IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC99-153
LT **CASE** NO.: **93-20647-CA-18**

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

ANGELO JULIANO,

Respondent.

RESPONDENT'S ANSWER BRIEF ON **JURISD**ICTION

L. Barry Keyfetz, Esquire
FL **Bar** #: **042658**
KEYFETZ, ASNIS & SREBNICK, P.A.
Attorneys for Respondent
44 W. Flagler St., Suite **2400**
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CERTIFICATE OF TYPE **SIZE** & STYLE

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

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STATEMENT OF THE CASE AND FACTS

Respondent Juliano was a correctional officer employed by the Florida Department of Corrections (DOC). While so employed as a correctional officer by the DOC, he was at a facility maintained and operated by the Florida Department of Transportation (DOT). Respondent Juliano tripped and fell, alleging negligence by employees of DOT.

Complaint by Juliano against DOT was filed December 10, 1993. After several years of litigation, Petitioner sought summary judgment in connection with workers' Compensation immunity defense, focusing on the Unrelated Works Doctrine. The trial court rejected Petitioner's position, from which Petitioner elected to file an interlocutory appeal. The District Court of Appeal affirmed the trial court's decision denying the workers' Compensation immunity defense citing this Court's decision in Holmes County School Board v. Duffel, 651 So.2d 1176 (Fla. 1995). Florida Dept. of Transp. v. Juliano, 664 So.2d 77 (Fla. 3rd DCA 1995). Ultimately, the cause proceeded to trial in December, 1997 resulting in a jury verdict in favor of plaintiff in the net amount of $402,500.00. (Appx. 1).

From that judgment, Petitioner sought review by the Third District Court of Appeal. After securing numerous delays in connection with preparation of briefs and

supplementing the record', Petitioner served its last brief on June 25, 1999. Petitioner agreed in the appellate court and in its brief submitted to this Court that the interlocutory appeal focused on the "Unrelated Works" Doctrine. (Brief of Petitioner p. 1). That is the very same issue Petitioner sought to re-raise and then says it added a different "spin" in their second appeal, claiming workers' compensation immunity as a matter of law.

After oral argument, by opinion rendered in July, 1999, the District Court affirmed the final judgment. From that order Petitioner filed Motion for Rehearing, Clarification, Certification and Rehearing En Banc, all of which were denied. (Appx. 6).

Petitioner now seeks to invoke this Court's discretionary jurisdiction.'

SUMMARY OF ARGUMENT

Petitioner elected to proceed with interlocutory appeal, raising workers'

'First sought more than fifteen months after filing Notice of Appeal which followed four lengthy extensions pertaining to Appellant's initial brief until the Court advised if not finally filed, the appeal would be subject to dismissal, **(Appx.** 2-5)

[2]It is noted that Petitioner takes the position that once the threshold of $100,000.00 is reached, (judgment, interest and costs in any combination) then there is no further obligation and every day of delay in payment simply redounds to the benefit of Petitioner. *So* long as the benefit of the delay is equal to or in excess of the defense fees generated, there is then a substantial economic benefit to Petitioner and their counsel in generating further delays. This case, so far, involved five years delay at the trial level and another two years at the District Court of Appeal level. While the case pends before this Court on request this Court take jurisdiction, Petitioners equally take the position - with trial court approval - that unlike other litigants who need to obtain a stay, the State can further delay and need not pay the judgment. (Appx. **7).**

compensation immunity, focusing on the Unrelated **Works** Doctrine. Any argument about the standard of care before that doctrine is operational is part and parcel of that issue, and could have and should have been made in the first appeal. The District Court rejected Petitioner's contention as to the inapplicability of the Unrelated **Works** Doctrine citing this Court's decision in Holmes County School Board v. Duffel, supra. There is no express and direct conflict with the two cases cited by Petitioner in that the second appeal in those cases involved different issues that were not even ripe at the time of the first appeal. Further, Petitioner's merits argument that the Unrelated Works Doctrine is not applicable unless there is a showing of criminal negligence by employees in the unrelated works is contrary to this Court's decision in Holmes County School Board **v.** Duffel, supra.

