclusivity provisions of the Workers' Compensation Act, a party injured in the work place can sue his public employer in a civil action where that party was injured by the negligence of a co-employee who, as set out in Section 440.11, Florida Statutes, was primarily assigned to unrelated works.
>
> (2) Whether, despite the exclusivity provisions of the Workers' Compensation Act, a party injured in the work place can sue his public employer in a civil action as set out in ***Department of Corrections v. Koch*** when that party has consciously elected to claim and receive a lump sum settlement on his workers' compensation claims against his public employer.

Both of the suggested certified questions above are inherently important to the public. The issues presented by the Court's decision directly impact a large body of

public employers. The Court's decision further exposes public employers to myriad litigation and the expenses associated with that litigation. Those expenses, of course, are borne by the taxpayers of the State of Florida. Thus these issues are inherently of great importance to the public.

The Court's ruling in the instant decision allows an additional area of liability for public employers only and flouts the exclusivity/immunity provisions of the Workers' Compensation Act particularly where, as here, the employee enters into a lump sum workers' compensation settlement with his employer yet sues his employer in a court of general jurisdiction anyway. And the Court's decision not only exposes public employers to a separate civil lawsuit which the Workers' Compensation Act was promulgated to avoid, but now public employers are exposed to dual litigation in both the workers' compensation and civil venues.

Further, the situation presented by the instant case is likely to recur often. Though the terms "unrelated works" is not well defined in the courts, it is apparently not difficult to establish the unrelatedness of two forms of employment.[1]

Regardless of the constraints the Court views itself under by the findings in and the decision of ***Department of Corrections v. Koch***, 582 So.2d 5 (Fla. 1st DCA), ***review den'd***, 592 So.2d 679 (Fla. 1991), the burden of a public employer's exposure to a separate and additional civil lawsuit becomes even more pronounced when the underlying workers' compensation claim was settled and the suing party

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[1]Indeed, in the instant case, without the issue being presented to the trial court, the trial court found in the first paragraph of its appealed order that the parties involved in this case were engaged in unrelated works. The Board challenged this finding in the first paragraph under the second issue in its initial brief, but the Court did not address it in its opinion.

released his rights to make any other claims. That is the situation presented by the instant case. Accordingly, the Board respectfully requests certification of the above questions to the Florida Supreme Court.

Clarification: Appellee Terry Duffell entered into a workers' compensation settlement with the Board and expressly disposed of "any claims" against the Board by doing so. As the Court pointed out in its opinion, the Supreme Court decision of ***Mandico v. Taos Construction Co.***, 605 So.2d 850 (Fla. 1992), held that the conscious election and receipt of workers' compensation benefits precludes a party from bringing an additional and separate civil claim on the same accident. Thus ***Mandico*** precludes the civil suit Mr. Duffell has brought in the instant case because Mr. Duffell consciously chose to claim workers' compensation benefits and, indeed, settled his claim for over $34,000 and continued future medical care.

However, the Court brushed aside the ***Mandico*** and related decisions by simply stating that it found them not to be controlling. The Court offered no rationale for its apparent finding that the rule announced in ***Mandico*** does not preclude Mr. Duffell's civil lawsuit. Even though the courts appear to be willing to allow the exclusivity provisions of the Workers' Compensation Act to be frustrated by a perceived "tunnel through" avenue of litigation, the avenue should not remain open when, as here, the litigant has first chosen another route. Mr. Duffell has successfully negotiated a lump sum settlement of workers' compensation benefits and continued medical care at the Board's expense. This is not a feature of the underlying ***Koch*** decision upon which the Court relies. Therefore, in addition to its request to have the questions set out above certified to the Florida Supreme Court, the Board respectfully requests the Court clarify its opinion as to why Mr. Duffell's

election to receive workers' compensation benefits does nothing to prevent him from forcing the Board into additional litigation.

FULLER, JOHNSON & FARRELL

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MWK: Florida Bar No. 0825883
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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished to Barry Gulker, Esquire of Caminez, Walker and Brown, 1637 Metropolitan Boulevard, Tallahassee, FL 32308, by regular U. S. Mail this 21 day of January, 1994.

_____
J. Craig Knox for Michael W. Kehoe

Appendix Part 3

Anthony MANDICO, Petitioner,

v.

TAOS CONSTRUCTION, INC., et al., Respondents.

No. 76766.

Supreme Court of Florida.

July 9, 1992.

Rehearing Denied Oct. 8, 1992.

