IN THE SUPREME COURT OF FLORIDA

CASE NO: SC01-1346

3D DCA CASE NO. 3D00-1718

CARIDAD SANCHEZ, individually, ILEEN SANCHEZ, her daughter and GEORGE A. SANCHEZ, HER SON,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This is an appeal from a Final Summary Judgment in favor of the defendant below, THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA, and against the plaintiffs below, CARIDAD SANCHEZ, individually, ILEEN SANCHEZ, her daughter, and GEORGE A. SANCHEZ, her son. The summary judgment was granted on the issue of workers' compensation immunity under §440.11,Fla.Stat. The plaintiffs/petitioners will be referred to herein as Sanchez. The defendant/respondent will be referred to herein as the School Board.

All references to the record on appeal will be referred to as follows: R. _____.

STATEMENT OF THE CASE AND FACTS

The School Board rejects Sanchez's statement of the case and facts because it is one sided and omits much of the relevant testimony in this case. A complete and accurate statement of the case and facts follows.

A. STATEMENT OF THE CASE

This action stems from an incident occurring on February 11, 1998, when Sanchez was attacked by a trespasser in the parking lot at West Miami Middle School. (R. Vol. I--26-44). At the time of the incident, Sanchez was a teacher at the school. (R. Vol. I--26-44 at ¶3). She did not work on the morning of the incident, and when she arrived at the school in the afternoon, she parked her car in the West Miami Middle School parking lot assigned to teachers and employees of the School Board. (R. Vol. I--26-44 at ¶7). After she exited from her vehicle, the trespasser attacked her. (R. Vol. I--26-44 at ¶9).

As a result of the incident, Sanchez filed a claim for workers' compensation benefits. (R. Vol. I--72-213 at 116). She candidly admits receiving both indemnity and medical benefits under Florida's Workers' Compensation Law, §440.01, et seq. (R. Vol. I--72-213 at 117-118).

Additionally, Sanchez filed the subject civil action seeking to hold the School Board vicariously liable for the purported

negligence of security personnel at the school, whom she identified as school security monitors and the school resource officer. The Amended Complaint, in pertinent part, alleges that "the Plaintiff is assigned to a department within the School Board that is unrelated to the departments responsible for the security of Dade County Public Schools and the protection of the faculty at West Miami Middle School." (R. Vol. I--26-44 at ¶5) (Emphasis in original). This allegation of Sanchez was an attempt by her to plead her case within the "unrelated works" exception to workers' compensation immunity, which would otherwise bar any claim by Sanchez against the School Board stemming from the negligence of Sanchez's co-employees.

The School Board answered the Amended Complaint, specifically denying the contention that Sanchez and school security personnel were engaged in "unrelated works." (R. Vol. I--50-54 at ¶4). Within its Answer, the School Board raised various affirmative defenses, including workers' compensation immunity. (R. Vol. I--50-54 at ¶¶8, 9). The School Board further asserted that, per *Dade County School Board v. Laing*, 731 So.2d 19 (Fla. 3d DCA 1999), the "unrelated works" exception to workers' compensation immunity does not apply to the facts and circumstances of this case as a matter of law. (R. Vol. I--50-54 at ¶11).

After the filing of the Answer and Affirmative Defenses, discovery proceeded. A number of depositions were taken, including, but not limited to (1) the deposition of Marcos Moran, who was the Principal of West Miami Middle School (R. Vol. II; 214-451); (2) the deposition of Vivian Monroe, who was the School Board police chief (R. Vol. III; 452-512); (3) the deposition of John Ramirez, who was the school resource officer assigned to West Miami Middle School (R. Vol. IV--702-754); (4) the deposition of Jose Perez, who was a security monitor at West Miami Middle School (R. Vol. III--513-544); (5) the deposition of Juan Perez, who was a security monitor at West Miami Middle School (R. Vol. III--615-653); (6) the deposition of Adolfo Costa, who was a teacher/administrative assistant at West Miami Middle School (R. Vol. III--545-614); (7) the deposition of Raul Guerrero, who was a teacher at West Miami Middle School (R. Vol. IV--654-701), and; (8) the deposition of Sanchez. (R. Vol. I--72-213).

Following the completion of those depositions, the School Board filed a Motion for Summary Judgment claiming that workers' compensation immunity barred Sanchez's action. (R. Vol. I--57-71). The Motion was based upon its assertion that Sanchez and security personnel at West Miami Middle School were not "assigned primarily to unrelated works," and therefore, the

exception to workers' compensation immunity did not apply. Sanchez filed a lengthy Memorandum of Law in Opposition to the Motion for Summary Judgment. (R. Vol. VII--1397-1417).

The Motion for Summary Judgment was heard by the trial court on May 31, 2000. (R. Vol. VIII--1436-1449). The trial court granted the School Board's Motion for Summary Judgment and entered a Final Judgment against Sanchez, specifically referencing the Third District Court of Appeal's decision in *Laing*. (R. Vol. VII--1434-1435).

Sanchez appealed the Final Judgment in favor of the School Board to the Third District Court of Appeal. (R. Vol. VII--1423-1425). The Third District affirmed, reasoning in the opinion as follows:

> We agree that by accepting workers' compensation benefits, Sanchez was precluded from asserting a tort claim against her employer. *See* § 440.11, Fla. Stat. (1999). We recently held in *Dade County Sch. Bd. v. Laing*, 731 So.2d 19 (Fla. 3d DCA 1999) that the "unrelated works" exception to workers' compensation immunity did not apply between a teacher and a custodian. "The fact that employees have different duties does not necessarily mean they are involved in 'unrelated works.'... Because both were engaged in activities primarily related to the provision of education related services, the 'unrelated works' exception to the School Board's immunity under Section 440.11(1) does not apply." *Id*. at 20. We see no distinction between the teacher-custodian relationship in *Laing* and the teacher-security personnel relationship in this case.

R. 1450-1451.

Sanchez filed a Motion for Rehearing, Rehearing en Banc, Clarification and Certification. R. 1452-1453. The Motion was denied, and Sanchez now seeks relief in this Court on the asserted basis that the Third District's opinion expressly and directly conflicts with the decision of the Fourth District Court of Appeal in *Lake v. Ramsay*, 566 So.2d 845 (Fla. 4th DCA 1990). By Order dated April 30, 2002, this Court accepted jurisdiction and directed the parties to file briefs on the merits.

B. STATEMENT OF THE FACTS[1]

At the time of the subject incident, West Miami Middle School had three full time security monitors and one part time security monitor; thus, there were four total security monitors. (R. Vol. III--545-614 at 25). In addition, West Miami Middle

[1] Sanchez devotes a large portion of her statement of facts to a description of the actual assault and the purported negligence of school security personnel. Sanchez also maintains that the School Board admitted at oral argument before the Third District that security personnel were negligent. The School Board did not make any such admission; the School Board's comment was simply to the effect that the negligence of school security personnel is irrelevant to the issue before the court. The School Board then redirected the court's attention back to the only relevant issue, which is workers' compensation immunity and more specifically, whether Sanchez and school security personnel were assigned primarily to unrelated works. Thus, as the School Board has done throughout these proceedings, it admits that the assault occurred, and it focuses herein not on the details of the assault and alleged negligence, but rather, on the facts pertaining to workers' compensation immunity.

