IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-153

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

ANGELO JULIANO,

Respondent,

_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1]

DOT seeks review of a Third District Court decision which held that DOT was precluded **from** raising any aspect of the workers' compensation law under § 440.11(1), Fla. Stat. (1997), because that court denied an interlocutory appeal based on the "unrelated works" exception to workers' compensation immunity. This decision expressly and directly conflicts with and misapplies the rule announced in this Court's decision in U.S. Concrete Pipe Co. **v.** Bould, 437 So.2d 1061 (Fla. 1983), and the Second District's decision in Two M Dev. Corp. v. Mikos, 578 So.2d 829 (Fla. 2d DCA 1991).

Juliano was injured when he tripped on a bump in the floor of a weigh station operated by DOT. DOT contracted with the Florida Department of Corrections ("DOC") to provide inmates to clean the weigh station under DOC supervision. Juliano was supervising inmates working at the station at the time of his accident. Although Juliano received workers' compensation benefits for his injuries, he filed a personal injury action against the DOT alleging negligence on the part of its employees.

DOT moved for summary judgment, arguing the "unrelated works" exception to workers' compensation immunity in § 440.11(1) was inapplicable. The court denied that motion, and

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1 Petitioner FLORIDA DEPARTMENT OF TRANSPORTATION will be referred to as it stands in this Court, as it stood in the trial court, and as DOT. Respondent ANGELO JULIANO will be referred to as he stands in this Court, as he stood in the trial court, and by name. Emphasis is supplied by counsel unless otherwise indicated.

DOT appealed. The Third District affirmed with a citation. Florida Dept. of Transp. v. Juliano, 664 So.2d 77 (Fla. 3d DCA 1995).

On remand, DOT filed a second motion for summary judgment, arguing that under a different sentence of § 440.11(1), a fellow-employee supervisor could be held liable only for criminal negligence. The court denied that motion on the grounds that it was a relitigation of the first unsuccessful summary judgment motion.[2] The case went to trial and the jury ruled for Juliano.

DOT appealed. The Third District ruled "that the doctrine of "res judicata precluded the DOT from raising or reraising any aspect of its workers' compensation defense on remand after the first appeal of this cause." Florida Dept. of Transp. v. Juliano, 24 Fla.L.Weekly D2064 (Fla. 3d DCA Sept. 11, 1999). The court relied on its decision in Thomas v. Perkins, 723 So.2d 293, 294 (Fla. 3d DCA 1998). DOT filed a timely notice to invoke the discretionary jurisdiction.

SUMMARY OF ARGUMENT

DOT seeks review of a Third District Court decision which held that DOT was precluded from raising any aspect of the workers' compensation law, because that court denied an interlocutory appeal based on the "unrelated works" exception to workers' compensation immunity. This Court has jurisdiction

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2 DOT also raised this same issue in its motions for directed verdict, and in its request for a jury instruction on the higher standard of negligence applicable to supervisors. The trial court also denied these motions.

because this decision expressly and directly conflicts with and misapplies the rule announced in this Court's decision in U.S. Concrete Pipe Co. v. Bould, and the Second District's decision in Two M Dev. Corp. v. Mikos.

This Court should exercise its jurisdiction because the Third District's decision highlights the conflict in Florida law on the proper scope of law of the case and res judicata. Also, this case presents the first opportunity for this Court to interpret § 440.11(1) relating to fellow-employees acting in a "managerial or policymaking capacity."

ARGUMENT

I. THIS COURT HAS DISCRETIONARY JURISDICTION BECAUSE THE THIRD DISTRICT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE SECOND DISTRICT.

The Third District held that an employer was precluded from raising any aspect of workers' compensation immunity because the employer unsuccessfully challenged the applicability of the "unrelated works" exception on interlocutory appeal. Florida Dept. of Transp. v. Juliano, Slip op., No. 98-267 ("Juliano II"). This decision expressly and directly conflicts with and misapplies the rule announced in this Court's decision in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983), and the Second District's decision in Two M Dev. Corp. v. Mikos, 578 So.2d 829 (Fla. 2d DCA 1991). This Court has jurisdiction under Art. 3, § 3(b)(3), Fla. Const.

