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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

This Reply Brief on the Merits is directed to those points advanced by the County and Amici that warrant a response.[1] With respect to points not discussed herein, we

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[1] The parties will be referred to as they appear in this Court of by name: Petitioner, JULIO ARAVENA, Husband and Personal Representative of the Estate of GREGORIA VEGA, Deceased, will be referred to as "Ms. Vega" or "Petitioner"; MIAMI-DADE COUNTY will be referred to as "the County" or "Respondent." There have been two amicus curiae briefs filed in support of Respondent's position, one by The School Board of Miami-Dade County, Florida, who will be referred to as "the School Board" and

rely upon our Initial Brief on the Merits. The County's Answer Brief was divided into two sections. The first argues that review was improvidently granted. (Answer Brief, pp. 5-9). The second argues that the Third District correctly held that the "primarily assigned to unrelated works" exception does not apply to this case. (Answer Brief, pp. 9-18). We will discuss each section separately.

I. THIS COURT HAS JURISDICTION UNDER ARTICLE V § 3(B)(3), FLA.CONST., TO REVIEW THE THIRD DISTRICT COURT OF APPEAL'S DECISION BASED UPON ITS EXPRESS AND DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW

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 v. Sch. Bd. of Brevard County*, 888 So.2d 1 (Fla. 2004). While acknowledging in its recitation of the facts that the

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The Florida Defense Lawyer's Association will be referred to as "FDLA."

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." *Miami-Dade County v. Aravena*, 886 So.2d 303, 305 (Fla. 3d DCA 2004). 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 was readily apparent in the Initial Brief and will be further demonstrated in this Reply Brief, the Third District did not employ the proper analysis and therefore reached a conclusion that conflicts with this Court's 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). Under such circumstances, discretionary jurisdiction exists, *see, e.g., Gibson v. Avis Rent-A-Car*

Systems, Inc., 386 So.2d 520 (Fla. 1980)("This court has certiorari jurisdiction based on conflict when a district court of appeal misapplies the law. . ."), and this Court properly exercised jurisdiction pursuant to Article V §3(b)(3), Fla.Const., and Rule 9.030(a)(2)(A)(iv), Fla.R.App.Pro.

The County's arguments to the contrary, that the opinion under review "adhered to the *Taylor* Court's logic" and that *Kelly* "is entirely distinguishable on its facts," (Answer Brief, pp. 7-8), are simply wrong. On the facts of this case, Ms. Vega was "assigned primarily to unrelated works" under this Court's opinion in *Taylor*. Evaluating the factual circumstances of this case 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. *Taylor*, 888 So.2d at 5.

Similarly, the opinion under review conflicts with *Kelly*. Like the employees in *Kelly*, Ms. Vega worked out of a completely different division of the County; she for the Police Department, they for the Department of Public Works. Like the employees in *Kelly*, the employees here were supervised by different people; she by the school's principal, they by the head of the Department of Public Works. In short, there was absolutely no relationship between Ms. Vega's project and the traffic repair personnel's project within the meaning of *Kelly*. As a result, the Third District's contrary ruling clearly conflicts with *Kelly*. The fact that a conflict exists is reinforced by the utilization of a "*compare*" signal by the district court in the instant case when referring to *Kelly*.

II. 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

On the merits, the County began by claiming that we "argue that *Taylor* was wrongly decided." (Answer Brief, p. 11)(*See also* Amicus Brief of FDLA, p. 8). Nothing could be further from the truth. Through its opinion in *Taylor,* this Court laid the cornerstone for interpretation of the statutory exception. We applied its teachings to the facts of this case, in the grandest tradition of statutory interpretation and adherence to *stare decisis*.[2] However,

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[2] The County argued that *stare decisis* "strongly counsels against using this case as a vehicle to revisit the issues in *Taylor*." (Answer Brief, p. 10, n. 1). The County's argument completely misses the point of the purpose of our common law system of judicial interpretation. As Justice

because the opinion was not explicit with regard to whether the statutory exception was clear and unambiguous, we analyzed the statute from two perspectives: the first assumed the statutory language was clear and unambiguous; the second assumed it to be ambiguous. As we clearly established in the Initial Brief, while the analysis is different, the result is the same. Either way, the Third District erred in holding that the exception did not apply to the facts of this case.