School had one school resource officer assigned to it. (R. Vol. III--452-512 at 28; Vol. IV--702-754 at 9-11, 45-46).

The main difference between the one school resource officer and four security monitors was that the school resource officer was a licensed police officer and security monitors were not. (R. Vol. III---452-512 at 11, 27-28). Although the school resource officer was a licensed police officer, his jurisdiction did not extend beyond School Board property. (R. Vol. III---452-512 at 15).

Within School Board property, the school resource officer had arrest powers, and could detain or physically remove trespassers. In contrast, security monitors did not possess those powers. (R. Vol. III--452-512 at 28; 615-653 at 19, 21). In addition, the school resource officer carried a gun and handcuffs, but security monitors did not. (R. Vol. III--452-512 at 25).

Security monitors were employees of the School Board. (R. Vol. III--513-544 at 8, 17, 19; 615-653 at 6-7). The school resource officer was likewise an employee of the School Board. (R. Vol. III--452-512 at 9).

Security monitors worked every school day from 8:00 a.m. to 4:00 p.m. (R. Vol. III--452-512 at 27; 513-544 at 19). The school resource officer likewise worked every school day from

8:00 a.m. to 4:00 p.m. (R. Vol. III--452-512 at 27, 28; 513-544 at 26; Vol. IV--702-754 at 18). The school resource officer stayed at the school to which he was assigned for the entire eight hour shift, unless called away. (R. Vol. III--452-512 at 27, 28; 513-544 at 8, 17; Vol. IV--702-754 at 28). If the resource officer happened to be called away from the school of his assignment, then the resource officer was required to report that event to the administrators at the school site. (R. Vol. III--452-512 at 40, 45).

The four security monitors and one resource officer worked together on a daily basis. (R. Vol. IV--702-754 at 46). They worked together, along with the school administrators, teachers and staff, to provide safety and security to the students, faculty and staff at the school. (R. Vol. III--452-512 at 47-48; Vol. IV--702-754 at 47). They were there to provide a safe learning environment for the school. (R. Vol. III--452-512 at 29-30, 32). It was a service for everyone, not just the students. (R. Vol. III--452-512 at 47).

The four security monitors and one resource officer patrolled the school grounds continuously throughout the course of the day. (R. Vol. II--214-451 at 118; Vol. III--452-512 at 28-29; 615-653 at 23-24; Vol. IV--702-754 at 48-49). They kept in contact with each other and with the school administrators

via walkie talkies. (R. Vol. II--214-451 at 118; Vol. III--615-653 at 24; Vol. IV--702-754 at 49).

The security monitors were supervised and took direction from the school site administrators, including the Principal and Assistant Principal. (R. Vol. III--513-544 at 17; 615-653 at 33). When at the school, the school resource officer likewise took direction from and reported to the site administrators of the school. (R. Vol. II--214-451 at 59, 125; III--615-653 at 33; Vol. IV--702-754 at 46, 49, 51).[2]

The four security monitors were trained by the School Board police. (R. Vol. III--452-512 at 17-19; 513-544 at 18). They were specifically taught how to deal with trespassers on school grounds. (R. Vol. III--452-512 at 20). They were taught that, if they saw a suspected trespasser, they were to first find out if the person had a legitimate reason for being on the school property. (R. Vol. III--452-512 at 20). If the person had a legitimate reason for being there, then they were to direct the person to the main office to obtain a visitor's pass. (R. Vol.

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[2] As stated by the school police chief, "[w]hen an officer is assigned at the school, the officer knows that the principal is the person that they have to report to for anything occurring on the school." (R. Vol. III 452-512 at 49). The school police chief considered the school resource officer to be part of the staff of security personnel of the school to which the school resource officer was assigned. (R. Vol. III 452-512 at 49).

III--452-512 at 20). If the person did not have a legitimate reason for being there, then they were to ask the person to leave the premises. (R. Vol. III--452-512 at 20). If the person refused, then they were to contact a school resource officer or a school administrator. (R. Vol. III--452-512 at 20).

Two of the four security monitors at West Miami Middle School, Jose Perez and Juan Perez, testified in this case. Both testified that their primary job duty was security and they were not involved in the education per se of students. (R. Vol. III--513-544 at 13-14; 615-653 at 16). However, Jose Perez also testified that he was involved in a mediation program with the school students. (R. Vol. III--513-544 at 29-30). He took a workshop in mediation and then trained some of the students on mediating their own problems. *Id*.

At the time of the incident, Officer John Ramirez was the school resource officer assigned to West Miami Middle School. Officer Ramirez testified that, in addition to providing security services, he also gave presentations at the school and talked to students about several topics, including harassment, drugs, weapons and "stranger danger." (R. Vol. IV--702-754 at 9). "It all depends on what the teachers want. Sometimes they want someone to talk to the class. That is what I will do."

Id.

When Officer Ramirez spoke to the students, it was at the teachers' request. *Id*. at 10. For example, if the teacher was doing a lesson on the U.S. Constitution, the teacher may ask him to discuss constitutional rights with the kids. *Id*. He has a pamphlet that he gives to the students, and he talks to them about their constitutional rights. *Id*.

Further, parents often talked to Officer Ramirez when there was something going on with their children, i.e., their children may have been hanging out with a gang. *Id*. at 12, 47. Similarly, teachers often asked him to speak to students acting suspiciously or acting up in class. *Id*. at 13-14.

Officer Ramirez considered his primary assignments to be *both* preventing violation of the law *and* counseling students and parents. *Id*. at 11. He was there if a student wanted to talk to him. *Id*. at 11, 48. "I am there not just for security reasons." *Id*. at 11.

Marcos Moran was the Principal of West Miami Middle School at the time of the subject incident. Prior to that, he was a teacher for 18 or 19 years. (Vol. II--214-451 at 8). Moran testified that his primary duty as a teacher was to teach and educate the students. *Id*. at 9. However, as a teacher, he also

felt that he had some security responsibilities. *Id*. at 10. As a teacher, he was responsible for the safety of his students. *Id*. It was his responsibility to do something if he saw a problem that would deter from the students' safety. *Id*. If he could not handle the danger himself, then he was to report the danger immediately. *Id*.

Moran believed that "anyone who works in a school system, regardless of their position, their primary responsibility is the safety of the students. That comes number one to anything else. And I think everyone who works in the school system knows and understands that, or they should." *Id*. at 11-12. He stated that, the safety of students is "certainly a primary responsibility of anyone who works in the school system." *Id*. at 12.

According to Moran, every Principal that he worked for in the past had explained "that the safety of the students is number one, always." *Id*. at 13-14. As a Principal, he now tells that to the teachers at his school. *Id*. at 14.

Every one of his employees, from the custodians to the cafeteria workers, are responsible for the safety of the students at the school. *Id*. at 30. "I think that the custodian's responsibility and the cafeteria worker's responsibility and the teachers' responsibility is no higher

than mine when it comes to the safety of the students, inasmuch as we have to do whatever needs to be done to maintain the safety and the security of our students and our staff." *Id*. at 48. "Every single person" who works at the school has been told "time and time again that they need to assist in the security and the safety of the students." *Id*. at 105.