These cases stand for the same basic proposition: On remand from an interlocutory appeal, litigants are precluded from

raising rulings on questions of law **actually presented, considered, and decided** in the former appeal. U.S. Concrete, 437 So.2d at 1063; Two M, 578 So.2d at **830.** This is based **on** the doctrine of "law of the case," which is allied to res judicata but addresses repeated rulings on the same issue within the same action.[3] See Barry Hinnant, Inc. v. Spottswood, 481 So.2d 80, **82 (Fla. 1st DCA 1986).**

U.S. Concrete involved an automobile accident caused by **the** negligence of **U.S.** Concrete's employee. 437 So.2d at 1062. The jury awarded plaintiffs $800,000 in punitive damages. However, the jury did not specify whether **U.S.** Concrete was vicariously liable, or whether liability arose from negligent hiring of **U.S.** Concrete's employee, Id. at **1063.** The defendants filed a post-judgment interlocutory appeal challenging the excessiveness of the jury' verdict.

On remand, defendants challenged whether they could legally **be** vicariously liable for punitive damages. Id. Plaintiffs claimed that defendants were precluded from raising this issue because it was not raised in the prior appeal regarding punitive damages. This Court disagreed: "The doctrine of law of the case is limited to rulings on questions of law actually presented and considered on a former appeal." Id.

Similarly, in Two M, the plaintiff challenged a tax assessment on two grounds: (1) that the property was not

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3 Indeed, the two terms appear to sometimes be confused. See Barry Hinnant, 481 So.2d at 82. The Third District in this case also misidentified the appropriate doctrine.

substantially completed at the time of the assessment, and (2) that even if the property was substantially completed, the assessment was still excessive under the statutory criteria. 578 So.2d at 830. The court ruled the property was not substantially completed. That judgment was reversed on appeal.

The trial court ruled on remand that it had no jurisdiction to consider the excessiveness of the assessment. Id. On appeal, the Second District noted that the first appeal did not address the propriety of the assessment as substantially completed property. Id. at **830-31**. Essentially, it was only after the first appeal that the issue ***of*** the assessment of substantially completed property could properly **be** addressed. The Second District reversed because "the doctrine of law of the case applies only to issues that were actually considered and decided on a former appeal." Id.

On the face of the Third District's opinion in this case, it is clear that two different issues were raised in the first and second motions for summary judgment, which formed the basis for the first and second appeals. The first involved the "`unrelated works'" exception" to workers' compensation immunity and the second involved lack of "allegations and proof of the supervisor's criminal negligence." Juliano II. These two issues are based on different facts and different sentences in the statute. See § 440.11(1), Fla. Stat. (1997). The second issue was neither presented, considered, nor decided in the first appeal.

This Court in U.S. Concrete ruled that even though the prior

appeal addressed **one** aspect of punitive damages, the defendants could raise **a** different claim regarding punitive damages on remand. Yet, the Third District ruled that because DOT unsuccessfully appealed one aspect of workers' compensation immunity, it could not raise "**any** aspect" of workers' compensation immunity. Juliano **11**. Moreover, as in Two M, the issue raised on remand in this case could not properly be addressed until the issue raised in the first appeal was decided. There was no point in addressing the higher standard for claims against supervisors if workers' compensation **law** completely barred the suit. These results cannot be reconciled.

The court cited its decision in Thomas v. Perkins, 723 So.2d 293, 294 (Fla. 3d DCA 1998), for the proposition that "appellant is precluded from raising any issues which were or should have been raised on first appeal." Juliano II. This proposition expressly and directly conflicts with the rule announced in **U.S.** Concrete and Two M. The Third District's opinion modifies the rule to preclude from consideration issues that theoretically "should have been raised" on the first appeal.

Thus, the Third District's decision in this case directly conflicts with decisions of this Court and the Second District. This Court **has** discretionary jurisdiction to review this case.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE THE QUESTIONS OF THE PROPER SCOPE OF LAW OF THE CASE AND THE PROPER NEGLIGENCE STANDARD UNDER WORKERS' COMPENSATION FOR FELLOW-EMPLOYEES WHO ARE SUPERVISORS.

This case raises two significant issues with **broad** and disturbing ramifications. First, the Third District's decision

highlights the conflict in Florida law on the proper scope of law of the case and res iudicata. Second, this case presents the first opportunity for this Court to interpret the statutory provisions in § 440.11(1) relating to fellow-employees acting in a "managerial or policymaking capacity."

