**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.: SC01-1924**
Lower Tribunal No.: 5D00-842

LAWRENCE TAYLOR and MARIE TAYLOR,
Individually and as Husband and Wife,

Petitioners,

vs.

THE SCHOOL BOARD OF BREVARD COUNTY,
FLORIDA,

Respondent.
_______________________________________/

ON APPLICATION FOR DISCRETIONARY REVIEW

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# PETITIONERS' INITIAL BRIEF ON THE MERITS

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## PREFACE

In this brief, Petitioner, Lawrence Taylor, shall be referred to as "Plaintiff", by name, or as "the employee". Respondent, The School Board of Brevard County, Florida, Defendant below, shall be referred to as "the Board". Witnesses shall be referred to by name. References to the position of school bus attendant shall be by the designation, "SBA". References to the Fifth District Court of Appeal will be by the notation, "DCA," unless another DCA is specifically noted. References to the Record on Appeal shall be by the symbol "R", followed by the page cited to. References to the Supplemental Record on Appeal shall be by the symbol, "SR", followed by the page cited to. Since the index to the record does not contain page references to the exhibits attached to the depositions taken in this cause,[1] references to those exhibits will be by the initials of the witness to whose deposition is reference is made, followed by a "P" (for plaintiff) or "D" (for defendant) and the number of the exhibit in question. Thus, Plaintiff's

exhibit 31, attached to the deposition of Jessica Shaffer, would be by the notation, "JSP31". References to the Appendix which accompanies this brief shall be by the symbol "A", followed by the page number of the appendix to which citation is made. Unless otherwise noted, all references in Chapter 440, Fla. Stat., shall be to the 1995 edition of the statutes.

## STATEMENT OF THE CASE

On October 2, 1998, Lawrence Taylor and Marie Taylor, his wife, filed a complaint [R1] alleging that Mr. Taylor was injured while carrying out his duties as an SBA [R2], when a wheelchair lift mechanism which he was preparing for deployment suddenly and unexpectedly fell and struck him in the head and body, causing injury [R2-3]. Mr. Taylor alleged the injury resulted from the negligent repair and/or maintenance of the lift mechanism by the Board's employees in its transportation garage [R3]. He claimed the work in which he was engaged at the time of his injury was work which was unrelated to that performed by the Board's mechanics, exempting him from the general immunity to suit in tort which would otherwise be enjoyed by the Board's employee pursuant to §440.11(1), Fla. Stat. [R3-4].

After completion of discovery on the immunity issue, Plaintiffs filed their Motion for Partial Summary Judgment [R511]. The Board filed its Cross-Motion for Partial Summary Judgment [R692]. The lower court entered its orders denying Plaintiffs' motion [R690; A4], granting the Board's Cross-Motion for Partial Summary Judgment on March 3, 2000 [SR790; A8], and entered final judgment for the Board on March 14, 2000 [SR792]. Petitioners' appealed the decision to the Fifth DCA [R789]. The only issue before the DCA was the propriety of the lower court's determining as a matter of law that the unrelated works exception to the immunity provided by the Workers' Compensation Statute did not apply on the facts of this case.

On July 13, 2001, the DCA filed its opinion affirming the lower court's actions [*Taylor v. School Bd. of Brevard County*, 790 So.2d 1156 (Fla. 5th DCA 2001) [A1], determining that, since it was

"undisputed" that both Plaintiff and the alleged negligent mechanics worked "out of the same transportation facility" and that a facet of both individuals' jobs dealt with the wheelchair lift, that the unrelated works exception to Workers' Compensation immunity would not apply [*Id.* at 1157-58, A2-3]. The Order Denying Petitioners' Motion for Rehearing and/or Alternative Motion for Certification was entered August 14, 2001. Petitioners' notice to invoke the discretionary jurisdiction of this court was served August 29, 2001.

## STATEMENT OF THE FACTS

On October 5, 1995, Lawrence Taylor was injured as he was preparing for the deployment of a wheelchair lift affixed to the school bus on which he was employed as an SBA by the Board [R2, 196-201]. The accident occurred away from the bus compound where he reported for work, at the first stop on the route where the lift was used [R196, 316].

The wheelchair lift on the school bus on which Mr. Taylor was employed was affixed to the side of the bus and was used to load and unload wheelchair-bound students on and off the bus [R307]. Two people are involved in the deployment of the lift, the attendant, who is outside the bus to open the lift doors, and the bus driver inside, who operates the control to activate the lift mechanism [R194-195, 306]. On the day of Mr. Taylor's injury, the emergency release pin plate on the mechanism became loose when the rivets on that portion of the mechanism wore off. This caused the lift to fall as soon as the doors were opened [R430, 436].

The Board's repair and maintenance records for this bus reflect the fold plate lock assembly on the lift was welded and replaced on July 4, 1995 [R433; WWP23]. This assembly is a part of the emergency release mechanism [R434]. On September 29, 1995 a Board mechanic made a service call out of the compound because of a complaint that the lift was "bound up" and had to be "reposition(ed)" to operate [R113; TWP8]. This involved a problem with the release pin [R115]. Putting the lift in a bind could have caused the plate (and the rivets) to come loose [R451].

