IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,211



STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JUNE CULVER AND GLENN CULVER,

Respondents.

/

On Discretionary Review from the District Court
of Appeal of Florida, First District

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# PETITIONER DOC'S REPLY BRIEF ON THE MERITS (WITH APPENDIX)

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## INTRODUCTION

This brief is filed by Petitioner, Florida Department of Corrections. The abbreviation "DOC" will be used to designate the Petitioner, the Respondents will be referred to "the Culvers" and the symbol "App." will be used to designate the attached appendix.

The Second District's opinion in ***Hastings v. Demming, 682 so.*** 2d 1107 (Fla. 2d DCA 1996) will be designated as ***"Hastings I,"*** and this Court's opinion in ***Hastings v. Demming, 694 So.*** 2d ***718*** (Fla. 1997) will be designated as ***"Hastings II."***

## ARGUMENT

Both DOC and the Respondents appear to agree that under *Rule 9.130(a) (3) (C) (vi), Fla.R.App.P.*, a non-final order denying summary judgment based on workers' compensation immunity is only appealable to the extent that the order turns on an issue of law and not on disputed material facts. *Hastings v. Demming (Hastings I), 682* So. 2d 1107, 1113 (Fla. 2d DCA 1996). The disagreement is over whether the lower court's order has to specifically state upon its face that its denial was made "as a matter of law" before it can be appealed, or whether the appellate court can review the record to determine if the denial was a matter of law or fact.

In support of their argument, Respondents merely repeat this Court's comment in *Hastings II,* that an order under the subject rule is not appealable unless the order specifically states the denial was made as a matter of law. *Hastings v. Demming, 694 So.* 2d 718, 720 (Fla. 1997). Respondents assert that the analysis need go no further.

But, as argued previously by DOC in its initial brief, it is not clear that this Court, in making the above comment in *Hastings II,* intended to narrow appellate review quite that far. The main opinion of *Hastings* II actually affirmed *Hastings I,* where the Second District promulgated the following test:

> [The appellate court must be able to] **discern from the record or the order** under review that the facts presented to the trial court in connection with the motion for summary judgment were so fixed and definite that the court was **in a position to determine** clearly and conclusively, beyond doubt [whether the employer] was entitled to workers' compensation immunity as a matter of law . . .

682 So. 2d at 1108 (emphasis added). The comment relied upon by Respondents contradicts this test propounded by the Second District which actively ***prescribes*** that a court look to the **record** as well if the order is not explicit. Moreover, the comment went outside the scope of the certified question and the certified conflict that was before this Court for review, and runs counter to the body of law on this issue. These arguments were advanced by DOC in its initial brief but were not addressed by Respondents in their answer brief.

DOC also argued in its initial brief, in short, that the defense of workers' compensation immunity is an immunity from suit, not just from liability. It would be unfair to require an employer who would otherwise be entitled to immunity from suit, to be forced to proceed to trial, simply because the order (which was likely not even drafted by the employer) failed to include specific language upon its face. Furthermore, this would run counter to the public policy in upholding employers' workers compensation immunity from suit

and in promoting early resolution of these issues. These arguments also were not addressed by Respondents.

Appellants do provide two post-***Hastings II*** opinions of this Court as evidence of this Court's intention to abide by its comment in ***Hastings II.*** However, these cases merely parrot the comment in ***Hastings*** II without discussing a rationale for forbidding appellate review of the record. Moreover, ***Pizza Hut of America v. Miller, 696 So.*** 2d 340 (1997) is completely distinguishable from the present case, because in ***Pizza Hut,*** the trial court's order denying summary judgment *specifically* stated upon its face that there were factual questions on the issue of workers' compensation immunity left for the jury. 696 so. 2d at 340. The present case concerns a order perfunctorily denying summary judgment based on workers' compensation immunity without elaboration.

There is also a comment made by Respondents in the conclusion that "it is not the province of the appellate court to go on a fact finding mission. That is the responsibility of the jury." (Answer Brief, page 12). But this argument misapprehends the certified question. The First District is not asking this Court if it can make findings of fact, but instead, whether it may look to the record to determine if there were any disputed material facts that would preclude it from exercising jurisdiction to determine the legal issue.

Instead, the main thrust of Respondents' argument seems to be that this Court need not even address the question of whether the district courts may look to the record to decide jurisdiction, because if the Court looks to excerpts from the transcript of the summary judgment hearing in the present case, "it is obvious" that the trial court denied summary judgment because there were disputed material facts, and not on a question of law.