General contractor and its employee petitioned for writ of certiorari to the Circuit Court, Broward County, Geoffrey D. Cohen, J., after motions for summary judgment in independent contractor's personal injury suit were denied. The District Court of Appeal, 566 So.2d 910, held that general contractor and its employee were immune from tort suit by operation of workers' compensation law, and certified questions. Application for reviews were made. The Supreme Court held that: (1) general contractor insulated itself from civil liability by procuring workers' compensation policy for independent contractor in accordance with parties' contract; (2) independent contractor elected exclusive remedy by claiming and receiving workers' compensation benefits; and (3) prohibition may not be employed to raise defense of workers' compensation immunity.

Approved in part, quashed in part.

Kogan, J., concurred in part, dissented in part, and filed opinion in which Barkett, C.J., and Shaw, J., concurred.

1. Workers' Compensation ⇐358

General contractor which employs independent contractor insulates itself from civil liability when, in accordance with parties' contract, it procures workers' compensation policy for benefit of independent contractor by deducting policy premiums from payments due independent contractor. West's F.S.A. §§ 440.04, 440.10, 440.11; F.S.1983, § 440.02(11)(d)1.

2. Workers' Compensation ⇐2171

Independent contractor who claimed and received workers' compensation benefits under policy which general contractor obtained in accordance with parties' contract by deducting policy premiums from payments due independent contractor elected such compensation as exclusive remedy and could not bring tort suit against general contractor or its employee.

3. Prohibition ⇐1, 10(1), 16

"Prohibition" is extraordinary remedy by which superior court may prevent inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction.

See publication Words and Phrases for other judicial constructions and definitions.

4. Prohibition ⇐1, 3(1)

Operation of prohibition is very narrow in scope and must be utilized only in emergency cases to prevent impending injury where there is no other appropriate and adequate legal remedy.

5. Prohibition ⇐10(1)

Prohibition may not be used to divest lower tribunal of jurisdiction to hear and determine question of its own jurisdiction or to test correctness of lower tribunal's ruling on jurisdiction where existence of jurisdiction depends on controverted facts that inferior tribunal has jurisdiction to determine.

6. Prohibition ⇐9

Prohibition may not be used to raise defense of workers' compensation immunity in a personal injury action. West's F.S.A. §§ 440.11, 440.21; F.S. 1983, § 440.-02(11)(d)1.

7. Workers' Compensation ⇐2242

Appellate review may be taken from nonfinal orders of circuit court which determine that party is not entitled to workers' compensation immunity. West's F.S.A. R.App.P.Rule 9.130(a)(3).

L. Barry Keyfetz of the Law Offices of L. Barry Keyfetz, Miami, for petitioner.

Neil Rose and Steven J. Chackman of Conroy, Simberg & Lewis, P.A., Hollywood, for respondents.

L. Barry Keyfetz of the Law Offices of L. Barry Keyfetz, Miami, amicus curiae for the Academy of Florida Trial Lawyers.

PER CURIAM.

We have for review *Taos Construction, Inc. v. Mandico,* 566 So.2d 910 (Fla. 4th DCA1990), in which the district court certified the following questions as being of great public importance:

> MAY A GENERAL CONTRACTOR, WHO PROVIDES WORKER'S COMPENSATION COVERAGE FOR AN INDEPENDENT CONTRACTOR BY DEDUCTING THE COVERAGE PREMIUMS FROM PAYMENTS DUE THAT INDEPENDENT CONTRACTOR, CLAIM IMMUNITY FROM THE INDEPENDENT CONTRACTOR'S CIVIL SUIT FOR PERSONAL INJURY UNDER THE WORKER'S COMPENSATION STATUTE WHERE THE INDEPENDENT CONTRACTOR CLAIMED AND RECOVERED WORKER'S COMPENSATION BENEFITS?
>
> MAY TRIAL COURT ORDERS, DENYING IMMUNITY FROM CIVIL SUIT UNDER THE WORKER'S COMPENSATION STATUTE, BE REVIEWED BY A WRIT OF PROHIBITION?

566 So.2d at 911. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

In June 1984, petitioner, Anthony Mandico, was injured while working on a construction project as an independent contractor for respondent Taos Construction, Inc. (Taos). The injury occurred when scaffolding fell on Mandico due to the alleged negligence of respondent Willie Philmore, one of Taos' employees. Although Mandico maintains that "over protest," Taos "unilaterally deducted" from his salary seven percent for worker's compensation insurance, it appears that Mandico entered into a written agreement with Taos that provided if he did not have a worker's compensation insurance policy of his own, seven percent of his gross weekly wages would be deducted for such insurance. It is undisputed that Mandico applied for and received benefits under the worker's compensation policy procured on his behalf by Taos.

