IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2349

JULIO ARAVENA, Husband
and Personal Representative of the Estate
of GREGORIA VEGA, Deceased,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW FROM
A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

LT. CASE NO. 3D03-2482

PETITIONER'S INITIAL BRIEF ON THE MERITS

MARTIN E. LEACH of
Feiler, Leach & McCarron, P.L.
901
Ponce de Leon Blvd.
Penthouse Suite
Coral Gables, Florida 33134

Tel: (305) 441-8818
Fax: (305) 441-8081

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INTRODUCTION

This Brief on the Merits is filed on behalf of JULIO ARAVENA, Husband and Personal Representative of the Estate of GREGORIA VEGA, Deceased, ("Ms. Vega" or "Petitioner"), the Plaintiff in the trial court, Appellee in the Third District Court of Appeal, and Petitioner in this Court, in whose favor a final judgment was entered by the Honorable Leslie Rothenberg after a jury verdict against the Defendant MIAMI-DADE COUNTY ("the County" or "Respondent"). On appeal, the County raised only one issue, claiming the workers' compensation immunity found in §440.11(1), Fla.Stat. (2001) applied. In an opinion by the Honorable Linda Wells, the Third District agreed with the County and reversed the final judgment with directions to enter a final judgment in the County's favor.

STATEMENT OF THE CASE

Petitioner filed a wrongful death suit against the County. (R. 1-5). The suit alleged that the accident that killed Ms. Vega was caused by the negligence of the County's traffic signal repair personnel, who failed to repair a malfunctioning traffic light at the intersection where the accident occurred. (R. 2). As relevant to this appeal, the County defended on the grounds of workers' compensation immunity. Based upon §440.11, Florida Statutes (2001), the County raised as an

affirmative defense in its Amended Answer that Petitioner's claim was barred because the "unrelated works" exception did not apply. (R. 228).

The County moved for summary judgment on this basis, which was denied. (R. 270-71). At the close of Petitioner's case, the County moved for directed verdict on this basis, (T. 165-67), which was also denied. (T. 167). After an adverse verdict, the County renewed the argument by filing a motion for judgment notwithstanding the verdict. (R. 339-42). The trial court again rejected the argument, finding that the County introduced no evidence in support of its defense and because it was clear on the record that the County's traffic signal repair personnel performed different functions for the County than Ms. Vega, a part-time crossing guard at an elementary school. (R. 342). Consequently, the trial court found that the "unrelated works" exception to worker's compensation immunity applied. (R. 342).

The County timely appealed to the Third District Court of Appeal. (R. 343). In its November 10, 2004, opinion, challenged here, the Third District Court of Appeal disagreed with the trial court's finding that the employees were "assigned primarily to unrelated works" and reversed the final judgment entered in favor of Petitioner. *Miami-Dade County v. Aravena*, 886 So.2d 303 (Fla. 3d DCA 2004). In the seminal passage from its opinion, the Third District reasoned:

> In the instant case, it cannot be said that these co-employees worked on entirely different projects. Nor can it be clearly demonstrated that the work of the County's signal repair personnel, whose job was to regulate vehicular and pedestrian traffic, was unrelated to the work of the school crossing guard, whose job also was to regulate vehicular and pedestrian traffic at the same intersection. To hold otherwise would contravene the overall legislative intent of the workers' compensation law, which "was meant to systematically resolve nearly every workplace injury case on behalf of both the employee and the employer." *Taylor*, 29 Fla. L. Weekly at S422.

Aravena, *supra,* 886 So.2d at 305.

Petitioner timely sought review with this Court, which accepted jurisdiction with oral argument by order dated March 2, 2005.

STATEMENT OF THE FACTS

As the County correctly states in its Jurisdictional Brief, "[t]he parties essentially agree on the facts as described by the Third District Court of Appeal." (Jurisdictional Brief of Respondent, p. 1).

A. The Accident. On October 24, 2001, Ms. Vega was run over and killed

when two vehicles collided in the intersection of Southwest 16th Street and Southwest 62nd Avenue in Miami-Dade County while she was working nearby as a school crossing guard. (T. 142-43). At the time of the accident, the traffic light was not working. The jury found that the County was negligent because of the inaction of the employees of the Department of Public Works employees of the County in failing to repair the traffic light in a timely manner. The County has acknowledged its negligence in this regard by failing to appeal that finding.

B. The job responsibilities of the parties. While all of the employees involved in this case worked for Miami-Dade County, it is undisputed that Ms. Vega worked for a different department of the County than the co-employees against whom she alleged negligence.

Ms. Vega. At the time of the accident, Ms. Vega was working for the County in the Police Department as a part-time crossing guard at Sylvania Heights Elementary School, which is located at 1501 S.W. 62nd Avenue. (T. 44; 124; 146). She had been employed there for four years. (T. 124). She worked in the morning from 7:00 a.m. until 9:30 a.m. and in the afternoon from approximately 1:00 p.m. until 3:00 p.m. (T. 124-25). As a crossing guard, her job was to help children to cross the street. (T. 147).

