IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO.: SC01-1924

LAWRENCE TAYLOR and MARIE TAYLOR, husband and wife,

Petitioners,

vs.

SCHOOL BOARD OF BREVARD COUNTY, FLORIDA,

Respondent.

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS

KRUPNICK, CAMPBELL, MALONE, ROSELLI, BUSER, SLAMA, HANCOCK, McNELIS LIBERMAN & McKEE, P.A.
Amicus Curiae Counsel for Petitioners

STATEMENT OF CASE AND FACTS

Amicus accepts the Statement of Case and Facts as set forth by Petitioners' Initial Brief.

SUMMARY OF ARGUMENT

The current case law offers little guidance to either trial or appellate courts in the proper application of the "primarily assigned to unrelated works" exception to fellow employee immunity found Florida Statute §440.11(1). As recently noted by the Fourth District Court of Appeal in Palm Beach County v. Kelly, 810 So.2d 560 (Fla. 4th DCA 2002), a review of the cases in this area reveals at least two different approaches to the issue: (1) a "case-by-case approach," which examines whether the co-employees were engaged in the same project and were "part of a team," and (2) a "bright-line" test, based on the physical location where the employees were primarily assigned and the unity of their business purpose. This Court should take the opportunity in this case to adopt an easy to apply standard for interpreting the "primarily assigned to unrelated works" exception. In adopting the guideline, the Court should follow the principle that where a statute acts in derogation of a common-law right, such statute should be extended only so far as a strict construction of the statute makes imperative. Summersett v Linkroum 44 So.2d 662 (Fla. 1950). The bright–line test utilized by the Second District Court of Appeal appears to reasonably effectuate these goals.

ARGUMENT

THE COURT SHOULD ADOPT AN EASY TO APPLY AND LIBERAL STANDARD FOR INTERPRETING THE "PRIMARILY ASSIGNED TO UNRELATED WORKS" EXCEPTION TO FELLOW EMPLOYEE IMMUNITY.

This Court is called upon in this case to interpret Florida Statute §440.11(1) which provides, in pertinent part, as follows:

> The liability of an employer prescribed in §440.10 shall be exclusive and in place of all other immunities of such employer to … the employee … The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow employee immunity shall not be applicable … *to employees of the same employer when each is operating in the furtherance of the employer's business that they are assigned primarily to unrelated works within private or public employment.* … (emphasis supplied)

As always, legislative intent is the pole star by which this Court should be guided in interpreting the provisions of this statute. Parker v State, 406 So.2d 1089, 1092 (Fla. 1982). Unfortunately, as noted by Judge Miner in his dissenting opinion in Vause v. Bay Medical Center, 687 So.2d 258, 267 (Fla. 1st DCA 1996): "Precisely what it was that impelled the legislature to add the primary work assignment exception to workers' compensation immunity is not readily apparent". However, the fact that the pole star in this case may not be bright does not make its ascertainment any less essential.

In ascertaining legislative intent, the courts may consider the history of the act, the evil to be corrected, the purpose of the enactment and the law then in existence bearing on the same subject. State Board of Accountancy v. Webb, 51 So. 2d 296, 299 (Fla. 1951). In this case, there is little history available which sheds light on the legislative intent behind the exception. However, as pointed out by Petitioners in their Initial Brief before this Court, an examination of language dropped from a predecessor version of the language which ultimately became the "unrelated works exception" is potentially enlightening. Section 2 of CS/SB 636, a predecessor version of what ultimately became the current form of the unrelated work exception, provided in pertinent part as follows:

> "… provided, however, employees of the same employer may have a cause of action if each is operating in furtherance of the employer's business *but they are not assigned to the*

> *same job site* or are assigned primarily to unrelated work within private or public employment." (emphasis supplied)

As noted by Petitioners in their Initial Brief, the omission of the "assigned to the same job site" language from the final version of the statute is strong evidence that the legislature did not intend the omitted matter to be effective. Mayo v. American Agricultural Chemical Company, 133 So. 885, 887 (Fla. 1931). Thus, by omitting the "assigned to the same job site" language, the legislature apparently rejected a formulation of the standard which relied upon such considerations alone.

Turning to the "evil" to be corrected factor, because the primarily unrelated works exception is just that, an exception to a "correction", it would not appear to correct any "evil". However, the "evil" to be corrected generally by the 1978 amendment to Florida Statute § 440.11 was the then existing common law liability for employees who negligently caused injury to their fellow employees. This lack of immunity had the potential for producing litigation which may have been seen as an "evil" in and of itself. Also, the resulting litigation could certainly have been seen as a cause of unwanted disharmony in the workplace as well.

