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IN THE SUPREME COURT OF FLORIDA

Case No. 93,652

OTTIS LEE DEEN, JR.,

Petitioner,

vs.

QUANTUM RESOURCES, INC., a foreign corporation; SAFWAY STEEL PRODUCTS, INC., a Florida corporation; and FLORIDA POWER & LIGHT CO.,

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

According to the allegations of his second amended complaint (R. 86), on May 19, 1992, the plaintiff, Ottis Lee Deen, Jr., was an employee of National Installation Services Co. (NISCO), an independent contractor hired by Florida Power & Light Co. (FPL) to perform repairs at its Manatee Electrical Generating Facility. While working on the power plant's premises in the course and scope of his employment with NISCO, he stepped on the end of a scaffolding board which had not been properly cut to size, fell a substantial distance to a concrete floor, and suffered serious injuries. He sued FPL, alleging that his injuries were caused by its negligence. He also sued Quantum Resources, Inc. (Quantum) -- another independent contractor hired by FPL to supervise the various contractors on the job -- alleging that his injuries were caused by its negligence as well.

Both FPL and Quantum moved for summary judgment, claiming that they were immune from suit because of the "exclusive remedy" provision of the Workers' Compensation Act. FPL's motion (R. 391) established the core facts recited above; established that FPL was a "self-insured public utility"; established that, pursuant to its contract with NISCO, it had provided workers' compensation insurance to NISCO's employees; and contended that it was therefore immune from suit. Quantum's motion (R. 619) contended that the single employee it had provided as supervisor was a "borrowed servant" of FPL at the time of the plaintiff's fall, and that it therefore enjoyed the protection of FPL's immunity from suit.

FPL's position was supported by *Cartier v. Florida Power & Light Co.*, 594

So.2d 755 (Fla. 3d DCA 1991), *review denied*, 602 So.2d 941 (Fla. 1992). The trial court determined that it was obliged to follow *Cartier*; it rejected the plaintiff's contention that, in view of several Supreme Court decisions on point, *Cartier* was wrongly decided; it stated that the plaintiff's quarrel with *Cartier* would have to be taken up in an appellate court; and it granted FPL's motion for summary judgment on the authority of *Cartier* (SR., T. 32-33). In response to Quantum's motion, the trial court determined that its employee was a "borrowed servant" of FPL at the time of the plaintiff's fall; it determined that Quantum therefore enjoyed FPL's immunity from suit; and it granted Quantum's motion on the authority of *Cartier* as well (R. 943). Separate final judgments were thereafter entered in favor of FPL and Quantum (R. 946, 947), and a timely appeal of both judgments followed to the District Court of Appeal, Second District (R. 952).

On appeal, we did not quarrel with the trial court's determination that Quantum's employee was a "borrowed servant" of FPL at the time of the plaintiff's fall. We did argue that *Cartier* was wrongly decided, however, and that neither FPL nor Quantum was immune from suit -- and we urged the Court to reverse both final judgments for that reason. In a split decision, a majority of the panel affirmed without elaboration, citing *Cartier* as authority for the affirmance. Judge Patterson wrote a lengthy dissenting opinion in which he concluded that "the holding in Cartier . . . , which the majority relies upon, is not a correct statement of the law," and "I would reverse and certify conflict with Cartier" (slip opinion, pp. 2, 7). Because of this dissent, and apparently uncomfortable with its reliance upon *Cartier*, the majority certified the following question to this Court as a question of great public importance:

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> DOES A SELF-INSURED PUBLIC UTILITY WHICH UNDERTAKES, PURSUANT TO SECTION 440.571, FLORIDA STATUTES (1991) (NOW SECTION 624.46-225, FLORIDA STATUTES (1997)), TO PROVIDE WORKERS' COMPENSATION COVERAGE TO A SUBCONTRACTOR WORKING ON ITS PROPERTY, OBTAIN THE BENEFIT OF WORKERS' COMPENSATION IMMUNITY PROVIDED IN SECTION 440.11, FLORIDA STATUTES (1991), AS TO INJURIES SUSTAINED BY AN EMPLOYEE OF THE SUBCONTRACTOR RESULTING FROM THE NEGLIGENCE OF THE PUBLIC UTILITY?

