IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC99-153
Lower Tribunal #: 3D98-267

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Petitioner,

vs.

ANGELO JULIANO,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT ANGELO JULIANO ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style of the Brief 14 point Times New Roman.

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DESIGNATION OF PARTIES AND RECORD REFERENCES

The designations heretofore established by Petitioners will also be utilized by Respondent.

Florida Department of Transportation will be referred to as Petitioner, Appellant, and as "DOT". Angelo Juliano will be referred to as Respondent, Appellee, Plaintiff and by name. "R" refers to record on appeal; "SR" refers to the supplemental record filed in the Third District Court of Appeal; "T" refers to the trial transcript; "A" refers to the Appendix of Petitioner.

In addition to the foregoing "AR" will refer to the Appendix of Respondent filed with this brief; "DCA" will refer to the Third District Court of Appeal. Florida Department of Corrections will be referred to as "DOC"; PB will refer to Petitioner's Initial Brief.

STATEMENT OF THE CASE

Petitioner seeks review by this Court of a decision of the Third District Court of Appeal which affirmed the final judgment in the Circuit Court. The Circuit Court judgment resulted from a jury verdict in favor of plaintiff in December, 1997.

Respondent Juliano, a corrections officer employed by the Florida Department of Corrections (DOC), filed suit against Petitioner, Florida Department of Transportation (DOT) claiming negligence of DOT employees failing to maintain and repair defective flooring resulting in serious injury to Juliano. (R 1-7).

After extensive discovery, Petitioner filed Motion for Summary Judgment contending they were workers' compensation immune. DOT confirmed to the DCA in their appeal below, "The first Motion for Summary Judgment focused on the 'unrelated works' exception found in the penultimate sentence of §440.11(1), Fla. Stat. (1997)." (AR 4). The trial court rejected Petitioner's workers' compensation immunity defense which focused on the "unrelated works" exception.

Petitioner then elected to file an interlocutory appeal, rather than awaiting final judgment.[1] By order entered December 13, 1995, the DCA affirmed the trial court decision denying workers' compensation immunity defense citing this Court's decision

[1]See Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992) [Fla. R. App. P. 9.130(3)(C)vi]

in Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995). Florida Dept. of Transp. v. Juliano, 664 So.2d 77 (Fla. 3rd DCA 1995).

Trial of the cause was ultimately commenced December 18, 1997. The special verdict form, was agreed to by the parties, (T 356).[2] After a five day trial, the jury found DOT employees Sgt. Michael Wyse, William Defoe, Capt. Robert Reynolds, R.J. Rulison, and Lt. Col. McPherson negligent in causing Juliano's injury. The jury returned their verdict in favor of Juliano in the amount of $575,000.00, but found Juliano 30% comparatively negligent. (T 498, 499, AR 28, 29). The net verdict was accordingly in the amount of $402,500.00.

From the final judgment, Petitioners filed their second appeal to the DCA. Petitioner raised three issues unrelated to workers' compensation immunity which were rejected by the DCA and not here in issue. (AR 2,3). The only issues pertaining to workers' compensation immunity raised by Petitioners before the DCA were their Points I and V. (AR 2,3). The contention in Point V raised before the DCA involved

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[2]Petitioner, in their brief, complains it was not until 3-4 weeks before the trial that they received the final listing of all those whom Juliano was complaining were negligent. (PB 6). However, at the trial of the cause, following discussion of instructions and the verdict form, counsel for DOT states, "whatever prejudice may have arisen from not having this information in a timely fashion and the necessity of making a Motion to Compel Discovery answers and so forth to get to this information, that's all behind us now." (T 352, emphasis supplied). It is noted that more than two years before the trial referred to (in their first Motion for Summary Judgment and interlocutory appeal), Petitioner acknowledged claim of negligence against Sgt. Wyse. (A 16, 24, 28, 67).

the Borrowed Servant Doctrine. (AR 3). That issue is no longer discussed in proceedings before this Court.[3]

The only immunity issue raised before the DCA and now raised before this Court is to contend that the 1988 amendment to §440.11(1) enhancing the requisite degree of negligence to sue certain supervisory fellow employees in one's own employment ("works") is also applicable to supervisory employees in unrelated works.[4] That issue in Petitioner's merits brief seems to be an after-thought with Petitioner seeming to seek a re-trial of everything before this Court, whether or not duly raised below.

