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, FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Amicus, the Florida Defense Lawyers' Association, adopts the Statement of the Case and Facts provided by Respondent.

SUMMARY OF THE ARGUMENT

The majority of Florida's District Courts of Appeal have fashioned a workable, common sense application of the "unrelated works" exception. These courts hold that employees serving a common purpose of the employer, working on the same project or as part of the same team, are not primarily assigned to unrelated works. The fact that the workers have different duties or skills within the project or team does not change the analysis.

This Court need not adopt a specific, "bright line" test for the unrelated works exception. The purported "bright line" test has only been applied by one court. Contrary to Petitioner's argument, the "bright line" test does not accomplish the purported goal of tying immunity to the creation of risk. Furthermore, it is just as difficult to apply as the common purpose test used by the majority of the DCAs, and it is by definition more arbitrary.

The decision of the Fifth District Court of Appeal should be affirmed.

ARGUMENT

The decision of the Fifth District Court of Appeal should be affirmed. A school bus attendant and school bus mechanics are not "assigned primarily to unrelated work."

The exclusiveness of liability provision in the Workers Compensation Act is found at section 440.11, Florida Statutes. That section provides in pertinent part:

> (1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, ... , except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow employee, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, <u>nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.</u> The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity and the conduct which

> caused the alleged injury arose within the course and scope of said managerial or policymaking duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in s. 775.082. The immunity from liability provided in this subsection extends to county governments with respect to employees of county constitutional officers whose offices are funded by the board of county commissioners.

(Emphasis supplied).

Exceptions to a statute must be construed strictly. Samara Development Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990). See also State v. Nourse, 340 So. 2d 966 (Fla. DCA 1976) (any statutory exception is strictly construed against the party seeking to take advantage of the exception). Conversely, the immunity granted under section 440.11 is broadly applied. See Johnson v. Comet Steel Erection, 435 So.2d 908, 909 (Fla. 3d DCA 1983).

In this case, the school bus mechanics and the school bus attendant were employees of the School Board involved in the same project, the provision of transportation services to Brevard County school children. This Court should adopt the majority view of Florida's District Courts of Appeal, which holds that employees engaged in the same project or furthering the same purpose of the employer are not unrelated, regardless of whether they have different skills or duties.

Florida's district courts have uniformly held that the specific function performed by the workers is not controlling. As the court

explained in Abraham v. Dzafic, 666 So. 2d 232 (Fla. 2d DCA 1995), in holding that a painter and a fluorescent lighting technician were not primarily assigned to unrelated works, while "their work skills may have been 'unrelated,' their work was not." 666 So. 2d at 233. The fact that the workers were assigned to the same overall project was enough to avoid application of the unrelated works exception. See also School Board of Broward County v. Victorin, 767 So.2d 551 (Fla. 4th DCA 2000) (school bus drivers on separate routes with different children from different locations were not engaged in unrelated work); Johnson v. Comet Steel Erection, Inc., 435 So. 2d 908, 909 (Fla. 3d DCA 1983) (common laborer for general contractor and welder for subcontractor were not primarily assigned to unrelated works since they were employed in same construction project).

Similarly, in Dade County Sch. Bd. v. Laing, 731 So.2d 19 (Fla. 3d DCA 1999), the court held that the "unrelated works" exception did not apply between a teacher and a custodian. The court explained:

> The fact that employees have different duties does not necessarily mean they are involved in 'unrelated works.' . . . [the custodian and teacher] were both working on the same project, in the sense that they were co-employees providing education related services to students . . . 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 . . . does not apply."

Id. at 20.

Likewise, in Sanchez v. Dade County School Bd., 784 So.2d 1172 (Fla. 3d DCA 2001), review granted, SC01-1346, the Third District held that the "unrelated works" exception did not apply between a teacher, who was sexually assaulted at work by a trespasser, and school's security personnel. Although the claimant directly educated students and the co-employee performed the entirely separate activity of providing security for the school, the court emphasized that both were engaged in activities primarily related to provision of educational related services.

A similar analysis was applied in Vause v. Bay Medical Center, 687 So.2d 258, 262 (Fla. 1st DCA 1995), in which the court defined the purpose of a nurse's job as "the provision of health care to patients of the medical center," and concluded that other medical personnel were not engaged in unrelated work. 687 So.2d at 263. The court explained: "while employees may have different duties as related to the same project, it does not mean they are involved in 'unrelated works'." 687 So.2d at 262.