(Slip opinion, p. 2). This Court's "certified question" jurisdiction was thereafter timely invoked. We will urge the Court to answer the certified question in the negative; to quash the district court's decision; and to remand the case with directions that both final judgments be reversed.

II.
ISSUE ON REVIEW

We restate the certified question as follows:

> DOES A SELF-INSURED PUBLIC UTILITY THAT HAS NO MANDATORY STATUTORY OBLIGATION TO PROVIDE WORKERS' COMPENSATION INSURANCE TO EMPLOYEES OF ITS INDEPENDENT CONTRACTORS IMMUNIZE ITSELF FROM SUIT BY THOSE EMPLOYEES BY VOLUNTARILY ASSUMING THE INDEPENDENT CONTRACTOR'S STATUTORY OBLIGATION TO PROVIDE SUCH INSURANCE?

III.
SUMMARY OF THE ARGUMENT

Section 440.10 requires *employers* to secure payment of workers' compensation benefits, and §440.11 confers immunity from suit upon *employers*. FPL was

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not Mr. Deen's employer, and without more, it plainly had no immunity from Mr. Deen's suit. Although the combination of §§440.38(1)(c) and 440.571 allowed Mr. Deen's employer to meet *its* statutory obligation by contracting with FPL for workers' compensation insurance and thereby obtain immunity under §440.11, neither statute says a word about conferring immunity on FPL. Neither is there any language in §440.571 which would confer "employer" status on FPL. There is therefore no language in the statutory scheme which even arguably extends immunity from suit to FPL simply because it agreed in its contract with Mr. Deen's employer to provide workers' compensation coverage to its employees.

On their face, §§440.38(1)(c) and 440.571 make perfect sense without the need to read an unspecified "immunity" between their lines. A public utility hiring independent contractors to work on its premises will have to pay the cost of workers' compensation insurance in one way or another -- either in the price of the contract, so that the contractor can secure the coverage from a commercial source, or by providing the coverage itself. Presumably, the latter can be provided at less cost to the utility. Section 440.571 therefore gives the utility the permissive *option* to provide the coverage itself if it can do so at a lower cost. The result is that the *contractor* satisfies *its* statutory obligation to procure coverage at a lower cost to the public utility. The two statutes therefore have a laudable economic purpose; they require no supplementation at all to make them meaningful pieces of legislation; and they suggest no reason whatsoever why the public utility should be *subject* to suit if it pays the contractor to procure coverage with its right hand, but *immune* from suit if it provides the coverage to the contractor with its left.

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The legislative history of §440.571 also provides no support for any notion that it was intended to confer immunity from suit upon a public utility which, for the simple economic expedient of reducing its own costs, voluntarily provides workers' compensation coverage to its independent contractors' employees. That the provision was merely an authorization to provide insurance, rather than an attempt to confer immunity, is further demonstrated, we believe, by the fact that the legislature removed the statute altogether from Chapter 440 in 1993, and placed it in the insurance code.

Equally important to the question at hand, §440.571 does not impose any mandatory *statutory obligation* upon FPL to provide workers' compensation insurance to its contractors' employees. By utilizing the word "may" rather than the word "shall," the statute is plainly permissive. This point is critical because this Court has held over and over and over again that it is the *statutory obligation* to secure compensation which provides the *quid pro quo* for abolition of the injured workers' common law rights -- and that absent such a statutory obligation, the mere voluntary provision of such coverage does not confer immunity from suit. Because §440.571 imposes no *statutory obligation* on FPL, if this Court's prior jurisprudence on the subject is still the law, the permissive *option* provided by the statute simply does not confer immunity upon FPL.

Additionally, in the absence of some explicit language in Chapter 440 mandating the conclusion reached below -- and there is none -- settled rules of statutory construction ought to *require* the different construction of §440.571 we have urged here. To the extent that the Workers' Compensation Act abolishes common law rights to sue for negligently-caused injuries, it is plainly in derogation

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of the common law. Statutes in derogation of the common law are to be construed strictly, and a statute designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit on the point. The immunity from suit which the district court purported to find in §440.571 is nowhere expressed in that statute, nor is it expressed anywhere else in Chapter 440. In addition, it is apodictic that, whenever possible, statutes should be construed to render them constitutional. Since it is the mandatory *statutory obligation* to procure workers' compensation insurance which provides the necessary *quid pro quo* to the employee to render the abolition of his common law rights constitutional, the construction given to §440.571 by the court below renders the statute unconstitutional. Settled rules of statutory construction therefore required a contrary result.