However, Mandico, later filed a negligence action against Taos and Philmore. Mandico alleged that Taos and its employee had no immunity under section 440.11(1), Florida Statutes (1983),[1] because he was an independent contractor from whose wages Taos had "unilaterally extracted" the cost of the premium for worker's compensation insurance in violation of section 440.21, Florida Statutes (1983). In their answer to the complaint, the respondents denied negligence and raised as an affirmative defense immunity from liability under section 440.11. Prior to trial, the respondents moved for summary judgment, arguing that the record demonstrated the absence of a genuine issue of material fact regarding the defense of immunity because Taos had procured a workers' compensation policy under which Mandico had claimed and received benefits. The trial court denied the motion and respondents filed a petition for common law certiorari in the district court.[2]

After asking the parties to address whether prohibition was proper, the district court treated the petition as a petition for

1. Section 440.11, Florida Statutes (1983), provides in pertinent part:

> **440.11 Exclusiveness of liability.—**
>
> (1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to ... the employee ... and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee ... may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death.... The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter....

2. Florida Rule of Appellate Procedure 9.130 does not provide for an appeal of an interlocutory order denying a motion for summary judgment.

writ of prohibition. Reasoning that "[s]ince on this record it is clear that petitioners are immune from suit for these injuries, the circuit court is without jurisdiction to proceed further against these petitioners," the district court granted the petition and quashed the order denying summary judgment. 566 So.2d at 911. On motion for rehearing, the district court added the certified questions set forth above. *Id.*

The first question certified presents two distinct issues. The first deals with whether a general contractor who employs an independent contractor insulates itself from common law liability pursuant to section 440.11 when it procures compensation coverage for the independent contractor by deducting the premiums for the coverage from wages due the independent contractor in accordance with the parties' contract. The second deals with whether one who claims and receives workers' compensation benefits has made an election of remedies or is otherwise estopped from bringing a common law action against an employer. We address each issue separately.

[1] First, although it is not apparent from a simple reading of the Workers' Compensation Law, our review of the applicable provisions of the Law leads us to the conclusion that an otherwise unimmune general contractor brings itself within the safeguards of section 440.11 when, as per the parties' contract, it procures workers' compensation coverage for the benefit of an independent contractor by deducting the coverage premiums from payments due the independent contractor.

Pursuant to section 440.02(11)(d)1, Florida Statutes (1983),[3] an independent contractor is ordinarily excluded from the provisions of the Workers' Compensation Law. *Strickland v. Al Landers Dump Trucks, Inc.*, 170 So.2d 445, 446 (Fla.1964). Therefore, the employer of an independent contractor is not required to secure to such an excluded individual the payment of workers' compensation and thus is not entitled to section 440.11 immunity from civil suit for work-related injuries suffered by the independent contractor. §§ 440.10, 440.11, Fla.Stat. (1983). However, pursuant to section 440.04, Florida Statutes (1983),[4] a person who is not otherwise considered an "employee" covered under chapter 440, but for whose benefit a contract of workers' compensation insurance has been secured, may be brought within the operation of the chapter by the acceptance of a policy of insurance by the employer and the writing of such policy by the carrier. *Allen v. Estate of Carman*, 281 So.2d 317, 322 (Fla. 1973); *Strickland v. Al Landers Dump Trucks, Inc.*, 170 So.2d at 446. As we have recognized, the purpose and effect of section 440.04 is to "empower" an employer having in its employ one who is excluded or exempted from the operation of the Law to voluntarily assume the obligations and privileges of the Workers' Compensation Law in relation to that individual and thereby insulate itself from common law liability pursuant to section 440.11. *Allen*, 281 So.2d at 322.

3. Under section 440.02(11)(d)1, Florida Statutes (1983), an independent contractor is excluded from the definition of an "employee" for whom an employer must secure the payment of compensation payable under chapter 440.

4. Section 440.04, Florida Statutes (1983), provides in pertinent part:

440.04 Waiver of exemption.—

(1) Every employer having in his employment any employee not included in the definition "employee" or excluded or exempted from the operation of this chapter may at any time waive such exclusion or exemption and accept the provisions of this chapter by giving notice thereof as provided in s. 440.05, and by so doing be as fully protected and covered by the provisions of this chapter as if such exclusion or exemption had not been contained herein.

(2) When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" ... or who is otherwise excluded or exempted from the operation of this chapter, the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions of this chapter with respect to such person, notwithstanding the provision of s. 440.05 with respect to notice.