On October 3, 1995, the shop performed an inspection which included securing the lift wires and

lubricating the lift [R447; WWP7]. The mechanic performing the inspection is supposed to check the release pin plate mechanism (fold cam plate) for looseness of pins or bolts [R159] and do whatever it takes to make it function properly [R159]. The paperwork on both the September 29, 1995, and October 3, 1995 service and inspection work does not indicate such an inspection was made, and no one told the shop foreman that one had been made [R451].

The job description for the part time position of SBA requires a high school diploma or equivalent and a general knowledge of exceptional education students and their expected manner and behavior. The attendant must be able to work with exceptional education students in an appropriate manner, studying the exceptional student transportation handbook to update skills and become knowledgeable of all exceptionalities [LTD1]. The job description places the bus attendant under the direct supervision of the school bus driver and the ultimate supervision of the transportation area supervisor. His job goal is:

> To assist in safely loading, securing and unloading students. To assist in maintaining student control in order to allow the school bus driver to concentrate [LTD1].

At the time of this injury, the term of employment for SBAs was nine months, 5.5 hours per day [LTD1].

Jessica Shaffer is one of three area transportation supervisors in the Board's system [R342]. She is responsible for establishing bus routes and the safe transport of the school district's students [JSP31][2]. In 1995, she supervised SBAs [R348]. She reports directly to the Director of Transportation for the Board [R347; JSP31]. Her office is located in the Board's south area bus compound [R348], in a separate building 50 or 100 feet away from the bus maintenance shop [R349].

Shaffer denied having any supervisory control over what goes on in the bus maintenance shop [R349]. Telling the mechanics what to do is the job of Wayne Wardwell, the bus shop foreman [R349, 417]. Shaffer acknowledged that the bus shop foreman would not order her people around on a day-to-day basis [R350].

Wayne Wardwell has been the bus shop foreman for the Board for 15 years [R421]. He acknowledged he has no supervisory control over the bus drivers or SBAs supervised by Shaffer [R420]. Wardwell has a different chain of command than Shaffer, reporting to Charles Stevenson, the Assistant Director of Transportation, while Shaffer reports directly to the Director of Transportation for the Board [R350]. Stevenson acknowledged this chain of command [R387; CSP30], and also acknowledged his lack of control over bus drivers and SBAs [R388]. Stevenson also acknowledged that SBAs in the Board's system do not perform the work of mechanics [R392].

The SBAs undergo initial training for their position consisting of four days involving instruction in first aid, CPR, the different exceptionalities of students, and viewing films on tie downs of wheelchairs using lifts [R358]. Shaffer acknowledged that the attendant's role involves more "interacting with the students" than other positions in the bus compound [R359]. No one else in the school system other than teachers and teachers assistants get the kind of training which SBAs get [R359]. In addition to the initial four days of training, they receive in-service training at the beginning of each school year. This consists of eight hours on subjects as disparate as emergency vehicle evacuation and blood borne pathogen training [R361].

The job description for a "machinist/mechanic" in the Board's repair and maintenance facility is: "To see that all automotive and truck engines and drive trains are maintained in a safe operating manner" [R142-143; MJP1]. As might be expected, the knowledge and skills abilities of this position are purely mechanical.

There is de facto separation between SBAs and the mechanics employed in the bus maintenance shop. Stevenson said that, while no county-wide rule exists, he advises his shop foremen to avoid allowing unauthorized persons in the shop [R389]. Wardwell, the shop foreman stated unequivocally: "There is that shop policy" [R420]. He understands that means that only people working in the shop are supposed to be there [R420]. Wardwell could not think of any reason why a bus attendant would need to be in a shop on business purposes [R421]. Bus Technician (mechanic), Tracy Woodard, remembered seeing "authorized personnel only" signs in the shop [R121]. He never remembered seeing Lawrence Taylor in the shop area.

Robert Jones, the driver on the bus on which Lawrence Taylor was employed was also questioned about this:

> Q. ...Are you aware of any policy of the School Board to the effect that only authorized personnel were allowed in the shop?
>
> A. Absolutely.
>
> Q. So, if you didn't have business there you weren't supposed to be there?
>
> A. That's right.

Q. Can you think of any reason why Casey[1] at any time he worked for the School Board would have had reason to be in the shop area?

A. Not that I know of [R308].

As is implied in the job description [LTD1], Mr. Taylor performs his primary duties on the school bus, away from the south area compound. Apparently, the only time maintenance shop personnel leave the shop is if a bus experiences a problem while away from the shop area, such as the bus on which Lawrence Taylor was employed and injured [R368, 281].

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[1] In the depositions of the School Board personnel, Plaintiff, Lawrence Taylor, is sometimes referred to as "Casey", his nickname.

## SUMMARY OF THE ARGUMENT

The unrelated works exception to the employer's general immunity under the Workers' Compensation law evidences a deliberate preservation by the legislature of the common law rights of an employee in this state injured by the negligence of a fellow worker, when they are jointly employed in furtherance of the employer's business, but assigned primarily to different duties. The clear language of the statute makes this explicit. Additionally, the legislature's studied rejection of language in an earlier form of that amendment that would have extended the employer's immunity to workers on the same job site is compelling evidence that it did not intend that the amendment be narrowly construed in favor of immunity.

The line of cases which adopt the "same project" or "primarily related to the provision of (employer) services" rationale, ignores the plain language of the statutory provision and its legislative history. The correct test is the physical location/business purpose test combined with consideration of the total employment relationship between the injured employee and the tortfeasor. The physical location/business purpose test adopted by the Second DCA is the decision with which the

decision on review is in express and direct conflict.