First, this Court should take this opportunity to clarify the scope of the doctrine of law of the case.[4] U.S. Concrete followed an earlier decision in Greene v. Massey, 384 So.2d 24, 27 (Fla. 1980), which held that a lower court "may in subsequent proceedings pass on issues which have not necessarily been determined or become the law of the case."

However, prior to these decisions, this Court decided Airvac, Inc. v. Ranser Ins. Co., 330 So.2d 467 (Fla. 1976). In Airvac, the plaintiff lost at trial, but successfully appealed the verdict. This Court ruled that the defendant's failure to cross-appeal the denial of leave to amend the answer precluded amendment after the first appeal. Id. at 469. Thus in Airvac, this Court precluded consideration of issues not actually or necessarily considered in the first appeal.

This Court's most recent opinions on law of the case do not cite Airvac or U.S. Concrete for law of the case, *so* this conflict remains unresolved. See Holder v. Keller Kitchen

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4 Law of the case or res judicata in this case was the basis for the trial court's and Third District's decisions below. In its briefs to the Third District, DOT challenged the trial court's ruling and discussed the interpretation of both applicable sentences of § 440.11(1), which shows that the issue of supervisor liability was not at issue in the first appeal. The propriety of applying this law of the case or res iudicata was also expressly addressed at oral argument.

Cabinets, 610 So.2d 1264 (Fla. 1992); Wells Fargo Armored Servs. Corp. v. Sunshine Sec. & Detective Agency, 575 So.2d 179 (Fla. 1991); see generally Raymond T. Elligett, Jr. & Charles P. Schropp, Law of the Case Revisited, Fla.Bar J. 48 (March 1994).

Second, this case presents a significant issue of workers' compensation law of first impression for this Court. The trial court's and Third District's decisions reflect an improper interpretation of § 440.11(1). Under § 440.11(1), workers' compensation benefits are an exclusive remedy and are "in place of all other liability of" employers. Employees of the same employer also receive immunity. Id. However, the injured employee may sue fellow-employees who "are assigned primarily to unrelated works." Id.

In Holmes County Sch. Bd. v. Duffell, 651 So.2d 1176 (Fla. 1995), this Court ruled that this "unrelated works" exception should be read in pari materia with § 768.8(9)(a), Fla. Stat., which requires that all actions for negligence of public employees be maintained against the government employer. Therefore, in cases of governmental employees involved in unrelated works, the agency may be sued as a surrogate defendant. Id. at 1179. Duffell was the basis for the Third District's decision in Juliano I. 664 So.2d 77.

Duffell, however, did not involve the alleged negligence of a manager or supervisor. Therefore, this Court did not have occasion to address the next sentence of § 440.11(1) which provides a higher standard of negligence when the fellow-employee is a "sole proprietor, partner, corporate officer or director,

supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity." Under this provision, a supervisor cannot be held liable unless his or her conduct rose to the level of criminal negligence. See § 440.11(1); see also Subileau v. Southern Forming, Inc., 664 So.2d 11 (Fla. 3d DCA 1995). As fellow-employees of any category generally share the employer's workers' compensation immunity, see § 440.11(1), the additional provision must only apply when the supervisory employee is engaged in "unrelated work."

This distinction between average and supervisory employees simply makes sense. Agency or corporate employers only function through their officers, directors, or other supervisory personnel. Thus, suit against supervisory personnel is essentially a suit against the employer itself.

That type of double recovery against the employer is precisely what the workers' compensation scheme is designed to avoid. Without this distinction, the exception would essentially swallow the rule, i.e., a plaintiff could avoid workers' compensation immunity simply by suing those in control of the agency or corporate employer for personal negligence.

The higher standard *of* negligence applicable to supervisory employees appears to represent a compromise, balancing the policies underlying workers' compensation immunity with the rights of injured employees. The legislature permitted injured employees to sue supervisors personally, but only if their actions were so egregious as to constitute criminal negligence. Moreover, where the employer is a governmental agency, like the

DOT, this higher standard becomes even more significant because recovery will be against the agency itself.

In this case, the rulings of the trial court and Third District resulted in improper double recovery. There were neither allegations nor proof of criminal negligence. Yet all the DOT employees ultimately claimed by the plaintiff to have been negligent were supervisors.[5] The trial court should have granted DOT's second motion for summary judgment, and motions for directed verdict on that ground. Moreover, the trial court also denied the defense requested jury instruction based on the supervisor provision of § 440.11(1). Therefore, the jury in this case did not determine liability based on the proper standard.