Department of Public Works employees. At the time of the accident, the

Miami-Dade County Department of Public Works was responsible for the installation, regulation and repair of all traffic lights in Miami-Dade County. (T. 168-69). The Department was divided into various sections. Mr. Robert Williams was the head of the Traffic Control Section, which was directly responsible for, and had exclusive control over, all traffic lights in Miami-Dade County. (T. 30). The address of the Traffic Control Section, which employed approximately 11 or 12 people, was 7100 Northwest 36th Street. (T. 30, 33). Reports of malfunctioning traffic lights were directed to the Traffic Control Section so that they could be entered into the computer system. (T. 31). Upon being entered into the system, the information was forwarded to another Section of the Public Works Department, the Maintenance Section, which was responsible for assigning trouble technicians to diagnose and repair malfunctioning traffic lights. (T. 32). The address of the Maintenance Section was 3655 Southwest 25th Terrace. (T. 55). The Maintenance Section was headed by Mr. Hugo Fuentes. (T. 31-32). Two of the trouble technicians at the time of the accident were Mr. Richard Pastrano and Mr. Julio Sanabria. (T. 56).

STANDARD OF REVIEW

Review of the judicial interpretation of a statute is subject to *de novo* review. *See Operation Rescue v. Women's Health Center, Inc.,* 626 So.2d 664, 670

(Fla.1993), *aff'd in part, rev'd in part on other grounds,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). To the extent that any factual disputes are believed to exist, they must be viewed in the light most favorable to Petitioner, the prevailing party in the trial court in this appeal from the denial of a motion for judgment notwithstanding the verdict. *See Irven v. Dep't of Health and Rehabilitative Services*, 790 So.2d 403 (Fla. 2001).

ISSUE ON APPEAL

WHETHER MS. VEGA, AN ELEMENTARY SCHOOL CROSSING GUARD WITH THE POLICE DEPARTMENT, WAS "ASSIGNED PRIMARILY TO UNRELATED WORKS" WHEN COMPARED TO PUBLIC WORKS DEPARTMENT EMPLOYEES RESPONSIBLE FOR REPAIRING TRAFFIC LIGHTS, SUCH THAT WORKER'S COMPENSATION IMMUNITY DID NOT BAR THIS CLAIM FOR NEGLIGENCE

SUMMARY OF ARGUMENT

The exception to workers' compensation immunity for employees "assigned primarily to unrelated works" clearly applies to this case. In conducting the required analysis, the first determination that must be made is whether the statutory language is (A) plain and definite, or (B) ambiguous.

A. If the statute is found to have a plain and definite meaning, then the Court's function is to apply it as written without the aid of rules of construction. In

applying the statute, focusing on the precise words utilized is of critical importance.

The early cases relating to the exception did not focus on the *words* used by the Legislature and, consequently, did not formulate a principled foundation for analysis of the statute. Subsequent cases drew analogies to the earlier cases, and engaged in an outcome determinative analysis of the facts, instead of focusing on the words of the statute. Out of this *ad hoc* process, a number of formulations were derived that were randomly formulated and not grounded in the words of the statute they were construing.

Focusing on the words of the statute, the critical question is whether the word "works" has a plain and definite meaning. According to the dictionary, "works" refers to a building or structure. Because it is undisputed that Ms. Vega was not assigned to the same building or structure as the employees responsible for repairing traffic lights and because her assigned building, a school, was primarily unrelated to theirs, the Department of Public Works, the exception applies as a matter of law under a plain-meaning analysis of the statute.

B. If the statute is found to be ambiguous, the analysis is different, but the result is the same. Ambiguity exists where reasonable people can find different meanings in the same language. In statutory construction, when an ambiguous

statute needs to be construed, the courts should follow a familiar path in order to determine the statute's legislative purpose. Specifically, the court should first identify the common law rule, analyze the problem that the legislature believed to exist with the common law rule, and then analyze the legislation with an eye toward its interrelationship to the problem and its application to the facts in the case being considered.

Prior to 1978, co-employees rights and responsibilities were governed by the common law, under which co-employees were treated as "third party tortfeasors." The legislative history does not indicate what motivated passage of the immunity for co-employees. Utilizing the canon of statutory construction that meaning can be found in a part of a statute by considering the contextual interrelationship between all of its parts, it is apparent that the Legislature enacted the immunity because of concern about litigation between co-employees creating disharmony in the work-place. Nonetheless, the Legislature made a conscious and deliberate decision -- when not legally required to do so -- that employees who are "primarily engaged in unrelated works" could maintain their common law rights because the locational and operational separation between them assured that there would be no disharmony in the work-place because of such lawsuits.

Reading the words as a signal to the statute's meaning, because the

ambiguity in the word "works" means that it has both locational and operational components, the word "assigned" in the formulation must refer with some level of specificity to the employees' job, and not just the general overall mission of the employer, in order to avoid a strained and unnatural description of what an employee is "assigned" to do. With the words and purpose in mind, the exception clearly applies when the employment relationship that exists between the injured worker and the co-worker causing the injury is such that disharmony could not result in the work-place because of the litigation. Thus, where, as here, co-workers are assigned to different physical locations and are so disconnected from each other that one does not even know of the existence or employing entity of the other, the "assigned primarily to unrelated works" exception clearly applies as a matter of law.