Most respectfully, *Cartier v. Florida Power & Light Co.*, 594 So.2d 755 (Fla. 3d DCA 1991), *review denied*, 602 So.2d 941 (Fla. 1992), was wrongly decided, and the district court therefore erred in following it below. The certified question should be answered in the negative; the district court's decision should be quashed; and the case should be remanded with directions to reverse both judgments.

IV.
ARGUMENT

A SELF-INSURED PUBLIC UTILITY THAT HAS NO MANDATORY STATUTORY OBLIGATION TO PROVIDE WORKERS' COMPENSATION INSURANCE TO EMPLOYEES OF ITS INDEPENDENT CONTRACTORS DOES NOT IMMUNIZE ITSELF FROM SUIT BY THOSE EMPLOYEES BY VOLUN-

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TARILY ASSUMING THE INDEPENDENT CONTRACTOR'S STATUTORY OBLIGATION TO PROVIDE SUCH INSURANCE.

Mr. Dean was not an employee of FPL; he was an employee of FPL's independent contractor, NISCO. And because NISCO was his only employer, only NISCO was statutorily obligated to provide workers' compensation benefits to him: "Every *employer* coming within the provisions of this chapter . . . *shall* be liable for and *shall* secure, the payment to his employees . . . of the compensation payable [under this Chapter]." Section 440.10(1)(a), Fla. Stat. (1991) (emphasis supplied).[1/] NISCO's immunity from suit derives from this statutory obligation: "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 . . . ." Section 440.11(1), Fla. Stat. (1991) (emphasis supplied). Without more, FPL plainly does not enjoy immunity from suit for negligently injuring an employee of NISCO on its premises. *See, e. g., Jones v. Florida Power Corp.*, 72 So.2d 285 (Fla. 1954); *Conklin v. Cohen*, 287 So.2d 56 (Fla. 1973); *Ramos v. Univision Holdings, Inc.*, 655 So.2d 89 (Fla. 1995); *Hogan v. Deerfield 21 Corp.*, 605 So.2d 979 (Fla. 4th DCA 1992) (per J. Anstead).

Unfortunately this thoroughly settled point is capable of being somewhat confused by two additional statutes. Section 440.38(1), Fla. Stat. (1991), authorizes NISCO to meet *its* statutory obligation in several alternative ways, including the following:

[1/] Because Mr. Dean was injured on May 19, 1992, the relevant statutes are Chapter 440, Fla. Stat. (1991).

> (1) Every *employer* shall secure the payment of compensation under this chapter:
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> . . . .
>
> (c) By entering into a contract with a public utility under an approved utility-provided self-insurance program as set forth in s. 440.571 . . . .

(Emphasis supplied).

Section 440.571, Fla. Stat. (1991), reads in turn as follows:

> A self-insured public utility, as authorized by s. 440.38-(1)(b) [sic], *may* assume by contract the liabilities under this chapter of contractors and subcontractors, or each of them, employed by or on behalf of such public utility when performing work on or adjacent to property owned or used by the public utility.

(Emphasis supplied). It is this provision upon which FPL stakes its claim to immunity from suit. We disagree with its expansive reading of the statute.[2/]

[2/] Before we explain our disagreement, we must alert the Court that the issue presented here is actually a considerably larger one than a mere claim to immunity by one "self-insured public utility" under §440.571. In 1990, the legislature provided a virtually identical option to *all* well-heeled self-insurers:

> **Authorization for a self-insurer to provide coverage.** An individual self-insurer having a net worth of not less than $250,000,000 as authorized by s. 440.38(1)(e) may assume by contract the liabilities under this chapter of contractors and subcontractors, or each of them, employed by or on behalf of such individual self-insurer when performing work on or adjacent to property owned or used by the individual self-insurer . . .