Although DOC disagrees with the Respondents' interpretation of the hearing transcript, DOC calls attention to the fact that Respondents are asking this Court to do ***exactly*** what DOC would have an appellate court do -- look beyond the face of the order to the record to determine if there were material facts in dispute that would have precluded the trial court from making a determination as a matter of law. However, contrary to Respondents' assertion, there is absolutely no indication in the hearing transcript that the trial court denied summary judgment because it found disputed material facts. ***No disputes over material facts were ever raised by either party.*** Instead, a reading of the entire transcript reveals that the entire hearing revolved around a debate over the law on this somewhat complicated exception. The arguments concerned application and interpretation of

statutory and case law to accepted fact and were ***not over*** disputes of material fact.

The trial court did ask the parties if the issue of whether co-employees were "assigned primarily to unrelated works" was a question of law or a question of fact to be determined by the jury. But this was a question, not a conclusion. And counsel for DOC argued in response that it was a question of law:

> THE COURT: Is that a question of law or is that a question of fact? Who is going to make that determination? . . .
>
> THE COURT: . . . But what I am saying is, and y'all help me, is that a question of law or a question of fact? If it is a question of fact then the jury has to make a determination, not me,
>
> MS. LUTTON-SHIELDS: Well, there is **cases *that say the question is* a *question of* law.** I don't understand how you deal **– –**
>
> THE COURT: How am I going to make that determination unless I hear testimony?
>
> MS. LUTTON-SHIELDS: That's what I say. I am not real clear on this angle, the courts are pretty confusing on it. . . But like I said, ***there is case law that says it is* a *question of law for the court to decide* . . .**

(App. p. 9, lines 21-30, p. 10, lines 10-25, p. 11, lines 1-5)(emphasis added). Then, a further debate over the case law ensued. Counsel for DOC presented the case law, and applied the law to the facts of this case, including the employees' job descriptions, the fact that they worked for the

same agency and within the same institution, and the express statutory goals of DOC which were shared by the employees. (App. p. 12-16). The court had asked how it was to make its determination without hearing testimony, and counsel for DOC showed the judge that there were sufficient facts before the court to make its decision without testimony. Counsel then concluded:

> MS. LUTTON-SHIELDS. . . accordingly, we would submit that ***under the case*** law that the correctional officers and Ms. Culver were not assigned primarily to unrelated works and, therefore workers comp immunity would apply. . .

(App. p. 16, line 17-20) (emphasis added).

Furthermore, in its opinion dismissing DOC's appeal, the First District itself noted:

> The sole issue [before the trial court was whether the prison security officers who worked for the Department of Corrections and the plaintiff, June Culver, a prison psychologist, were engaged in primarily unrelated works at the time of the attack on the plaintiff. ***A* review *of the record presented to the court on the motion for summary judgment* reveals *that there were no disputed issues of material fact*** involving the job duties and responsibilities of the various parties at the time of the attack.

***Department of Corrections v. Culver,*** Case No. 96-4883 (1st DCA, December 31, 1997) (emphasis added).

The First District even acknowledged that "the immunity issue appears ripe for review." ***Id.*** But, in light of this Court's comment in ***Hastings II,*** the First District dismissed

DOC's appeal and certified the question to this Court, asking whether it was permitted to review the record at all.

Although Respondents now claim that the trial court determined that there were disputed issues of material fact, in light of the arguments presented below, a more plausible explanation for the trial court's denial, is that the court mistakenly believed that the *question* of "unrelated works" *itself* was a question of fact for the jury to decide. Counsel for DOC argued against this, and this analysis is further bolstered by the First District's subsequent opinion in ***Vause v. Bay Medical Center, 687 So.*** 2d 258 (Fla. 1st DCA 1997) rev. *den. 697 So.* 2d 703 (1997). In ***Vause,*** the First District upheld the trial court's dismissal of the complaint on the grounds that the co-employees in that case were *not* assigned primarily to unrelated works based upon the employees' alleged job descriptions and work responsibilities. 687 So. 2d at 262-263. The ***Vause*** court held that what was relevant for determining this issue was not so much the specific job functions of the co-employees, but the actual *project, or* shared goal of the co-employees, as well as the fact that the employees worked in the same facility. Id. In the case at bar, counsel for DOC made this precise argument to the trial court at the hearing on summary judgment (App. p. 14-16). Therefore, even if the judge made the legal determination that

the question of unrelated works in this case should go to the jury, he was in legal error, and an appeal should be granted on that basis.