ARGUMENT

BECAUSE MS. VEGA, AN ELEMENTARY SCHOOL CROSSING GUARD WITH THE POLICE DEPARTMENT, WAS "ASSIGNED PRIMARILY TO UNRELATED WORKS" WHEN COMPARED TO PUBLIC WORKS DEPARTMENT EMPLOYEES RESPONSIBLE FOR REPAIRING TRAFFIC LIGHTS, WORKER'S COMPENSATION IMMUNITY DID NOT BAR THIS CLAIM FOR NEGLIGENCE

Both parties agree that the sole issue on appeal is governed by §440.11(1), Fla.Stat., (2001) which provides, in pertinent part, as follows:

> The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer . . . to the employee, . . . 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, *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*. ...

§ 440.11(1), Fla. Stat. (2001)(emphasis added). Based upon the wording of the statute, this case turns on whether Ms. Vega, a part-time crossing guard for the Police Department, and the County employees in the Public Works Department responsible for repairing inoperative traffic lights, were "assigned primarily to unrelated works." If they were "assigned primarily to unrelated works," then, as the trial court concluded, workers compensation immunity does not bar this action and the Third District's contrary holding was in error and should be reversed with directions to reinstate the final judgment entered after a jury trial in favor of Petitioner.

Because the facts are basically undisputed, the determination of this issue turns largely on the construction of the relevant statutory provision. In conducting

the required analysis, the first determination that must be made is whether the statutory language is plain and unambiguous. If it is, then the Court's function is to simply employ the statutory language to the facts and determine whether it applies. On the other hand, if the statutory language is found to be ambiguous, then the Court's function is more complicated. Specifically, the Court must then ascertain the legislative purpose of the statute and determine whether applying it to the facts of the case accomplishes that statutory purpose. This brief will be divided into two broad sections. The first section will analyze the case assuming the statute is clear and unambiguous. The second will analyze the case assuming it is ambiguous.

A. ASSUMING THE STATUTORY EXCEPTION TO BE CLEAR AND UNAMBIGUOUS, PETITIONER WAS "ASSIGNED PRIMARILY TO UNRELATED WORKS" BECAUSE SHE WAS ASSIGNED TO A COMPLETELY SEPARATE PHYSICAL LOCATION FROM THE TRAFFIC SIGNAL REPAIRMEN AND THAT LOCATION WAS IN NO WAY RELATED TO THE REPAIR OF TRAFFIC LIGHTS

1. Respect for the integrity of the words chosen by the legislature is the core value in judicial interpretation

"The cardinal rule of statutory construction is 'that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as

expressed in the statute.'" *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 579 (Fla.1984) (emphasis added). In this regard, this Court has stated that

> [i]n making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.

Tropical Coach Line, Inc. v. Carter, 121 So.2d 779, 782 (Fla.1960)(emphasis added). Thus, "it is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation," even where the court believes the legislature meant something else. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454-55 (Fla. 1992). *Accord, e.g.*, *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1229 (Fla. 2004); *Golf Channel v. Jenkins*, 752 So.2d 561, 564 (Fla. 2000); *Modder v. American Nat'l Life Ins. Co.*, 688 So.2d 330, 333 (Fla. 1997); *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla.1987); *Coon v. Continental Ins. Co.*, 511 So.2d 971, 973 (Fla.1987); *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984); *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879, 882 (Fla.1983); *Citizens v. Public Serv. Comm'n*, 425 So.2d 534, 542 (Fla.1982); *St. Petersburg*

Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla.1982); *Carson v. Miller*, 370 So.2d 10, 11 (Fla.1979); *Thayer v. State*, 335 So.2d 815, 817 (Fla.1976); *McDonald v. Roland*, 65 So.2d 12, 14 (Fla.1953); *Van Pelt v. Hilliard*, 75 Fla. 792, 798-99, 78 So. 693, 694-95 (1918).

Implicit in the above quotation and all of the above cases is the principle that the *precise words* of a statute are of prime importance in interpreting it. Those *words* are the subject of the formal votes of the Legislature; those *words* must be approved in identical form by both houses of the Legislature; and those *words* are approved by the Governor. Indeed, the rules that determine whether a law is enacted necessarily mean that *the words of the text* are the focus of all official legislative procedures and processes. This emphasis on text is reflected not only in the oft-required formal "readings" of bills as a pre-condition of legislative consideration (a vestige of the days before printing was common and literacy universal), but in the far more important fact that attempts to modify a bill in the course of passage take the form of changes in *wording*. Respecting the integrity of the words chosen in the legislative process is at the center of judicial interpretation of statutes and, consequently, courts "should accept whenever possible the meaning which an enactment reveals on its face." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395, 71 S.Ct. 745, 751, 95 L.Ed. 1035

(1951)(Jackson, J., concurring).

2. The early case-law that laid the foundation for interpreting the "assigned primarily to unrelated works" exception did not analyze the *words* chosen by the Legislature

Judicial interpretation of what the Legislature meant by "assigned primarily to unrelated works" did not have an auspicious start. The early cases did not attempt to determine the meaning of the words chosen by the Legislature, and the foundation was therefore laid without the stability necessary for the process of judicial interpretation to build a solid structure thereon. Specifically, *Johnson v. Comet Steel Erection, Inc.*, 435 So.2d 908 (Fla. 3d DCA 1983), the first case to address the issue of the meaning of the exception, did not even use the correct words, instead turning the words around and deleting the "s" from the end of "works." *Id.* at 909 ("there is no direct precedent for determining what is related work.")(emphasis added). The second case to apply the exception, *Lake v. Ramsay*, 566 So.2d 845 (Fla. 4th DCA 1990), did the same thing, noting that "[t]he legislature did not define what is meant by 'related work' within the private or public employment." *Id.* at 848 (emphasis added).