Ch. 90-201, §43, reenacted at Ch. 91-1, §41, Laws of Florida; codified at §440.572, Fla. Stat. The professed purpose of this statute, according to the

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To begin with, although the combination of §§440.38(1)(c) and 440.571 certainly allows *NISCO* to meet *its* statutory obligation by contracting with FPL for workers' compensation insurance and thereby obtain immunity from suit under §440.11, neither statute says a word about conferring immunity upon FPL. As a result, if any immunity from suit is to be found in Chapter 440, it must be found in the only provision dealing with the subject of immunity -- §440.11. That provision provides no immunity to FPL, however, because it explicitly provides immunity only to "employers," and FPL was not Mr. Deen's employer. Neither is there any language in §440.571 which would confer "employer" status on FPL. There is therefore no language in the statutory scheme which even arguably extends immunity from suit to FPL simply because it has agreed in its contract with NISCO to provide workers' compensation coverage to its employees.

On their face, §§440.38(1)(c) and 440.571 make perfect sense *without* the need to read an unspecified "immunity" between their lines. A public utility hiring independent contractors to work on its premises will have to pay the cost of workers' compensation insurance in one way or another. Normally, the cost of the coverage would be factored into the price of the contract paid to the contractor, and the contractor would secure the coverage from a commercial source, as

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Whereas clauses of Ch. 90-201, was to provide cost-cutting options to reduce the cost of workers' compensation coverage. Because the two statutes are virtually identical, the district court's decision threatens to confer immunity not only upon public utilities but upon *all* large corporations doing business in this state, and the answer which the Court gives to the certified question will undoubtedly affect that far larger universe of property owners. Because the two statutes are virtually identical, we will not address §440.572 separately; the arguments which follow will be equally applicable to both.

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§440.10 requires. The public utility would plainly gain no immunity from suit if the cost of the coverage were handled in that manner.

However, a public utility with a self-insurance program for its own employees can presumably provide coverage to the contractor's employees at less cost than it could be procured by the contractor from a commercial insurer. Section 440.571 therefore gives the utility the *option* to provide the coverage itself if it can do so at lower cost, and then factor the cost of the workers' compensation coverage *out* of the price of the contract paid to the contractor.[3/] The result is that the *contractor* satisfies *its* statutory obligation to procure coverage at a lower cost to the public utility. The two statutes therefore have a laudable economic purpose on their face; they require no supplementation at all to make them meaningful pieces of legislation; and they suggest no reason whatsoever why the public utility should be *subject to* suit if it pays the contractor to procure coverage

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[3/] That this is the reason for the cost-cutting option granted by §440.571 is underscored, we think, by the very document establishing FPL's "Wrap-Up Insurance Program" with NISCO, since the document rather emphatically mandated that the price of the contract *exclude* the cost of workers' compensation insurance, so that FPL could realize the optional cost reduction which the statute allowed it to achieve:

> Under no circumstances may the cost of any additional insurance secured by Contractors or Subcontractors for their own protection be included in the cost of the work without the written approval of the Company and Qualified Contractors and Subcontractors hereby certify that no sums are included in the Contract for the cost of insurance as provided by the Company.

(¶1.1.3 of Exh. C to motion for summary judgment at R. 391-471).

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with its right hand, but *immune* from suit if it provides coverage to the contractor with its left.[4/]

The legislative history of §440.571 also provides no support for any notion that it was intended to confer immunity from suit upon a public utility which, for the simple economic expedient of reducing its own costs, voluntarily provides workers' compensation coverage to its independent contractors' employees. The statute was part of Ch. 83-305, Laws of Florida, which derived from House Bill No. 1277. The Final Staff Summary of H.B. 1277 by the Florida House of Representatives explains the purpose of the statute as follows:

> Section 14. Section 440.38(1) is amended to authorize an employer to secure the payment of workers' compensation by entering into a contract with an approved public utility self-insured program under s. 440.571. . . . Section 440.571 is created by section 19 of this bill. See section 19 of this analysis for further discussion.
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> . . . .
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> Section 19. Section 440.571 is created to authorize public utilities to assume by contract the workers' compensation liability of contractors and subcontractors employed by or on behalf of the utility when performing work on or adjacent to property owned or used by the public utility. Such arrangements have been approved in the past, but since there was no clear statutory authority the division has recently rescinded its approval. The bill would clearly authorize public utility assumption of

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[4/] The document identified in the preceding footnote also reveals that FPL's so-called "self-insurance" is reinsured in significant part by a commercial excess insurance policy -- a fact which fully reinforces our point that §440.571 is merely an economic option which permits FPL to pay for coverage with its left hand if it would be more expensive to pay for it with its right.