The DCA followed the Third DCA's superficial and flawed analysis of this question after ignoring a compelling factual record which establishes the "unrelatedness" of the jobs of a mechanic and an SBA who is involved in the transport of handicapped children. This is particularly distressing, since the majority of that factual record comes from the sworn testimony of the Board's own management and employees.

The courts and those who serve them in this state need a reasoned way to evaluate whether the unrelated works exception applies to specific fact situations. The citizens of this state, including Petitioners, deserve to have vindicated the common law rights explicitly reserved to them by the legislative action which became the unrelated works exception.

## **ARGUMENT**

THE DCA'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DCA IN *LOPEZ v. VILCHES*, 734 So.2d 1095 (Fla. 2nd DCA 1999) BECAUSE THE COURT REJECTS THE VERY "BRIGHT LINE", PHYSICAL LOCATION/BUSINESS PURPOSE TEST WHICH *LOPEZ* USED TO DETERMINE "UNRELATED WORKS" ON VIRTUALLY IDENTICAL FACTS.

I. INTRODUCTION

In recent years in the legislature, it has almost become a blood sport to observe what new rights and protections will be stripped from Florida's labor force at the instance of powerful business interests.[3] In 1978, at the beginning of the serious erosion of the legal rights of Florida's working citizens, the legislature passed a provision which extended to negligent fellow employees the same immunities to suit in tort enjoyed by their employer. However, by enacting the unrelated works exception to the general co-employee immunity, the legislature preserved common law rights of Florida's working people in instances where the exception applied.

Unfortunately, in the ensuing two plus decades, some DCAs interpreting this partial preservation of common law rights have construed the provision so restrictively that it amounts to a de facto judicial repeal of the provision. Petitioners seek to have this court construe this provision in a way that effectuates the plain language of the statute and embodies the evident legislative intent which was the foundation for this enactment.

## II. JURISDICTION

This court's discretionary review of the DCA's opinion was sought, and, presumably, granted pursuant to Article V, §3(b)(3), Fla. Const., and Fla. R. Civ. P. 9.030(a)(2)(A)(iv). The DCA's opinion manifestly expressly and directly conflicts with *Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2nd DCA 1999), *Rev. Den.,* 749 So.2d 504 (Fla. 1999). The expressness and directness of the conflict is memorialized in the DCA's opinion where, in deciding to affirm the trial court's grant of summary judgment in favor of respondent, the DCA employed a "but see" signal when citing to *Lopez*. According to *The Blue Book: A Uniform System of Citation* (16th Ed.), this signal is to be used when the cited authority directly states the contrary of a proposition. This constitutes the DCA's acknowledgment that its decision directly and expressly conflicts with *Lopez*.

## III. STANDARD OF REVIEW

This proceeding involves the lower court's entry of summary judgment, determining as a matter of law that petitioners are barred from proceeding with their lawsuit. Since the decision deals with a pure issue of law, the standard of review is *de novo*. *Menendez v. Palms West Condo. Assn., Inc.*, 736 So.2d 58 (Fla. 1st DCA 1999). Additionally, since there is an issue of statutory construction in this case, the *de novo* standard applies to review of questions of that nature. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376 (Fla. 5th DCA 1998).

## IV. FACTUAL CONSIDERATIONS

Since the overriding question in this controversy is whether the work of SBAs and bus mechanics is "related," the factual indicia of "relatedness" or "unrelatedness" must be found by a detailed examination of the employment relationship of the two employees to their joint employer, and to each other. A detailed factual record on these questions was made at the trial level and demonstrates why, on ten different factors affecting the employer/employee relationship, the positions of SBA and mechanic in the Brevard County School System are completely unrelated.

First, the uncontroverted testimony from every Board managerial and rank and file employee who testified was that the Board enforces a policy of separation between SBAs and the Board's mechanics. This means that, during the course of their work day, the possibility that SBAs and mechanics will have any interaction is miniscule. The only time that happens is in the rare instances when a bus malfunctions and a mechanic is dispatched from his "primary" place of employment to see to the problem at the SBA's "primary" place of employment. When employees with different job descriptions and duties are segregated by Board fiat, it is difficult to understand how those positions could be "related" within the contemplation of the statutory language.

The time lapse between the negligent act and the injury is also important to this consideration. The fact that the negligent act could occur in one point in time and the injury causally related to that act at some time later is another indication of "unrelatedness." Equally as important in analyzing this question is the fact that, here, there were different locations between the performance of the negligent act and the situs of the injury which resulted from that act. This

is consistent with the enforced separation of SBAs and mechanics, but is yet another, and strong, indication of the "unrelatedness" of the positions. The fact that the primary work of the two employees is performed in different areas is yet another factual indication of unrelatedness.

Finally, in looking at the traditional indicia of employment, the factual record clearly demonstrates these two individuals had different supervision; different duties; different educational requirements for the performance of their jobs; different training; different job skills; and a different employment status [full-time vs. part-time]. This factual record establishes strong indications of unrelatedness. These factors were ignored by both the trial court and the DCA.

## V. THE STATUTORY SCHEME

### A. The Statute

The statute, construction of which will govern the resolution of this controversy, is §440.11(1), Fla. Stat., which provides, in pertinent part:

> The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liabilities 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 but they are assigned primarily to unrelated works within private or public employment*. . . [emphasis supplied].