We cannot agree with Mandico that the benefits of chapter 440 are not secured for one excluded from the definition of "employee" simply because, in accordance with the parties' contract, a general contractor deducts the cost of the premiums for the workers' compensation policy from payments due the excluded individual. *Cf. id.* (policy secured the benefits of Workers' Compensation Law where policy was procured with funds deducted from independent contractor's commission). It is true that section 440.21(1), Florida Statutes (1983), specifically provides that any agreement by *an employee* to pay any portion of the premium for workers' compensation insurance paid by the employer is invalid and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of the chapter is guilty of a misdemeanor. *See Barragan v. City of Miami*, 545 So.2d 252 (Fla.1989). However, as noted above, an independent contractor is specifically excluded from the definition of "employee" as used in chapter 440. § 440.02(11)(d)1. Therefore, we conclude that the section 440.21 prohibition does not apply to such agreements by an independent contractor.

Moreover, an independent contractor who enters into an agreement whereby coverage premiums will be deducted from payments due, if the independent contractor does not have workers' compensation coverage, in effect elects to be covered and thereby bound by the provisions of chapter 440, including the exclusiveness of liability clause. *See Mullarkey v. Florida Feed Mills, Inc.*, 268 So.2d 363, 365 (Fla.1972) (when chapter 440 coverage is elected, chapter's provisions, including exclusiveness of liability, apply and bind employee), *appeal dismissed*, 411 U.S. 944, 93 S.Ct. 1923, 36 L.Ed.2d 406 (1973). We find no constitutional impediment to limiting the liability of one who employs an independent contractor where such a contractual election has been made. *See id.* (no unconstitutional discrimination exists where employee voluntarily binds himself and his survivors to exclusiveness of liability provision of chapter 440). Finally, we note our agreement with the Georgia Court of Appeals that the quid pro quo provided by the employer in such a case, thus justifying the grant of immunity, is the employer's surrender, under the agreement, of traditional defenses in regard to a compensable injury to the independent contractor. *Lott v. Ace Post Co., Inc.*, 175 Ga.App. 196, 332 S.E.2d 676 (1985).

Accordingly, we hold that a general contractor who employs an independent contractor insulates itself from civil liability when, in accordance with the parties' contract, it procures a workers' compensation policy for the benefit of the independent contractor by deducting the policy premiums from payments due the independent contractor.

[2] Turning to the second issue raised in the first certified question, 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. *See Ferraro v. Marr*, 490 So.2d 188 (Fla. 2d DCA), *review denied*, 496 So.2d 143 (1986); *Ferraro v. Marr*, 467 So.2d 809 (Fla. 2d DCA1985); *Velez v. Oxford Development Co.*, 457 So.2d 1388 (Fla. 3d DCA1984), *review denied*, 467 So.2d 1000 (Fla.1985); *see also* 2A A. Larson, *Workmen's Compensation Law* §§ 67.32, 67.35 (1990 & Supp.1991). Likewise, such an individual is estopped from bringing 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 Dev. Co.*, 457 So.2d at 1391.

Accordingly, with the above qualifications, we answer the first question certified in the affirmative.

[3, 4] We answer the second question certified in the negative. Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction. *Southern Records & Tape Serv. v. Goldman*, 502 So.2d 413, 414 (Fla.

1986); *English v. McCrary*, 348 So.2d 293, 296 (Fla.1977); *State ex rel. B.F. Goodrich Co. v. Trammell*, 140 Fla. 500, 503–04, 192 So. 175 (1939). The writ is very narrow in scope and operation and must be employed with caution and utilized only in emergency cases to prevent an impending injury where there is no other appropriate and adequate legal remedy.

[5] As we noted in *English v. McCrary:*

> Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction. In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *specially* appears so to be.

348 So.2d at 297 (citation omitted) (emphasis added). Therefore, prohibition may not be used to divest a lower tribunal of jurisdiction to hear and determine the question of its own jurisdiction; nor may it be used to test the correctness of a lower tribunal's ruling on jurisdiction where the existence of jurisdiction depends on controverted facts that the inferior tribunal has jurisdiction to determine. 348 So.2d at 298.