Subsequent cases drew analogies to the earlier cases, and engaged in an outcome determinative analysis of the facts, with one case building on the unstable

foundation of the preceding cases for support. For example, in the third case to consider the exception, *Abraham v. Dzafic*, 666 So.2d 232 (Fla. 2d DCA 1995), the court found the *Johnson* case to be "instructive in this case," and quoted at length from it after announcing its conclusion that "even though their work skills may have been 'unrelated,' their work was not." *Id*. at 233. Again, no analysis of what the words in the statute meant was attempted by the court.

Each of these first three cases relating to the exception dealt with construction workers being injured by the negligence of fellow construction workers. On the facts before them, one court found that issues of fact existed relating to whether the exception applied (*Lake*) and the other two found the exception did not apply as a matter of law and granted immunity (*Johnson* and *Abraham*).

Vause v. Bay Medical Center, 687 So.2d 258 (Fla. 1st DCA 1996), *rev. denied*, 695 So.2d 703 (Fla.1997), moved the factual setting off of the construction site and into the hospital, and concerned "an obstetrical nurse who works regularly, albeit on a part-time basis in another department providing health care." *Id.* at 262. When the nurse died as a result of negligence in the hyperbaric chamber and suit was brought on her behalf, the question the court faced was whether the nurse was "engaged in <u>work unrelated</u> to that of the hospital supervisor, the

departmental supervisor, or the operator of the machine which is utilized to provide care for the patient whom the nurse is attending." *Id.* at 262 (emphasis added). As the underlined portion demonstrates, the court in *Vause*, just as the others above, focused on "work" instead of "works."

The *Vause* Court's analysis followed the framework of *Abraham*: no discussion of the words used in the statute, but determined efforts to draw factual analogies to cases that preceded it. The court began by noting that the plaintiff "cites no case nor law which would support his position," and then the court set forth the frame-work for analysis with the quotation from *Abraham* recited above followed by the same block quote from *Johnson* that the *Abraham* Court quoted in its opinion. *Id.* at 262. In formulating its rule of law, the *Vause* Court built upon the *Johnson* Court's factual statement that both of the construction workers in its case were "employed on-site in the same construction project," *Johnson*, 435 So.2d at 909 (emphasis added), and held that the test for determining whether the exception applied therefore depended on whether the employees "were both involved in the same project," *Vause*, 687 So.2d at 263. Notably, the *Vause* Court did not invoke the language of the statute to justify its introduction of the "same project" analysis; instead, as can be seen, it relied upon *Johnson*, which used the term only because in common parlance work on a construction site is referred to as

a "project." Surely a rule of law should not be built upon something so random in origin and so discrete from the language in the statute it is construing.

Nonetheless, subsequent cases applied the same method of analysis in various different factual contexts, drawing analogies to earlier cases and ignoring the

words of the statute. *See, e.g., Turner v. PCR, Inc.*, 732 So.2d 342, 345 (Fla. 1st DCA 1998), *quashed on other grounds*, 754 So.2d 683 (Fla. 2000)(in the context of co-employees in a chemical plant, court noted that the technicians worked "cooperatively" in a "team effort," and their different duties "related to the same project."); *Dade County Sch. Bd. v. Laing*, 731 So.2d 19, 20 (Fla. 3d DCA 1999)(in the context of a teacher and custodian at a school, court noted that "different duties" not controlling, the "pertinent factor is whether the co-employees are involved in different projects."); *Sanchez v. Dade County Sch. Bd.*, 784 So.2d 1172, 1172-73)(Fla. 3d DCA 2001)(in the context of a teacher and security personnel at a school, court adhered to reasoning of *Laing, supra*), *rev. dismissed*, 889 So.2d 778 (Fla. 2004).

Our purpose in tracing the method of analysis utilized in interpreting the exception is not to argue whether the specific result in any of the cases is correct or not. Indeed, in his thoroughly analyzed and well reasoned concurring opinion in

Taylor v. Sch. Bd of Brevard County, 888 So.2d 1, 6-16 (Fla. 2004), Justice Lewis agreed with the result in many of the cases discussed above. The point we are trying to make, and the point his concurring opinion seems to share, is that the method of analysis utilized in many of the cases was faulty.

The first step in statutory analysis must be to analyze the *words* used in the statute under review. Because the early cases interpreting the exception did not do this, the foundation was unstable and a solid structure for judicial interpretation could not be built. While some commentators believe that "courts will continue to struggle with application of the unrelated works exception," William S. Dufoe, *The "Unrelated Works" Exception to Workers' Compensation Immunity*, 79-1 Fla.B.J. 45 (January 2005), we believe close examination of the words in the statute -- and fidelity to their plain meaning -- will make interpretation not only possible, but consistent and devoid of the imprecision that leaves courts open to criticism that they are dictating rather than discerning. *See generally* Antonin Scalia, *A Matter of Interpretation*, (Princeton Univ. Press, 1997).