STATEMENT OF THE FACTS

There are no pertinent facts if Petitioner is restricted to the workers' compensation immunity merits argument made below and made in their jurisdictional brief. That is solely the legal issue as to whether an employee suing a fellow employee

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[3]Presumably Petitioners abandoned any discussion thereof in view of the total lack of supportive evidence. Further, Petitioners failed to even seek a special jury instruction.

[4]Petitioners represent to this Court that they raised and argued before the DCA multiple issues pertaining to unrelated works-immunity including their concept of "institutional" negligence. Petitioner's extensive Appendix unfortunately omits to even bring to the attention of this Court the Points Presented to the DCA involving workers' compensation immunity, Argument thereunder, and Summary of Argument. Those, however, are found in Respondent's Appendix. The only workers' compensation immunity issue raised before the DCA now raised before this Court is Petitioner's Point I below involving the legal issue as to whether supervisors in unrelated works must be found culpably negligent before suit would lie against them. (AR 1-23).

in unrelated works has to establish culpable negligence for a supervisor-managerial employee. There is no dispute it was never even contended that the DOT employees were grossly negligent, let alone culpably negligent.

However, Petitioner discusses portions of the trial testimony at length, and seems to suggest this Court should re-examine the jury's findings of negligence against Sgt. Wyse and other employees which were affirmed by the DCA. (e.g. PB 10).[5] Since it is unknown whether the Court will accede to Petitioner's request to re-weigh the evidence, it is necessary for Respondent to supplement the facts as set forth by Petitioner.

Juliano was a corrections officer with DOC hired in 1981. (T 184). At the time of his accident, September 16, 1991, he had an average weekly wage with fringe benefits of $787.50 (AR 31). Corrections officer Juliano was guarding and supervising a trash crew of inmates who cleaned the Plantation Key Weigh Station operated by DOT. (T 199). Juliano supervised those inmates as a corrections officer working for the DOC. (T 233). In that capacity, he had to be able to defend himself, control the inmates, and was responsible for their well-being. (T 193).

On the day in question, corrections officer Juliano suspected an inmate in the

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[5]However, in another portion of the brief, Petitioner concedes "it is arguable that more could, and perhaps should, have been done more quickly to remedy the situation, the evidence in this record simply does not show that this hazard, or the delay in repairing it, was the result of culpable negligence by any DOT employee." (PB 42).

weigh station had secured contraband. He was creeping toward the inmate, keeping eye contact with him, as his training taught him to do, when he stepped in a deep depression on the floor, causing his leg to twist and the knee to "pop". (T 199, 200, 205, 206).

As a result of the accident, Juliano suffered serious injuries resulting in his being out of work for several years (T 211) and involving three surgeries. (T 208, 211, 212). Solely as a result of his injuries he was terminated from his position as a corrections officer and relegated to substantially lesser earnings. (T 213). His injuries and sequelae therefrom also resulted in significant depression necessitating treatment therefore. (T 223, 240).

More than one year before the occurrence of the accident, Sgt. Wyse, who was in charge of the weigh station, stated the floor was so negligently maintained that it "poses an immediate situation that could cause possible injury to both our staff, the public, or industry representatives." (A 104). It was the position of DOT employees, however, that repair was not feasible because supposedly the cost was $8,000.00-$10,000.00. (A 104).

Sgt. Wyse had been employed by DOT since 1982. (T 50). His duties were weight laws and safety enforcement with commercial truck traffic and included safety of the Plantation Key Weigh Station. (T 50, 51). Sgt. Wyse recognized the buckling-

depression resulting in Juliano's injury was a hazard. (T 55). DOT employee Wyse had authority to fix the problem. (T 66).