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

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Scalia observed in his book *A Matter of Interpretation*, 9 (Princeton University Press, 1997):

> . . . making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge – the Holmes, the Cardozo – is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose the rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal – good law.

was in No Way Related to the Repair of Traffic Lights

Given the difficulty this Court acknowledged to exist in determining the legislative intent, *see Taylor*, 888 So.2d at 5 (noting that the Court's analysis is "limited by our lack of precise knowledge of the legislative intent behind the exception"), we suggested a textualist approach to construction of the statute, whereby the *precise words* in the statute would be analyzed to find their meaning. Because this Court's opinion in *Taylor* did not affirmatively state that the statute was ambiguous, we attempted to construe it assuming a clear and unambiguous meaning could be ascertained. To determine the meaning of the key word used in the provision, the word "works," we consulted *Black's Law Dictionary*, which defined the word as referring to the exact physical location where someone is employed. (Initial Brief, pp. 20-21).

The County criticized this methodology as rendering the exception "illogically narrow." (Answer Brief, p. 12). We agree. As Justice Lewis observed in his concurring

opinion in *Taylor:* "[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." *Id.* at 9 (Lewis, J., concurring). On the other hand, such a construction would have the virtue -- if it is a virtue -- of creating stability and certainty in the application of the exception and render the provision devoid of the imprecision that has left commentators complaining that, in the wake of *Taylor*, "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).

The County also criticizes the use of *Black's Law Dictionary* as the source for the definition of the word "works," arguing that there is no reason it should provide the "controlling definition for a non-legal word." (Answer Brief, p. 12). However, the County did not offer an alternative definition from another dictionary. In *Lopez v.*

Viches, 734 So.2d 1095 (Fla. 2d DCA 1999), *overruled on other grounds, Taylor, supra* 888 So.2d at 6, the court utilized the definition of "works" from the *American Heritage Dictionary*, which was almost identical to the *Black's Law Dictionary* definition we relied upon in the Initial Brief. Specifically, "works" was defined as "[a] factory, plant, or similar building or system of buildings where a specific type of business or industry is carried on." *See Lopez*, 734 So.2d at 1097. We have reviewed a number of other dictionaries, most of which include the word "works" as a subset within the definition of the word "work," and define it as having the meaning we have ascribed to it from *Black's Law Dictionary* along with definitions that suggest "the output of a writer, artist, or musician considered or collected as a whole, such as collected works"; an "engineering structure, such as bridges or dams"; and "a fortified structure, such as a trench or fortress." *See, e.g.*, DICTIONARY.COM. In short, a review of all of the dictionaries reveals that the only

conceivable definition of the *precise* word in the context of the statutory provision is the one we have ascribed to it from *Black's Law Dictionary.*

Finally, the County argues that the locational definition of "works" cannot be the "determinative factor," (Answer Brief, p. 15, n. 5), because an earlier version of the bill provided that an employee could sue for the negligence of a co-employee where ". . . they are not assigned to the same job site or are assigned primarily to unrelated works. . ." C.S./S.B. 636, 1978 Leg. Sess. (Fla. 1978)(emphasis added). The County points out that, in the final version of the statute, the Legislature omitted the emphasized language, leaving only the phrase "assigned primarily to unrelated works." The County claims that this "is strong evidence that the Legislature did not intend for application of the exception to turn on whether the employees work at 'the same job site.'" (Answer Brief, p. 15, n. 5).

Most respectfully, in the absence of rank speculation, the only clue that can be gleaned from this legislative

history is that an earlier version of the statute provided two separate tests for the exception. The first test had nothing to do with the second test, as the disjunctive term "or" was used, instead of the conjunctive term "and." *See, e.g.*, *Sparkman v. McClure*, 498 So.2d 892, 895 (Fla. 1986)("We first note the word 'or' is generally construed in the disjunctive when used in a statute or rule. The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended."). Moreover, even if the Court wanted to assign some meaning to the omission of the first test, we would argue that its omission was just as likely the result of a consensus by the Legislature that the first test was superfluous because embodied within the "primarily assigned to unrelated works" test. Consequently, for several reasons, the County's reliance upon the draft version of the bill provides no insight into the meaning of the final version of the bill.