> Q. In your view, based upon your experience as an administrator who has had responsibility with safety and security issues, are security monitors and school resource officers the only employees at a particular school who have anything to do with safety and security?
>
> MR. HERSKOWITZ: Form objection.
>
> A. No, I consider everyone who works at my school responsible for the maintaining of safety of our students in any way possible. Everyone who works there has a responsibility to maintain the safety of the students and the staff.

Id. at 110-111. The primary responsibility of everyone in the school system is the safety of students. *Id*. at 107.

Principal Moran explained that the education of students includes providing a safe learning environment. *Id*. at 106. The safe learning environment is for the protection of everyone, including himself and the staff. *Id*. at 108. The security plan includes providing security for all individuals properly at the school, not just students. *Id*. at 109.

At West Miami Middle School, the teachers are specifically

involved in Principal Moran's basic security plan. The teachers are instructed to stand in their classroom doorways and monitor the hallways during class changes. *Id*. at 24-25, 28-29, 122. It was explained that, for security purposes, it's important to have the teachers monitoring the halls to ensure that there's an orderly process for the change of classes. *Id*. at 113-114. The monitoring of the halls by teachers is "absolutely" part of the overall security process at the school. *Id*. at 29, 114.

According to Principal Moran, teachers are also in charge of discipline and security in their own classrooms. *Id*. at 119-120. In fact, the "Procedures for Promoting and Maintaining a Safe Learning Environment," under the heading Responsibility and Authority of the Teacher, provide that "each teacher . . . shall have authority for the direction and discipline of students, . . ., and shall keep good order in the classroom and in other places in which responsibility for students is assigned." *Id*. at 119-120 and Exhibit 3.

Further, during special events, teachers are asked to patrol the school area. *Id*. at 42-43. Teachers are also given security instructions for emergency situations. *Id*. at 43.

Principal Moran testified that he instructs the teachers every year to report anything that endangers the safety of the students. *Id*. at 31, 122. The teachers know that that is their

responsibility. *Id*. at 31. In fact, that responsibility is specifically set forth in the Procedures for Promoting and Maintaining a Safe Learning Environment, Chapter II. Id. at 120. That section provides that "[a]ll employees of the Dade County public school system are required to report to the responsible administrator, or designee, any criminal act or other disruptive behavior occurring on School Board property." *Id*. at 120 and Exhibit 3.

As to unauthorized persons on the school premises, Moran testified that all employees have some responsibility with regard to that situation. *Id*. at 114. Every year, he instructs his staff, including teachers, how to deal with unauthorized persons on school property. *Id*. at 38, 115, 124. He instructs them to either ask the person to leave the school premises, or if they don't feel comfortable doing that, to call security or a school administrator. *Id*. at 38-39, 115, 124-125.

Principal Moran candidly admitted that the school security monitors are not there to educate the students in the traditional sense of the word. *Id*. at 53-53. However, he did confirm that one of the school monitors (as mentioned above) provided training to students on peaceful resolution of issues. *Id*. He considers that particular school monitor to be a quasi-counselor. *Id*. at 55-56.

At the time of the subject incident, Adolfo Costa was a teacher on special assignment at West Miami Middle School. (R. Vol. III--545-614 at 8-9). He testified that, as a teacher, he felt it was his professional duty to keep the children safe. *Id*. at 17. "As a teacher you have to protect your children." Id. at 18. He further testified that teachers are given direction from the administrators as to security. *Id*. at 61. Specifically, the teachers are asked to keep their classrooms secure, and to handle rowdy students, or if they cannot handle it, to call security. *Id*. In addition, the teachers are instructed to monitor the hallways when they take their students to or from lunch. *Id*.

Costa confirmed that teachers are supposed to question people without a visitor's pass and direct them to the main office. *Id*. The procedure is the same whether a teacher sees the person, a custodian sees the person, clerical staff sees the person, etc. *Id*. at 62.

Raul Guerrero was a teacher at West Miami Middle School at the time of the subject incident. (R. Vol. IV--654-701 at 6). Guerrero testified that his primary responsibility as a teacher was to educate the students. *Id*. at 15-16. However, he also testified that all teachers have responsibilities beyond classroom instruction, and that all employees are supposed to

work together to provide a safe working environment. *Id*. at 20, 44-46. In fact, he pointed out that the guidelines from the State of Florida specify that teachers should have a safe learning environment in their classrooms. *Id*. at 17-18.

> Q. In the curriculum guidelines provided to you each year from the State of Florida as a teacher, do any of them include security of the school or premises?
>
> A. I am charged with having a secure room, making sure that my classroom and students conduct themselves in a manner that no one else is harmed, so I supervise the comportment or behavior of my kids regularly.

Id. at 16. Pursuant to that charge, he would attempt to break up a fight if one broke out in his classroom. *Id*. at 18. Moreover, he would confront a trespasser on the premises and would not first contact a school monitor or School Board police. *Id*. at 21-22. If that person had no business on school property, then he would tell the person to leave. *Id*. at 23. He considers that to be part of his duty as a teacher to enhance the safety of the school and students. *Id*. at 28, 43-45.

In sum, the entire staff at West Miami Middle School is part of the Principal's security team and is responsible for providing for the safety of students and staff. The teachers work hand in hand, so to speak, with the security monitors and school resource officer to provide a safe learning environment

for everyone at the school.

SUMMARY OF ARGUMENT

The issue at bar is governed by §440.11(1), Fla.Stat., which, in pertinent part, provides that: fellow-employee immunities shall not be applicable . . . to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works." The parties in this case disagree as to the meaning of the phrase "assigned primarily to unrelated works." Sanchez contends that the focus should be on whether the plaintiff and co-employee had the same job duties, whereas the School Board contends that the focus should be on whether the plaintiff's and co-employee's job duties are related.

In the case at hand, the trial court and Third District applied the test advocated by the School Board and concluded that Sanchez and school security personnel were not "assigned primarily to unrelated works" because each's job duties, although different, related to the same project of education. The holding of the trial court and Third District is consistent with the plain meaning of the words used in the statute and the majority (if not all) of the district courts to consider the issue.

Further, and perhaps controlling in this case, is the fact that the Florida School Code specifically defines "educational

support employees" to mean "employees whose job functions are neither administrative nor instructional, *yet whose work supports the educational process*." §220.041(38), Fla.Stat. (emphasis added). Included specifically within the definition are "those responsible for: *preserving the security of school property; and keeping the school plant safe for occupancy and use*." *Id*. Thus, by definition, school security personnel "support the educational process," and it would therefore be contrary to legislative intent to hold that teachers and school security personnel are "assigned primarily to unrelated works."

The summary judgment in this case is also warranted by the factual record, which demonstrates without dispute that all employees at the school (including teachers) have job responsibilities with respect to safety and are part of the school's overall security plan. Although some testimony exists to establish that teachers have different safety responsibilities than the security monitors and school resource officer, no testimony exists to establish that teachers have no safety responsibilities whatsoever. Thus, the plaintiff's attempt to demonstrate that there exists an issue of fact is nothing more than a red herring.