Shortly following the fall by Juliano, Sgt. Wyse, himself, put his foot through the flooring. The same day, after Sgt. Wyse was similarly injured, he promptly arranged for repair by the maintenance staff from DOT. (T 66). The problem was temporarily fixed with plywood - at no real cost. (T 70). Robert Rulison, who was another of the employees found negligent by the jury, acknowledged in a sworn deposition under oath that following injury to his own employee, Sgt. Wyse, that he "sent Johnny McKnight out to cut the holes in the floor and put plywood and make it nice and flat." (T 292). At the trial, he said that testimony had not been correct and that he had not sent anyone out. (T 292). Whichever one chooses to believe, Rulison acknowledged he had authority to make repairs. (T 124).

The flooring was known to pose a serious hazard, but was never fixed to any extent - until following Juliano's injury, DOT employee Wyse, himself, was similarly hurt - and then it was fixed by DOT the same day.

SUMMARY OF ARGUMENT

After two years of litigation, Petitioner in 1995 elected to take an interlocutory appeal in connection with their workers' compensation immunity defense, which in their own words "focused on the unrelated works exception." (AR 3). If an enhanced legal standard (gross or culpable negligence) was necessary to establish liability of DOT employees engaged in unrelated works for Juliano to recover, then that would have been determinative in Petitioner's favor. That issue, now raised five years later before this Court, is an integral part of applicability or inapplicability of the unrelated works exception.

Where DOT elects to raise through interlocutory appeal workers' compensation immunity and more specifically focusing on the unrelated works exception, Petitioner was obliged to raise this legal issue, which, if they are correct, would be determinative or are later barred from raising same by the law of the case.[6] To hold otherwise is inconsistent with the purpose of this Court, in the first instance, in allowing an interlocutory appeal - to promote prompt resolution. Rather, to hold that a party can hold back available arguments that are an integral part of the issue appealed and raise them in one or more multiple later appeals encourages delay, the attrition defense, more

[6]Juliano never contended DOT employees were guilty of anything other than ordinary negligence. Whether an enhanced standard of care was applicable was purely a legal issue which could have and should have - if being challenged - been raised in the first appeal they elected to institute.

litigation, and particularly benefits and even provides economic reward for that conduct in the case of the State.[7]

The only workers' compensation immunity issue raised before the DCA, duly discussed by Petitioner in their jurisdictional brief, but seemingly alluded to as an after-thought in Petitioner's merits brief, is the contention that the legislature's amendment of §440.11 in 1988 to enhance the threshold for suit against a managerial fellow employee from gross to culpable negligence also applied when seeking to sue a fellow employee in an unrelated works. If so, then the unrelated works exception is surplusage. Further, Petitioner's contention in that respect is inconsistent with the decisions in Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995); Austin v. Duval County School Board, 657 So.2d 945 (Fla. 1995); and State, Dept. of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1981). In all of said cases only ordinary negligence was shown. Suit against a fellow employee in an unrelated work must not be confused with the right, in certain circumstances to sue a fellow employee in the same works. The standard for suit against an employee in the same works is gross negligence for an ordinary employee, culpable negligence since 1988 for a supervisory-managerial employee. However, in accordance with Duffell, Austin, and Koch, for suit against a fellow employee in unrelated works only ordinary negligence

[7]See Footnote 12, page 12.

need be established.

POINT I

WHERE A DEFENDANT ELECTS TO PROCEED WITH AN INTERLOCUTORY APPEAL, MAY THEY WITHHOLD ARGUING A DETERMINATIVE, PURELY LEGAL CONTENTION, AN INTEGRAL PART OF THE ISSUE RAISED, IN ORDER TO BE ABLE TO SEPARATELY RAISE IT IN ONE OR MORE SUBSEQUENT APPEALS?

Petitioner conceded and represented to the DCA in their brief that in their interlocutory appeal:

> The first Motion for Summary Judgment focused on the 'unrelated works' exception found in the penultimate sentence of §440.11(1), Fla. Stat. (1997). (AR 3).