Next, the exact purpose of the exception is also less then obviously apparent. One purpose could have been to encourage employees to act non-negligently at all times by retaining civil liability as a sanction not only when an employee injures innocent third parties, but also when he or she injures fellow employees outside their

primary works. In other words, when the interaction of two employees is mere happenstance and is largely unrelated to their co-employee status, what is the value in immunity? Such a person should logically be no more entitled to immunity than any other third party tortfeasor who injures someone while they are working. It serves no societal purpose to cloak with immunity an employee tortfeasor who is otherwise unrelated to his fellow employee, except for the moment of injury, anymore than any other third party tortfeasor.

Because the exception was enacted at the same time as the general grant of fellow employee immunity, the purpose of that immunity, which was discussed above, should also be taken into consideration in determining the purpose of the exception. In doing so, the exception should be interpreted so as not to infringe on that purpose but still give the exception meaningful effect. In its simplest form, such an interpretation would eliminate litigation by employees who come into contact in the workplace on a regular basis regardless of their job description. This would necessarily reduce the chance for litigation in general because employees who seldom work together would have little chance to harm or be harmed by each other. Also, for those situations where the employees who fall within the exception became involved in litigation, workplace disharmony would be unlikely to result since they would not be working side by side on a daily basis and thus the chance for friction would be greatly reduced.

It also might be important to take into account the other exception to immunity enacted at the same time. That exception retained civil liability for an employee who acts towards a fellow employee with willful and wanton disregard or unprovoked physical aggression or with gross negligence. The exception encourages personal responsibility on the part of employees. This purpose is consistent with at least one of the apparent purposes of the unrelated works exception.

Finally, as to the last consideration in determining legislative intent, prior to the amendment to Florida Statute Section 440.11(1) in 1978, co-employees rights and responsibilities were governed by the common law. Under the common law, employees mutually owed to each other the duty of exercising ordinary care in the performance of their service and were liable for any failure in that respect when it resulted in injury to a fellow employee. Frantz v. McBee Company, 77 So.2d 796 (Fla. 1955). Thus, under the common law, co-employees were treated as "third party tortfeasors" could be held responsible for their negligence if it resulted in injury to a fellow employee. Id. [1]

The law continued as such until 1978 when the amendments to Florida Statute §440.11(1) were made. With the amendment, employees were granted the same

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[1] Pursuant to Florida Statute 440.39 this would also mean that the employer would have a right of subrogation against the negligent employee for sums paid to their injured employee under the Act. The amendment extending the immunity to employers also eliminated this obviously friction producing result.

immunity from suit as employers except where gross negligence was involved or the employees were assigned primarily to unrelated work. Thus the amendments to the statute restricted previously existing common law right except for the two provisos as noted above. The proviso in the statute relating to employees who are assigned primarily to unrelated work amounts to a preservation to such employees of their common law right to recover for the ordinary negligence of their fellow employees.

Where a statute is a restriction on or a derogation of a common law right, such statute should only be extended so far as the strict construction of the language of the statute makes imperative. Summersett v. Linkroum, 44 So.2d 662, 664 (Fla. 1950). In Summersett, the Florida Supreme Court was called upon to determine whether a minor plaintiff fell within an exception to the then existing "guest statute". That exception allowed school children being transported to or from school to sue their host drivers despite the general grant of immunity otherwise afforded host drivers under the guest statute. Noting that prior to the enactment of the guest statute, automobile host drivers owed their guests the common law duty of exercising ordinary care and that the guest statute restricted this common law right, the court interpreted the proviso relating to children being transported to and from school in the most liberal manner possible.

Similarly here, the Court should interpret the exception to the newly enacted restriction on common law rights of employees in the most liberal manner possible

while still effectuating the Legislature's intent in enacting the grant of immunity as well as the exception to that immunity. [2] Such a liberal interpretation would best effectuate this State's preference for preserving common law rights.

For this reason, the very strict construction given the exception by the court below, as well as the First and Third District Courts of Appeal, appears to be erroneous. The cases decided by these courts take an expansive approach to immunity and talk in terms of whether the employees in question were working on the same "project" and make this factor largely outcome determinative. See e.g., Dade County School Board v. Laing, 731 So.2d 19 (Fla. 3rd DCA 1999); Vause v. Bay Medical Center, 687 So. 2d 258 (Fla. 1st DCA 1996); Turner v. PCR, Inc., 732 So. 2d 342 (Fla. 1st DCA 1998). Although this approach works fairly well in relation to

[2] Amicus recognizes that the legislative intent expressed in Florida Statute §440.015 of the Workers' Compensation Act states that the Act should not be interpreted liberally so as to benefit employers over employees or vice versa without conceding that the legislature has any right under the doctrine of separation of powers to dictate to the courts a method of judicial statutory interpretation, this directive must be taken in the context of employer/employee situations where the purpose of effectuating the general goal of the Act, i.e. providing benefits to employees at a reasonable cost to employers, is concerned. Such a directive has little or no bearing on situations where employer v. employee litigation is involved.

construction site accidents, See, Abraham v. Dzafic, 666 So.2d 232 (Fla. 2nd DCA 1995); Johnson v. Comet Steel Erection, Inc., 435 So. 2d 908 (Fla. 3rd DCA 1983), outside the construction field, use of the "project" approach can yield overly broad conclusions.

