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

PETITIONERS' REPLY 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

[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.

made. Unless otherwise noted, all references in Chapter 440, Fla. Stat., shall be to the 1995 edition of the statutes.

References in this Brief to Petitioners' Initial Brief on the Merits will be by the symbol "PIM," followed by the page cited to. References to Respondent's Answer Brief on the Merits will be by the symbol "RAM," followed by the page cited to. References to Amicus Curiae, the Florida Defense Lawyers Association, will be to the "FDLA." Reference to that organization's Brief will be by the symbol, "RAC," followed by the page cited to.

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.

A. INTRODUCTION

Petitioners iterate and adopt the argument and citation to authority in their Initial Brief on the Merits. Neither the Brief of the Respondent Board nor that of its Amicus demonstrates good cause why the DCA's Opinion should be affirmed.

B. DISAGREEMENT WITH BOARD'S STATEMENT OF THE FACTS

The Board's implication that, since the repair shop's routine was to inspect and repair damaged parts, the worn out rivets on the pin plate would have been repaired [RAM 2]. This invites a questionable inference, since it ignores the testimony there was no evidence in accordance with the Board's procedures such an inspection had been performed [PIM 4, R451]. Additionally, the Board is silent concerning the illogic of the inference which it requests us to draw. If the inspection was performed, the worn rivets would have been discovered, based on

descriptions of how worn they were. The only inferences to be drawn were: (1) they would have been replaced, in which event, this accident could not have occurred; or (2) they were ignored, which aggravates the negligence.

The Board's assertion there was no enforcement of the policy of separation of "bus personnel" and mechanics in the shop is misleading [RAM 4]. The testimony was that bus drivers had a legitimate reason to be in the shop reporting bus malfunctions, but there was no reason for SBAs to be there [R 520-21]. As Mr. Taylor observed, reporting malfunctions ". . . wasn't my job [R 236]."[2]

C. THE "BROAD IMMUNITY" ARGUMENT

The Board and its Amicus both rely on dicta from *Vause v. Bay Medical Center*, 687 So.2d 258 (Fla. 1st DCA 1997) [RAM 8] and *Johnson v. Comet Steel Erection, Inc.*, 435 So.2d 908 (Fla. 3rd DCA 1983) [RAC 4] for the proposition the immunity conferred on fellow employees is "broad" and must be construed strictly in favor of immunity in this fact setting. This puts the "cart" of Workers' Compensation immunity before the "horse" of common law and constitutional rights which the unrelated works exception preserves. This ignores the history of the unrelated works exception amendment.

The original Workers' Compensation legislation supplanted the constitutional and common law

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[2] When the Board thinks it benefits from arguing Board policy where there is no direct evidence, it does, as with the inspections. When the Board suffers from application of Board policy separating mechanics and SBAs, it ignores the policy.

rights of this state's working people to have a tort remedy[3] In the original enactment, co-employees retained their common law rights to sue negligent co-employees, of whatever description. The unrelated works exception passed in 1978 defined classes of co-employees to which immunity applied and specifically *excluded* classes of employees including those engaged in unrelated works from the operation of the immunity provision.

Thus, employees engaged in unrelated works have never come within the purview of the statute, from its original enactment to the present time. Employees in this category have never had their common law right to a tort remedy and their constitutional right to access to the courts[4] impaired by statute. The argument of the Board and the FDLA suggests that, in weighing the application of the unrelated works exception, the immunity provision of §440.11 should extend *beyond* the confines of the statute, to a class of employees which has never been covered by that immunity. This suggestion ignores almost seven decades of history and misapplies the authority cited. Employees in this class are entitled to the liberal construction of the unrelated works exception mandated by this court in *Leon County v. Sauls*, 151 Fla. 171, 9 So.2d 461 (1942) [PIM 21].

D. THE "SAME JOB LOCATION" ARGUMENT

In spite of uncontroverted evidence, the Board insists, as did the DCA, Mr. Taylor and the mechanics worked at the "same job location" [RAM 9]. The Board never explains how an SBA working on a bus miles away from the shop where the mechanics are primarily employed can be working at the

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[3] See, Initial Brief on the Merits, p. 12, f.n. 4; and Appendix, p. 10.
[4] Art. I, §§21, 22, Fla. Const.