Thus, it is important that this Court exercise its discretionary jurisdiction to review this case and resolve the conflict created by the Third District's decision and clarify the underlying law involved in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to exercise its jurisdiction and resolve the conflict presented by the Third District's decision in this case.

CERTIFICATE OF SERVICE

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5 Interestingly, the complaint lists no specific DOT employees, The record is clear that the plaintiff did not identify all the allegedly negligent DOT employees until close to trial, despite repeated requests by defense counsel, and made changes during the trial itself. The fact that the plaintiff could not even identify the allegedly negligent employees until late in the litigation makes it clear that what the plaintiff really sought was double recovery from the employer DOT.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30 day of December, **1999** to L. Barry Keyfetz, Esq. KEYFETZ, ASNIS & SREBNICK, P.A., 44 West Flagler Street, Suite 2400, Miami, **Florida, 33130.**

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By: _____
Dirk M. Smits
Fla. Bar No. 911518

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

FLORIDA DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

ANGELO JULIANO,

Appellee.

**

CASE NO. 98-267

LOWER TRIBUNAL NO. 93-20647

An appeal from the Circuit Court for Monroe County, Stephen P. Shea, Judge.

Vernis & Bowling of the Florida Keys, P.A. and Dirk M. Smits, for appellant.

Keyfetz, Asnis & Srebnick, P.A. and L. Barry Keyfetz, and Bradley D. Asnis, for appellee.

Before COPE, LEVY, and GREEN, JJ.

GREEN, J.

The Florida Department of Transportation ("DOT") appeals an adverse final judgment entered pursuant to a jury verdict in this personal injury action. We affirm.

The appellee, Angelo Juliano, a former correctional officer, employed by the Florida Department of Corrections ("DOC")[1], was injured when he tripped on a large bump in the floor of a mobile weigh station operated by the DOT. At the time of Juliano's accident, the DOT had a contract with the DOC for the use of its inmates to clean the DOT's weigh station under the supervision of the DOC correctional officers. Juliano was supervising inmates at the weigh station when he tripped and injured himself. Juliano received workers' compensation benefits for his injuries from the the DOC and filed this personal injury action against the DOT for additional damages. The DOT moved for summary judgment on grounds that the workers' compensation immunity defense involving the "unrelated works" exception found in section 440.13(1), Florida Statutes (1997) precluded this lawsuit. That motion was denied by the trial court and affirmed on appeal by this court. See Florida Dept. of Transp. v. Juliano, 664 So. 2d 77 (Fla. 3d DCA 1995).

On remand, the DOT filed a second motion for summary judgment based again on the workers' compensation exemption. This time, the DOT argued that the Florida Supreme Court's holding in Holmes County School Board v. Duffell, 651 So. 2d 1176 (Fla. 1995), precluded an employee from maintaining a negligence suit against his employer, due to the negligent acts of a supervisor, in the

[1] As a result of his injuries, Juliano was terminated as a correctional officer.

absence of allegations and proof of the supervisor's crimina negligence. The trial court denied and rejected this second motion as a mere relitigation of the first motion for summary judgment. The case then proceeded to trial with a verdict being ultimately entered in Juliano's favor. This appeal followed.

For its first issue on appeal, the DOT asserts that the denial of its second motion for summary judgment on the workers' compensation exemption was error. We conclude, however, that the doctrine of res judicata precluded the DOT from raising or reraising any aspect of its workers' compensation defense on remand after the first appeal of this cause. See Thomas v. Perkins, 723 SO. 2d 293, 294 (Fla. 3d DCA 1998) (under the doctrine of res judicata, appellant is precluded from raising any issues which were or should have been raised on first appeal).