ARGUMENT

POINT I

ARE THE CASES CITED BY PETITIONER OF U.S. CONCRETE PIPE CO. v. BOULD AND TWO M DEV. CORP. v. MIKOS, IN EXPRESS AND DIRECT CONFLICT WITH THE DISTRICT COURT DECISION HEREIN JUSTIFYING THIS COURT TAKING JURISDICTTON?

The case of Two M Dev. Corp. v. Mikos, *578* So.2d *829* (Fla. 2nd DCA 1991) involved an initial appeal wherein the Court reversed the trial court determination that the property was not substantially completed. The cause was remanded for the trial

court to consider the assessment. The trial court, upon remand, refused to consider the assessment, contending the issue was foreclosed. However, as the District Court held and Petitioner acknowledges in its brief, "it was only after the first appeal that the issue of the assessment of substantially completed property could properly be addressed." (Brief of Petitioners p. 5).

In the pending matter, Petitioner could and did address the issue of workers' compensation immunity, focusing on the Unrelated Works Doctrine. The contention that said doctrine would not apply unless criminal negligence was shown is part and parcel of that issue, and could have and should have been raised in connection therewith. The Court rejected Petitioner's position on workers' compensation immunity citing Holmes County School Board v. Duffel, supra. There is no express and direct conflict with the Mikos case - no conflict at all.

Petitioner argues it can take as many appeals as they want raising workers' compensation immunity as long as they continually raise it with a different "spin". It is suggested Petitioner cannot, but the Court need not even address that aspect. That is because what it claims to be a different argument from that raised in the first ***Summary*** Judgment, was, in fact, part and parcel of the Unrelated Works Doctrine on which they admittedly focused. Petitioner's "merits" argument as to why this Court should take jurisdiction is that the Unrelated Works Doctrine involves a higher

standard to be triggered (supposedly criminal negligence) - but supposedly there was no need to talk about that aspect in initially "focusing" on the Unrelated Works Doctrine in their initial appeal. (Brief of Petitioner p. 1, **7-9).**

There is no direct and express conflict - nor any conflict at all - with the only other case cited by Petitioner, **U.S.** Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. **1983).** That case, according to its facts involved a post-judgment interlocutory appeal involving the excessiveness of the punitive damage award. That case does not stand for the proposition, as contended by Petitioner in the pending matter, that a **party** can raise the legal issue of excessiveness as many times **as** they want, as long as there is a different "spin" each time. There, the parties were not foreclosed from later challenging obligation of the insured or the insurance company to pay the punitive damages. That is because, in that case, that issue was not previously presented or even ripe. On the contrary, in the pending matter, the workers' compensation immunity defense was, of course, presented on appeal - and even Petitioners concede they "focused" on the Unrelated Works Doctrine. (Brief of Petitioners p. 1). Petitioner's "additional" argument is that before it is triggered there is a higher standard than regular negligence, higher than even gross negligence, but supposedly only triggered upon showing of criminal negligence.

To whatever extent Petitioners are "serious" about such a position - as

distinguished from maintaining spurious proceedings simply with a view toward delay in payment - Petitioners could have and should have raised that in the first appeal, if they did not.

This Court lacks jurisdiction in that there is hardly the requisite "express" and "direct" conflict required for this Court to take jurisdiction. See Bondurant v. Geeker, 515 So.2d 214 (Fla. 1987); see Paddock v. Chacko, 553 So.2d 168 (Fla. 1989).

POINT II

WHETHER PETITIONER'S MERITS ARGUMENT IS SPURIOUS SO THAT, EVEN IF JURISDICTION LAY, THIS COURT SHOULD NOT EXERCISE SAME.

Petitioner's "merits" argument was and is that any supervisory-managerial employee, even in unrelated works, are immune - that supposedly the 1988 amendment to §440.11(1) was intended to change the Unrelated Works Doctrine. However, this Court, in Eller v. Shova, 630 So.2d 537 (Fla. 1993) discusses from the legislative history the reason for the 1988 amendment stating:

> As a result of our decision in Streeter, in 1988 the legislature again amended §440.11(1). Eller v. Shova, supra p. 540.

In Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987), this Court held under the statutory language that corporate officers, executives and supervisors of one's own employer ("the same works") could be sued for gross negligence. The amendment, as noted by

this Court, was to change that - had nothing to do with the Unrelated Works Doctrine. The Unrelated Works Doctrine simply establishes employees of a large conglomerate employer (e.g. State of Florida) will be given no lesser rights than other employees - they may maintain suits, upon satisfying the Unrelated Works Doctrine, just as if they worked for different companies. Even without the enhanced standard in the 1988 amendment, the requisite standard to sue a fellow employee was "gross" negligence. The plaintiff in Duffel did not satisfy the previous lesser standard (gross negligence), but, of course, did not have to do so. That is because the then gross negligence standard, now enhanced to criminal negligence, pertains only to employees of **an** employer "in the same works". Where **an** employee of **an** unrelated works is involved - just like a different company - then the standard is simple negligence - otherwise, even with the pre-1988 lesser standards of gross negligence, **Duffel** would have failed.

CONCLUSION

For the foregoing reasons, it is submitted there is no express and direct conflict permitting this Court to take jurisdiction. Further, Petitioners' "merits" contention is spurious - plaintiff Duffel, well after adoption of the 1988 amendment, nevertheless was permitted to sue **an** employee in unrelated works for ordinary negligence. Holmes County School Board v. Duffel, supra.

Respectfully submitted,

BY: _____
L. Barry Keyfetz, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of February, 2000 to: DIRK M. SMITS, ESQUIRE, Vernis & Bowling of The Florida Keys, P.A., Attorney for Appellants, P.O. Drawer 529, Islarnorada, FL 33036.

KEYFETZ, ASNTS & SREBNICK, P.A.
Attorneys for Respondent
44 W. Flagler Street, Suite 2400
Miami, Florida 33130
Phone: (305) 358-1740

By: _____
L. BARRY KEYFETZ, ESQUIRE
FL Bar #: 042658

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

ANGELO JULIANO,

Plaintiff,

vs.

FLORIDA DEPARTMENT OF TRANSPORTATION,

Defendant.
_____/

CASE NO.: *93-20647* CA (18)

FINAL JUDGMENT

Pursuant to the jury verdict rendered in this action on December 23, 1997,

IT IS ADJUDGED that Plaintiff, **ANGELO JULIANO**, shall recover from Defendant, **FLORIDA DEPARTMENT OF TRANSPORTATION,** the sum of Four Hundred Two Thousand Five Hundred **($402,500.00)** DOLLARS, lawful currency of the United States of America, which shall bear interest at the lawful rate and for which let execution issue, subject to the limitations of Florida Statutes, Section 768.28.

The Court reserves jurisdiction to entertain motions for the taxation of costs and interest, for the determination of collateral source set-offs, and for the determination of the worker's compensation third party lien.

DONE AND ORDERED in Chambers, at Plantation Key, Monroe County, Florida this 26 day of January, *1998.*

STEVEN P. SHEA

HONORABLE STEPHEN P. S E A
CIRCUIT COURT JUDGE

Copies furnished to:
Dirk Smits, **Esq.**
Bradley D. Asnis, Esq.
Jorge **A.** Duarte, Esq.

FNL.JJMT

DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: *98-00267*

FLORIDA DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

ANGELO JULIANO,

Appellee,

MOTION TO SUPPLEMENT THE RECORD

COMES NOW Appellant, FLORIDA DEPARTMENT OF TRANSPORTATION, by and through the undersigned counsel, and submits this Motion To Supplement The Record in the above-styled matter and in support thereof, states as follows:

1. The video depositions of Dr. Powell, Dr. Steiner, Dr. Livingston, and Dr. Grider were presented as evidence at trial but they were not transcribed by the court reporter and made a part of the trial transcript. Said video depositions were also not transcribed and made a part of the Record on Appeal, although they should have been.

2. Appellant acknowledges that it alone shoulders the burden to ensure

LAW OFFICES
VERNIS & BOWLING OF THE FLORIDA KEYS, P.A.

the Record on Appeal is complete and that it was Appellant's oversight that caused this omission. R. App. **P.** 9.200(e). However, the aforementioned depositions are essential to one of the issues Appellant has raised on appeal and, therefore, they need to be added to the Record to make it complete. R. App. P. 9.200(f). (Appellee acknowledged that these depositions are pertinent to one of the issues Appellant raised on appeal, in its Answer Brief at page 18.)