3. This Court should review the statute to determine whether a plain meaning can be discerned

This Court's opinion in *Taylor v. Sch. Bd. of Brevard County* does not

discuss what it believes the plain-meaning of the exception to be. Normally, courts employ canon's of statutory construction *only* where the statute is found to be ambiguous.[1] *See, e.g., Knowles v. Beverly Enterprises-Fla. Inc.*, 2004 WL 2922097 (Fla. December 16, 2004)(Cantero, J., concurring)("If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.")(citation omitted). To be sure, the Court's opinion in *Taylor* appears to employ canon's of statutory construction that should only be applicable if the statute were believed to be devoid of a plain-meaning. Specifically, the opinion states that "[t]he resolution of the issue before us turns largely upon the question of whether the Legislature intended that the unrelated works exception be construed liberally or narrowly." *Taylor*, 888 So.2d at 4. Notwithstanding the implicit belief of ambiguity inherent in this statement, the Court's opinion in

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[1] The only exception to this rule of which we are aware is where a plain-meaning interpretation would render the statute unconstitutional. *See, e.g, DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988)("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Taylor does not affirmatively state whether it found the statutory exception to be ambiguous.

We would urge the Court to explicitly attempt to discern the exception's plain-meaning before throwing the baby out with the bath water. We believe this is a worthwhile exercise because, as set forth above, no effort was made in the first instance to find a plain-meaning, which has resulted in disarray and outcome determinative formulations that provide no guidance to the people of this state. *See id.* at 8, 9 (Lewis, J., concurring)("the decisions of the district courts of appeal . . . demonstrate the challenges that our courts have experienced in attempting to apply this exception" and "it is clear that the lower courts have struggled to provide a precise definition for the word ['works']"). With this sentiment in mind, we will now turn to the language of the statute.

4. Ms. Vega was clearly "assigned primarily to unrelated works" based upon a plain meaning review of the *words* used in the statute

As highlighted above, the statutory provision at issue states that, "[s]uch fellow-employee immunities shall not be applicable . . . to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works." §440.11(1), Fla.Stat. The Legislature provided no definition as to the meaning of the exception or of any of the words used therein. When no definition is provided, courts presume the words were intended to be used in their plain and ordinary way, and, consequently, their meaning "can be ascertained by reference to a dictionary." *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So.2d 201, 204-05(Fla. 2003)(*quoting*

Seagrave v. State, 802 So.2d 281, 286 (Fla.2001)). *Accord, e.g., L.B. v. State*, 700 So.2d 370, 372 (Fla. 1997)(stating that "a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term").

The crucial word used by the legislature in the exception from immunity is "works." In consulting the bible for judicial interpretation of the meaning of words, *Black's Law Dictionary* (8th Ed. 2004), "works" is defined in a simple and straight-forward manner 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.

This is the only definition of "works" in *Black's Law Dictionary*. *See Black's Law Dictionary* (8th Ed. 2004).

Applying the dictionary definition, Ms. Vega was clearly "assigned primarily to unrelated works." As the dictionary definition makes clear, when the place of assignment of two employees is at different buildings or structures that are primarily unrelated to each other, the two are "assigned primarily to unrelated works." On the other hand, if the two employees are assigned to work primarily in the same building or structure, then a plain-reading of the statute would suggest that immunity should probably apply, even though, as Justice Lewis correctly observed in his concurring opinion, "[s]uch a definition would result in the exception being rarely applicable, as all co-employees in a common business location, regardless of actual operational duties, would be immune." *Taylor*, 888

So.2d at 9 (Lewis, J., concurring).

In any event, the record in this case is clear that Ms. Vega was not assigned to the same building or structure as the traffic signal repair personnel. She worked for the Police Department and was assigned to a street corner near Sylvania Heights Elementary School. (T. 146). The County employees in the Public Works Department responsible for repairing inoperative traffic lights were headquartered elsewhere. (T. 55). As an employee of a different department of the County, Ms. Vega had a completely different and separate chain of supervision and command from the employees in the Public Works Department, in addition to different duties, different requirements for the performance of her duties, different training, and different job skills. The record does not suggest that her path ever once crossed with the traffic signal repair personnel, or that theirs crossed hers.

Moreover, the function of her physical location, a school, was unrelated to theirs, the Department of Public Works. The existence of her position in no way facilitated the performance of theirs. Indeed, there is no evidence that they would even knew who she was or what she did or whether she even worked for the County. To argue that such employees could be involved in anything besides "unrelated works" would be, we respectfully submit, at best facetious. In short, Ms. Vega was clearly "assigned primarily to unrelated works" under a plain

meaning analysis of the statute assuming the word "works" means what Black's Law Dictionary says it means.