For its second argument, the DOT contends that it was unfairly prejudiced by a special jury instruction concerning the distraction rule because the issue of Juliano's distraction at the time of his accident was not framed by the pleadings and evidence. We find no merit to this argument. Given Juliano's deposition and trial testimony that his attention and eye contact was focused on the inmates and not on the bump in the floor at the time of the accident, the distraction issue, at the very least, was tried by implied consent. See C.A. Davis, Inc. V. City of Miami, 400 So. 2d 536, 540 (Fla. 3d DCA 1981) (when plaintiff failed to object to

evidence not included in counterclaim issue was tried by implied consent); see also Department of Rev, of the State of Florida v. Vaniaria Enters., Inc., 675 So. 2d 252, 254 (Fla. 5th DCA 1996) (holding that "[a]n issue is tried by consent where the parties fail to object to the introduction of evidence on the issue.").

returned special verdict finding no negligence on defendant's part); cf. Kinya v. Lifter, Inc., 489 So. 2d 92, 94 (Fla. 3d DCA 1986) (failure to give concurring cause instruction harmless error where jury never reached the issue); McDaniel v. Pwsi, 432 So. 2d 174, 175 (Fla. 2d DCA 1983) (no prejudice in personal injury action when court gave improper cautionary instruction and jury never reached the issue).

The DOT next asserts that it was unfairly prejudiced by a jury instruction on the aggravation of a preexisting condition when there was no evidence that any preexisting condition existed. See Winn-Dixie Stores, Inc. v. Nall, 302 So. 2d 781-82 (Fla. 3d DCA 1974). Although Juliano did not make a claim for the aggravation

of a preexisting condition, the trial court decided to give this instruction after the DOT stated that it was going to argue that Juliano had had problems with his leg prior to this accident. Having elected to argue the issue of the aggravation of a pre-existing condition, DOT cannot now complain about the giving of a jury instruction regarding this issue. See e.g., Behar v. Southeast Banks Trust Co., N.A., 374 So. 2d 572, 575 (Fla. 3d DCA 1979) (stating that "[o]ne who has contributed to alleged error will not be heard to complain on appeal."); Arsenault v. Thomas, 104 So. 2d 120, 122 (Fla. 3d DCA 1958) (providing that "[w]here a litigant requests and receives a favorable ruling, he cannot later on appeal be heard to complain of the actions of the trial judge in acceding to his requests."). Although we find the giving of this instruction to be erroneous in the absence of any evidence in support of a preexisting injury, we conclude that any such error was harmless in this case inasmuch as the instruction did not relate materially to the total amount of the damages awarded by the jury. Nall, 302 So. 2d at 782; see also Metropolitan Dade County v. Brill, 414 So. 2d 626 (Fla. 3d DCA 1982).

Finally, the DOT argues that the trial court abused its discretion when it permitted evidence of subsequent remedial measures to the floor at the weigh station in violation of section 90.407, Florida Statutes (1991). We disagree. Given the DOT's evidence and argument throughout this litigation that it was not

feasible to repair the floor of the weigh station, the trial court properly permitted evidence of repairs made to the weigh station after Juliano's accident for impeachment and/or rebuttal purposes. Se Morowitz v. Vistaview Apartments, Ltd., 613 So. 2d 493, 495 (Fla. 3d DCA 1993); Currie v. Palm Beach County, 578 So. 2d 760, 763 (Fla. 4th DCA 1991).

Thus, finding no reversible error, we affirm the judgment under review.

Affirmed.

LEVY, J., concurs,

COPE, J. (specially concurring).

On the issue of preexisting condition, I do not believe there was any error. The Department of Transportation ("DOT") said during the charge conference that in closing argument it would contend that some of plaintiff's claims were attributable to plaintiff's preexisting physical condition. DOT based its argument that plaintiff had a preexisting condition on medical evidence at trial. The court correctly ruled that plaintiff was entitled to have the jury instructed that he could recover for aggravation of a preexisting condition.

I concur with the rest of the opinion.

1999-153

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO.: 98-00267

FLORIDA DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

ANGELO JULIANO,

Appellee,

/

CERTIFICATE OF FONT SIZE

Appellant, FLORIDA DEPARTMENT OF TRANSPORTATION, by and through the undersigned, hereby certifies the foregoing has been drafted in accordance with Rule 9.210, Florida Rules of Appellate Procedure and the applicable rules of Procedure. It is hereby certified that the font style utilized is Courier and the font size is twelve point type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original copy of the foregoing has been filed with the court and a true and correct copy was mailed to L Barry Keyfetz, Esq. KEYFETZ, ASNIS & SREBNICK, P.A., 44 West Flagler Street, Suite 2400, Miami, Florida, 33130.

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