3. Appellant has ordered the transcripts of the foregoing video depositions, which were inadvertently omitted from the Record, and will provide this Court with the originals **and** supply Appellee with copies of the same as soon as they are transcribed.

WHEREFORE, the Appellant, FLORIDA DEPARTMENT OF TRANSPORTATION, respectfully requests that this Court grant its Motion To Supplement The Record as requested herein.

I HEREBY CERTIFY that on the 26th day of April, 1999, the original of the foregoing Motion was furnished by mail to the Clerk of Court and copies of the notice were furnished by mail to Bradley D. Asnis, Esq., Attorney for Plaintiff, KEYFETZ, **ASNIS** & SREBNICK, **44** West Flagler Street, Suite 2400, Miami, FL **33** 130-1856 and to Jorge A. Durate, Esq., Co-Counsel for Plaintiff, 44 West Flagler Street, Suite 2400, Miami, FL 33130-1**856.**

VERNIS & BOWLING OF THE FLORIDA KEYS, **P.A.**
Attorney for **Appellant**
P.O. **Box 529**
Islamorada, FL 33036
(305) 664-4675

By: _____ (FOR)
Dirk M. Smits, Esq.
Florida Bar No: 911518

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1998

SEPTEMBER 28, 1998

FLORIDA DEPARTMENT OF TRANSPORTATION, Appellant(s),	**	CASE NO. 98-00267
vs.	**	
ANGELO JULIANO, Appellee(s).	**	LOWER TRIBUNAL NO. 93-20647

Appellant's motion for an extension of time in which to file the initial brief is granted up to and including October 16, 1998 with no further extensions allowed. If said brief is not timely filed in accordance with this order, the appeal will be subject *to* dismissal.

A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of Appeal, Third District

By: _____ Deputy Clerk

cc: Dirk M. Smits
Jorge A. Durate
/LA

Bradley D. Asnis

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

NOVEMBER 22, 1999

FLORIDA DEPARTMENT OF TRANSPORTATION,
Appellant(s)/Petitioner(s),

vs.

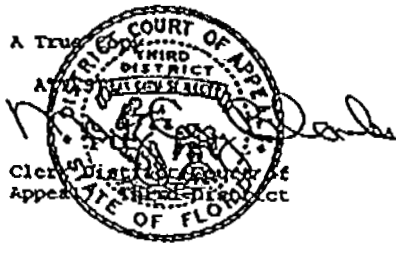
ANGELO JULIANO,

Appellee(s)/Respondent(s).

CASE NO.: 98-267

LOWER TRIBUNAL NO. 93-20647

Upon consideration, appellant's motion for rehearing, clarification, and certification is hereby denied. COPE, LEVY and GREEN, JJ., concur. Appellant's motion for rehearing en banc is denied.



cc:
Dirk M. Smits
Jorge A. Durate
L. 'Barry Keyfetz

mc

EXHIBIT "C"

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT
IN **AND** FOR MONROE COUNTY, FLORIDA

ANGELO JULIANO,

Plaintiff,

vs.

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Defendant.

CASE NO.: **93-20647-CA-18**

00 JAN 13 AM 11:25
FOR RECORD
DANIEL J. HERNANDEZ
CLERK CIR. CT.
MONROE COUNTY, FLA

ORDER
DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS **CAUSE** having come on to be heard on Defendant, FLORIDA DEPARTMENT OF TRANSPORTATION, Motion for Protective Order, and the Court having heard argument of counsel, **and** being otherwise advised in the premises, it is hereupon,

ORDERED **AND** ADJUDGED-that said Motion be, and the same is hereby granted until the FL Supt takes or denies jurisdiction in this matter. AHG

DONE **AND** ORDERED in Chambers, in Plantation Key, Monroe County, Florida, this 17th day of January, 2000.

Arthur H. Goyle

Circuit Court Judge

Copies furnished to: Dirk M. Smits, Esquire, L. Barry Keyfetz, Esquire, and Beth Koller, Esquire