"same job location." While it is true SBA's and mechanics report to work in separate buildings within the bus compound, none of the primary duties of the two positions are performed within proximity to each other. To suggest otherwise is to invite this court to ignore reality.

As seen in *Palm Beach County v. Kelly*, 810 So.2d 560 (Fla. 4th DCA 2002) [PAM 23][5] the fact co-employees report to work at the same location does not defeat an unrelated works claim. The Board attempted to distinguish *Kelly* on a "same project" analysis [RAM 15-17]. The Board was silent as to the implications of two employees reporting to the same location, but working in separate venues.

In its attempt to bolster its argument that Mr. Taylor and the mechanics worked at the "same job location" the Board states:

> . . . Taylor in effect, is asserting that this court should conclude that his primary work location was the streets and roads of South Brevard County, and therefore not the same primary work location as the . . . mechanic [RAM 21].

This argument misstates Petitioners' position to the extent that the Board maintains Mr. Taylor's "primary work location" was the "streets and roads." His primary work location was the bus to which he was assigned -- wherever that bus happened to be. The

[5] On the last line of page 38 of the Initial Brief on the Merits, the writer inadvertently stated, "this is the same situation which prevailed in *Victorin*. The sentence should read: "this is the same situation which prevailed in *Kelly*."

Board denotes its spin on Petitioners' argument, to be "inherently illogical" [RAM 21]. Petitioners believe the Board is "reaching" with this argument.

The Board uses two examples to demonstrate the "irrational results" which accepting Petitioners' analytical model would cause. First, the Board posits Mr. Taylor being "run over" by a mechanic driving his bus out of the shop. The Board is correct that, under this analysis, Mr. Taylor would come within the unrelated works exception. Since his primary work location is away from the Bus Compound, his injury at that place by an employee whose primary work is unrelated to his, this situs of the injury is not controlling. This is a similar fact scenario to *Kelly* and should achieve the same result.

The Board then posits that Mr. Taylor is run over by the director of food services while on his route and says it is "illogical" he would be deemed to be working at his primary job location {RAM 21]. Rather plaintively, the Board insists that:

> An employee must have a primary work location that *doesn't move or change based on the employee's daily activities* [emphasis supplied, RAM 21-22].

Here, the Board is establishing a new test to the viability of the unrelated works exception. The Board seems to be suggesting that the exception could not apply to any traveling employees, if injured by a co-employee working "out of" the same "primary work

location" as the one artificially assigned to the injured employee. This seems to Petitioners to be the illogical position.

The problem with the Board's analysis is that, in focusing on "work location," the Board ignores the express language of the statute. The statute requires that employees be "primarily *assigned"* to unrelated works for the exception to apply. Thus, the focus is on the *duties* of the employees, rather than where they are geographically assigned.[6]

The undisputed fact is that SBA's and mechanic's "primary" work assignments were geographically separated. That fact doesn't end the analytical process, but it is a factor in favor of Mr. Taylor being covered by the exception.

E. THE "TWO POSITIONS" ARGUMENT

The Board maintains that Petitioners' are engaging in semantic schizophrenia by arguing for the "Bright Line" test adopted in *Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2nd DCA 1999), while maintaining that:

> . . . the *Lopez* decision, given its substantial reliance on the physical location of the co-employees work site as a factor in the . . . analysis is also incorrect. Taylor therefore appears to be contending that neither the "same project" nor "Bright Line" analysis should be employed . . . [RAM 18].

[6] This would be particularly true under the Board's "informal" definition of "works" as, ". . . of, relating to, designed for, or engaged in work" (RAM 24].

This is a flat mischaracterization of the position the Taylors have taken in their Petition.[7]

F. THE "UNITY OF BUSINESS PURPOSE" ARGUMENT

The Board argues that SBAs and mechanics have a similar "unity of business purpose" to that memorialized in *Dade County School Board v. Laing*, 731 So.2d 19 (Fla. 3rd DCA 1999) [RAM 19] ("providing education related services," *Id.* at 20). Here the Board characterizes the "unity" of the business purpose as, ". . .the provision of bus transportation to South area students [RAM 15]." Should this court accept that superficial analysis, Petitioners' counsel can envision no fact setting where the "unity of business purpose" analysis would not defeat the claim.[8] Actually, this analysis has no basis in the plain language of the statute. To the contrary, the statute actually, *requires* that the co-employees have a unity of business purpose as a *precondition* for qualifying for exemption from the Workers' Compensation statute. The involved co-employees must be ". . .operating in furtherance of the employer's business. . . [§440.11(1), Fla. Stat.; PAM 30]." What is being engaged in, ". . .transportation by bus of South area school Board students. . ." [RAM 19], but "operating in furtherance of the

[7] "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 [PIM 10]."