The legal standard of culpability required of employees in unrelated works is a pure and simple legal issue. If Petitioners are correct that the standard for liability of managerial employees in the unrelated works is one of culpable negligence, then that would be determinative in their prevailing with their workers' compensation immunity defense. At no time during the course of these proceedings did corrections officer Juliano ever plead or contend there was culpable negligence or even gross negligence by any DOT employees - but simply ordinary negligence.

Petitioner states to this Court that in the interlocutory appeal:

> The Court was not presented with the issue of the

> appropriate standard for negligence where the fellow employee was a supervisor. (PB 5).

If, as Petitioner now contends, the unrelated works exception is not applicable unless it was established employee supervisors in the unrelated works were criminally culpable, then that facet of the argument must be required to have been raised when DOT elected to institute the initial interlocutory appeal.

The purpose of allowing an interlocutory appeal was not to create additional appeals for the Courts nor allow the parties to raise issues in a piecemeal fashion. Rather, the purpose was to allow prompt review of certain permissible matters with a view toward promoting an early resolution.[8] What is more central to the issue of the unrelated works exception than the contention that the standard of negligence before suit will lie is culpable negligence, rather than ordinary negligence? It would be directly contrary to this Court's policy to allow Defendant to elect to proceed with an interlocutory appeal of an order adversely determining workers' compensation immunity defense, but hold that the defendant can save for future interlocutory or final appeals their main purely legal argument, which if they are correct would be

[8]This Court apparently felt it so important to allow an interlocutory appeal denying workers' compensation immunity defense, that the Court, in the course of Mandico v. Taos Construction, Inc, 605 So.2d 850 (Fla. 1992) took the unique action of amending the Florida Rules of Appellate Procedure to allow such an interlocutory appeal. Also see Hastings v. Demming, 694 So.2d 718 (Fla. 1997).

determinative in their favor.

Although not so noting in their jurisdictional brief, Petitioner now seemingly agree the decision below was in accord with this Court's decision in Airvac, Inc. v. Ranger Ins. Co., 330 So.2d 467 (Fla. 1976) and that line of cases.[9] They say, however, Airvac allegedly conflicts with this Court's decision in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) and a separate line of authorities following U.S. Concrete.[10] (PB 20, 21). Petitioner alleges "in effect, U.S. Concrete subsilentio overruled Airvac." (PB 24).[11]

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[9]Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976) (Ranger not permitted to amend complaint, but won directed verdict, on appeal verdict set aside and remanded, Ranger never cross-appealed denial of right to amend, trial court again refused upon remand to allow amendment, upon re-trial, verdict for Airvac, this Court upheld denial of right to amend under law of the case); Valsecchi v. Proprietors Ins. Co., 502 So.2d 1310 (Fla. 3rd DCA 1987) (initially raised issue as to whether Florida or North Carolina law, later foreclosed from seeking to argue New York or Massachusetts law).

[10]U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) (post-judgment interlocutory appeal challenging amount of punitive damages which was reversed, subsequently raising issue as to status and vicarious liability for punitive damages permissible); Holder v. Keller Kitchen Cabinets, 610 So.2d 1264 (Fla. 1992) (WC order finding claimant at MMI, later claimant underwent surgery and held entitled to seek temporary benefits in connection therewith without modifying prior order); Wells Fargo Armored Servs. Corp. v. Sunshine Sec. and Detective Agency, 575 So.2d 179 (Fla. 1991) (Sunshine appealed default judgment, DCA ignored that issue, but held complaint failed to state a cause of action, amended complaint filed dismissed by lower court on statute of limitations grounds; on appeal to DCA dismissal affirmed, but on law of the case - in effect precluding amended complaint - this Court rejected law of the case application thereto).