B. General Considerations

This exception to the general immunity of an employer is described as "unique" to Florida law. *Turner v. PRC, Inc.*, 732 So.2d 342, 344 (Fla. 1st DCA 1998). Thus, there is no other body of law in any other part of the country which would assist the court in considering the application of this rare statutory provision in the jurisprudence of Workers' Compensation law.

Additionally, since this is a claim against a public employer, somewhat different considerations apply than in the private sector. That is because, under the sovereign immunity statute [§768.28(9)(a), Fla. Stat.] public employees are immunized from personal liability for negligent acts committed within the course and scope of their employment. These distinctions are discussed in this court's opinion in *Holmes County School Board v. Duffell*, 651 So.2d 1176 (Fla. 1995),

which notes that, in these instances, the public employer is not being sued in its capacity as the employer, but pursuant to §768.28(9)(a), Fla. Stat., as a surrogate defendant based on the negligent acts of its employee [*Id.* at 640]. That is the precise situation which prevails in this case.

C. Policy Considerations

Any inquiry as to what the legislature intended in adopting this statute must begin by considering what the provision does and does not do. This is a very limited preservation of an existing tort remedy where an individual is injured as the result of the negligence of one of a small universe of fellow employees. Nothing in the enactment eliminates the *employer's* immunity to claims arising out of the *employer's* active negligence. The very concept of "unrelatedness" embodied in the statute indicates at least two reasons why the legislature felt this enactment was merited.

First, if the employees' work is unrelated, they are not going to be in constant contact with one another. In the present case, contact between the negligent employee and the injured employee was precluded by a Board policy. With reduced contact, the possibility of one employee committing a negligent

act which injures a fellow employee is sharply reduced. Second, since the employees are not in constant contact with each other, in the event one does make a claim against another; the possibilities of tension in the work place because of this fact are concomitantly reduced. This must have been a consideration of the legislature in preserving the tort remedy in this setting.

D. Statutory Construction

In construing the language of this enactment, the crucial words used by the legislature are "primarily," "unrelated," and "works." None of these words are defined in the statute. The term "works" is defined by *Black's Law Dictionary* [7th Ed. 1999] as follows:

> **1.** A mill, factory, or other establishment for manufacturing or other industrial purposes; a manufacturing plant; a factory.
> **2.** Any building or structure on land.

The dictionaries do not contain any definition of the word "unrelated". The word, "related" is defined in this context in both the *Webster's New Twentieth Century Dictionary* [2d Ed. 1983] and in *The Random House College Dictionary* [Rev. Ed. 1982], as "associated; connected". Obviously the addition of the prefix, "un" to this would be the opposite of,

"associated; connected" – not associated, not connected.

The word, "primarily", is defined as: "1. At first; in the first instance; originally. 2. In the first place; *principally*" [emphasis supplied]. *Webster's New Twentieth Century Dictionary* [2d Ed. 1983]. In this case the evidence clearly demonstrates that Lawrence Taylor was not engaged in "works", in the sense that he was employed in the same structure as the Board's mechanics. Likewise, his principal employment was on the school bus, helping exceptional children get to and from their schools. The mechanics' principal employment was confined to the bus compound repair and maintenance facility.

Words of common usage, when used in a statute, should be construed in their plain and ordinary sense. *Pedersen v. Green*, 105 So.2d 1, 4 (Fla. 1958). Unambiguous statutory language must be accorded its plain meaning. *Carson v. Miller*, 370 So.2d 10, 11 (Fla. 1979). One must assume the legislature knows the plain meaning of the words it uses. *Brooks v. Anastasia Mosquito Control Dist.*, 148 So.2d 64, 66 (Fla. 1st DCA 1963). The court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended. *L.B. v. State*, 700 So.2d 370, 372 (Fla. 1997). Thus, under the plain

language of the statute, work proceeding in different plants, factories, buildings or structures of the employer which is not associated or connected with work done by other employees of the employer is "unrelated". This must certainly mean the employment of the mechanics at the Board's maintenance shop "works", is unrelated to that of the attendant performing his principal duties miles away from those "works".

The legislature's use of the term, "works" can also be seen as an intent that the exception to the general rule of immunity should not be as narrowly applied as the DCA applied it in this case and as it has been applied by other courts in other instances. Since this preserves the employee's common law rights, it is entitled to a liberal construction. *Leon County v. Sauls*, 151 Fla. 171, 9 So.2d 461, 464 (1942). Plaintiff should prevail on the plain language of the statute.

Lending more emphasis to the statutory construction espoused by Petitioners is an examination of a predecessor version of the language which ultimately became the unrelated works exception. CS/SB 636 [A21] was considered by the legislature in the 1978 session which ultimately produced the current form of the unrelated works exception. Section 2 of

this predecessor version of the exception reads, in pertinent part:

> . . . provided, however, employees of the same employer may have a cause of action if each is operating in the furtherance of the employer's business *but they are not assigned to the same job site* or are assigned primarily to unrelated works within private or public employment. [emphasis supplied]

The omission of "the same job site" language from the final version of the statute is a strong indication that the legislature did not intend that the unrelated works exception be interpreted in the manner adopted by the DCA and others of its sister courts, where the decisions seem to equate "same job site" with "related works."[4]

This failure ignored this court's decision in *Mayo v. American Agricultural Chemical Co.*, 133 So.2d 885 (Fla. 1931). This case holds that the omission on final enactment of a clause of a bill originally introduced is strong evidence that the legislature did not intend the omitted matter to be effective [*Id.* at 887]. Under *Mayo*, all of the "same job site" analysis in which this DCA and its sister courts have engaged has clearly been improper.