ARGUMENT

THE TRIAL COURT AND THIRD DISTRICT PROPERLY RULED THAT SANCHEZ AND SCHOOL SECURITY PERSONNEL AT WEST MIAMI MIDDLE SCHOOL WERE NOT "ASSIGNED PRIMARILY TO UNRELATED WORKS" AND THAT WORKERS' COMPENSATION IMMUNITY THEREFORE BARRED THE CLAIM FOR NEGLIGENCE AGAINST THE SCHOOL BOARD. ACCORDINGLY, THE FINAL SUMMARY JUDGMENT IN FAVOR OF THE SCHOOL BOARD SHOULD BE AFFIRMED.

A. STANDARD OF REVIEW

Review of both summary judgment orders and the judicial interpretation of statutes are subject to *de novo* review. *Florida Bar v. Cosnow*, 707 So.2d 1255 (Fla. 2001) (summary judgment); *Volusia County v. Aberdeen at Ormond Beach*, 760 So.2d 126 (Fla. 2000) (summary judgment); *Dixon v. City of Jacksonville*, 774 SO.2d 763 (Fla. 1st DCA 2000); (judicial interpretation of statutes); *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376 (Fla. 5th DCA 1998) (judicial interpretation of statutes).

B. ISSUE ON APPEAL

Both parties agree that the issue at hand is governed by §440.11(1), Fla.Stat., which, in pertinent part, 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 the employee, . . . , 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 . . . 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 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.

(Emphasis added). Based on the wording of the statute, this case turns on whether Sanchez, who was a teacher at West Miami Middle School, and security personnel at the school (i.e., the school resource officer and security monitors) were "assigned primarily to unrelated works." If they were "assigned primarily to unrelated works," then workers compensation immunity does not bar this action and the order appealed should be reversed. By the opposite token, if they are ***not*** "assigned primarily to unrelated works," as the trial court and Third District ruled, then workers' compensation immunity does bar this action and the order appealed should be affirmed.

1. Analysis of the Statute

As noted above, the provision at issue states that, "[s]uch fellow-employee immunities shall not be applicable . . . to employees of the same employer when each is operating in the

furtherance of the employer's business but they are assigned primarily to unrelated works." §440.11(1), Fla.Stat. The Legislature provided no definition as to the meaning of "unrelated works." However, the words used are plain and unambiguous, and therefore, there is no room for judicial interpretation and the statue must be given its plain and obvious meaning. *McLaughlin v. State*, 721 So.2d 1170 (Fla. 1998).

Sanchez contends that the focus of the inquiry should be on the specific job responsibilities of the involved co-employees, and if their "primary job assignments" are different, then workers' compensation immunity does not bar a claim for negligence. Thus, according to Sanchez's theory, only a teacher whose negligence injures another teacher would be entitled to workers' compensation immunity, a custodian whose negligence injures another custodian would be entitled to workers' compensation immunity, a security guard whose negligence injures another security guard would be entitled to workers' compensation immunity, etc.

The problem with Sanchez's argument is that it is not based on the actual language of the statute, but instead superimposes language upon the actual language utilized. In that regard, the statute utilizes the phrase "unrelated works," not "primary job

assignments." Clearly, had the Legislature intended to limit workers' compensation immunity to employees whose negligence injures co-employees with the same job duties, then it could have done so. Instead, however, the Legislature utilized a broader concept of "unrelated works," which focuses not on whether the co-employees have the same job duties, but whether the job duties of the co-employees are related.

Sanchez attempts to find support for her argument in the legislative history of the statute. She relies heavily on the fact that an earlier 1978 proposed version of the statute provided that an employee could seek civil damages stemming from the negligence of a co-employee where "they *are not assigned to the same job site or* are assigned primarily to unrelated works." (Emphasis added). She points out that, in the final version of the statute, the Legislature omitted the emphasized language,[3]

[3] Sanchez refers to this omission as a statutory amendment, thus permitting her to rely upon *Carlile v. Game and Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977), for the proposition that "[w]hen a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment." The School Board questions whether the law cited by the plaintiff is even applicable given that the legislative history relied upon by Sanchez appears to be an earlier *draft* of the statute that was ultimately implemented, as opposed to an actual *amendment* to the statute.

leaving only the phrase "assigned primarily to unrelated works."[4]

Sanchez then speaks authoritatively as to what the Legislature meant in omitting the emphasized language. In fact, she devotes several pages of her brief to telling this Court what the lawmakers' meant. The real truth, however, lies in a footnote in her brief where she admits that she has no actual knowledge of the lawmakers' intent because she "has been unable to locate other formal legislative history discussing this particular language," and "there is no memorandum of legislative intent, no staff analysis and no unsigned, undated 'summary' specifically discussing this provision and the reasons for selecting the 'primarily assigned to unrelated works' language." *See* Initial Brief at 39, n 49. Thus, Sanchez's dissertation of the lawmakers' intent is nothing more than rank speculation.

Without speculating, the only real knowledge that can be taken from this legislative history is that an earlier version of the statute provided two, separate tests for workers' compensation immunity. One test was whether the co-employees were "not assigned to the same job site," and the second test

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[4] Sanchez's reliance upon this legislative history is improper as a court should not look beyond the plain language of the statute for legislative intent where the statute is clear and unambiguous. *City of Miami Beach v. Galbut*, 626 So.2d 192 (Fla. 1993). Notwithstanding, the School Board will address on the merits Sanchez's argument with respect to the legislative history.

was whether the co-employees were "assigned primarily to unrelated works." The first test had nothing to do with the second test as the disjunctive term "or" was used, instead of the conjunctive term "and."[5] In the end, the Legislature decided that the second test should be the only guiding factor.[6] Beyond that, the parties are simply guessing as to the Legislature's meaning. Thus, the School Board maintains that this legislative history provides little or no guidance whatsoever as to the meaning of the subject phrase "assigned primarily to unrelated works."

The School Board further contends that, even if the Court does want to assign some meaning to the Legislature's omission of the phrase "are not assigned to the same job site" from the final version of the statute, the meaning is not what Sanchez suggests. At the outset, the School Board states that it does not disagree with Sanchez's initial claim that the "unrelated works" exception to fellow-employee immunity is not meant to be

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[5] *Sparkman v. McClure*, 498 So.2d 892, 895 (Fla. 1986) ("We first note the word 'or' is generally construed in the disjunctive when used in a statute or rule. The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended.") (citations omitted).

[6] The Legislature apparently did not want a blanket rule that would automatically subject co-employees at different job sites to liability for negligence.

work-site specific. The School Board agrees that there are clearly circumstances where co-employees at different work sites can be assigned primarily to related works (i.e., the School Board superintendent whose office is downtown and school Principals whose offices are at the school sites). By the same token there are clearly circumstances where co-employees at the same work site are assigned primarily to unrelated works (i.e., Miami-Dade County who has various department offices at the same downtown location).

What the School Board disagrees with is that reliance on the legislative history is even needed to arrive at that conclusion. This is because the prior version of the statute utilized the word "or" between the phrase "are not assigned to the same job site" and the phrase "assigned primarily to unrelated works." Thus, the two tests were independent of, as opposed to related to, each other. In other words, the School Board maintains that there wasn't then and still isn't a physical location component to the "unrelated works" exception.[7]

The main disagreement that the School Board has with Sanchez's argument is her jump in logic from the initial premise just discussed to her final conclusion that lawmakers must

[7] However, the School Board does maintain that the physical location of one's work may be a factor bearing upon the relatedness of co-employees' works.

therefore have meant "unrelated works" to mean "unrelated primary assignments."[8] It is unclear to the School Board how Sanchez makes that leap in logic, even if it agrees with Sanchez's initial proposition that "unrelated works" was not meant to be tied to co-employees' work-sites. There is simply no bridge in the thought process that connects the gap between the initial premise and final conclusion.