[6] In urging that prohibition is proper in this case, Taos relies heavily on this Court's decision in *Winn-Lovett Tampa v. Murphree*, 73 So.2d 287 (Fla.1954). In *Murphree*, a motion to dismiss a personal injury suit brought by an illegally employed minor against his employer had been denied by the trial court. As in this case, the employer maintained that the circuit court was without jurisdiction because chapter 440 provided the exclusive remedy for recovery for the minor employee's injury. *Id.* at 288. When the motion was denied, the employer petitioned this Court for a writ of prohibition. Prohibition was granted on the premise it was clear from the plain language of the relevant statutes that the minor was limited to his remedy under the compensation act and therefore the circuit court was without jurisdiction. We now conclude that *Murphree* was an unwarranted extension of the principle of prohibition. A person has a right to file a personal injury action in circuit court, and the court has jurisdiction to entertain the suit. The assertion that the plaintiff's exclusive remedy is under the workers' compensation law is an affirmative defense, and its validity can only be determined in the course of litigation. The court has jurisdiction to decide the question even if it is wrong. Moreover, the decision will often turn upon the facts, and the court from which the writ of prohibition is sought is in no position to ascertain the facts. At the same time, it is incongruous to say that while the circuit court has jurisdiction to make findings of fact, depending upon the nature of the findings, it may thereupon lose jurisdiction. Thus, we hold that henceforth prohibition may not be employed to raise the defense of workers' compensation immunity.[5]

[7] We suspect that one reason the court was willing to permit prohibition in *Murphree* was to avoid the necessity of requiring the trial to proceed to its conclusion when it was evident from a construction of the relevant statutes that the plaintiff's exclusive remedy was to obtain workers' compensation benefits. Because we are sensitive to the concern for an early resolution of controlling issues, we amend Florida Rule of Appellate Procedure 9.130(a)(3) to read as follows:

> (3) Review of non-final orders of lower tribunals is limited to those which:
>
> (A) concern venue;
>
> (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
>
> (C) determine:
>
> (i) jurisdiction of the person;
>
> (ii) right to immediate possession of property;
>
> (iii) right to immediate monetary relief or child custody in domestic relations matters;

5. Of course, prohibition would lie if a claimant sought to recover workers' compensation by filing suit in circuit court because the court would have no jurisdiction to entertain a workers' compensation action.

(iv) the issue of liability in favor of a party seeking affirmative relief; ~~or~~

(v) whether a party is entitled to arbitration; or

(vi) that a party is not entitled to workers' compensation immunity as a matter of law.

This amendment shall become effective immediately upon the release of this opinion.

Accordingly, we quash the decision below insofar as it grants prohibition. However, because we approve the opinion below as it relates to the first question certified, we remand with directions that the suit be dismissed.

It is so ordered.

OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which BARKETT, C.J., and SHAW, J., concur.

KOGAN, Justice, concurring in part and dissenting in part.

I concur in the majority's handling of the first question certified. However, I do not believe it is necessary to recede from our decision in *Winn-Lovett Tampa v. Murphree*, 73 So.2d 287 (Fla.1954), in order to resolve the second certified question. I also dissent from the majority's remand with directions that the suit be dismissed.

While I agree that prohibition is not appropriate in this case, I find *Murphree* distinguishable. As the majority notes:

> Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction. In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *specially* appears so to be.

Majority op. at 854 (quoting *English v. McCrary*, 348 So.2d 293, 297 (Fla.1977). For example, in *State ex rel. B.F. Goodrich Co. v. Trammell*, 140 Fla. 500, 192 So. 175 (1939), this Court refused to issue a writ of prohibition to restrain a circuit court from exercising jurisdiction over a civil suit against an employer where the circuit court's jurisdiction depended on a determination by that court of an issue of fact as to whether the employer had complied with the requirements of the compensation act in effect at the time. Denial of the writ was proper in *Trammell* because it was not "conclusively" shown upon the face of the record that the circuit court was without jurisdiction. 140 Fla. at 503, 192 So. 175.

In *Murphree*, the trial court denied an employer's motion to dismiss a personal injury suit that had been brought against the employer by an illegally employed minor. The employer sought a writ of prohibition in this Court maintaining that the trial court was without jurisdiction because chapter 440 provided the minor's sole remedy. We granted the writ because it was clear from the plain language of the relevant statutes that the minor was limited to his remedy under the compensation act and therefore there could be no doubt that the circuit court was without jurisdiction. 73 So.2d at 290 (an examination of relevant statutes "forced the conclusion" that the minor was limited to the compensation remedy; the statutes said so "in no uncertain terms").

Adherence to our holding in *Murphree* does not require a conclusion that prohibition is available in this case. Unlike *Murphree*, it is not clear from a simple reading of the controlling statutes that workers' compensation is Mandico's exclusive remedy; and therefore, in this case, it cannot be conclusively shown on the face of this record that the circuit court was without jurisdiction. As noted in the majority's analysis in connection with question one, nowhere in chapter 440 is it clearly provided that a general contractor secures the payment of compensation for an independent contractor for purposes of the waiver of exemption provisions of section 440.04, thus limiting its liability under section 440.11, by deducting the cost of compensation premiums from the independent contractor's wages. Prohibition is not the proper vehicle for resolving such uncertainty. Likewise, it is not a proper vehicle for address-

ing the appropriateness of a lower court's rejection of an affirmative defense of election of remedies or estoppel. Such matters are properly reviewed by plenary appeal. *See Ferraro v. Marr*, 490 So.2d 188 (Fla. 2d DCA), *review denied*, 496 So.2d 143 (1986). Although review by writ of prohibition is not proper in this case, prohibition was proper in *Murphree*. I see no reason to recede from that decision.