## VI. THE CASE LAW

Only ten cases decided by Florida courts with published opinions rule directly on the proper construction of the unrelated works exception.[5] Two of those decisions strongly support Petitioners' position in this controversy. Four cases were relied on by the DCA in arriving at its ruling in this case. As will be demonstrated, those cases are so factually distinguishable and so poorly analyzed as to provide no authority for the DCA's action herein. The four remaining cases are also factually dissimilar and do not provide much assistance to the resolution of this controversy.

### A. The Cases Which Support Petitioners' Position

As noted above, this court's jurisdiction is predicated upon the conflict between the DCA's opinion and *Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2nd DCA 1999). On its facts, *Lopez* is the closest case to respondents' fact situation. There, four interrelated business entities operating cemeteries and funeral homes were involved. Lopez was employed by one of the funeral homes, which was geographically separated from the location where the defendant employees performed their duties, mechanically maintaining the vehicle Lopez operated. While driving that vehicle, it malfunctioned as a result of negligent maintenance by the defendants, causing injury to Lopez. The court reversed a summary judgment in favor of the defendant

employees and remanded for further proceedings.

Noting that the statutory term was undefined, the court resorted to dictionary definitions in its analysis. To bolster its finding, the court noted that the physical location of the work of plaintiff and defendants: ". . . appears to be separate and their specific purpose, general funeral home duties versus vehicle maintenance appear distinct. [*Id.* at 1097]" Then Judge, now Justice, Quince dissented, reasoning that, since all of the employees had duties related to the van in question, she did not feel the employees were engaged in unrelated works [*Id.* at 1098].

This case has striking similarities to Petitioners' facts. As noted, the plaintiff and defendant employees had separate job descriptions and duties. They worked in different locations. They apparently had very little occasion to interface with each other. As in this case, the negligent act which caused the injury occurred at some indeterminate time before the actual injury and in a different location than the situs of the injury. These are all indicators that the work of Mr. Taylor was in no wise related to the work of the Board mechanics. *Lopez* strongly supports the reversal of the DCA's

decision.

A more recent case which supports Petitioners is *Palm Beach County v. Kelly*, 810 So.2d 560 (Fla. 4th DCA 2002). Kelly was a county employee at the International Airport, working as a maintenance equipment operator (sweepers, mowers, front end loaders). Rostant John was employed as an equipment mechanic for the county's Fleet Management Division, maintaining and operating heavy equipment (tractors, dozers, front end loaders). John was occasionally assigned to make "on the road" repairs, but his main job was to pick up his county truck from a shop near the airport and drive to the county's shell rock pit in Boca Raton.

The automobile accident occurred near the county buildings where both Kelly and John reported to work. Kelly had just finished his work shift and was on his way home in his personal vehicle. John was leaving the location in his county vehicle, acting within the course and scope of his employment. The trial judge determined the work of Kelly and John to be "unrelated" and entered summary judgment in Kelly's favor.

In analyzing the case, the court noted two approaches applied by other courts considering the question: (1) a "case-

by-case approach," and (2) a "bright-line" test based on the physical location where the employees were primarily assigned and the unity of their business purpose [*Id*, at 562]. The court determined that in this case both approaches yielded the same result noting:

> Kelly and John had different job duties and did not work cooperatively as a team but, rather, worked on two entirely different projects. . . *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* [emphasis supplied, *Id.* at 562].

This case lends strong support to the position espoused by Petitioners.

B. The Cases On Which The DCA Relied

The DCA's reliance on *Turner* is completely misplaced. Turner was killed and Creighton was seriously injured in an explosion at PCR's chemical plant. Creighton claimed he was engaged in work unrelated to Turner and thus came outside of Workers' Compensation immunity [*Id.* at 343]. The facts showed:

> . . . both Creighton and Turner were technicians at PCR; . . . Creighton worked in the catalogue section and Turner worked in the research and development section; . . .*technicians in both sections worked cooperatively in preparing compounds; . . .*

> *technicians in a "team effort," worked with the same equipment; and that the type of cylinder that exploded in the fatal accident was used by technicians in both sections — the cylinders were "all over the plant" . . .* [emphasis supplied, *Id.* at 345].

To cap off the "relatedness" of Turner's and Creighton's work, they were jointly handling the instrumentality of the injury and death at the time of the explosion [*Id.* at 343].

Looking at the factors which dictate "unrelatedness" in Petitioners' case and comparing those factors with the facts in *Turner*, demonstrates the inapplicability of citing *Turner* as a precedent for the DCA's action. Both employees were "technicians" assigned to the same project. They worked under a "team effort" concept. The instrumentality of the injury was used by technicians in both sections, and was "all over the plant." To top it off, the negligence which caused the damage occurred at the same point in time and at the same place where both employees were touching the instrumentality of the accident. This makes the DCA's reliance on this case as precedent for its action very questionable.