In the final analysis, a textualist approach to the interpretation of the statute leads to the obvious conclusion

that Ms. Vega was "assigned primarily to unrelated works" because her place of assignment was at a different building or structure that was primarily unrelated to that of the negligent County employees in question. Specifically, 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. Indeed, the record does not suggest that her path ever once crossed with the traffic signal repair personnel, or that theirs crossed hers. 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

In the second section of the Initial Brief, we analyzed the statute assuming it to be ambiguous. The County claims that our analysis is premised on a "faulty assumption." (Answer Brief, p. 14). Utilizing canons of statutory construction, in the Initial Brief we argued that the 1978 Amendments to the Worker's Compensation statute were concerned with litigation between fellow employees *creating* disharmony in the work-place. (Initial Brief, p. 27-28). The County claims that we have cited "no authority"

for this proposition; however, in offering its own test for applying the exception, the County employed the same canon of statutory construction we employed as authority. (Answer Brief, p. 15). The County argues that "although the Legislature was expanding an already broad grant of immunity, it did not wish to extend it so far as to cover situations where employees were injured in completely unforeseeable ways." (Answer Brief, p. 15). As relevant to this case, the County argues that "it is foreseeable that employees will be injured by fellow employees performing related work, but it is not foreseeable that employees will be injured at the workplace by fellow employees assigned to completely unrelated tasks." (Answer Brief, p. 15-16). Thus, the County concludes that we must "determine whether the employees' respective job functions are so unrelated that it could not have been reasonably foreseeable that the injured employee could be harmed by the co-worker in question." (Answer Brief, p. 16).

The County's proposed test provides no useful basis

for analysis because it is devoid of any underlying principle. Indeed, to conclude that a particular incident is "unforeseeable" is merely to state a conclusion. Most respectfully, in the context of the exception, the County's test is nothing more than an outcome determinative statement of a conclusion. In contrast, the test we propose provides an underlying principle for analysis.

We begin with first principles: the Legislature would obviously like to encourage all employees in the State of Florida to act non-negligently at all times. As a result, third parties can sue when an employee causes injury as a result of negligence. For example, in the context of the instant case, if a child had been killed along with Ms. Vega, there is no question that suit could have been commenced against the County on behalf of the child. *See, e.g., Goldberg v. Florida Power & Light Co.*, 30 Fla.L.Weekly S224 (Fla. April 7, 2005).

Through the "primarily assigned to unrelated works exception," the Legislature clearly wished to retain the

same rights for co-employees in certain circumstances. To determine what those circumstances are, we do not read the County's proposed test to deny the importance of *the relationship between the employees* as a factor of central importance. However, the County's test does not explain why the relationship between the employees is important. By focusing on whether disharmony would result from the lawsuit, our test recognizes that when the interaction of two employees is mere happenstance and is largely unrelated to their co-employee status, the statutory exception should apply because it serves no societal purpose to cloak with immunity an employee tortfeasor who is so unrelated to his fellow employee that the two of them do not interact with each other and therefore do not see each other or rely upon each other in the course of doing their jobs. In contrast, where the two employees work in close proximity to each other or must interact with one another on a regular basis because of the nature of their job duties, then the overriding interest in avoiding disharmony would exist and, under a

proper reading of the statute, must take precedence.

Moreover, assuming the word "works" has both physical location and operational components, the words chosen in the statute are consistent with this methodology. In the context of this case, the County parrots the language of the Third District, arguing that a part-time elementary school crossing guard who works for the Police Department and a traffic signal repairman who works for the Public Works Department are not engaged in "unrelated works" because both "regulate vehicular and pedestrian traffic at the same intersection." (Answer Brief, pp. 7, 9, 17). This formulation does not comport with the language in the statute. We would respectfully suggest that it is facetious to argue that the traffic signal repairman in this case was, in the words of the statute, "primarily" "assigned" to regulate vehicular and pedestrian traffic light at the intersection of Southwest 16th Street and Southwest 62nd Avenue in Miami-Dade County. As we demonstrated in the Initial Brief (and without challenge in the Answer Brief), to avoid an

unnatural and absurd construction, 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 Dade County Sch. Bd. v. Laing*, 731 So.2d 19, 20 (Fla. 3d DCA 1999). Instead, the description of his *assigned* work would involve something much more specific, such as "providing janitorial services at a school."

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 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.

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.

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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 May, 2005 to: JEFFREY P. EHRLICH, Esquire, Asst. Dade County Attorney, 111 N.W. First Street, Room 2810, Miami, FL 33128-1993; , MARGARET E. SOJOURNER, Esq., Langston, Hess, et.al., 111 So. Maitland Avenue, Maitland, Florida 32794 and MELINDA L. MCNICHOLAS, Esq., 1450 N.E. 2nd Avenue, Room 400, Miami, Florida 33132.

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