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. 83,283

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

ON PETITION TO ESTABLISH DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT BASED ON AN ASSERTED EXPRESS CONFLICT BETWEEN A DECISION OF THE FLORIDA SUPREME COURT AND THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL

RESPONDENTS TERRY DUFFELL AND LINDA DUFFELL'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner is the Holmes County School Board and will be referred to as the School Board. Respondents are Terry Duffell and Linda Duffell and will be referred to by name.

SUMMARY OF ARGUMENT

Petitioner seeks review of the First District Court of Appeal's decision in the instant case because it is allegedly in direct conflict with this Court's decision in Mandico v. Taos Construction Co., Inc., 605 So.2d 850 (Fla. 1992). Respondents contend that no such direct conflict exists because the cases are distinguishable. In Mandico, the plaintiff made a conscious election between two inconsistent remedies; in the case at bar, Mr. Duffell has made no such election because the remedies sought are not inconsistent.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL'S HOLDING IN THE INSTANT CASE DOES NOT CONFLICT WITH THIS COURT'S DECISION IN MANDICO V. TAOS CONSTRUCTION, INC. BECAUSE MR. DUFFELL MADE NO "ELECTION OF REMEDIES"

The decision of the First District Court of Appeal in the instant case does not conflict with any decisions of this Court, and specifically, the decision of this Court in Mandico v. Taos Construction Co., Inc., 605 So.2d 850 (Fla. 1992). Mandico reached this Court upon two certified questions of the Fourth District Court of Appeal. The first question addresses the issue presented

herein (albeit indirectly), and is as follows:

> "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 RECEIVED WORKER'S COMPENSATION BENEFITS?"
>
> Mandico, at 851.

Even a cursory reading of the question above reveals that the Mandico decision never considered nor addressed the issue present here. 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 his employer, where the employer 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.

The School Board relies on one sentence in the Mandico decision which seems to support its argument. This Court held that "one 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." Mandico, at 853. This holding, however, applies to the facts in Mandico, and not to the facts of the instant case. It is important to note that in the instant case, Mr. Duffell is not making a "choice of remedies" because the remedies are not mutually exclusive or inconsistent, and therefore, the School Board's "election of remedies" argument does not apply. As this Court explained in Encore, Inc. v. Olivetti Corporation of America, 326 So. 2d 161 (Fla. 1976):

> "[T]he doctrine of election of remedies applies only where the alternative remedies are repugnant and inconsistent. . .. It does not preclude the use of consistent remedies in proper circumstances."
>
> Encore, 326 So. 2d at 163. citations omitted.

In many cases, persons injured on the job by third parties will apply for and receive worker's compensation benefits and will then file a civil action against the third party. For example, a salesman driving between sales calls is rearended by another car. He is entitled to worker's compensation benefits because he was on the job, but can also sue the other driver. In such cases, he will not be found to have made a "choice of remedies" because such remedies are not inconsistent[1].

In Mandico, the plaintiff applied for and received worker's compensation benefits as if he were a statutory "employee."

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[1] It is important to note that in such a case, as in the instant case, a double recovery is prevented because the worker's compensation insurance carrier has a statutory lien on any judgment in the civil action.

Subsequently, in contradiction of this position, he alleged that he was not within the purview of the worker's compensation statutes, and that therefore his employer enjoyed no immunity from suit. In doing so, the plaintiff made a "conscious choice of remedies." Mandico, 605 So. 2d at 853.

In the instant case, Mr. Duffell is making a third party claim against his co-employee, a claim clearly permissible under section 440.11(1), Florida Statutes, which allows claims against co-employees "assigned primarily to unrelated works within private or public employment." However, Mr, Duffell's claim against his co-employee is transferred by operation of section 768.28(9), Florida Statutes, to the School Board. In the civil suit, the School Board is a "stand-in" for the otherwise liable third-party. Mr. Duffell has made no "election of remedies", because the remedies available to him are not mutually exclusive or inconsistent.

Although not a jurisdictional argument, the School Board cites Department of Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA 1991), review denied, 592 So. 2d 679 (Fla. 1991). Koch presents facts virtually identical to the instant case, and holds that a government employee may bring suit against his employer where an employee is injured on the job by a fellow employee who is engaged in an unrelated job. Id. The School Board suggests that a distinction can be made between Koch and the case at bar because the Koch decision does not indicate that the litigant pursued a worker's compensation claim. While the published opinion does not indicate whether worker's compensation benefits were paid, the

appellate record in Koch indicates that benefits were paid. (Department of Corrections v. Koch, Florida First District Court of Appeal Case no. 90-1705, Initial Brief of Appellant, p.1.).

Clearly, no meaningful distinction can be made between the Koch decision (which this Court declined to review) and the case at bar. However, the Mandico decision is distinguishable on several key points, as outlined above. Therefore, there is no conflict, express or otherwise, between the decision of this Court in Mandico and the First District Court of Appeal's decision in the instant case. Since this asserted conflict is the only basis for this Court's jurisdiction, Petitioner's request for this Court to exercise its discretionary jurisdiction should be denied.

CONCLUSION

For the reasons set forth above, Respondents Terry Duffell and Linda Duffell respectfully request the Supreme Court to decline to accept discretionary jurisdiction of this matter.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael W. Kehoe of Fuller, Johnson & Farrell, P.O. Box 12219, Pensacola, FL 32581 by U.S. Mail this 10th day of March, 1994.

Barry Gulker