[8] Or as Judge Minor observed in his dissent in *Vause*: ". . . Under (this) construction of the statute . . . it is just this side of impossible for me to conceive of any situation in which the unrelated works exception . . . could ever apply." [687 So.2d at 269]

employer's business"? Thus the Board's analysis, which parrots the *Laing* and *Vause* analyses, is clearly improper under the express wording of the statute.

This argument is a red herring, since the law subsumes the two fellow employees must necessarily be engaged in a common objective. Once this is understood, the true analysis must focus on the *Lopez* criteria supplemented by an in-depth analysis of the co-employees' employment relationship to their common employer and to each other. That is the only way to effectuate legislative intent.

G. THE BOARD IS ESTOPPED FROM ARGUING SOMETHING ON APPEAL NOT RAISED AT THE TRIAL LEVEL

As its final response to Petitioners' arguments, the Board observes:

> . . . though the School Board believes that the trial court's decision granting final summary judgment on the basis of Workers' Compensation immunity was correct, if this court disagrees, *a jury question exists as to whether Taylor and the allegedly negligent maintenance employees were involved in unrelated works* [emphasis supplied, RAM 25].

Thus, the Board takes a position before this court which was never taken at the trial level. There, the Board filed a "Cross-Motion for Partial Summary Judgement on the Question of Workers' Compensation Immunity," in which it asserted that, ". . .there is no genuine issue as to *any material fact*. . . [emphasis supplied, R 592]."

The only alternative argument made before the trial court was that there was a jury question whether the school bus driver

was negligent [R 604].[9] No where does the Board even suggest at the trial level the material facts were in dispute (other than as to the bus driver's "negligence," which was not at issue before the court).

The doctrine of estoppel against inconsistent positions provides, when one takes a position in a legal proceeding, he cannot thereafter assume a contrary position. This is especially true if the opposing party is prejudiced. *Dubois v. Osborne*, 745 So.2d 479 (Fla. 1st DCA 1999). When a party does not raise an issue before the trial court, it is not properly before the appellate court. *Lee v. City of Jacksonville*, 793 So.2d 62 (Fla. 1st DCA 2001). Here, the Board is attempting to hedge its bet in case it fails on the main argument. Since the Board failed to provide the trial court the opportunity to rule on this argument, it may not raise it for the first time in the appellate proceedings.

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[9] In a footnote espousing this theory, the Board argues the driver was negligent in failing to test the lift before leaving the bus compound, per Board rules [RAM 25]. First, the "issue" is irrelevant to this court's determination whether Mr. Taylor and the mechanics were engaged in unrelated works. Second, the logic does not withstand close scrutiny. If the mechanic had performed the test before leaving the compound, Mr. Taylor would have been struck there by the lift when he opened the doors for the test, rather than at the first stop, where the accident happened. The Board does not explain how the driver is "negligent" for failing to anticipate the negligence of the mechanics. The sole proximate cause of Mr. Taylor's injury was their negligence. Without the test, the injury just occurred later than it would have had the test been done. That "negligent" failure to perform the test at the bus compound was not the causative factor in Mr. Taylor's injury.

CONCLUSION

Nothing in the Briefs of Respondent or its Amicus is persuasive on the issue it advocates. Petitioners maintain their 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.

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 this _____ day of June, 2002, to: **MICHAEL H. BOWLING**, **ESQUIRE**, Bell, Leeper & Roper, P.A., Post Office Box 3669, Orlando, Florida 32801; **KELLY B. GELB, ESQUIRE**, 700 S.E. Third Ave., Suite 100, Ft. Lauderdale, FL 33316; and **TRACY RAFFLES GUNN, ESQUIRE**, P.O. Box 1438, Tampa, FL 33601.

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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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