## CONCLUSION

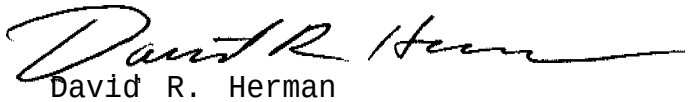
Based on the foregoing arguments and authority, the certified question should be answered that a district court may review either the order or record in the manner described in ***Hastings I,*** to determine its jurisdiction over a non-final order denying workers' compensation immunity.

Accordingly, the First District's order dismissing DOC's appeal should be reversed and this case remanded to the First District for determination of whether DOC is entitled to workers' compensation immunity as a matter of law.

Alternatively, given that the trial court made its determination, and that the order was drafted prior to the ***Hastings II*** decision, as well ***Vause,*** and other applicable cases, DOC requests that this case be remanded to the trial court for rehearing of DOC's Motion for Summary Judgment, and the entry of a new order indicating whether DOC is entitled to workers' compensation immunity as a matter of law.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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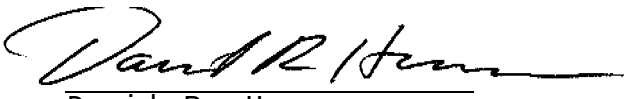
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail delivery to Marcia Davis, Esquire, 2228 NW 40th Terrace, Ste. B, Gainesville, FL 32605; this 31st day of March, 1998.



David R. Herman

# Appendix

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR JACKSON COUNTY, FLORIDA

JUNE CULVER and GLENN CULVER

Plaintiffs,

vs. Case No. 95-573-CA

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS and STATE Of FLORIDA BOARD OF CORRECTIONAL EDUCATION, a legislatively dissolved body corporate,

Defendants.

COPY

MOTION HEARING

November 13, 1996

This cause came on to be heard before Honorable John E. Roberts, Circuit Judge, in and for the Fourteenth Judicial Circuit, in and for the State of Florida, at the Jackson County Courthouse, Marianna, Florida, on the 13th day of November, 1996.

DIANE T. PATE
Court Reporter
Post Office Box 447
Marianna, Florida 32447

EXHIBIT
"A"

APPEARANCES:

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THE COURT: Okay. I am just going to be honest with y'all, normally I read these motions ahead of time but I have not had time to read this. We visited the issue once before but I have been in this two week trial and I have not read this. So you are renewing your motion for summary judgment, is that correct?

MS. LUTTON-SHIELDS: No, I did not, I moved to dismiss originally. And at chat time I said at least on the workers' comp grounds I conceded for purpose of a motion to dismiss that it was not -- my motion on the Workers Comp question was not appropriate at that time and would need to be --

THE COURT: This is a case set for trial in December and you indicated if you are not successful you are going to take it up on appeal.

MS. LUTTON-SHIELDS: Right, on the Workers Comp question.

MS. DAVIS: There is two defendants in the case and motion for summary judgment applies to only one.

MS. LUTTON-SHIELDS: We have moved for summary judgment on behalf of the Department of Corrections.

THE COURT: Give me a little background information. June Culver was working at A.C.I.

MS. LUTTON-SHIELDS: Correct.

THE COURT: And while working over there she was

raped.

MS. LUTTON-SHIELDS: True.

THE COURT: And she was employed at chat time by?

MS. LUTTON-SHIELDS: The Department of Corrections.

THE COURT: And then how is the State of Florida Department of Corrections and the State of Florida, Correctional Education School Authority, is that two distinct bodies?

MS. DAVIS: Yes.

THE COURT: If she was employed by the Deparcmenc of Corrections how is the second part of the State of Florida Correctional Educational School, how are they involved or maybe I need to ask you.

MS. DAVIS: *They're* called CESA. It is the organization that runs the education programs within the prisons or it did at that time. What we have alleged and have developed through discovery is that this inmate was in the CESA program at the school house shortly before this incident occurred, was allowed to leave the program to go back to his dormitory to get medication, went through the pass procedure.

THE COURT. You are alleging that CESA didn't properly supervise him.

MS: DAVIS: Didn't follow up,

THE COURT: Department of Corrections, there wasn't

proper security. Is that correct?

MS. DAVIS: Yes, as well as following procedures.

MS. LUTTON-SHIELDS: We have moved for summary judgment on behalf of the Department of Corrections on workers' comp immunity and additionally on the fact chat the individual, assuming chat workers' comp immunity did not bar the action, that the indivi-dual DOC employees upon whom this negligence, of whom this action is based, did not owe plaintiff a duty of care to protect her from assault or to perform their jobs in any particular manner. And furthermore, that the functions chat were allegedly negligently performed relating to inmate security movement and activity are governmental activity wherein no duty of care is owed regardless and so sovereign immunity would not have been waived for those activities.