The DCA also relied on *Dade County School Board v. Laing*, 731 So.2d 19 (Fla. 3rd DCA 1999). Here, a school teacher was injured by a school custodian operating a golf cart on the

school campus where both individuals were employed. Custodians used golf carts to travel across the school grounds [*Id.* at 20]. The trial court had denied the Board's motion for summary judgment predicated on Workers' Compensation immunity.

The Third DCA's analysis focused ". . . upon the nature of the project involved, as opposed to the specific work skills of individual employees [*Id.* at 20]." From that, the DCA determined that the custodian and the teacher 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* [emphasis supplied, *Id.* at 20]." The court concluded that, because both men were involved in "activities primarily related to the provision of education related services, the "unrelated works" exception . . . does not apply [*Id.* at 20]."

As seen in the foregoing discussion, Petitioners believe that, in order to conduct a reasoned legal analysis of the "relatedness" question, one must perform an in-depth analysis of all of the facts bearing on the employment relationship of the two employees. The *Laing* Opinion demonstrated a paucity of the kind of information necessary to

afford a basis for applying the statutory language.

For instance, the Opinion (and presumably the record) is silent as to where the two employees perform their *principal* duties. One would assume teachers don't perform those duties outside the classroom (where the accident happened), and that custodians are not primarily employed in the classroom. We are unable to tell the chain of command for the two employees. We have no information as to the employment status (full or part-time). Importantly, there is no information as to the hours worked by each employee in relation to the time the accident occurred. The court acknowledged that the employees had "different duties [*Id.* at 20]," but minimized this important point in favor of the ". . . activities primarily related to provision of education related services . . . [*Id.* at 20], " analysis. Thus, this was a quantum leap to a universal legal principle from the slender reed of an inadequate factual picture and a cursory analysis of the few facts presented.

The Third DCA's superficial analysis, if taken to its logical limit, would be the death knell for the unrelated works exception. The use of the term, ". . . activities primarily related to the provision of education related services . . ." is

so open ended and indefinite, it could apply to a state trooper in Key West injuring a toll taker in Pensacola. They are, after all, engaged in activities "primarily related to" provision of government related services. Petitioners suggest that *Laing* has little if any value as precedent. The DCA in its decision in this case did not engage in any critical analysis.

The *Laing* formula also ignores clear statutory language that indicates the infirmity of this analysis. Within the confines of the exception, the legislature explicitly provided that, simply being involved ". . . in activities primarily related to provision of education related services . . .," was not sufficient to avoid the operation of the exception. The legislature accomplished this by allowing the exception to apply to, ". . .employees of the same employer when each is operating *in furtherance of the employer's business*. . . [emphasis supplied, §440.11(1)], the legislature anticipated the *Laing* analysis and rejected it. "Operating in furtherance of the employer's business" is just saying, "activities primarily related to provision of education related services," in another way. The phrases mean the same thing. By twisting an explicit statutory mandate into a court-made denial of common law rights

explicitly preserved by the legislature, the *Laing* court perverted the legislative aims. Unfortunately, the DCA made the same mistakes by adopting the flawed reasoning of *Laing*.

The *Laing* Opinion is also silent as to the impact of the legislative history regarding the deletion of the "same job site" language from the final version of the exception. In *Laing*, the "same job site" was the school campus. Apparently, this history was not presented to the *Laing* court. However, this is yet another reason to question the vitality of *Laing* as precedent.

Interestingly, the DCA also relied on *Vause v. Bay Medical Center*, 687 So.2d 258 (Fla. 1st DCA 1997). There, a nurse who worked primarily in the medical center's obstetrics department but also worked on a regular part-time basis in the center's hyperbaric chamber died from decompression sickness because the operator of the chamber's controls failed to follow established protocols. Procedurally, this case bears no relation to Petitioners' case, since it came to the DCA after dismissal of the complaint with prejudice [*Id.* at 259]. Other than the allegations of the complaint, there was no factual record. Based solely on the complaint, the court determined

that, contrary to plaintiff's allegations, her primary work assignment was, ". . . the provision of health care to a patient" noting that the complaint clearly alleges nurses are routinely in the chamber [*Id.* at 263]. This was found to be sufficient to uphold the dismissal of the complaint.

The *Vause* majority also ignored the legislative allowance for two employees operating in furtherance of the employer's business to defeat the claim, because all employees were engaged in "provision of health care." This fails to withstand close scrutiny. Interestingly, Judge Minor dissented from his colleague's decision based on the unrelated works issue. In a scholarly dissertation, Judge Minor felt the thrust of the 1978 amendment was:

> . . . if each (employee) was assigned work which was primarily unrelated to the others employment, the injured worker's common-law action remained unaffected by the legislative grant of immunity. On the other hand, if the *primarily assigned employment activities* of both workers were *substantially similar*, the immunity provision applied . . . [emphasis supplied; *Id.* at 267].

Judge Minor then observed:

> . . . I believe the legislative expression is clear; Workers' Compensation immunity is not afforded to a worker who negligently

> injures a co-worker when the latter is carrying out an assignment which is unrelated to the duties which the injured worker is/was primarily *assigned* (emphasis added). Moreover, I believe that by its use of the words "primarily assigned," the legislature must have contemplated the possibility if not the probability, that an employee might be called upon to perform more than one task within the same employment and that if such an employee is injured by a co-worker's negligence while performing a secondary assignment, the injured worker has the right to bring an action at law for any resulting damages. . . [*Id.* at 267-268].