For example, in this case, the Fifth District Court of Appeal concluded that the employees in question were involved in the same project because they were involved in a common project, to-wit: the "provision of transportation services to Brevard County's school children". The court reached this overly broad conclusion despite the fact that Mr. Taylor and the School Board mechanics were geographically separated by School Board policy so that they rarely came into contact and their primary duties were performed miles apart. In addition, the specific business purpose of Mr. Taylor, assisting disabled children who ride the school bus, is completely different from the specific business purpose of mechanics who are merely employed to perform maintenance and repairs on school buses. Under the Fifth District's analysis, essentially anybody who worked for the school board is involved in the same "project" that is, education related services.

Similarly, in Laing, the Third District found that a custodian and teacher were both working on the same "project" in that they were co-employees providing education related services to students at Hialeah High School. However, the same could be said of a teacher and administrative personnel at the School Board

headquarters who are involved in a motor vehicle accident during a visit by the teacher to the School Board building, and yet that clearly seems to be a situation where the exception should apply. The apparent difference in the Laing facts was that the two employees were not only both providing educational services to students at Hialeah High School, but they were both physically assigned to that location. This example highlights the importance of both geographic location and the scope to be afforded the term "project".

Based on the above, Amicus would suggest that the Court adopt a test which takes into account the geographic location where the employees are primarily assigned as well as the specific business purpose of the employees rather than their general business purpose. This approach would both preserve the common law remedies afforded employees prior to l978 and at the same time effectuate the purposes of the l978 Amendment, as well as its exception.

In fact, the Second District in Lopez v. Vilches, supra, adopted such an approach when considering a fact situation very similar to that found herein. In Lopez, as in this case, the defendant employees were responsible for the maintenance of a fleet of vehicles used by their employer, a funeral home business. The plaintiff was also employed by the funeral homes, but was geographically separated from where the defendant employees performed their duties. The plaintiff was injured when he was driving one of the vehicles maintained by the defendant employees, allegedly because

of lack of proper maintenance on the vehicle. Under these facts, it could have been said by the Second District that the employees were involved in the same "project", that is, the provision of funeral home services but the Court refused to do so. Instead, the Court reversed summary judgment in favor of the defendants and remanded the case for trial based upon its finding that the employees did not work at the same geographic location and were not involved in the same specific business purpose.

Very similarly here, the "defendant" employees are responsible for the maintenance of school buses. Mr. Taylor is employed by the same employer, but is geographically separated from the location where the defendants performed their maintenance duties. In fact, that geographic separation was enforced by the employer itself. As in Lopez, it could be said that the employees were engaged in the same "project", i.e., education related services to students, but such a broad and expansive reading of the term "project" would virtually swallow the exception whole. Clearly, the legislature would not have enacted an exception only to have it interpreted in such a way that it would become largely ineffectual. Courts should avoid interpretations that would render part of a statute meaningless. Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 455-456 (Fla. 1992). The limited and specific approach to the business purpose analysis utilized by the Second District would be more likely to render the result intended by the legislature.

In conclusion, this Court should take the opportunity to adopt an easy to apply and liberal standard for interpreting the "primarily assigned to unrelated works" exception to the fellow employee immunity conferred by Florida Statute §440.11(1). Such a standard would take into account the geographic separation of employees as well as the specific business purpose of the employees. Such a standard, when applied to the facts in this case, would support a reversal of the summary judgment entered in favor of the Respondent.

CONCLUSION

This Court should reverse the Fifth District Court of Appeals decision and vacate the Orders on the parties' Cross-Motions for Summary Judgment. The cause should be returned to the trial court with directions to reconsider the facts of the case in the context of an easy to apply and liberal standard to be adopted by this Court for considering cases which involve the primarily assigned to unrelated work exception to Florida Statute §440.11(1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this ____ day of May, 2002 to: MICHAEL H. BOWLING, Esquire, Bell, Leeper & Roper, P.A., Attorneys for Respondent, Post Office Box 3669, Orlando, FL 32801; and JOSPEH H. WILLIAMS, Esquire, Troutman, Williams,

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