Equally important is the fact that, although Sanchez repeatedly states that "unrelated primary assignments" is the test to be applied, she is clearly advocating a test of "same primary assignments" as she never looks beyond the specific assignments of each co-employee to see if the assignments are related. Instead, she simply concludes that fellow-employee immunity does not bar the claim for negligence if the specific job tasks are different.

For the reasons stated above, the School Board contends that the legislative history relied heavily upon by Sanchez provides little guidance to the Court as to the meaning of the phrase "assigned primarily to unrelated works." Instead, the School

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[8] Sanchez states that "if physical separateness of the co-workers in different buildings is not the dispositive factor - and plainly it is not - then the 'primarily assigned to unrelated works' 'in furtherance of the employer's business' must mean 'unrelated works' in the sense of 'unrelated primary assignments'." *See* Initial Brief at 41.

Board maintains that the Court should focus on the plain meaning of the words used.

There is no dispute that the words used in the statute are "assigned primarily to unrelated works." Thus, based on the words used, the correct test is to focus on the relatedness of co-employees' job duties, as opposed to whether the co-employees performed the same job duties. Clearly, in any business, it takes many different types of employees performing completely different job functions to make the business operate as intended. Within the school setting, this includes teachers, security personnel, administrators, custodians, cafeteria workers, maintenance workers, etc. Although each classification of School Board employee performs different job functions, each is very much involved in the education process in the sense that, without them, the school (whose goal is to educate students) cannot operate as intended.[9]

It is noteworthy that Sanchez was the one who brought the definition section of the Florida School Code to the attention of the Third District, but now completely ignores it. The definition section of the Florida School Code is very enlightening and provides strong evidence that the job of school

[9] This holds true for any type of business, which takes many different types of workers to make the business operate as intended.

security is related in every way to the educational process. In that regard, §220.041(38), Fla.Stat., sets forth the following definition of "educational support employees."

> "Educational support employees" means employees whose job functions are neither administrative nor instructional, ***yet whose work supports the educational process***: (e) Service workers are staff members performing a service for which there are no formal qualifications ***including those responsible for***: cleaning the buildings, school plants, or supporting facilities; maintenance and operation of such equipment as hearing and ventilation systems; ***preserving the security of school property; and keeping the school plant safe for occupancy and use***. Lead workers in the various service areas shall be included in this broad classification.

§220.041(38), Fla.Stat. (emphasis added). In light of that definition, it would be contrary to legislative intent to hold that teachers and school security personnel are "assigned primarily to unrelated works." By definition, within the Florida School Code, school security personnel "support[] the educational process." Thus, the decision appealed should be affirmed.

2. Analysis of Case Law

Dade County School Board v. Laing

The most analogous case to the one at hand is *Dade County School Board v. Laing*, 731 So.2d 19 (Fla. 3d DCA 1999). In *Laing*, Ronald Laing was working as a teacher at Hialeah High School when he was hit by a golf cart operated by a school

custodian, Jose Rodriguez. At the time of the incident, the custodian was operating the golf cart in the school hallway, and Ronald Laing was hit by the golf cart when he opened his classroom door. Golf carts were used by custodians and security guards to travel across the school grounds. The Dade County School Board filed a Motion for Summary Judgment on the basis of workers' compensation immunity. The trial court denied the motion, concluding that a school teacher and custodian are assigned primarily to unrelated works. On appeal, the Third District reversed, stating that:

> Laing argues that, because his profession as a teacher and Rodriguez' profession as a custodian are "unrelated," the exception applies to abrogate the School Board's immunity. We disagree.
>
> The fact that employees have different duties does not necessarily mean they are involved in "unrelated works." *See Johnson v. Comet Steel Erection, Inc.*, 435 So.2d 908 (Fla. 3d DCA 1983). The pertinent factor is whether the co-employees are involved in different projects. Thus, the focus is upon the nature of the project involved, as opposed to the specific work skills of individual employees. *See Vause v. Bay Medical Center*, 687 So.2d 258 (Fla. 1st DCA 1996), *review denied* 695 So.2d 703 (Fla.1997); *Abraham v. Dzafic*, 666 So.2d 232 (Fla. 2d DCA 1995).
>
> Here, Rodriguez and Laing were both working on the same project, in the sense that they were co-employees providing education related services to students at Hialeah High School. Although each individually were assigned different duties and had different work skills, Laing in his capacity as a teacher and Rodriguez in the capacity of custodian, both were involved as part of a team in promoting education at

> the school campus. Because both were engaged in activities primarily related to the provision of education related services, the "unrelated works" exception to the School Board's immunity under Section 440.11(1) does not apply. *See Johnson v. Comet Steel Erection, Inc.*, 435 So.2d at 908.

Laing at 20.

Sanchez asked the Third District to take judicial notice of the *Laing* appendix, claiming that the appendix somehow shows that *Laing* is distinguishable from this case. In support of that argument, Sanchez claims that there was no evidence presented in *Laing* as to the parties' primary assignments. However, contrary to Sanchez's contention, nothing could be further from the truth as the custodian in *Laing* explained in detail his primary job assignments. He testified that his job duties included locking and unlocking classroom doors, cleaning the classrooms, and delivering packages to teachers. He also testified that, at the time of the accident, he was in charge of the cafeteria at breakfast time; he would clean up the cafeteria after the students finished eating so that the cafeteria would be clean for lunch time. He also did lawn work, and he broke open lockers when asked to do so. *See Laing* appendix, tab 7, at 28-27, 32. The custodian made it perfectly clear that he did not have ***any*** teaching responsibilities. Q. All right. Did you have any teaching responsibilities back in February of 1996 at

Hialeah High? A. No. I have never had any teaching responsibilities. *Id*. at 32.

Thus, as can be readily seen, the *Laing* court did have before it evidence of the parties' primary assignments.[10] However, instead of focusing on the specific job duties of the custodian and teacher, the *Laing* court instead properly focused on the relatedness of their job duties as dictated by the words used in the statute. In that light, the Third District properly found that their job duties were related in the sense that each was "providing ***education related services*** to students at Hialeah High School" *Laing* at 20 (emphasis added).[11]

Sanchez alternatively suggests that *Laing* is distinguishable from this case because there was regular interaction between the teachers and custodian in *Laing*, whereas no such evidence exists in this case as between the teachers and security personnel. The "regular interaction" in *Laing* that Sanchez relies upon is that the custodian in *Laing* locked and unlocked teachers'

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[10] Even without such evidence, common sense would dictate that a custodian's primary job function is to clean and a teacher's primary job function is to teach.

[11] Notably, this holding is supported by the definition of "educational support employees" within the Florida School Code as §228.041(38)(e), Fla.Stat., includes "those responsible for cleaning the buildings, school plants, or supporting facilities" among the employees "whose work supports the educational process."

classrooms, cleaned teachers' classrooms, and delivered packages to teachers.