I concur in the amendment of Florida Rule of Appellate Procedure 9.130(a)(3) because I too wish to promote the early resolution of controlling issues in cases, such as this, where prohibition is not available. In light of this amendment, I also would answer the second question certified in the negative. However, this conclusion is based solely on the fact that henceforth review of such orders by writ of prohibition will never be proper.

Finally, I also dissent from the majority's remand for dismissal of Mandico's suit. As I read this record, there are factual matters that must be resolved by the trial court before the principles set forth in connection with the first question certified should be applied in this case.

BARKETT, C.J., and SHAW, J., concur.

Robert B. POWER, Jr., Appellant/Cross-Appellee,

v.

STATE of Florida, Appellee/Cross-Appellant.

No. 77157.

Supreme Court of Florida.

Aug. 27, 1992.

Rehearing Denied Oct. 27, 1992.

Jury convicted defendant of first-degree murder and death penalty was imposed by the Circuit Court, Orange County, Gary L. Formet, Sr., J. Defendant appealed. The Supreme Court held that: (1) evidence supported jury verdict; (2) giving flight instruction was harmless error; (3) search warrant was validly obtained and executed; (4) evidence supported finding of aggravating circumstance of especially heinous, atrocious, and cruel killing; (5) erroneous finding of one aggravating circumstance was harmless; and (6) statute defining aggravating circumstance of heinous, atrocious, and cruel and standard jury instruction were not unconstitutionally vague.

Affirmed.

1. Homicide ⇐234(8)

First-degree murder conviction was supported by evidence that white male with reddish hair was in victim's house with gun shortly before victim's death, defendant had sandy blond hair, defendant robbed deputy shortly after victim's death at location near body, hair indistinguishable from defendant's was found on bedding in victim's room and on victim's pubic hair area, head hairs recovered from clothing in house where defendant was arrested were consistent with victim's, and defendant was found hiding in attic crouched near bag containing gun, knife, and gloves when arrested.

2. Criminal Law ⇐1169.2(6)

Any error in admitting hearsay evidence indicating that defendant stole deputy's radio was harmless since deputy clearly identified defendant as person who committed robbery.

3. Criminal Law ⇐1172.2

Any error in giving flight instruction in capital murder case was harmless, even though ambiguity may have existed concerning whether defendant fled from robbery scene or from murder scene, since murder occurred within 10 or 15 minutes of time defendant robbed deputy.

jointly between husband and wife by use of the conjunctives "and," "and/or," or "or" shall not be forfeited if the coowner establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity.

(3) No bona fide lienholder's interest shall be forfeited under the provisions of ss. 932.701–932.704 if such lienholder establishes the he neither knew, nor should have known after a reasonable inquiry, that such property was being used or was likely to be used in criminal activity; that such use was without his consent, express or implied; and that the lien had been perfected in the manner prescribed by law prior to such seizure.

We should reverse the judgment below. On *In Re Forfeiture of 1978 BMW Automobile*, 524 So.2d 1077, 1080–1081 (Fla. 2d DCA 1988), the court held:

> Applying and extending our reasoning in [*City of Clearwater v. Malick*, 429 So.2d 718 (Fla. 2d DCA 1983)], to this case, we hold that if the co-owners are not husband and wife, the guilty knowledge of one conjunctive co-owner is a sufficient basis to justify forfeiture.

In the *1978 BMW* case, *supra*, as in *City of Clearwater v. Malick*, 429 So.2d 718 (Fla. 2d DCA 1983), the court upheld the forfeiture of a vehicle titled in the names of parents and son, where the son, without actual knowledge of the parents, used the vehicle for illegal purposes.

The "innocent spouse" exception in the Act is based on the doctrine of tenancy by the entireties. Under that doctrine, neither spouse can, by his or her unilateral act, alienate, encumber, or forfeit property held jointly by husband and wife. *See Parrish v. Swearington*, 379 So.2d 185 (Fla. 1st DCA 1980); *United States v. One Parcel of Real Estate at 11885 S.W. 46 Street, etc.*, 715 F.Supp. 355, 359 (S.D.Fla.1989). Property held jointly by husband and wife is thus not subject to rules applicable generally to jointly-held property. The *BMW* case, *supra*, holds that where the Legislature has expressly limited the forfeiture exemption for a coowner to property held by husband and wife coowners, the court would not extend it to other coowners, applying the maxim "*expressio unius est exclusio alterius.*"

ON MOTION FOR REHEARING

BARFIELD, Judge.