In this case, "[i]t is undisputed that both Taylor and the alleged negligent mechanics worked out of the same transportation facility and that Taylor, as a part of his job, was responsible for the operation of the wheelchair lift while the mechanics, as a part of their job, were responsible for the lift's maintenance and repair." Taylor v. School Board of Brevard County, 790 So.2d 1156 (Fla. 5th DCA 2001). Like the

teacher and security person in Sanchez and the teacher and custodian in Laing, a school bus assistant and a school bus mechanic, employed by the same school board and working with the same buses, may have different work skills or duties but are not primarily assigned to unrelated work.

In fact, Florida has already applied the very same definition of the employer's purpose as was applied by the Fifth District and the trial court here. In School Board of Broward County v. Victorin, 767 So.2d 551 (Fla. 4th DCA 2000), the court held that school bus drivers on separate routes with different children from different locations were not engaged in unrelated work, since they both were fulfilling the County's purpose of transporting schoolchildren. See also Sanchez v. Dade County School Bd., 784 So.2d 1172 (Fla. 3d DCA 2001) (teacher and school's security personnel were both engaged in activities primarily related to provision of educational related services). The provision of school transportation is an equally proper definition of the "project" or "purpose" fulfilled by the co-employees in this case.

It is significant in this case that both workers' primary assignments involved the injury-causing equipment. In Turner v. PCR, 732 So.2d 342 (Fla. 1st DCA 1998), quashed on other grounds, 754 So.2d 683 (Fla. 2000), the court held that a plaintiff who worked in the catalog department of a chemical plant was not engaged in unrelated work from a chemist who prepared compounds. The court concluded that

there was a "team effort" and that the workers had "different duties as related to the same project." 732 So.2d at 345. The court emphasized that the workers' jobs both involved the same type of equipment as that involved in the accident. 732 So.2d at 345. Similarly, the attendant and mechanics here both worked with school buses, and both worked with the equipment that caused the injury.

The above cases demonstrate a workable, common sense, and relatively predictable test for unrelated works - a shared purpose or project, regardless of differences in specific duties or skills. This Court should formally approve those cases.

The cases cited by Petitioners are distinguishable. Petitioners rely on Palm Beach County v. Kelly, 810 So.2d 560 (Fla. 4th DCA 2002), in which the court held that a County worker responsible for maintaining airport roadways, taxiways and grassy areas and a County worker who repaired and operated heavy equipment at the County's shell rock pit were primarily assigned to unrelated works. The Kelly court emphasized that the workers worked on entirely different projects, furthered different business purposes of the County, and did not work as part of a team. 810 So.2d at 562.

In contrast, the workers in this case were both employees of the School Board as opposed to being part of different segments or divisions of the County. Unlike the workers in Kelly who dealt with the unrelated purposes of airport maintenance and operating heavy

equipment at a shell rock pit, the workers in this case furthered the same business purpose of the County - providing school bus transportation to students. Additionally, unlike the workers in Kelly who dealt with different equipment, the workers here all had the school buses as the subject of their work.

Perhaps the most significant aspect of the Kelly case cited by Petitioner is the fact that the Kelly court applied the majority "common purpose" or "project" test. The only decision to have apparently applied the "bright line" test urged by Petitioner is the Second District's decision in Lopez v. Vilches, 734 So.2d 1095 (Fla. 2d DCA 1999). However, that decision is also distinguishable. The employees in the Lopez case were involved in different purposes - one employee was engaged in general funeral home operation, and the other in maintaining a fleet of vehicles used by that and other funeral homes and cemeteries. 734 So.2d at 1097. Furthermore, the court emphasized that the employees were part of different "divisions" of the employer's various companies. 734 So. 2d at 1097.

In this case, the school bus mechanic and the school bus attendant are involved in the same purpose - school bus transportation. They are employed by the same "division" of the County, the School Board.

Furthermore, there is language in Lopez that is entirely consistent with the holding of the Fifth District below. Lopez holds that the cases "clearly state that the exception does not turn on

whether the employees were engaged in similar work." 734 So.2d at 1096.

Petitioner and the Academy urge this Court to adopt a "bright-line" test, based in part on physical location, allegedly adopted by the Second District Court of Appeal in Lopez. Petitioners argue that the unrelated works exception was intended to apply where there is little contact between the parties and, presumably, little risk of harm. They conclude that the physical location element is essential to a "related" work.