Clearly, if Sanchez concedes that such superficial and incidental interaction between teachers and custodians constitutes "regular interaction" to make the work of custodians and teachers "related," then surely that flimsy standard is met in this case where the testimony is undisputed that teachers and security personnel work hand in hand, so to speak, in providing security at West Miami Middle School. Although Sanchez minimizes the security services provided by teachers,[12] nowhere in her brief does she maintain that teachers have no responsibility whatsoever for security at the school or that they are not part of the overall security plan.

Again, however, the real issue in these cases is not the specific job functions of teachers versus other School Board employees. Rather, as held in ***Laing***, the focus is on the relatedness of each's job functions, and as demonstrated above, the job functions of teachers and school security personnel (the co-employees in this case) are both related to the educational process.

Johnson v. Comet Steel Erection, Inc.

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[12] For example, she attempts to limit teachers' security duties to the classroom.

Johnson v. Comet Steel Erection, Inc., 435 So.2d 908 (Fla. 3d DCA 1983), is another case that supports the School Board's argument with respect to the meaning of the phrase "assigned primarily to unrelated works." In *Johnson*, an employee of a general contractor was injured as a result of the negligence of a subcontractor's employee while both were employed on the same construction project. The employee of the general contractor was a general laborer, and the employee of the subcontractor was a welder. Despite the difference in their duties, the Third District held that workers' compensation immunity barred the action. In so doing, the court stated that the fact that one was a general laborer and the other a welder "did not make their work 'unrelated.'" *Johnson* at 909.

With respect to *Johnson*, Sanchez states that "[t]here is no indication in the four corners of that case that the litigants presented the Court with any testimony on the respective individuals' primary unrelated assignments." *See* Initial Brief at 27.

With respect to that statement, it appears that Sanchez is arguing that the court in *Johnson* reached its decisions without any evidence before it as to the employees' specific job skills or duties. However, the only way that Sanchez can know that is if she has before her the appellate record in *Johnson*, which

there is no indication of.

Simply because the *Johnson* court did not set forth the evidence of the employees' specific job skills or duties within the "four corners" of the published opinion does not mean that the court, in fact, had no such evidence before it. Moreover, it is highly doubtful that the *Johnson* court expressly recognized in its opinion that the primary job tasks of the employees involved were different if the court, in fact, had no evidence of the job tasks before it.[13]

Abraham v. Dzafic

The case of *Abraham v. Dzafic*, 666 So.2d 232 (Fla. 2d DCA 1995), is similar to the *Johnson* case. In *Abraham*, an employee sued his employer and co-employee after he sustained injuries when the van the co-employee was driving collided with his van. One of the employees was a painter and the other was a flourescent light technician. Both were employed by the same contractor on the same construction site, and the accident occurred when the two were traveling from the construction site. Despite the difference in their job duties, the Second District held that workers' compensation immunity barred the action. As

[13] Additionally, even without such evidence, a mere layperson could correctly conclude that the primary duties of a general laborer versus a welder are different.

stated by the court, "[a]lthough one was a painter and the other was a fluorescent lighting technician, and their work skills may have been 'unrelated,' their work was not." *Abraham* at 233.

With respect to *Abraham*, Sanchez states that the Second District would have decided the case differently had the court had the legislative history of the statute before it. For the reasons stated above, the School Board disagrees that the legislative history would impact any court's decision on the meaning of the phrase "assigned primarily to unrelated works."

Vause v. Bay Medical Center

Vause v. Bay Medical Center, 687 So.2d 258 (Fla. 1st DCA 1997), is another case that supports the School Board's argument with respect to the phrase "assigned primarily to unrelated works." In *Vause*, a nurse at a hospital died shortly after exiting the hospital's hyperbaric chamber where she had escorted a patient. She sued the hospital and several hospital employees for negligence. The employee defendants were the co-director of the hyperbaric center, the operator of the hyperbaric chamber and the administrator of the hospital. The Complaint, which was extremely detailed, described the specific duties and responsibilities of all parties to the action. With respect to the nurse, the Complaint specifically alleged that she was "assigned primarily to full-time duties in the Hospital's

Obstetric Department" and that "[t]he Obstetric Department is unrelated to the Hyperbaric Medicine Department." The Complaint further stated that, since 1988, the nurse "worked part-time as an on-call nurse in the . . . Hyperbaric Department." The defendants filed Motions to Dismiss on various grounds, including workers' compensation immunity. The trial court granted the motions, and the First District affirmed, stating that:

> [A]ppellant cites no case nor law which would support his position that an obstetrical nurse who works regularly, albeit on a part-time basis in another department providing health care, is engaged in work unrelated to that of the hospital supervisor, the departmental supervisor, or the operator of the machine which is utilized to provide care for the patient whom the nurse is attending.
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> In the instant case, while there were conclusory allegations that the coemployees were engaged in unrelated works, the alleged facts do not support this conclusion. At the time of the injury to the deceased, she was engaged in activity related to her primary assignment, the provision of health care to a patient. (The complaint clearly alleges that nurses are routinely in the chamber "to administer medicine or provide other necessary assistance to the patient"). The fact that the decedent was assigned to a different department or that she was using a specialized piece of medical equipment should not serve to undermine the broad workers' compensation immunity provided in section 440.11(1), Florida Statutes.
>
> The operator of the hyperbaric chamber and Nurse Vause had a similar relationship as the welder and the

> laborer in *Johnson*, *supra*: They were both involved in the same project (rather than an unrelated project)--the care of one particular patient. The director of the chamber was also involved in the same project. Furthermore, the appellant fails to explain how the administrator of the entire hospital could be involved in works unrelated to a nurse who works in that same hospital. Each individual defendant was assigned to duties related to the purpose and function of decedent's job: The provision of health care to patients of the medical center. The facts alleged in the complaint establish this relationship. The trial court, therefore, could have correctly dismissed the complaint against BMC because the court could have found that the employees were not engaged in unrelated works.

Vause at 262-263.

With respect to *Vause*, Sanchez states that "[a]gain, there is nothing in the four corners of that decision suggesting the court had before it evidence of unrelated primary assignments. Indeed, *Vause* was decided not by summary judgment, but on a motion to dismiss with prejudice . . . Since there was no factual record before reaching the appellate level *Vause* is neither procedurally [n]or factually on point." *See* Initial Brief at 32.

Sanchez's suggestion that the *Vause* court had no evidence of unrelated primary assignments before it is simply not true as the allegations in the Complaint surely constituted evidence in the context of a Motion to Dismiss. In fact, the plaintiff's own allegations were the only evidence that the trial court

could have properly considered in ruling on the plaintiff's Motion to Dismiss, and the plaintiff's Complaint contained a detailed description of the parties' alleged respective assignments. The court had no choice but to accept those allegations as true. The court did so and simply concluded that, even if the nurse was assigned primarily to full-time duties in the Obstetric Department and worked only part-time as an on-call nurse in the Hyperbaric Department, and even if the Obstetric Department was unrelated to the Hyperbaric Medicine Department, as alleged in the Complaint, then the nurse and individual defendants still were not "assigned primarily to unrelated works" because all were involved in the same project of providing health care services to patients at the hospital.[14]

State, Dept. of Corrections v. Koch

State, Dept. of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991), is one case where the court ruled that workers' compensation immunity did not bar an employee's claim because the employee and co-employee who injured him were "assigned primarily to unrelated works." In *Koch*, an employee of the Florida Department of Corrections picked up a truck at the

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[14] As to *Vause*, Sanchez also suggests that the court might have decided *Vause* differently had it had the legislative history before it. The School Board has already expressed its disagreement with that argument several times herein.