Both parties have sought rehearing alleging among other things that the state and the defendant stipulated that the father had no knowledge of the criminal activity of the son and was therefore an innocent owner. Our remand for determination of this matter is therefore not necessary. The trial court need only determine the appropriate disposition of the property consistent with the opinion of the court. Except to the extent the opinion is modified herein, the motions for rehearing or clarification are denied.

ERVIN, J., concurs.

BOOTH, J., dissents.

STATE of Florida, DEPARTMENT OF CORRECTIONS, Appellant,

v.

Patricia Derban KOCH, individually, as Personal Representative of the Estate of Robert Graham Koch, deceased, and as natural parent and guardian of Travis Derban Koch, and Robert Graham Koch, II, minors, and next friend of Tiffany Colleen Koch, Appellee.

No. 90–1705.

District Court of Appeal of Florida, First District.

May 3, 1991.

Rehearing Denied Aug. 8, 1991.

Survivors of deceased Department of Transportation (DOT) employee brought ac-

tion against Department of Corrections (DOC) after car that DOC employee was driving struck and killed DOT employee. The Circuit Court for Leon County, F.E. Steinmeyer, III, J., held DOC liable for negligence of its employee and DOC appealed. The District Court of Appeal, Cawthon, Senior Judge, held that: (1) case fell within unrelated works exception to workers' compensation exclusive remedy provision, and (2) unrelated works exception was not abolished by sovereign immunity statute.

Affirmed.

1. Workers' Compensation ⇐221

Workers' Compensation Act was applicable to action brought against Department of Corrections (DOC) by survivors of Department of Transportation employee who was struck and killed by automobile driven by DOC employee because both decedent and driver were employees of state; state, not agency, was employer for purposes of Workers' Compensation Act. F.S.1989, § 440.02(12).

2. Workers' Compensation ⇐2084

Action brought against state by survivors of Department of Transportation (DOT) employee who was killed when he was struck by car driven by Department of Corrections (DOC) employee was not barred by exclusive remedy provision of Workers' Compensation Act, but rather case fell within unrelated works exception to exclusive remedy provision; neither party disputed that victim and driver were coemployees "assigned primarily to unrelated works." West's F.S.A. § 440.11(1).

3. States ⇐191(1.19)

Unrelated works exception to workers' compensation exclusive remedy provision was not abolished by sovereign immunity statute. West's F.S.A. §§ 440.11(1), 768.28(9)(a).

R. William Roland and Mary L. Wakeman, of McConnaughhay, Roland, Maida, Cherr & McCranie, Tallahassee, for appellant.

Ronald W. Brooks, of Brooks & LeBoeuf, Tallahassee, for appellee.

Thomas M. Ervin, Jr., Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, for amicus curiae The Academy of Florida Trial Lawyers.

CAWTHON, Senior Judge.

[1] The State of Florida, Department of Corrections (DOC), appeals a final order granting a motion for partial summary judgment which holds DOC liable for the negligence of its employee who fatally struck an employee of the Department of Transportation (DOT) in an automobile accident.[1] DOC contends that it is immune from suit based on the exclusive remedy provision of § 440.11, Florida Statutes, and the sovereign immunity provision in § 768.28(9)(a), Florida Statutes. Appellees, the survivors of the fatally injured DOT employee, contend that the workers' compensation exclusivity provision is not applicable because the DOT and DOC are two different employers. They argue in the alternative that even if the workers' compensation act were applicable, the instant case would fall within the unrelated works exception to coemployee immunity pursuant to § 440.11(1), Fla.Stat.

We affirm the trial court's order holding DOC liable. We find that the workers' compensation act is applicable based on § 440.02(12), Florida Statutes (1987),[2] which defines "employer" as "the state and all political subdivisions thereof...." Although the victim worked for DOT, while the negligent employee worked for DOC, both were employees of the state and were therefore coemployees pursuant to the workers' compensation act. The state, not

1. On the morning of March 10, 1988, DOC employee Kenneth Warren Tyre picked up a truck at DOT's maintenance yard to transport inmates who were working on state roads pursuant to a contract between DOT and DOC. As Tyre was leaving, he steered the vehicle to the left of the center line and fatally struck Robert Graham Koch, a DOT employee who was crossing the street on his way to work.