B. ASSUMING THE STATUTORY EXCEPTION TO BE AMBIGUOUS, PETITIONER WAS "ASSIGNED PRIMARILY TO UNRELATED WORKS" BECAUSE THE PURPOSE OF THE STATUTE WAS TO AVOID CREATING DISHARMONY IN THE WORKPLACE AND THE STATUTORY EXCEPTION APPLIES WHERE, AS HERE, A LAWSUIT COULD NOT POSSIBLY CREATE DISHARMONY IN THE WORKPLACE BECAUSE THE EMPLOYEES WERE ASSIGNED TO SEPARATE JOB SITES AND THEIR JOBS WERE SO DISCONNECTED FROM EACH OTHER THAT THEY WOULD NEVER EVEN SEE EACH OTHER IN THE COURSE OF THEIR WORK

The law is well established in Florida that it is only if statutory language is ambiguous that "the Court must resort to traditional rules of statutory construction to determine legislative intent." *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1282 (Fla.2000); *see also Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla.2000) (stating that "if the language of the statute is unclear, then rules of statutory construction control"). "Ambiguity suggests that reasonable persons can find different meanings in the same language." *Forsythe, supra*, 604 So.2d at 455. In his classic book *The Morality of Law*, Professor Lon Fuller examined the difficult problem of construing ambiguous statutes and sought ways to "enable us to clear the problem of interpretation of the confusions that have

typically beclouded it." Lon Fuller, *The Morality of Law*, 83 (Yale Univ. Press 1964). To this end, Professor Fuller noted that the "best short answer I know dates back to 1584 when the Barons of the Exchequer met to consider the difficult problem of interpretation in Heydon's Case," the rule of which was quoted as follows:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: –
>
> *1st*. What was the common law before the making of the Act.
> *2nd*. What was the mischief and defect for which the common law did not provide.
> *3rd*. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> And, *4th*. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy.

Fuller, supra, at pp. 82-83 (emphasis added)(*quoting Heydon's Case*, 3 Co. Rep. 7a). Adopting this method of analysis, we must first identify the common law rule, analyze the problem (or "mischief") that the Legislature believed to exist regarding it, and then analyze the legislation (or "remedy") with an eye toward its interrelationship to the problem.

1. The Common Law rule and the 1978 statute relating to co-employees

Prior to 1978, co-employees' rights and responsibilities were governed by the common law. *Taylor*, 888 So.2d at 8 (Lewis, J., concurring). 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, whether the act of negligence occurred within the course and scope of employment or outside the course and scope of employment. *Id.* (*quoting Frantz v. McBee Company,* 77 So.2d 796 (Fla. 1955). Thus, under the common law, co-employees were treated as "third party tortfeasors" and could be held responsible for their negligence if it resulted in injury to a fellow employee. *Frantz*, 77 So.2d at 797-98.

2. The "defect" in the common law that the Legislature sought to remedy

In *Taylor*, this Court articulated the overall defect in the common law that necessitated creation of a workers' compensation system in the first place, and described the basic purpose behind the law as twofold:

> (1) [T]o see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents. *See McLean v. Mundy,* 81 So. 501, 503 (Fla. 1955).

Taylor, 888 So.2d at 3 (*quoting De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204, 206 (Fla. 1989). *See generally* William E. Sadowski *et al.*, *The 1979 Worker's Compensation Reform: Back to Basics*, 7 Fla.St.U.L.Rev.. 640 (1979) and Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206 (1952).

Of course, discussion of the purpose behind the creation of the worker's compensation system many years earlier does not answer the question of what motivated the 1978 amendments to the statute that brought about the co-employee immunity that is the subject of this case. In his concurring opinion, Justice Lewis emphasized this distinction by observing that "[e]mployers enjoyed general immunity long before co-employees were provided limited immunity." *Taylor*, 888 So.2d at 9 (Lewis, J., concurring).

This Court's opinion in *Taylor* does not provide an answer to the question of why the 1978 amendments were enacted. After a review of the relevant materials, Justice Lewis' concurring opinion concluded that the reason the amendment granting limited immunity was passed could not be determined from a review of the legislative history:

> In adding the limited co-employee immunity provisions along with exceptions, however, the Legislature did not define, nor did it provide guidance to define, the "unrelated works exception," and a

> review of the legislative history simply provides no insight into the Legislature's intended meaning for the exception. It is also interesting that we find no authority from foreign jurisdictions because the unrelated works exception appears to be unique to Florida's workers' compensation scheme.

Taylor, 888 So.2d at 8 (Lewis, J., concurring)(emphasis added).[2]

To find an answer to the question of what defect in the common law system actuated passage of immunity for co-employees (with exceptions), we therefore turn to canons of statutory construction. "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe,* 604 So.2d at 455. Under this aid to statutory construction, "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." *Id.* (quoting source omitted).

When the Legislature amended the worker's compensation statute in 1978 to change the common law rule and grant co-employees the same immunity enjoyed

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[2] In his dissenting opinion in *Vause*, 687 So.2d at 267, (Miner, J., concurring in part and dissenting in part), Judge Miner offered a possible explanation, premised on the idea that the exception was included "as a disincentive to employers assigning employees, primarily assigned to full-time duties in a particular area of employment, occasional, non-routine duties because of a legislative assumption that the danger of injury might be increased if workers were expected to perform such tasks on a relatively infrequent basis." We do not believe this rationale is logical because, at least in theory, allowing one employee to sue another employee does not serve as a "disincentive to employers," who are

by employers, it carved out two major exceptions. First, the statute excepted from the immunity granted to co-employees where an employee acted "with willful and wanton disregard or unprovoked physical aggression or with gross negligence." §440.11(1), Fla.Stat. Second, as the discussion in this case clearly highlights, the statute also excepted from the immunity "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." *Id.*

Reading the two exceptions together suggests that the Legislature was concerned with litigation between fellow employees *creating* disharmony in the work-place. Obviously, if one employee has acted toward another employee -- in the words of the first exception -- with "willful and wanton disregard or unprovoked physical aggression or with gross negligence," there would already be disharmony between the employees regardless of whether a lawsuit was filed by one against the other. Thus, disharmony would not be created by excepting such conduct from the immunity granted to co-employees. Similarly, if two employees are "assigned primarily to unrelated works," there would be no disharmony in the work-place as a result of a lawsuit because of the lack of contact between the employees. Thus, "[i]n crafting the amendment, it seems to me that the legislature

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presumably unaffected by the action.

necessarily considered the relationship between the two employees" as a factor of central importance. *Vause*, 687 So.2d at 267 (Miner, J., concurring in part and dissenting in part).