Judge Minor found the majority's reasoning in support of its decision to be "completely at odds with the purpose behind the creation of the unrelated works exception . . . [*Id.* at 268]." He felt the majority overlooked the explicit legislative recognition that employees,

> . . . can be carrying out their work assignments 'in the furtherance of their employer's business,' *and yet a cause of action can nonetheless be maintained by the injured worker, if his assigned work activity is primarily unrelated to that of the employee responsible for the injury* [emphasis supplied, *Id.* at 268].

Petitioners submit that Judge Minor's analysis is the correct analysis of this preservation of a common-law right to Florida's working people. This is a complete repudiation of the "same

project" analysis adopted by *Laing*.

Finally, the DCA relied on *Abraham v. Dzafic*, 666 So.2d 232 (Fla. 2nd DCA 1995), to bolster its opinion in this case. There, two employees of a mutual employer, one a painter and the other a lighting technician, were each driving an employer's van to a hotel provided by the employer from the job site where both worked [*Id.* at 233]. The DCA determined the unrelated works exception did not cover this fact situation, even though the two employees had different job descriptions.

The Second DCA's decision failed to address the explicit statutory language regarding, ". . . in furtherance of the employer's business . . .," in which both of these individuals were clearly involved. Also, as with every other district that has considered the question, no inquiry was made as to the legislative history. Thus, no discussion was had concerning the predecessor version of the amendment which included the "same job site" requirement as an indication that immunity would be extended, where the final version had deleted that.

C. <u>Other Cases Involving This Question</u>

*Johnson v. Comet Steel Erection, Inc.*, 435 So.2d 908

(Fla. 3rd DCA 1983), is the first reported decision involving the application of the unrelated works exception. There, the 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 site. The injured employee was a common laborer, while the tort-feasor was a welder. Recognizing that no direct precedent existed in determining the unrelated work question, the Third District relied on cases discussing the general "broad scope of immunity" of §440.11, Fla. Stat., most of which predated the 1978 amendment to the statute. Additionally, this court, along with every other court that has considered this question, failed, or refused to consider the implications of the proposed legislation using "same job site" language which was deleted in the final version of the enactment.

*Lake v. Ramsay*, 566 So.2d 845 (Fla. 4th DCA 1990), is only tangentially relevant to this discussion. The Court reversed a summary judgment because of the existence of genuine issues of fact on the "related work" question [*Id.* at 848]. It was not clear from the opinion whether the two employees were working on the same project, or not. This case is of very

little use in the analysis of the issue before the court.

Respondent has indicated reliance on the decision in, *School Board of Broward County v. Victorin*, 767 So.2d 551 (Fla. 4th DCA 2000), but the case is factually dissimilar from the case on review. In *Victorin*, two school bus drivers for the Board were involved in a vehicular accident while operating their school buses and the injured driver sued the Board as surrogate for the tortfeasor. The court determined that whether the *Lopez*, bright line physical location/business purpose test, or *Laing*'s case-by-case approach was used, it was clear that both school bus drivers were assigned primarily to related works. *Victorin* echoed *Lopez*'s frustration concerning the lack of a legislative definition of the term.

Explaining the distinction between the facts in its case and in *Lopez*, the court made an observation with crucial bearing on the present case:

> . . . Because the *physical location* of Lopez and the defendant employees' work was separate and their *specific purpose* (general funeral home duties versus vehicle maintenance) was distinct, it held that Lopez's complaint was not barred by the co-employee provisions of Workers' Compensation immunity [citation omitted, *Id.* at 554].

That same separation of physical location and "specific purpose"

also mandates a ruling in favor of the Taylors.

The final case is *Sanchez v. Dade County School Board*, 784 So.2d 1172 (Fla. 3rd DCA 2001). Caridad Sanchez was a middle school teacher who was brutally attacked by a trespasser in the teachers' parking lot. Her claim against the Board alleging negligence on the school's security personnel, was rejected by the Third DCA in an opinion which gave almost no facts and engaged in an analysis shallower, if possible, than the decision in *Laing*. Since both employees were engaged in "activities primarily related to the provision of education related services [*Id.* at 1173]," the DCA felt that was all that was required to void the unrelated works exception. This case can have no precedential value.[6] The court missed another opportunity to address the explicit statutory language to reverse the mistake made in *Laing*. Also, the court failed to consider the implication of the legislative refusal to incorporate the "same job site" language in the final version of the exception to defeat unrelatedness.

## VII. ANALYSIS OF THE DCA OPINION IN *TAYLOR*

In this case, the court gives an abbreviated version of the facts, omitting the crucial evidence which demonstrates the "unrelatedness" of the work of SBAs and mechanics. Adding insult to injury, the panel cites an "undisputed" fact that

completely skews the overall picture on this issue. Finally, the court adopts the *Turner/Laing* "same project" analysis without any consideration or discussion of the facts and legal considerations, which make that analysis faulty.

The court does not even discuss the factors that make this case more closely aligned to *Lopez* than *Turner* or *Laing*. Here, the Board enforced a policy forbidding contact between SBAs and mechanics in the work place. The negligent act occurred at one point in time and the injury proximately caused by that act at another point in time. The negligent act occurred at one geographical location; the injury proximately caused by that act at an entirely different physical location. The job descriptions, actual duties, places of work, supervision, and terms of work, were all completely different. The DCA never addressed these indicia of "unrelatedness."