And the workers' comp immunity cannot waive that sovereign immunity. We filed an affidavit of the Superintendent of A.C.I. at the time and basically he just set out the fact that what his responsibilities were at the institution and attached the official position descriptions of, that Ms. Culver was in, the psychological specialist, forensic corrections, as well as the correctional officers' position description, and additionally attached the training schedule which

Ms. Culver had as a new employee, her orientation relating to the various correctional courses that she took at that time in 1991, plus in 1992 her refresher training course that she cook in February and March of '92.

Basically Your Honor, on the workers' comp question the Workers' Comp statute, of course, provides Immunity to employers for any tort action for accions for any negligence within the scope of employment. There is an exception to the workers' comp immunity for -- co-employees are likewise immuned under the statute. There is an exception to chat immunity for co-employees that says while working for the employer, but if co-employees are assigned primarily to unrelated work --

THE COURT: That's that case that came out of Holmes County about the school bus driver.

MS. LUTTON-SHIELDS: That's what allowed the governmental agency in that --

THE COURT: I am familiar with that.

MS. LUTTON-SHIELDS: -- in that-situation to be sued in place of, in the shoes of,.in effect the co-employee. So that's a step further. The first one is there is a co-employee immunity but there is an exception to co-employee immunity when co-employees are assigned to unrelated works. And then in the Holmes County case the

Supreme Court said that a state agency or a governmental entity can be sued in the place of the allegedly negligent co-employee, can basically because, because the employee is immuned under 768.28 under the waiver of sovereign immunity sracute. They said that the agency or the entity steps into the shoes of the allegedly negligent co-employee who was assigned primarily to unrelated works. So we're still looking ac each individual co-employee to decide whether or not chat person who was allegedly negligent was assigned primarily to unrelated work.

THE COURT: In the Holmes County case, give me -- there was somebody that was assigned like a janitor that moved the school bus or something.

MS. LUTTON-SHIELDS: True. Let me start off *on* Holmes County because Holmes County really does not speak to --

THE COURT: Are you traveling under this Holmes County?

MS. DAVIS: That case as well as the case called Vause which is a First DCA case.

THE COURT: Give me the facts of the Holmes County case that allowed -- there was an employee while employed at the Holmes County School Board that was injured.

MS. LUTTON-SHIELDS: He was a school custodian.

While participating in the evacuation drill the bus driver, let me add it is *very* important is the point that --

THE COURT: Now the employee of the Holmes County School Board that caused the injury, they said he was doing something that hc normally was not assigned co do, is that correct?

MS. DAVIS: Vice versa. The custodian, the man, who was injured was doing something he normally was not assigned to do, he was the custodian at the time and was helping the bus driver position the bus and the bus driver ran over him.

THE COURT: Why did the court say that because they were both employees -- why did the School Board step into the shoes of the bus driver and allow the employee Co sue the School Board?

MS. LUTTON-SHIELDS: That's because of the 768.28 that I was telling you about. That 768.28 immunizes employees individually, but the workers' comp statute provides you can sue the co-employee:'

THE COURT: In the Holmes County case the person who was engaged in something not normally assigned to him was the injured person, is that correct?

MS. DAVIS:, '(Indicating in affirmative)

THE COURT: The school bus driver ran over him, he

was normally assigned to drive a school bus. The person that was injured was performing a duty that he was not normally assigned to do.

MS. LUTTON-SHIELDS: True.

THE COURT: Therefore, they said --

MS. LUTTON-SHIELDS: The trial court said that they were -- that he was assigned primarily unrelated works.

THE COURT: So that's the law of the State of Florida as far as I understand.

MS. LUTTON-SHIELDS: Well, I would disagree and this is why. If you look at, I know you have a copy, if you look at footnote "1" on page 1177 you notice --

THE COURT: I understand, I mean somebody has to make a determination that they were engaged --

MS. LUTTON-SHIELDS: It was the trial court and that was not taken up on appeal. So I would submit that neither the DCA nor the Supreme Court ruled on that particular issue, they simply accepted because the parties accepted it. The School Board did not appeal and say --

THE COURT: Is that a question of law or is that a question of fact? Who is going to make that determination? The trial court made it, here is what they said.

MS. LUTTON-SHIELDS: Right, but the School Board

didn't appeal it.'