2. Renumbered § 440.02(13), Fla.Stat. (1989).

the agency, is the employer for purposes of the workers' compensation act.

[2] Although the workers' compensation act is applicable, the present case falls within the unrelated works exception to the workers' compensation exclusive remedy provision. Section 440.11(1), Florida Statutes (1987), provides:

> 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, legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer.... 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 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 with private or public employment.* (e.s)

[3] In the present case, neither party disputes that, pursuant to the workers' compensation act, victim Koch and DOC employee Tyre were coemployees "assigned primarily to unrelated works." The DOC argues that the unrelated works exception was abolished by § 768.28(9)(a), Florida Statutes, the sovereign immunity provision. Appellant relies on *McClelland v. Cool*, 547 So.2d 975 (Fla. 2d DCA 1989), which found conflict between the two statutes. However, that conflict was on the issue of whether a public employee could be sued personally for gross negligence. The court found that § 768.28(9) controlled and that a public employee could not be personally sued for gross negligence. The issue in *McClelland* is not before us in the present case. The *McClelland* court did not discuss whether the state could be held liable for a coemployee's negligence.

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

> 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 for 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 ... shall be by action against the government 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.

We find no legislative intent in § 768.28(9), Florida Statutes, to abolish causes of action against a negligent coworker. The right of an employee to sue a coemployee for injury caused by that coemployee's negligence was in existence as part of the law of Florida in 1968, and was one of the rights of access and remedy encompassed by Article I, Section 21, of the Florida Constitution. *See Kluger v. White*, 281 So.2d 1 (Fla.1973); *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1087–1089 (Fla.1987) (the legislature is without power to abolish

common law rights predating Article I, Section 21, without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries).

In 1978, the Florida Legislature amended section 440.11(1), Florida Statutes, and limited this common law right by extending the employer's immunity from suit to employees, except in cases involving intentional torts, gross negligence, or situations in which coemployees are engaged in unrelated work. Ch. 78–300, § 2, Laws of Fla. This limited abolishment of coemployees' common law cause of action for negligence was held constitutional in *Iglesia v. Floran*, 394 So.2d 994 (Fla.1981). The Court in *Iglesia* reasoned that the amendment did not abolish the right to sue but merely changed the degree of negligence necessary to maintain an action. Section 768.28(9)(a), Florida Statutes likewise places further limitations on the circumstances under which a state employee may recover for injuries caused by another employee. Although the instant appellant contends that section 768.28(9), Florida Statutes has completely abolished the right of recovery for the negligence of a coemployee engaged in unrelated work, the legislature could not have intended to abolish that right of recovery without providing an adequate alternative remedy.

Moreover, several courts have examined the constitutionality and scope of § 768.28(9), Florida Statutes, and have found that § 768.28(9) did not abolish the right of an injured person to sue and recover based on the liability of a negligent employee; it merely required that the action be maintained against the public employer as the sole, substitute defendant. *White v. Hillsborough County Hospital Authority*, 448 So.2d 2, 3 (Fla. 2d DCA 1983); *Bryant v. Duval County Hospital Authority*, 459 So.2d 1154, 1155 (Fla. 1st DCA 1984). In *White v. Hillsborough County Hospital Authority, supra* at 3, the court specifically stated that with regard to a state employee's simple negligence, the injured person's "cause of action has not been destroyed but has been converted to an action against a state agency." The court found the legislature merely substituted the state and its agencies, which previously could not be sued because of sovereign immunity, for the individual who could be sued. *Id. See also Campbell v. City of Coral Springs*, 538 So.2d 1373, 1374 (Fla. 4th DCA 1989) ("section 768.28(9)(a) does not abolish causes of action. Rather, the statute reasonably arranges and restricts the classes of potential defendants based on the nature of the claims as part of an overall statutory scheme").

In the instant case, the trial court's order granting plaintiff's motion for partial summary judgment held DOC liable for the negligence of its employee. Appellees had a cause of action based on the unrelated works exception to the workers' compensation exclusivity provision, and the court properly transferred liability from the employee to the state in accordance with § 768.28, Florida Statutes. Accordingly, we affirm the trial court's order granting plaintiff's motion for partial summary judgment.

JOANOS and ZEHMER, JJ., concur.

Carolyn LEAMON and Wayne Leamon, her husband, Appellants,

v.

Anabel PUNALES and Eduardo Punales, Appellees.

No. 90–1562.

District Court of Appeal of Florida, Third District.

May 7, 1991.

Rehearing Denied Aug. 7, 1991.

Appeal was taken from judgment entered in accident case by the Circuit Court, Dade County, Joseph Nadler, Judge. The District Court of Appeal held that time