3. As relevant to this case, the Legislature's "remedy" was to grant immunity to co-employees except where, because the employees were "primarily engaged in unrelated works," disharmony would not result because of the litigation by one employee against another

Following the analytical frame-work set forth above, with the "mischief" identified (avoiding the creation of disharmony in the work-place), we turn to the "remedy" enacted by the Legislature. *Fuller*, *supra*, at pp. 82-83 (*quoting Heydon's Case*, 3 Co. Rep. 7a). As an initial matter, it is important to emphasize that the Legislature was careful to only grant co-employees immunity if "the injured employee is entitled to receive benefits under this chapter." §440.11(1), Fla.Stat. This limitation on the immunity granted to co-employees was no doubt included to avoid a challenge to the law as being in violation of the constitutional right to access to the courts guaranteed by the Florida Constitution. *See, e.g.*, *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973)("We hold, therefore, that where a right of access to the courts for redress for a particular injury. . . has become a part of the common law of the State . . .the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people

of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.")(emphasis added). Significantly, with the fact that an alternate remedy existed via worker's compensation, "the Legislature could have opted to broadly grant co-employees total immunity." *Taylor*, 888 So.2d at 9 (Lewis, J., concurring). That the Legislature deemed it important to include exceptions to the grant of immunity -- when it legally did not have to -- should not be minimized. The Legislature was no doubt attempting to achieve its purpose in a way directed at remedying a specific "mischief," and was thus legislating with a chisel instead of a sledgehammer.

In evaluating the "remedy" chosen by the legislature, several points should be noted regarding the words in the statutory exception as signals to its meaning. First, the exception applies when "each [employee] is operating in the furtherance of the employer's business," and thus acting in the course and scope of his or her employment. Accordingly, the exception covers negligent acts of the employee committed while simply doing his or her job.

The final two points begin with the assumption, explicitly found by Justice Lewis (and implicitly found by the Court's invocation of canons of statutory construction), that the word "works" is ambiguous and does not refer solely to the

physical location where the employees perform their duties, but instead includes an operational component as well. *Taylor*, 888 So.2d at 9 (Lewis, J., concurring)("the Legislature's use of the word 'works' is beyond the ordinary use of common understanding"). That being the case, the word "primarily" suggests that the focus is on the principal responsibilities of the co-workers, not what they were doing at the specific time of the accident. Finally, and most importantly, the word "assigned" must refer with some level of specificity to the employees' job, and not just the general overall mission of the employer, because when referring to "works" that a particular employee is "assigned" to do, it would be strained and unnatural to say, to take the example of a janitor at a high school, that he is "assigned" to "provide education related services." *See Laing*, 731 So.2d at 20. Instead, the description of his *assigned* work would involve something much more specific, such as "providing janitorial services at a school."

With the words of the statute in mind and the purpose of the exception determined, this Court should find that the "primarily assigned to unrelated works" exception should clearly apply where the employment relationship that exists between the injured worker and the co-worker causing the injury is such that disharmony could not result in the work-place because of the litigation. Under this rule, where co-employees are assigned to different physical locations and are

so disconnected from each other that one does not even know of the existence or employing entity of the other, the two must be "assigned primarily to unrelated works" as a matter of law. Such a construction is faithful to the legislative purpose, shows fidelity to the words chosen by the Legislature, and obeys this Court's admonition that statutory exceptions should be interpreted "narrowly." *Taylor*, 888 So.2d at 5.

By focusing on the relationship between the employees, the Court avoids the difficult definitional problems identified by both the majority opinion[3] and the concurring opinion of Justice Lewis[4] in *Taylor*, and provides a framework for

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[3] The majority opinion noted:

> in one sense, all employees of the same employer could always be considered engaged in related works since they are all charged to carry out the mission of the employer. At the same time, however, some distinction could always be drawn between the work of most employees so as to make their work unrelated.

Taylor, 888 So.2d at 5.

[4] Justice Lewis' concurring opinion stated:

> to include every employee who may perform some work at an educational, hospital, or other similar facility as being within the same team or specific business project would, in my view, be fundamentally flawed. In a generalized manner, everything within the universe may be said to be "related" in the broadest of philosophical terms, which

analysis on a basis that minimizes the type of arbitrary, *ad hoc*, and outcome determinative decisonmaking that has lead to criticism that when courts make decisions this way, they are merely dictating their own favored outcome rather than discerning the statute's purpose. *See by analogy*, *Michael H. v. Gerald D.*, 491 U.S. 110, 127, n. 6, 109 S.Ct. 2333, 2344, n.6, 105 L.Ed.2d 91 (1989)(Opinion of Scalia, J., announcing the judgment of the Court).