THE COURT: Somewhere along the line the trial court in some motion or somewhere made a determination that - -

MS. LUTTON-SHIELDS: Admittedly, but I chink what the Supreme Court is saying here is they are not making a determination that in fact this is true as a matter Of law because that issue was not raised before them and it was simply accepted.

THE COURT: I understand. But what I am saying is, and y'all help me, is that a question of law or a question of fact? If it is a question of fact then the jury has to make a determination, not me.

MS. LUTTON-SHIELDS: Well, there is cases that say the question is a question of law. I don't understand how you deal --

THE COURT: How am I going to make that determination unless I hear testimony?

MS. LUTTON-SHIELDS: That's what I say. I am not real clear on this angle, the courts are pretty confusing on it. There is actually a Fifth DCA case that said if there was a *ruling, even* though the ruling said, "Well, I think there is disputed issues of fact, &hat that had to be appealed at that time." And it was' a matter of law, I because that was a determination. Now to me I agree chat

that's unsettling because you say, "Well, so does that mean that the judge has to decide disputed issues of fact in making the determination@'? But like I said, there is case law that says it is a question of law for the court to decide. I will tell you that there was in --

THE COURT: Let me ask you this. But for this case, but for this case and the other case she mentioned, she said it was a follow-up case, you wouldn't be here as it relates to the Department of Corrections, would you?

MS. DAVIS: Judge, I think there is ways to get around it even beyond these two cases but these two cases give me the opportunity to be here against the Department of Corrections, especially the Vause case. You want me to discuss the Vause case?

THE COURT: I want to give everybody an opportunity. I told the jury --

MS. DAVIS: I know you have a trial.

THE COURT: I told them to be here at 9:30, I knew this hearing was coming up. You are saying that she shouldn't be here because the workmens' compensation immunity is conferred upon the Department of Corrections.

MS. LUTTON-SHIELDS: True,

THE COURT: If there were two correctional officers guarding a prisoner and one of them was negligent in guarding the prisoner and the other one got hit in the

head they were both performing the duties in which they were assigned. First of all he couldn't sue the employee or the Department of Corrections, they were both doing their duties and workmen's comp immunity would make both the negligent employee and the Department of Corrections immuned.

MS. LUTTON-SHIELDS: True.

THE COURT: He has co rely on his workmens' compensation benefits and rights. In this particular case I need co know how this case is distinguished, the facts and set of circumstances is distinguished.

MS. LUTTON-SHIELDS: From --

THE COURT: From --

MS. LUTTON-SHIELDS: Holmes.

THE COURT: Holmes County.

MS. LUTTON-SHIELDS: All right. Let me begin with as I said, I don't think Holmes stands for any proposition of putting a stamp of parameters of the court's determination that these guys were engaged in unrelated work. I think they accepted 'it because the appellate didn't appeal it in the DCA and didn't present the issue to the Supreme Court. So what you have is a trial court determination that these guys were engaged in unrelated works, I guess it was guys, it might have been a woman, I don't know.

Let me tell you in Lake versus Ramsay, at 566 Southern Second 845, a Fourth DCA case, 1990, what you have was a construction supervisor and a maintenance worker, where one was a subcontractor, the construction supervisor, and then the maintenance worker for the regular business of that employer. And what the DCA said there, and this is one where they sent it back to make a determination as to whether or not they were engaged and primarily assigned to a primarily unrelated works, they said that while there may be vast difference between what a construction supervisor does and what a maintenance worker does, nevertheless both types of work could be involved in the same construction job. And that's what they wanted co know in that particular case, whether or not they were involved in that same construction job and if so, then the Fourth DCA certainly indicated that the workers' comp immunity would apply.

THE COURT: I understand basically the Holmes County case said you have a janitor who would not normally, you would expect to be doing 'janitorial things and then you have got a janitor out. there that you would not expect that janitor to be out there loading and unloading children from a school bus. He was engaged in something even though they're both there working at the same school, he was doing something he normally didn't

do.

MS. LUTTON-SHIELDS: That's one aspect of that. In this case everybody was doing their own job.

THE COURT: If two bus drivers out there and one of them ran over the ocher there would be no problem.

MS. LUTTON-SHIELDS: In this particular case it wasn't-a question of anybody not doing the job to which they were ordinary assigned, the question is the other aspect of assigned primarily to unrelated works. With the way the courts have looked at it as to whether or not because their jobs are different in function, chat that somehow makes them assigned primarily co unrelated work.

THE COURT: That's not what my understanding of what Holmes County stood for.