Florida Department of Transportation's maintenance yard to transport inmates who were working on state roads pursuant to a contract between the DOT and DOC. As the DOC employee was driving out of the DOT maintenance yard, he fatally struck the plaintiff, who was a DOT employee on his way to work. The court concluded that the DOT and DOC employees were assigned primarily to unrelated works, and therefore, workers' compensation immunity did not bar the action.

The School Board does not contend that *Koch* was wrongly decided. In fact, the School Board contends that *Koch* provides the perfect example of a situation where the "unrelated works" exception was meant to apply.[15] Clearly, although the two employees in *Koch* were both employed by the State of Florida, one employee was assigned primarily to tasks encompassed within the purpose of the DOT and the other employee was assigned primarily to tasks encompassed within the purpose of the DOC. Thus, in the true sense of the word, the two employees were "assigned primarily to unrelated works." This is in sharp

[15] Sanchez suggests at page 44 of her Initial Brief that the School Board disagrees with the holding in *Koch*. Sanchez is wrong in her contention. However, although the School board does not contend that *Koch* was wrongly decided, it is still important to note that neither party in *Koch* disputed that the DOT employee and the DOC employee were coemployees "assigned primarily to unrelated works." *Koch* at 7. Therefore, *Koch* is of little precedential value.

contrast to the case at hand where the involved employees were both assigned to the same political subdivision of the State of Florida, i.e., the School Board, furthermore both were assigned to the same work location and were providing education related services, those services at least in part being related to safety.

Lopez v. Vilches

Sanchez cites to *Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2d DCA 1999), as a case applying a different standard to the "unrelated works" exception to fellow-employee immunity. However, Sanchez fails to take any position as to *Lopez*'s applicability to this case.

The *Lopez* court described the facts as "complicated." The scenario involved at least four different related business entities that operated cemeteries and funeral homes. The defendants were responsible for the maintenance of a fleet of vehicles used by those business entities. The plaintiff was employed by one of the funeral homes that was geographically separated from the location where the defendants performed their duties. Part of the plaintiff's duties required that he drive vehicles from the fleet maintained by the defendants. He alleged that one of the vehicles malfunctioned while he was driving it. He alleged that the malfunction was due to

negligent maintenance by the defendants. The trial court entered a final summary judgment in favor of the defendants, finding that workers' compensation immunity applied. On appeal, the Second District reversed.

Sanchez claims that the court "held that the 'unrelated works' exception did apply to those facts." *See* Initial Brief at 33. Sanchez's representation is inaccurate as the court did not hold that the plaintiff and defendants were engaged in unrelated works; it simply held that summary judgment was improperly entered because "the pleadings and facts developed through discovery do not foreclose that Lopez and the Defendants were engaged in unrelated works so that workers' compensation would be the exclusive remedy as a matter of law. The physical location of their work appears to be separate and their specific purpose, general funeral home duties versus vehicle maintenance, appear distinct." *Lopez* at 1097. Based on those facts, the court felt that the issue should be decided by a jury and not as a matter of law. Again, however, the court made no finding on the ultimate issue of whether the two employees were "assigned primarily to unrelated works."

Despite that, *Lopez* does support an affirmance in this case to the extent that it found pertinent the specific division to which each employee was assigned, as opposed to the specific job

assignments. In that regard, the court stated that "*Koch* presents something of an analogy to the present case. In our case, Lopez, the injured employee, used a vehicle maintained by an apparently separate division of the same employer, where the allegedly negligent employees worked. In *Koch*, the DOC employee, the allegedly negligent employee, used a vehicle maintained by a separate division of the State, where the injured employee worked." *Lopez* at 1097. Thus, to the extent that the phrase "unrelated works" means "separate divisions," the order appealed should still be affirmed because the co-employees in this case were part of the same division at the time of the injury, i.e. they were both employed by the School Board, which is a political subdivision of the State of Florida.

The *Lopez* court also suggests that the physical location of one's work is a factor to consider. To the extent that physical location is a pertinent inquiry, the co-employees here pass that test as both were assigned to and worked out of the same school location.

School Board of Broward County v. Victorin

Another case on the issue is *School Board of Broward County v. Victorin*, 767 So.2d 551 (Fla. 4th DCA 2000).[16] In *Victorin*,

[16] *Victorin* was decided while this case was on appeal to the Third District.

the plaintiff was a bus driver employed by the Broward County School Board (BCSB). He received injuries when another school bus driver employed by the BCSB drove her school bus into the plaintiff's school bus. The plaintiff and the other school bus driver worked out of different bus depots and had different areas where they dropped off the school children. The plaintiff received workers' compensation benefits, and then filed a negligence suit against the BCSB seeking to hold it vicariously liable for the negligence of the other school bus driver. The BCSB sought summary judgment claiming that workers' compensation immunity barred the action. The trial court denied the motion, and the BCSB appealed. The appellate court reversed because the co-employees were both bus drivers for the BCSB; they both drove buses in Broward County on Interstate 95, and the purpose of both their jobs was to transport school children.

Although Sanchez discusses *Victorin* in her brief, she apparently takes no position as to whether *Victorin* supports a reversal or an affirmance of the order appealed. However, at a minimum, *Victorin* is yet another example of courts interpreting §440.11(1), Fla.Stat., broadly to achieve its intended effect of providing immunity to employers who secure and pay workers' compensation benefits to injured employees.

Holmes County School Board v. Duffell

Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995), is another case cited by and relied upon by Sanchez in her brief. In *Holmes*, a custodian employed by the Holmes County School Board (HCSB) was injured in February, 1990, while assisting in a school bus evacuation drill. During the drill, the custodian was helping students exit a bus through the bus's rear door. Robert Lewis, another employee of HCSB, was driving the bus immediately behind the custodian, and he allowed his bus to roll forward. As a result, the custodian was pinned between the two buses and seriously injured. The Florida Supreme Court ruled that the custodian was entitled to maintain a negligence action against the HCSB to the extent that the custodian was not suing the HCSB in its capacity as an employer, but as a surrogate defendant based upon the negligence of the custodian's co-employee (the school bus driver).

Sanchez suggests in her brief that the Court permitted the employee to sue the HCSB as a surrogate defendant because the two involved employees were "assigned primarily to unrelated works." Sanchez's suggestion is not supported by the Court's decision as the issue before the *Holmes* Court was not whether the two school employees were actually engaged in unrelated works (which is the issue in this case); rather, the sole issue on appeal was the interaction between section (9)(a) of the

sovereign immunity statute, §768.28, Fla.Stat., and the workers' compensation immunity statute, §440.11(1), Fla.Stat., and more specifically, whether the HCSB, who paid workers' compensation benefits, could be sued in a surrogate capacity for the negligence of a co-employee of the plaintiff.