[11]After alleging conflicting lines of authority, Petitioner discusses Two M Dev. Corp. v. Mikos, 578 So.2d 829 (Fla. 2nd DCA 1991) as the line to be followed. In analyzing that case, they state in their brief "essentially, it was only after the first appeal that the issue of the assessment of substantially completed property could properly be addressed. If the property was not substantially completed, that

Even if this Court wants to again re-examine those cases to try to establish new rules, it is suggested the case subjudice does not provide the appropriate vehicle. That is because whatever the rule, it must include obligation to argue a determinative legal issue that is an integral part of the issue raised on interlocutory appeal. This case is a compelling example.

In 1995, two years after the commencement of litigation in this cause, DOT elected to proceed with interlocutory appeal before the DCA raising workers' compensation immunity focusing on the unrelated works exception. Juliano never alleged nor contended that any managerial employees or any employees of DOT were culpably negligent or even grossly negligent. If it was DOT's position that was required, as now espoused before this court five years later, can they nevertheless just decide not to make that facet of the argument in the interlocutory appeal apparently just to keep the case on-going?

That simply makes no sense.[12] But, here we are, five years later, with Petitioner

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determination was unnecessary." (PB 24). Respondent concurs with that analysis, but it is unclear how that is helpful to Petitioner's position in the present case. In Juliano I, the purely legal issue involving the required standard of negligence was indubitably ripe and ready to be discussed, obviously was an integral part of the unrelated works exception - and would have been determinative for Petitioner, if they were correct.

[12]There is already in place substantial reward encouraging delay by governmental entities. That results from the $100,000.00 cap and determinations by this Court that the cap includes not only attorney's fees, costs, but interest as well. Thus, whenever the $100,000.00 threshold has or will be reached, there need be no accountability regarding continued litigation costs, attorney's fees in

contending the requisite standard to permit recovery against DOT employees was culpable negligence; and contending they prevail as a matter of law because that was not shown(admittedly never even contended to be the case) . Under any of the cases cited in Petitioner's brief however analyzed can they be permitted to deliberately withhold discussing that facet of the argument and later raise it whenever they wish? We think not.

Accordingly, it is submitted the DCA was correct in holding under the circumstances of this matter that DOT, upon electing to take an interlocutory appeal focusing on the unrelated works exception, was obligated to make their culpable negligence argument.[13] That argument, if correct, would of course have been determinative in their favor since Juliano never even contended there was gross or culpable negligence by any DOT employees. It is further suggested even if this Court

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connection with failure to accept reasonable settlement offers, and even a substantial benefit from delay in that no interest is due. Accepting Petitioner's contention that they can withhold arguments as they wish and raise and re-raise them as they wish in multiple appeals, including interlocutory appeals, simply encourages continued litigation and further delay.

[13]Following the interlocutory appeal herein, there was a subtle change in the language of the applicable rule restricting its application. See Hastings v. Demming, supra. The Court in Hastings clarified that a defendant may not seek interlocutory appeal until there is a determinative denial of workers' compensation immunity at the trial level. Whether Petitioner, in electing to pursue their interlocutory appeal and the DCA in accepting jurisdiction, did so under the ultimate narrower view or a broader view, is irrelevant. That is because even if one or more interlocutory appeals are permitted testing factual and legal immunity issues as the parties go along, no one can properly contend where the DCA accepts jurisdiction that a purely legal issue central to the argument made, which will be determinative, nevertheless, need not be raised, but can be withheld to raise in following appeals.

wished to examine the issue of the law of the case, the case subjudice does not appear to be the appropriate factual scenario for any such re-examination.

For the foregoing reasons, it is submitted the DCA was correct in applying the law of the case and determining DOT could not re-raise later the contention that culpable negligence was required in order to sue a supervisory employee in an unrelated works.

POINT II

> WHETHER THE 1988 AMENDMENT TO §440.11(1) ENHANCING THE REQUISITE DEGREE OF NEGLIGENCE TO SUE CERTAIN SUPERVISORY FELLOW EMPLOYEES FROM GROSS TO CULPABLE NEGLIGENCE WAS INTENDED TO CHANGE THE UNRELATED WORKS EXCEPTION OR SIMPLY CHANGE STREETER v. SULLIVAN?