4. Ms. Vega was clearly "assigned primarily to unrelated works" based upon the purpose of the statutory exception

Applying these principles to the facts of this case, the record in this case is clear that Ms. Vega was "assigned primarily to unrelated works" when compared to the traffic signal repairmen. As noted above, she was not assigned to the same building or structure as the traffic signal repair personnel. She worked for the Police Department and was assigned to a street corner near Sylvania Heights Elementary School. (T. 146). The County employees in the Public Works Department responsible for repairing inoperative traffic lights were headquartered elsewhere. (T. 55). As an employee of a different department of the County, Ms. Vega had a completely different and separate chain of supervision and command

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would lead to the absurd result that nothing could ever be "unrelated" to the specific business project.

from the employees in the Public Works Department, in addition to different duties, different requirements for the performance of her duties, different training, and different job skills. The record does not suggest that her path ever once crossed with the traffic signal repair personnel, or that theirs crossed hers. The existence of her position in no way facilitated the performance of theirs. Indeed, there is no evidence that they would even knew who she was or what she did.

In reviewing the decision of the Third District in the instant case, it is clear that the court misapplied the "assigned primarily to unrelated works" exception and did not properly apply this Court's opinion in *Taylor*. While acknowledging in its recitation of the facts that the employees in question worked out of different physical locations for different departments of the County, with different job titles and distinct job duties, the court concluded that "it cannot be said that these co-employees worked on entirely different projects." *Aravena,* 886 So.2d at 305. The court did not analyze the words of the statute or its purpose; instead, the court recited an outcome determinative formulation of the "projects" of the employees, finding that both were responsible for "regulat[ing] vehicular and pedestrian traffic at the same intersection." *Id.* As can readily be seen, the court did not employ the proper analysis and therefore reached a conclusion that conflicts with this Court's

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Id. at 15 (Lewis, J., concurring).

opinion in *Taylor* and the Fourth District's well-reasoned opinion in *Palm Beach County v. Kelly*, 810 So.2d 560 (Fla. 4th DCA 2002).

On the facts of this case, Ms. Vega was "assigned primarily to unrelated works" under this Court's opinion in *Taylor*. In *Taylor*, this Court held that

> . . . we conclude that the exception to [the worker's compensation] scheme for unrelated works should be applied only when it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee. While we would like to be more precise in providing guidance to those initially charged with deciding disputes based upon this exception, we are limited by our lack of precise knowledge of the legislative intent behind the exception and the reality that we could not hope to contemplate the myriad of factual circumstances that may give rise to the issue.

Taylor, 888 So.2d at 5 (emphasis added). Evaluating the factual circumstances with an eye toward the *duties* of the respective employees, Ms. Vega's job duties in no-way involved repairing traffic lights and the traffic repair personnel's duties in no-way involved assisting children in crossing a street corner outside a school. In short, given the facts here, this case is clearly one of the "myriad of factual circumstances" in which the exception for "unrelated works" clearly applies under this Court's *Taylor* formulation because of the unrelatedness of the duties of the respective employees.

Moreover, Ms. Vega was clearly "assigned primarily to unrelated works"

under Justice Lewis' through categorization of the exception in his concurring opinion in *Taylor*. The facts in this case fit into the first category of cases identified by Justice Lewis:

> . . . in my view, the unrelated works exception should be defined with reference to the consolidated physical business location/same project-business purpose analytical framework. . . .
>
> First, <u>if co-employees are not assigned to work at the same physical business location, and the work being performed at the injury location is not part of a team or the same joint project, I would conclude that the unrelated works concept should apply as a matter of law</u>.

Taylor, 888 So.2d at 14 (Lewis, J., concurring)(emphasis added).

For all of the above reasons, the conclusion is obvious.

CONCLUSION

Based on the foregoing arguments and citations to authority, Petitioner JULIO ARAVENA, Husband and Personal Representative of the Estate of GREGORIA VEGA, Deceased, respectfully requests that this Court QUASH the decision of the Third District Court of Appeal and REMAND the case with directions to reinstate the final judgment in favor of Petitioner entered by the trial court.

FEILER, LEACH & McCARRON, P.L.

Attorneys for Petitioner

901 Ponce de Leon Boulevard
Penthouse Suite
Coral Gables, Florida 33134
Telephone: (305)441-8818
Facsimile: (305)441-8081

By:_____

MARTIN E. LEACH
Florida Bar No. 0037990

CERTIFICATE OF COMPLIANCE

I certify that this Petitioner's Initial Brief on the Merits complies with the font size requirements of Rule 9.210, Fla.R.App.P. and that the type size and style used throughout this Answer Brief is 14 point Times New Roman.

By:_____

MARTIN E. LEACH

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of April, 2005 to: JEFFREY P. EHRLICH, Esquire, Asst. Dade County Attorney, 111 N.W. First Street, Room 2810, Miami, FL 33128-1993.

FEILER, LEACH & McCARRON, P.L.

Attorneys for Petitioner
901 Ponce de Leon Boulevard
Penthouse Suite
Coral Gables, Florida 33134
Telephone: (305)441-8818
Facsimile: (305)441-8081

By:_____

MARTIN E. LEACH
Florida Bar No. 0037990