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contractors' workers' compensation liability.

(R. 378, 380-82).

The statute would therefore appear to be no more than a simple authorization for employers to procure and for public utilities to provide insurance, and there is no mention in this explanation of any intent whatsoever to confer immunity from suit upon a public utility making such a voluntary "arrangement" with its independent contractors for the economic benefit of them both. That the provision was merely an authorization to provide insurance, rather than an attempt to confer immunity, is further demonstrated, we believe, by the fact that the legislature removed the statute altogether from Chapter 440 in 1993, and placed it in the insurance code, where it is now §624.46225, Fla. Stat. (1997). Ch. 93-415, §81, Laws of Florida.

Equally important to the question at hand, §440.571 does not impose any mandatory *statutory obligation* upon FPL to provide workers' compensation insurance to NISCO's employees. By utilizing the word "may" rather than the word "shall," the statute is plainly permissive. *See City of Miami v. Save Brickell Avenue, Inc.*, 426 So.2d 1100, 1105 (Fla. 3d DCA 1983) ("In statutory construction, the word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall'"); *Fixel v. Clevenger*, 285 So.2d 687, 688 (Fla. 3d DCA 1973) (same); *Brooks v. Anastasia Mosquito Control District*, 148 So.2d 64, 66 (Fla. 1st DCA 1963). And because the word "may" is plainly permissive, not mandatory, it just as plainly destroys any notion that §440.571 imposes a *statutory obligation* on FPL. An obligation is something

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that *must* be done. *Compare* §440.10(1)(a), Fla. Stat. (1991) ("Every employer coming within the provisions of this chapter . . . *shall* be liable for and *shall* secure, the payment to his employees . . . of the compensation payable [under this Chapter]"; emphasis supplied). Something that *may* be done is simply not an obligation; it is merely a permissible option -- so the most that §440.571 contains is an exercisable option, not a *statutory obligation*.

In other words, FPL may elect to provide workers' compensation insurance to NISCO's employees if it wishes, for whatever economic reasons may motivate it to do so, but it is not obligated to provide such coverage in any way. It may, if it wishes, simply factor the cost of the coverage into the price of its contract, and let the contractor secure the coverage. This point is critical because this Court has held over and over and over again that it is the *statutory obligation* to secure compensation which provides the *quid pro quo* for abolition of the injured workers' common law rights -- and that absent such a statutory obligation, the mere voluntary provision of such coverage does not confer immunity from suit.

The leading decision is *Jones v. Florida Power Corp.*, 72 So.2d 285, 287, 289 (Fla. 1954), which makes the point as follows:

> The real question here is whether the [Florida Power] Corporation is an "employer" within the meaning of the Workmen's Compensation Act. If it is such an "employer", then it is liable for and is required to "secure the payment to [its] employees of the compensation payable under [Chapter 440] . . . .
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> The fact that the Corporation in its contracts with [its independent contractors] required them to provide workmen's compensation for their employees is indeed commendable but is irrelevant to a determination of the

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> question here presented. The question is whether the Workmen's Compensation Act imposed upon the Corporation the *duty*, as an "employer" . . . , to secure compensation for such employees. It is the *liability* to secure compensation which gives the employer immunity from suit as a third party tort-feasor. His immunity from suit is commensurate with his liability for securing compensation -- no more and no less.
>
> If the Corporation was, in fact, liable for and *required* to secure compensation for [its independent contractors'] employees, then the Corporation is immune from suit by the plaintiff as a third-party tort-feasor . . . .
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> . . . .
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> . . . The record does not show, nor is there any allegation, that the Corporation, as to the construction job in which plaintiff was employed, was liable for and *required* to secure workmen's compensation for the employees of [its independent contractors] as an "employer" engaged in this particular construction job. And, as heretofore noted, if there was no liability as an employer under the Act, there was no immunity from suit as a third-party tortfeasor. . . .