The foregoing is the focused issue raised before the DCA and raised before this Court in Petitioner's jurisdictional brief. However, Petitioner's brief on the merits discusses that issue almost as an after-thought. Notwithstanding agreement to the verdict form and the jury specifically finding five DOT employees negligent, DOT now coins the phraseology "institutional negligence" as their primary complaint. (PB 31, 33). They state:

> What Juliano pled and proved was, at best, institutional negligence - not the individual negligence of any particular employees involved in unrelated works, as required by

> §440.11(1) Fla. Stat., and this Court's decision in Duffell. (PB 32).

That contention should be compared with Petitioner's jurisdictional brief and the immunity issue, as presented below to the DCA. (AR 2, 8-17). Petitioner asks this Court to re-weigh the evidence contending Juliano failed to show any DOT employee was even negligent (e.g. PB 43), seeks to raise various claimed trial errors not even raised before the DCA (e.g. PB 6, 7), repeatedly utilizes the "buzz" words "double recovery" (PB p. 2, 15, 30, 33, 43)[14] and incorrectly asserts Juliano continues to receive workers' compensation benefits.[15]

DOC filed a lien and are entitled to recovery, as would any other workers' compensation insurance carrier where there is a third party recovery. They are due a lien since the unrelated works exception applies equally to both a private employer or a State employer. Although Petitioner likes to contend they are being discriminated against because they are a public employer, the unrelated works exception applies

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[14]However, Petitioners scrupulously avoid advising this Court that DOC, who had been providing compensation benefits filed a Notice of Lien in connection with these proceedings and as well secured an adjudication they are entitled to a lien. (AR 24-26). That is inconsistent with the position now espoused by DOT before this Court that "we are all one."

[15]It should be irrelevant to the proceedings herein whether or not Respondent continues to receive workers' compensation benefits. However, since Petitioner chooses to erroneously assert before this Court that Juliano continues to receive workers' compensation benefits, Respondent notes, with attached documentary support, that statement is incorrect - benefits have been suspended. (AR 27).

equally to employees of private multi-works employers as it would to employees of the State of Florida in unrelated works. The only difference is that by virtue of §768.28(9)(a) the legislature mandates DOT stands in the shoes of their employee.[16] That is really no different than if the employee took out separate liability insurance, the premium for which the employer, in any event, may pay.[17]

The purpose of the unrelated works exception is to avoid further restriction on the rights of injured employees to sue in tort just because they are employed by a conglomerate type employer. The workers' compensation law takes away the right of the employee to sue fellow employees in tort[18] in return for receipt of workers' compensation benefits. Without the unrelated works exception, that right for redress for injury would be significantly abridged for employees of large employers engaged

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[16]The legislature in so mandating may have wanted to be more benevolent in formally accepting this obligation for their employees. In addition, or in the alternative, the legislature may have wanted to shield said employees under the Sovereign Immunity Cap, which shield does not apply in private industry. However, as a practical matter, there is no real difference in that respect in the public or private sector. See Footnote 17.

[17]Justice Anstead, specially concurring in Holmes County School Board v. Duffell, supra, p.1179, noted "As a practical matter, when a fellow employee is sued under this exception, the employer's liability insurance will presumably apply since the employee is acting in the scope of his employment in the unrelated work. So, an employee may recover in tort, and probably against his employer's insurer, although his recovery may be reduced by any workers' compensation lien imposed."

[18]Tort suit against a "regular" employee is allowed if the conduct reaches the threshold of wanton, willful or gross negligence. Tort suit against a managerial employee is permitted only where the conduct can be shown to be culpable.

in multiple unrelated works. If Juliano worked for a security firm and suffered injury as a result of negligence of employees of a paving contractor, he would be entitled to seek redress in tort against the negligent paving contractor employees with his employer retaining a lien for any workers' compensation benefits provided. Suppose, however, the security firm decided one day before that injury to take over the paving contractor and have a separate paving contracting division. Then, although the security firm employees and paving contractor employees are involved in unrelated works, they would technically fall in the category of "fellow employees".