MS. LUTTON-SHIELDS: Okay. It is kind of confusing. Let me just say also that the Vause versus Bay Medical Center, the last time I checked which was very recently, that the motion for rehearing on that case which has been pending for over a year was still pending and hadn't been ruled on and consequently that decision is not a final decision and therefore, can't be, you know, made as a basis.

THE COURT: Are y'all involved in that?

MS. DAVIS: No, sir.

MS. LUTTON-SHIELDS: You notice that the cite we

have here is April "Law Weekly" cite and that's because it is not in the regular Reporters. So I cite to you Johnson versus Comet Steel. Erection Incorporated which is a Third DCA, 1983 case. And in chat case you had a common laborer for a general contractor and a welder for a subcontractor chat were employed on the same site on a construction project. And the court there held that they were assigned primarily related jobs and therefore the exception, you know, workers' comp immunity applied in that situation.

We would submit here that by statute, I should also tell you that for workers' comp purpose the State of Florida is the employer, you know, the Comptroller pays, and the court held in DOC versus Koch, that in fact the State is the employer for workers' comp purpose and that's why in Koch the question was whether DOC, DOC employee and the DOT employee were assigned to primarily unrelated works. In that case they held they were. What was happening there was DOC employee was delivering inmates to a DOT site and hit a DOT-employee who was in the labor yard there. So the first thing you look at is whether or not, I think when you are dealing with a state agency defending, were the employees working for the same agency within the State and here clearly they were, they both worked for the Department of Corrections. And by

statute DOC, the statute creating DOC says it was designed to "integrate delivery of all offender rehabilitation and incarceration services that are deem necessary for the rehabilitation of offenders and protection of society." And we would submit DOC employees, therefore, are pledged to chose goals.

Furthermore, so we have plaintiff and however many correctional officers that she contends were negligent, they were all employed by the Department of Corrections, They were also employed at Apalachee Correctional Institution. And Ms. Culver's contact with inmates in daily activities involved the rehabilitation of inmates, even though she certainly was not involved in the other aspect of the actual acting as a security guard. Certainly supervision was part of her duties when an inmate was in her part of the facility, and accordingly, we would submit that under the case law that the correctional officers and Ms. Culver were not engaged or not assigned primarily to unrelated works and, therefore workers comp immunity would apply. - -

Additionally, the individual employees, correctional officers, to the extent that they would be liable under the regular co-employee, but for the fact that they were not, that they are stat'e employees, their liability would be individual to them.

We would submit that that potential liability is a liability where there is a general duty owed to other people, for example the bus driver in ~~Holmes~~ County. A bus driver owes a duty to everybody while he is driving his bus to drive it safely and to do ic in a non-negligent fashion, just like any ocher operator of a motor vehicle. But what: you are dealing wirh here is allegations not of they threw down their banana peel and they clearly owed a duty not to throw a slippery substance on the floor or they negligently operated a motor vehicle but rather that they didn't do their job correctly in that they should have done some other things. Not even something individual of "You did rhis particular thing wrong," that you owe to everybody.

It is much more a fuss than that in that "You ought to have protected me from this particular inmate," not because "You saw him attacking me but because you should have known to do something to classify him differently."

We would submit that as an individual chose co-employees did not owe the duty to do their job in a non-negligent fashion, that aspect of their job. Rather it is only the Department of Corrections chat owes, if there is any such duty, that owes such a duty. And I know in response the point was made that DOC has fired people for the negligent performance of their duties.

Well, certainly as a employee if they do not, the relationship with DOC with their employees, if they don't fulfill their duties or if they act negligently that, of course, is grounds for discipline, but that does not mean that they individually owe rhac duty to everybody out there on the correctional institution grounds.

THE COURT: I have co stop you and give her --

MS. LUTTON-SHIELDS: I know you are --

THE COURT: Give her a little time.

MS. DAVIS: Judge, I appreciate that. I have filed a lengthy memorandum and sent it up to you and I don't know that you need to look at it once I think your understanding of Holmes County case is such that you realize that workers comp immunity in this case doesn't apply.

THE COURT: Tell me how ic doesn't apply, give me the factual situation.

MS. DAVIS: Sure. June. Culver is a professional, she is a psychologist specialist, she has a Master's Degree. She works at A.C.I. She tests' prisoners. I have filed her affidavit but she is responsible for testing people, interviewing them, counseling them, evaluating them and providing mental health services. You can see Ms. Shields. filed an af f idavit from the superintendent of the prison which gives her job

description. You can look at that and see the kind of things chat she does versus the kind of things that correctional officers do, A correction officer's duty, as I read from the job description, is supervision, custody, care, control and physical restraint of any inmate assign co rhis institution. June Culver was not at rhac time or ever responsible for supervision, custody, control or physical restraint of any inmate assigned to the institution.