(Emphasis partially supplied).

This fundamental prerequisite for obtaining immunity under Chapter 440 has been reiterated by this Court in numerous subsequent decisions, all of which make it clear that the mere voluntary assumption of someone else's statutory obligation to procure workers' compensation insurance is insufficient to confer immunity. *Jones v. Florida Power Corp., supra*, is followed and quoted, for example, in *Smith v. Ussery*, 261 So.2d 164 (Fla. 1972), and *Conklin v. Cohen*, 287 So.2d 56 (Fla. 1973). More recently, in *Gulfstream Land & Development Corp. v.*

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Wilkerson, 420 So.2d 587, 589 (Fla. 1982), this Court put the fundamental prerequisite into the following nutshell: "Since *Jones v. Florida Power Corp.* . . . this Court has consistently held that immunity from suit under the workmen's compensation statutes follows the *statutory liability* for providing such coverage" (emphasis supplied).

More recently, this Court stated the point as follows:

> The justification for limiting liability or granting immunity is the substitution of something else in its place, a quid pro quo. The duty to provide workers' compensation benefits supplants tort liability to those injured on the job. *Jones v. Florida Power Corp.* . . . If the duty to provide such coverage does not exist, then one has no reason to expect immunity from wrongdoings committed against a third party. . . .

Employers Ins. of Wausau v. Abernathy, 442 So.2d 953, 954 (Fla. 1983). And more recently still, this Court "confirm[ed] that an owner must be a . . . *statutory employer* within the meaning of the Workers' Compensation Act and *thus liable* for securing workers' compensation benefits in order to be entitled to workers' compensation immunity pursuant to section 440.11 . . . ." *Ramos v. Univision Holdings, Inc.*, 655 So.2d 89, 90 (Fla. 1995) (emphasis supplied).

The newest Justices on this Court have certainly understood that to be the law settled by this Court. In *Hogan v. Deerfield 21 Corp.*, 605 So.2d 979, 982 (Fla. 4th DCA 1992), for example, Justice Anstead wrote:

> Obviously, Deerfield [the allegedly negligent defendant-owner of the premises] was not a "contractor" or "employer", and Hogan [the injured plaintiff] was not an "employee" of Deerfield, in the ordinary sense that these words are used. More importantly, because Deerfield 21

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> was not a contractor or the employer of Hogan, and did not otherwise have any *statutory duty* to provide workers' compensation coverage, Deerfield was not the statutory employer of Hogan, and does not enjoy the immunity provided by section 440.11 from Hogan's tort suit.

(Emphasis supplied). And more recently, in *Sotomayor v. Huntington Broward Associates L.P., Ltd.*, 697 So.2d 1006, 1007 (Fla. 4th DCA 1997), Justice Pariente wrote:

> It is the liability to secure coverage for employees . . . that immunizes a contractor from suit by such employees. . . . In other words, the statutory grant of immunity is co-extensive with the *statutory obligation* to provide workers' compensation benefits.

(Emphasis supplied).

The Court will also find a characteristically thorough and thoughtful explanation of this point -- that there can be no immunity without a "statutorily imposed liability," and that the mere voluntary assumption of someone else's statutory obligation to procure workers' compensation coverage does not confer immunity from suit upon the volunteer -- in Judge Van Nortwick's recent opinion in *Proctor & Gamble Cellulose Co. v. Mann*, 667 So.2d 338, 340 (Fla. 1st DCA 1995). An examination of that decision will reveal that, but for the single wrinkle of the permissive option provided by §440.571, the decision is indistinguishable from the instant case, and that it fully supports our general position here. We commend its analysis to the Court.

In its brief below, FPL recognized that its claim to immunity must derive from a *statutory obligation* to provide workers' compensation coverage. It therefore attempted to convert the permissive option given to it by §440.571 into

an obligation by arguing that, once it exercised the option, it became obligated -- so it therefore follows that it is statutorily obligated to provide workers' compensation coverage. This argument plainly puts the cart in front of the horse, however. FPL may well be *contractually* obligated to NISCO to provide coverage to Mr. Deen after it exercised the cost-cutting option provided it by §440.571, but that does not amount to a mandatory *statutory obligation* to provide coverage in the first instance. *See Proctor & Gamble Cellulose Co. v. Mann, supra* (explicitly rejecting the argument that a contractual obligation satisfies the statutory obligation required as the necessary *quid pro quo* for immunity from suit). Most respectfully, §440.571 itself imposes no *obligation* of any sort on FPL; and the mere fact that FPL volunteered to do something which the statute allowed it to do at its contractual option simply cannot pass muster as the mandatory *statutory obligation* required as the necessary *quid pro quo* for outright abolition of Mr. Deen's common law rights.