In fact, the Court expressly stated that "[t]he trial court made a determination that Duffell [the custodian] and Lewis [the school bus driver] were assigned to unrelated works. *This determination was not disputed on appeal to the district court, addressed by the district court, or presented in the petition for our review." Holmes* at 1177, n. 1 (emphasis added). Thus, the precise issue at hand was not even addressed by the Court in *Holmes*.[17]

Lake v. Ramsay

Lake v. Ramsay, 566 So.2d 845 (Fla. 4th DCA 1990), is the case that Sanchez claims expressly and directly conflicts with

[17] Although *Holmes* does not help the Court in deciding the precise issue at hand, the actual holding in *Holmes* will have a huge impact upon public employers in the event the Court now interprets the "unrelated works" exception to fellow-employee immunity in the narrow manner advocated by Sanchez. In fact, workers' compensation immunity will be all but eviscerated as to public employers in Florida because, in virtually every instance that an employee is injured, the employee can point to a co-employee with different job responsibilities whose alleged negligence caused the injury. Per *Holmes*, the public employer will be the defendant in those actions, not the co-employee.

the decision in this case. In *Lake*, the plaintiff sued Sergio Fernandez and others for damages sustained as a result of injuries he received due to the defendants' alleged negligence in the construction of the ceiling of a garage, which collapsed on the plaintiff while he was working on the premises. Fernandez moved for summary judgment on the ground that he was immune from suit under section 440.11, Fla.Stat, as a co-employee at the time of the accident.

The record indicated that the plaintiff was an employee of the builder, and his duties included maintenance and janitorial work. Fernandez was employed by the builder as a construction supervisor and the qualifying agent on this project. In the course of his duties, Fernandez supervised the construction of the ceiling that collapsed and injured the plaintiff. The trial court held, in part, that Fernandez and the plaintiff were co-employees involved in "related work," which would make Fernandez immune from suit. However, the Fourth District reversed finding the issue inappropriate for summary judgment.

Contrary to Sanchez’s implication here, the court did NOT reach any decision as to whether workers’ compensation immunity would eventually bar the action; it simply held that the evidence presented did not support a summary judgment at that time. In so doing, the court specifically recognized that there

"may be a vast difference between Fernandez's construction supervision work and Lake's maintenance work." *Id* at 848. Nevertheless, the court stated that "both types of work could be involved in the same construction job." *Id*. Thus, it appears that the court simply did not have the necessary evidence before it to ascertain whether the two employees were "assigned primarily to unrelated works."

One fact the court noted might make a difference was the timing of the plaintiff's work on the project. As stated by the court, "we are unable to determine whether [the plaintiff] was working on this job prior to completion of construction, which might affect the 'related work' concept. For example, if the construction was completed before [the plaintiff] became the maintenance man on the property, ..., the interpretation of 'related work' may exclude worker's compensation coverage." *Id*. Due to the lack of evidence, the court remanded for "further proceedings to determine the questions involved in the second point having to do with related work." *Id*.

In that light, *Lake* does not expressly and directly conflict with the decisions of the Third District in this case. The court in *Lake* simply did not have the record evidence it needed to rule on the "unrelated works" exception to workers' compensation immunity, whereas the Third District in this case

did have the necessary record evidence.

Palm Beach County v. Kelly

The last case cited in Sanchez's brief, discussing the exception to fellow-employee immunity is *Palm Beach County v. Kelly*, 810 So.2d 560 (Fla. 4th DCA 2002), which was decided after the Third District's opinion in this case. In *Kelly*, a county employee was driving home from work when he was struck by a motor vehicle driven by another county employee. The plaintiff worked as a maintenance equipment operator for the maintenance division at the Palm Beach International Airport. As part of his job, the plaintiff operated equipment for the airport maintenance division, including the large sweepers used to clean the airport's roadways and taxiways and the tractor mowers used to cut the airfield's grassy areas. The plaintiff also operated front-end loaders and dump trucks as needed. At the beginning of each day, the plaintiff reported to work at 3700 Belvedere Road, Building G, which was the main office for the maintenance department.

The co-employee involved in the accident worked as an equipment mechanic for the county's Fleet Management Division, which was located in Building D at 3700 Belvedere Road. The co-employee maintained and operated heavy equipment, such as the tractors, dozers, front-end loaders, trucks and other motor

vehicles for the County. His main job each day was to pick up his county truck from a shop on Belvedere Road and drive to the County's shell rock pit in Boca Raton. At the shell rock pit, he maintained and repaired the excavation equipment used to dig up shell rock. The shell rock was used for building and maintaining county roads.

The accident at issue occurred off Belvedere Road, near the county buildings where the plaintiff and co-employee reported. The plaintiff had just finished his work shift and was on his way home in his own car. The co-employee was leaving the Belvedere Road location in his service truck and was within the scope of his employment.

The plaintiff sued the county as surrogate defendant for the co-employee. The trial court ruled that fellow-employee immunity did not bar the claim because the two men were involved in unrelated works. On appeal, the Fourth District noted that two different concepts could be applied: "(1) a "case-by-case approach," which examines whether the co-employees were engaged in the same project and were "part of a team," *see Dade County School Board v. Laing*, 731 So.2d 19 (Fla. 3d DCA 1999), and (2) a "bright-line" test, based on the physical location where the employees were primarily assigned and the unity of their business purpose, *see Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2d

DCA), *rev. denied*, 749 So.2d 504 (Fla.1999)." With those two tests in mind, the Fourth District concluded:

> that both approaches yield the same result. Under either the "case-by-case" analysis or the "physical location/unity of business purpose" bright-line test, these employees were engaged in unrelated works. Kelly and John had different job duties and did not work cooperatively as a team but, rather, worked on two entirely different projects. Kelly's primary mission was the maintenance of the roads and taxi-ways at the Palm Beach International Airport. He was on a team that swept and mowed the airport grounds. John, on the other hand, performed maintenance and repair work on the County's heavy equipment, primarily excavation equipment at the shell rock pit in Boca Raton. Although they both began and ended their day at County offices in the same general location, they worked on different projects at different locations and furthered different business purposes of the County.
>
> We conclude that the trial court correctly determined that the unrelated works exception to workers' compensation immunity applies in this case.

Kelly at 562.

Similarly here, both tests would yield the same result, although the opposite result than that reached in *Kelly*. This is because Sanchez and the co-employees in this case worked hand-in-hand, so to speak, in providing security at the school; Sanchez and the co-employees were all engaged in the same project of providing education related services, and; Sanchez and the co-employees all worked out of the same work location. Thus, Sanchez and the co-employees were not "assigned primarily

to unrelated works.”

CONCLUSION

For all of the above stated reasons, the School Board contends that the trial court and Third District properly ruled that Sanchez and school security personnel were not "assigned primarily to unrelated works" and workers' compensation immunity therefore barred the claim. The School Board now prays that this Court affirm the order appealed for the same reasons. Alternatively, the School Board prays that the Court dismiss the appeal as there exists no true "express and direct" conflict.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this _____ day of June, 2002, to: Jon M. Herskowitz, Esq., The Herskowitz Law Firm, One Datran Center, Suite 1404, 9100 South Dadeland Boulevard, Miami, Florida 33156, and; Dorothy F. Easley, Esq., Law Office of Dorothy F. Easley, Federal & State Appeals, P.O. Box 144389, Coral Gables, Florida 33114.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Answer Brief complies with the typeface and font size requirements set forth in Rule 9.210, Fla.R.App.P., in that the following font type and size was used: Courier New 12-point font.

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