We have alleged that these correction officers were negligent in failing to supervise this man. They let him slip through their fingers. Judge, they were on notice, they knew that this man had it in for my client. He had gotten in trouble, he had been placed in administrative confinement just two months prior to this tragic incident because he had been in an unauthorized area.

THE COURT : Let me ask you this, she had to be at the prison to perform her duties.

MS. DAVIS: Sure.

THE COURT : Now, and y'all educate me on this, I think the reason the Holmes County case came out like it did, if this, if the janitor had been walking across a roadway to put garbage in a receptacle and that was part of his job was to take the garbage from the school to the receptacle and the bus driver had ran over him he would

be performing his duty that was expected of him, the bus driver would have been engaged in his duty and the janitor could not sue the bus driver because he was doing his job.

MS. DAVIS: That's not right. "Such fellow-employee immunity shall not be applicable co 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."

What the statute says on this unrelated works, if they're doing different jobs and one of them runs over the other one, then workers comp immunity doesn't apply. That's what the statute says. That's what Holmes County says and that's what this Vause case says.

I think both of these very important cases that apply in this case come from our circuit but the Vause case is called Vause versus Bay Medical Center. What happened in that case briefly, there was a lady that was a nurse. She worked most of the time-in OB-GYN unit as a register nurse, occasionally she would be called down to be the hyperbaric nurse and she went in the hyperbaric chamber and the employees were negligent and she comes out and she gets decompression sickness and she dies.

THE COURT. She was doing something she normally

didn' c do.

MS. DAVIS: That's right.

THE COURT: But what I am saying co you is, and this is where I am having trouble with this, June was doing something she normally did. The janitor was doing something he normally did not do and this nurse is doing something she normally did not do. And, you know, I thought that's what the distinction is. I am certainly no expert in this field.

Here I have got a correctional officer who was doing her job and I have June Culver who was at the prison doing her job, a job she normally did. And you are alleging that the correctional officers negligently supervised the prisoner, that the school system that he was engaged in didn't supervise him correctly and then he attack June Culver while she was doing something she was normally assigned to do. And you are saying the statute says because the negligent act of the school people and the negligent act of the correctional officers, their job function was different from the job function of June Culver, therefore, June can sue the employer of the State of Florida, the State of Florida because they employed two groups that were negligent. You are saying that's what the statute says.

You know, if June, it appears to me and the way I

have read these cases and y'all deal with this much more than I do, but it appears to me if June were asked while she was there doing her counseling or whatever she was supposed co do, if she was asked co do something unrelated to thar job and while she was doing chat unrelated work then she had been actacked, then I could see chat. But if that's not what the cases say y'all explain it to me.

MS. DAVIS: It is even simpler because the law says such fellow-employee immunity, this worker comp immunity we're talking about, doesn't apply co employees of the same employer when each is operating, when each is doing his job,

THE COURT: What about rhe Third District case, one guy was doing one thing and another another thing and both of them were doing what they were expected to do on the same job and they said because of the negligent act of one that his job-was completely unrelated to what the other fellow was supposed to be doing but they were expected to be doing that on the same job, that therefore they had comp immunity, the employer had comp immunity.

MS. DAVIS: I haven't been provided with a copy of that case but I think the statute is clear. I think we have got two unrelated people doing totally unrelated things in their jobs. The only reason this came up in

Vause and this came up in the Duffell, Holmes County case, is because of these unusual circumstances where they were kind of operating outside the scope of what they normally did.

MS. LUTTON-SHIELDS: The cases, for certain, it is certainly Vause talks about exactly what you are saying, Your Honor, is the fact that it is what her job was primarily, primarily where she was assigned and since she wasn't assigned to a different job that in fact the workers comp immunity wouldn't apply. Again like I said, I think we're treading on chin water relying on Vause anyhow because of the fact that it is not a final decision and the fact that it's been pending there for a year. It certainly makes one wonder what's going on with it.