All of which brings us to the decision which a majority of the district court chose to follow below -- *Cartier v. Florida Power & Light Co.*, 594 So.2d 755 (Fla. 3d DCA 1991), *review denied*, 602 So.2d 941 (Fla. 1992) -- which holds that the voluntary provision of workers' compensation coverage under §440.571 confers immunity from suit upon the public utility that exercises the option. In our judgment, as Judge Patterson concluded in his dissent below, *Cartier* was wrongly decided. The decision ignores the fact that §440.571 says not a word about conferring immunity upon FPL. The decision appropriately looks to §440.11 as a source for FPL's claim of immunity, but ignores the fact that §440.11 confers immunity only upon "employers." The decision also ignores the fact that

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§440.571 does not confer "employer" status on FPL for purposes of the immunity granted to "employers" by §440.11.

The decision also purports to "distinguish" a prior Third District decision -- *Florida Power & Light Co. v. Huwer*, 508 So.2d 489 (Fla. 3d DCA 1987) -- which, in our judgment, is indistinguishable. *Huwer* holds that an employee of an independent contractor engaged by FPL was not an employee of FPL; that, notwithstanding that FPL had provided workers' compensation coverage to the independent contractor's employee, it was not her "employer"; and that FPL was therefore not entitled to immunity under §440.11. Most respectfully, the *Cartier* panel's effort to "distinguish" *Huwer* notwithstanding, the two decisions are plainly in conflict.[5/]

More importantly, the *Cartier* panel cited *no* decision supporting its conclusion, and there is not even a hint in its opinion that it was aware of or considered the long line of authority emanating from *Jones v. Florida Power*

[5/] The *Cartier* panel purported to "distinguish" *Huwer* on a single ground, by positing that FPL had magnanimously volunteered to pay benefits to Mr. Huwer *after* he was injured, without any contractual obligation to do so. In our judgment, because the *Huwer* panel's opinion says no such thing, the *Cartier* panel simply made up this "distinction." FPL's claim of immunity in *Huwer* was based on the undisputed fact that *it* paid the workers' compensation benefits to the plaintiff, an employee of FPL's independent contractor, and such an arrangement could *only* have arisen by contract between FPL and the independent contractor, under the permission then available to it from the Division. Perhaps if the *Cartier* panel had understood that FPL had contracted with Mr. Huwer's employer to provide coverage under the permission then available to it from the Division -- and if it had also been apprised (as it apparently was not, and as the Final Staff Summary of H.B. 1277 explains) that the sole purpose of §440.571 was to reinstate this permission after it was rescinded by the Division -- it would have felt obliged to follow *Huwer* and reach precisely the conclusion we have urged here.

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Corp., supra -- which establishes beyond peradventure that, absent a mandatory *statutory obligation* to provide workers' compensation coverage, there is no immunity from suit. Although it was apparently unaware of this line of authority, it at least intuited that FPL would be entitled to immunity only if it was "legally obligated to provide insurance coverage" (594 So.2d at 756). However, it then concluded that this *legal obligation* was satisfied because FPL voluntarily "assumed a contractual duty to provide coverage" (*id.*). Most respectfully, a voluntarily assumed "contractual obligation" to provide coverage is not the type of "legal obligation" which creates immunity; as *Jones* and its progeny make clear, the only type of "legal obligation" which creates immunity is a "*statutory obligation*" -- and because §440.571 is plainly permissive and therefore not *obligatory* in any way, it simply does not create the type of "*statutory obligation*" which will support a claim of immunity. In short, if *Jones* and its progeny are still the law -- and they plainly are -- then *Cartier* was wrongly decided.