Compounding the problem, the DCA noted:

> It 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 part of their job, were responsible for the lift's maintenance and repair [emphasis supplied, *Id.* at 1157-58].

By saying Taylor and the mechanics worked "out of" the same transportation facility, the court's implication is they worked "in" the same transportation facility. That blurs one of the major distinctions in this case between every other case the DCA relied on in arriving at its ruling. The evidence here was undisputed that Taylor reported to a building in the school bus compound that was near the building where the mechanics reported and worked in isolation from other Board employees. This is the same situation which prevailed in *Victorin*. Taylor's *primary duties* were performed miles away from the situs of the mechanics' work, as he went about his duties of delivering handicapped children to and from school. Thus, the mischaracterization that SBAs and mechanics work "out of the same transportation facility" cannot be used as a basis for denying Petitioners' the remedy which they seek in this case. Of course, the assertion is also factually inaccurate, since it was Taylor alone who worked primarily "out of" and the mechanics who worked primarily "in" the facility.

Because of distortion of the facts in the case, the DCA's legal analysis is also faulty. In *Turner*, *Laing*, and *Vause*, the involved employees all worked in proximity to each other. In

each case, the negligent act and the injury which it proximately caused occurred instantaneously. Those factors are missing in Petitioners' case.

Finally, the DCA did not even comment in its original Opinion or in the Order Denying Rehearing on the circumstance of a predecessor version of the unrelated works exception which clearly contemplated extending immunity to fellow employees "assigned to the same job site" [CS/SB 636; A21]. The deletion of the "same job site" test from the final version of the unrelated works exception is a clear indication that the legislature, familiar with the principles of labor-management relations did not intend that the inquiry as to "unrelatedness" end if the employees worked at the "same job site." The existence of this legislative history calls into question the decisions in *Laing*, *Vause*, *Abraham*, *Johnson* and *Lake*, since the primary basis in all of those decisions boiled down to the fact that the involved employees worked at the same "job site." As explicated above, the evidence here clearly establishes that petitioner did not work at the same job site as the mechanics of the Board.

If the legislature made a considered decision to allow employees on the same job site to prove the "unrelatedness" of their work, then this legislative history also calls into question the "same project" analysis employed by *Laing*, *Abraham*, and *Sanchez*. The "same project" analysis is so indefinite as to

afford no guidance to the trial courts considering questions under the unrelated works exception. The analysis also appears to encourage a superficial approach to the question, rather than the in-depth analysis which the legislature obviously intended. The factual and legal deficiencies in the DCA's analysis of this detailed, factual record, if approved by this court, would be the last nail in the coffin of the unrelated works exception.

## CONCLUSION

The factual record in Petitioners' claim clearly establishes the unrelatedness of the work. Petitioners' legal analysis incorporates all the statutory language and legislative history. Petitioners request that this court reverse the decision of the DCA; determine as a matter of law based on uncontroverted material facts that the unrelated works exception allows Petitioners' action; and, remand this case for further proceedings at the trial level.

Equally as important, Petitioners request that this court establish a workable standard to guide the bench and bar in this state in the consideration of these complicated questions.

Respectfully submitted,

___________________________________

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to: **MICHAEL H. BOWLING**, Esquire, Bell, Leeper & Roper, P.A., Post Office Box 3669, Orlando, Florida 32801, this ____ day of May, 2002.

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**CERTIFICATE OF TYPE FACE COMPLIANCE**

Petitioners file this, their certificate that the size and style of type used in this brief is: Courier New 12-point, a font that is not proportionately spaced.

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**APPENDIX**

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2. Order Denying Plaintiffs' Motion for Summary Judgment entered February 25, 2000 A4

3. Order Granting Defendant's Cross-Motion for Summary Judgment, entered March 3, 2000 A8

4. Portion of Amicus Curiae Brief of the Academy of Florida Trial Lawyers in support of respondent, filed in *Wilson v. Gerth*, Case No. SC 00-2390 A10

5. Legislative Bill CS/SB 636 A21

[1]. The Appeals Clerk for the Brevard County Circuit Court has assured this writer that the exhibits are attached to the depositions transmitted to the DCA as part of the record.

[2]. Plaintiffs' exhibit 31 to the Shaffer deposition was the current job description when the deposition was taken. Shaffer assumed an earlier job description would have noted her supervision of SBAs in 1995 [R348].

[3]. See Amicus Curiae Brief of the Academy of Florida Trial Lawyers in Support of Respondent, p.p. 9-18, filed in *Wilson v. Gerth*, Case No. SC 00-2390. [A10]

[4]. The DCA was given notice of this language in Appellants' Notice of Supplemental Authority served July 18, 2000. This was iterated in Appellant's Motion for Rehearing and/or Alternative Motion for Certification served July 26, 2001, and was not commented on by the DCA in its Opinion and on rehearing.

[5]. For example, *Holmes County School Board*, above, deals with the interplay of Chapters 440 and 768, Fla. Stat.; *Dept.*

*of Corrections v. Koch*, 582 So.2d 5 (Fla. 1st DCA 1991) held the unrelated works exception was not abolished by the sovereign immunity statute.

[6]. This court has accepted review of *Sanchez*, Case No. SC 01-1346.