MR. FITE: Your Honor, it seems like we almost have a issue of statutory interpretation and the clear interpretation of the statute is, I don't think it can be read any other way, that the only criteria is that the two employees of the same employer be involved and each of them unrelated to each others work, not that either one of them be working outside of their job description at the time it take place. Yes, Vause --

THE COURT: What I am saying --

MR. FITE: And the Holmes County case, Duffell,

both involve the situation where someone was working outside of their job description but the statute does not at all require that,

THE COURT: You know, this is a problem, you know, I have always thought that if I were an employer and somebody was injured on the job and that person was doing the job that he was employed to do and injured by another employee doing the job he was employed co do, I had no idea that he could be sued, you know, because there were two employees out there that had unrelated works. That basically, now the workmen's comp, if what you are telling me is the law, and I don't know, but if what you are telling me is the law then the workmen's comp immunity doesn't mean a whole lot. If you have somebody building a house and you have a plumber doing plumbing work and you have an electrician doing electrician work and they're both doing what they're supposed to be doing and the plumber negligently injures the electrician, then the home builder who has employed both of them is going to be subject to be sued and has no comp immunity.

MR. FITE: I think what we may be talking here it goes in to ancient history about the old fellow-servant rule. Workers comp arose to keep one employee on the job from suing a negligent employee on the same job. kid that is what workers comp was designed to take care of

was chat the injured employee receive automatic compensation.

THE COURT: It also evolve chat the employer stepped into the shoes of the negligent employee and so is immuned. The employee's immunity employed from the negligent employees, fellow-servant.

MR. FITE: IL seems to me then the clear reading of this statute, if you had HRS case worker who had to travel from Chipley to Bonifay co check on a child that was in foster care or something of that nature, and as that case worker is traveling along U. S. 90 a Department of Transportation dump truck ran a stop sign and pulled out in front of her and caused her serious injury, could she sue?

THE COURT: Let's make it another HRS worker, the same employee.

MR. FITE: That's not what we have here necessarily, we have two totally unrelated. You are talking about two case workers hit each other, I think there would be a problem, Both of them' happening to go to different locations on the same day, that's a different situation. But here we have clearly different professions, different job descriptions, different backgrounds, and the correction officer has to go through the correction training to be certified, she was a

psychologist, that type of thing. But the statute just, we have a couple of cases that involve someone just happened to be working outside of their particular area, but the statute does not require that. There is no other way, it is absolutely clear on the face of the statute that's not required.

THE COURT: Your position is that it does, is that correct?

MS. LUTTON-SHIELDS: I was going to say, I mean clearly the argument exactly as is articulated is it is what was made in Vause is what you said, because she was assigned primarily over here to this other department. Now I disagree with Vause, you know, and I am hoping, you know, that that's going to be overruled, but because she worked in primarily in a different area, you know, her workers comp immunity doesn't apply. Under either interpretation I believe that the workers comp immunity applies here.

THE COURT: Read the statute again to me.

MR. FITE: Skipping the first half of it which grants the immunity, "Such fellow-employee immunity shall not 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."

There is a phrase we haven't talked about and that is "assigned primarily to primarily work within public or private employment."

THE COURT: It looks to me there ought to be a lot of cases on chat,

MS. LUTTON-SHIELDS: But there aren't, that's the thing.

THE COURT: The case, the two cases that I have been told about is Vause and the Holmes County case.

MR. FITE: Duffell.

THE COURT: You can distinguish those two cases from this particular factual situation. Then she quoted a case from Third DCA where they work for the same employer and one of them had completely unrelated work from the other but they were expected to be doing that work on that job and one of them was negligent and harmed the other and they said that comp immunity did apply. Have you got a copy of that case?

MS. LUTTON-SHIELDS: I can give it to you, Johnson, 435 908, that's the Third DCA one. Johnson versus Comet Steel Erection, Inc. That other one was 566 Southern Second 845, which is the Fourth DCA case and that's Lake versus Ramsay, R-A-M-S-A-Y. That's the one they remanded it back to decide whether or not they were.

THE COURT: I will tell you what I am going to do,

this case is set for trial in December.

MS. DAVIS: December 16th.

THE COURT: And I am in the middle of this trial and give me sometime but I know y'all are wanting me to rule. I want to rule, of course I have got nine cases set that week so we will be doing something anyhow. I don't know where you are on the-docket.

(WHEREUPON THE HEARING WAS CONTINUED OFF RECORD)

## CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF JACKSON

I, Diane T. Pace, Court Reporter, certify that I was authorized to and did stenographically report the Motion Hearing and that that transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney OK counsel connected with the action, nor am I financially interested in this action.

WITNESS my hand and official seal this 14th day of January, 1997.

Diane T Pate

DIANE T. PATE, COURT REPORTER