We also respectfully submit that, in the absence of some explicit language in Chapter 440 mandating the novel conclusion reached in *Cartier* -- and there is none -- settled rules of statutory construction ought to *require* the different construction of §440.571 we have urged here. To the extent that the Workers' Compensation Act abolishes common law rights to sue for negligently-caused injuries, it is plainly in derogation of the common law. There is a well-settled rule governing the construction of such statutes, a rule which the *Cartier* panel also overlooked:

> Statutes in derogation of the common law are to be construed strictly . . . . They will not be interpreted to

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> displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. . . .

Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977). *Accord Kitchen v. K-Mart Corp.*, 697 So.2d 1200, 1207-08 (Fla. 1997); *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Division of Administrative Hearings*, 686 So.2d 1349, 1354-55 (Fla. 1997); *Ady v. American Honda Finance Corp.*, 675 So.2d 577, 581 (Fla. 1996); *State v. Egan*, 287 So.2d 1 (Fla. 1973). *See generally* 49 Fla. Jur.2d, *Statutes*, §192 (and numerous decisions cited therein).

The immunity from suit which *Cartier* purports to find in §440.571 is nowhere expressed in that statute. Neither is it expressed in §440.11, which confers immunity only upon "employers." Neither does Chapter 440 anywhere confer "employer" status on self-insured public utilities for purposes of the immunity provided to "employers" by §440.11. *Cartier* therefore "invents" an immunity which is nowhere expressed in Chapter 440, squarely in the face of a rule of statutory construction requiring a contrary result.

It is also apodictic that, whenever possible, statutes should be construed to render them constitutional. *See, e. g., Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986); *Capital City County Club, Inc. v. Tucker*, 613 So.2d 448 (Fla. 1993); *Firestone v. News-Press Publishing Co., Inc.*, 538 So.2d 457 (Fla. 1989); *Miami*

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Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). Since it is the mandatory *statutory obligation* to procure workers' compensation insurance which provides the necessary *quid pro quo* to the employee to render the abolition of his common law rights constitutional, the construction given to §440.571 by *Cartier* and the court below renders the statute unconstitutional. That construction must therefore be avoided here at all costs. Most respectfully, *Cartier* was wrongly decided, and the district court erred as a consequence in affirming the defendants' judgments on its authority.

It remains for us to address the multiple miscellaneous arguments which FPL made below, in which it attempted to derive a claim to immunity from several additional statutory sections in Chapter 440. In our judgment, each of the arguments was meritless -- and frankly, we think they proved our point. Surely, if it is necessary to resort to four or five different statutes to derive a claim of immunity because no one statute is sufficiently clear on the point, then the statutory scheme is plainly lacking in the "explicit," "clear and unequivocal terms" required for a conclusion that the legislature intended to abolish Mr. Deen's common law rights. In the hope that FPL will be more selective in the miscellaneous arguments it advances in this Court, we will not anticipate all of the previously-argued points here. There will be time enough to respond to the ones that are raised, in our reply brief. And for the moment at least, we rest our case.

V.
CONCLUSION

It is respectfully submitted that the district court erred in concluding that FPL is immune from Mr. Deen's lawsuit. If we are correct about that, then FPL

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has no immunity in which Quantum can share, and the trial court erred in entering both of the judgments which are the subject of this proceeding. The certified question should be answered in the negative; *Cartier* should be disapproved; the district court's decision should be quashed; and the case should be remanded with directions to reverse both judgments.

Respectfully submitted,

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VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 2nd day of October, 1998, to: Robert B. Sendler, Esq., 700 Universe Blvd., Juno Beach, FL 33408; John R. Mathias, Esq., 13923 Icot Boulevard, Suite 815, Clearwater, FL 34620; James A. Epstein, Esq., 3303 W. Commercial Blvd., Suite 101, Fort Lauderdale, FL 33309; Michael A. Tonelli, Esq., P.O. Box 172118, Tampa, FL 33672-0118; Arthur J. LaPlante, Esq., 200 E. Broward Blvd., Suite 1310, Fort Lauderdale, FL 33302; Stephen A. Smith, P.A., Post Office Box 1792, Lake City, FL 32056-1792; and to Stuart C. Markman, Esq., Kynes, Markman & Felman, P.A., Post Office Box 3396, Tampa, FL 33601.

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