Even assuming that Petitioners' theory as to the intent of the exception, which is unsupported by any case or other authority, is correct, their analysis does not fulfill that intent. Physical location does not necessarily predict risk. A maintenance person certainly creates risk for a fellow employee who later uses the equipment being maintained, regardless of whether the maintenance occurs at a separate location. Working together on the same project or purpose is a closer predictor of risk because it allows the court to include persons who create risk beyond their physical location, and to exclude persons who work in the same physical location but have no contact or common purpose.

Furthermore, while characterizing the test as a "bright line" test may make it more appealing because of the perceived savings in judicial labor, the Lopez case does not actually provide a bright line test or

an efficient method for determining the unrelated works issue. The fact that there was a dissent in that case, see Lopez, 734 So.2d at 1098 (Quince, J., dissenting), and the fact that other District Courts of Appeal have declined to adopt this test but still managed to resolve their unrelated works cases, demonstrates that the "bright line" test is not a cure for the perceived difficulty in applying the unrelated works exception.

In fact, the Fourth District's description of the "bright line" test in the Kelly case reveals that it does not necessarily provide uniform results. The Kelly court described the test as being "based on the physical location where the employees were primarily assigned and the unity of their business purpose." The "unity of their business purpose" is virtually indistinguishable from the "same project" or "part of team" language used by the same court to describe the supposedly different "case by case" test. In fact, the cases which have expressly discussed both approaches have concluded that the result would be the same under either one. See Kelly, 810 So.2d 560; Victorin, 767 So.2d 551. In short, there is no reason for this Court to overrule the majority view cultivated by the District Courts of Appeal in favor of a less workable, less predictable and less sensical "bright line" test.

Florida's unrelated works exception has been described as "unique." Vause v. Bay Medical Center, 687 So.2d 258 at n.2 (Fla. 1st

DCA 1995) (quoting Larson, Workers' Compensation, § 72.21). There is virtually no out of state case law that would be helpful in this matter. FDLA has located only one other state with a comparable provision. Oregon Statutes § 656.018(3)(b) provides there will be no immunity "where the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives." Unfortunately, there is no relevant case law interpreting the Oregon provision. In fact, the Oregon courts have held their workers' compensation statute unconstitutional at least in part. See Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001); Rogers v. Valley Bronze of Oregon, Inc., 35 P.3d 1102 (Or.App. 2001).[1/]

As a final matter, this Court should also clarify the application of the unrelated works exception to claims against the employer. Petitioners properly acknowledge at page 17 of

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[1/] One commentator has indicated that Minnesota has a similar scheme. See Modern Workers Compensation § 103:7 Part 3. Exclusivity Chapter 103. Remedies Against Third Persons § 103:7 -- REQUISITE EMPLOYMENT CONNECTION, at note 50. However, Minnesota's provision is contained in the third party liability and election of remedies statute. See Minn. Stat. § 176.061 (4) (no immunity unless employer liable for benefits and the party legally liable for damages are "engaged, in the due course of business in, (a) furtherance of a common enterprise, or (b) in the accomplishment of the same or related purposes in operations on the premises where the injury was received at the time of the injury"). Because the Minnesota statute applies to extend immunity beyond the original employer, its limitation to common enterprises serves a different purpose than Florida's unrelated works exception.

their Initial Brief that the employer is a defendant in this case because it is a public employer. The public employer is sued only as a "surrogate" for the employee, who is granted statutory sovereign immunity. See Holmes County School Board v. Duffel, 651 So. 2d 1176, 1779 (Fla. 1995). See also Vause v. Bay Medical Center, 687 So.2d 258 (Fla. 1st DCA 1995); State of Florida, Dept. of Corrections v. Koch, 582 So. 2d 5 (Fla. 1st DCA 1991). The unrelated works exception therefore "passes through" to an employer standing in the shoes of a fellow employee because to hold otherwise would wholly deprive public employees, who cannot sue their fellow employees, of the benefit of the exception. See Fla. Stat. § 768.28(9)(a).

In private employer cases, however, the unrelated works exception applies only to permit claims against the claimant's fellow employee and not against the common employer. So as to avoid any misapplication of the exception in a private employer situation, it is respectfully submitted that any opinion from this Court should specify that the exception only potentially allows claims against the employer where sovereign immunity requires the employer to be substituted as a surrogate defendant.

CONCLUSION

The decision of the Fifth District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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