The unrelated works exception adopted by the legislature, levels the playing field between employees of "one works" employers and employees of "multi-works" employers. Because of the unrelated works exception, common law rights of employees of multi-works employers are not abridged to a greater extent because of workers' compensation immunity than employees of one-works employers. Under the exception, where the works are "unrelated", they are, for the purpose of workers' compensation immunity, treated as different employers.

A suit against an employee in an unrelated work must not be confused with the right, in certain circumstances, to sue a fellow employee in the same works. Prior to 1988, redress against a negligent employee in the same works could only be instituted upon showing of "gross" negligence or wilful and wanton conduct. §440.11(1) Fla.

Stat. (1987). In 1988, the legislature amended the provision enhancing the requisite negligence standard to sue certain employees in the same works from gross negligence to criminal negligence.[19] The reason for the enhanced standard to sue fellow employees in one's own works was to change the result of this Court's decision in Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). Eller v. Shova, 630 So.2d 537 (Fla. 1993).

Following the 1988 amendment, to sue fellow employees in one's "own works",

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[19]As amended, §440.11(1) provides as follows: The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow employee, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment. The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor or other person who in the course and scope of his duties actus in a managerial or policy making capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy making duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in §775.082.

there is a standard of gross negligence for regular employees and criminal culpability for managerial employees. If those standards involving employees of the same works were also applicable to employees in unrelated works, then the unrelated works exception would be meaningless and surplusage.

Petitioner's contention that gross negligence for regular employees, criminal negligence for managerial employees must now be shown before an employee can seek redress against an employee in unrelated works is contrary to this Court's decision in Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995). Plaintiff Duffell was permitted to proceed with suit against an employee in unrelated works upon showing of simple negligence. Similarly, Plaintiff Austin, who was a city employee, was permitted under the unrelated works exception to proceed with suit against the Duval County School Board upon showing ordinary negligence resulting in injuries to her when riding in the School Board vehicle. Austin v. Duval County School Board, 657 So.2d 945 (Fla. 1995).

State, Dept. of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991) involved employees of the same entities herein with the negligence in that case being that of an employee of DOC. Therein, DOC employee Tyre picked up a truck at DOT's maintenance yard to transport inmates who were working on State roads pursuant to a contract between DOT and DOC. The DOC employee fatally struck a DOT

employee. There was no evidence of gross or culpable negligence. DOC defended on the grounds both employees were employed by the State and the unrelated works exception was abolished by §768.28(9)(a) Florida Statutes. The Court rejected that contention holding, although both were employed by the State, they were employed in unrelated works and §768.28(9) F.S. did not abolish suit against the negligent co-employee. Rather, the statute merely required that the action be maintained against the public employer as the sole substitute defendant.

For the foregoing reasons, it is submitted corrections officer Juliano, an employee of DOC, was entitled to proceed against DOT upon establishing ordinary negligence of DOT employees, whether they be regular employees or supervisory-managerial employees. If Juliano were suing a fellow DOC employee or one of his supervisors, then, in the former instance, he would have to show gross negligence, and in the latter instance, since 1988, culpable negligence. However, he was not. Rather, he was seeking redress against employees in unrelated works and accordingly simple negligence was the correct standard.

CONCLUSION

For the foregoing reasons, it is submitted Petition for Certiorari should be denied.

Respectfully submitted by:

By:_____

L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of July, 2000 to: DIRK M. SMITS, ESQUIRE, Vernis & Bowling of The Florida Keys, P.A., Attorney for Petitioner, P.O. Drawer 529, Islamorada, FL 33036; JOSEPH H. WILLIAMS, ESQUIRE, Troutman, Williams, Irvin, et al, on behal of The Academy of Florida Trial Lawyers, 311 W. Fairbanks Avenue, Winter Park, FL 32789-5001.

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