IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC99-153
Lower Tribunal No.: 3D98-267

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

ANGELO JULIANO,

Respondent.

PETITIONER'S, FLORIDA DEPARTMENT OF TRANSPORTATION, BRIEF ON THE MERITS

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INTRODUCTION

Petitioner FLORIDA DEPARTMENT OF TRANSPORTATION will be referred to as it stands in this Court, as it stood in the trial court, and as DOT. Respondent ANGELO JULIANO will be referred to as he stands in this Court, as he stood in the trial court, and by name.

"R" stands for the record on appeal; "SR" refers to the supplemental record filed in the Third District Court of Appeal; "T" refers to the trial transcript; "A" refers to the appendix filed with this brief. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Third District Court held here that DOT was precluded from raising any aspect of the workers' compensation law under § 440.11(1), Fla. Stat., because that court had previously affirmed the denial of summary judgment based specifically on the "unrelated works" exception to workers' compensation immunity. The end result in this case was that Juliano was permitted double recovery for his injuries, contrary to both the plain language and intent of the workers' compensation statute. In these proceedings, this Court will determine the proper scope of the law of the case doctrine and the proper standard when co-employees are charged with negligence under the "unrelated works" exception to workers' compensation immunity.

Background. This action stems from an accident that occurred in 1991 at the trailer that served as the Plantation Key Weigh Station. (R. 2). Angelo Juliano was a corrections officer employed by the Florida Department of Corrections ("DOC"). (T. 184). DOT contracted with DOC to provide minimum security inmates to pick up trash along the road and clean DOT facilities such as weigh stations,[1] along with

[1]DOT operates weigh stations to weigh trucks using the highway in order to ensure compliance with weight limits designed to protect the roads and bridges of the Florida Keys

corrections officers to supervise those inmates. See (T. 133).

A portion of the floor of the weigh station trailer had buckled and was uneven with bumps and dips in it. (T. 53). Juliano had been in the weigh station trailer numerous times before. (T. 224). He was aware of the poor condition of the floor. (T. 194).

On the day of the accident, Juliano and his trash crew had been assigned to clean the weigh station. (T. 134-35, 194). Juliano tripped on a large bump in the floor while trying to sneak up on an inmate who was acting suspiciously while cleaning. (T. 199). The bump was an open and obvious hazard, jokingly referred to as "Mount St. Helens." (T. 60). Juliano simply failed to look where he was going. See (T. 230-31).

Juliano received workers' compensation benefits for his injuries.[2] (R. 33, 38). Nevertheless, Juliano filed a personal injury action against DOT. (R. 1-7). Significantly,

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from excessive wear. (T. 274-75).

[2]Since both DOT and DOC are state agencies, Juliano received his workers' compensation benefits from the State of Florida. See (R. 13-15). As of this date, Juliano continues to receive those benefits.

the complaint named no specific DOT employee whose negligence allegedly caused Juliano's injuries. See (R. 1-7).

First Motion for Summary Judgment. DOT moved for summary judgment, arguing that workers' compensation immunity applied because he had not named a fellow employee whose negligence caused his injuries. (R. 491). At best, Juliano had informally suggested two DOT employees, Mary Lou Karner, a safety specialist, and Sergeant Wyse, supervisor of the weigh station.[3] (A. 21-22). The first had no responsibility for the weigh station. (R. 367). As to the second, Juliano had neither alleged nor shown any specific actions on the part of Sgt. Wyse that were negligent. The "unrelated works" exception to workers' compensation immunity in § 440.11(1) did not apply. (R. 360-68; A. 22-25)

Juliano argued that it was unnecessary to name a particular employee for the exception to apply. (A. 11, 26). Moreover, in his written response, Juliano definitively alleged for the first time that Sgt. Wyse had been negligent. (A. 12). Juliano alleged that Sgt. Wyse was responsible for making repairs to the weigh station and a jury could infer his

[3]This suggestion came up in Juliano's deposition. However, Juliano's attorneys tried to keep Juliano from naming any specific persons. See (R. 49-52).

negligence because there was a hazardous condition at the weigh station of which DOT was aware. (A. 12, 26-30). At the hearing, plaintiff's counsel also alleged that there were other negligent employees, but did not name them. (A. 26). According to Juliano, there was a genuine issue of material fact and DOT could properly be sued because it stands in the shoes of its employee--Sergeant Wyse. See (A. 30). The trial court agreed and denied the motion for summary judgment. (R. 449; A. 37).

DOT appealed the denial of summary judgment based on workers' compensation immunity to the Third District Court. (R. 491). The only issue before the Third District Court at that time was the propriety of summary judgment. DOT argued that it was entitled to immunity unless Juliano named all the specific allegedly negligent employees. (A. 38, 70). Juliano argued that there was a disputed issue of material fact as to whether Sgt. Wyse was negligent which was sufficient to defeat summary judgment. (A. 56). The court was not presented with the issue of the appropriate standard for negligence where the fellow employee was a supervisor. The Third District affirmed without opinion, merely citing Holmes County School Bd. v. Duffell, 651 So.2d 1176 (Fla. 1995). Florida Dept. of Transp. v. Juliano, 664 So.2d 77 (Fla. 3d DCA 1995).

Second Motion for Summary Judgment. On remand, DOT filed a second motion for summary judgment based on a different ground from the first. (R. 496; A. 79). In the second motion, DOT argued that under a different sentence of § 440.11(1), a fellow employee who was a supervisor could be held liable only for criminal or culpable negligence. Sergeant Wyse, a DOT supervisor, was still the only person Juliano had alleged was negligent. (R. 497; A. 80). As Juliano had neither alleged criminal negligence nor did the undisputed facts support a finding of criminal negligence, DOT argued that summary judgment was appropriate. (R. 500; A. 83). In other words, there were no disputed issues of material fact, and under the facts Juliano could not meet the appropriate standard of negligence.

In response, Juliano argued that the second summary judgment motion simply reargued the same issues presented in the first summary judgment motion. (R. 536; A. 112). Juliano also argued, without citation, that DOT was required to raise this in the first summary judgment motion. (R. 537; A. 113). Juliano claimed that this motion was rivolous and asked for attorneys' fees and costs under Fla.R.Civ.P. 1.510(g). (R. 537; A. 113). The trial court denied the motion and granted

fees and costs. (R. 548; A. 124).

The Trial. The case proceeded to trial. In the interim, DOT repeatedly requested a complete list of those fellow employees Juliano alleged were negligent. This included filing a motion to compel better answers to interrogatories on July 1, 1996, (R. 571), and a second motion to compel better answers to interrogatories on November 21, 1997, (R. 803). Finally, on December 3, 1997, on the eve of trial, Juliano's counsel supplied a letter with nine names on it: Paul Mitchell, Lt. Bill DeFeo, Sgt. Michael Weiss [sic], Capt. Robert Reynolds, R.J. Rullison, Lt.Col. McPherson, Johnny McKnight, Samuel Smith, and Maj. William Mickler. (R. 840). Trial began December 18, 1997 before Judge Steven Shea. (T. 1).

At trial, it became excruciatingly clear that DOT was not merely the defendant on paper--it was the negligent party on trial. First, Juliano's counsel promptly invoked the rule to prohibit witnesses from being present in the courtroom unless testifying. (T. 13). Over defendant's objection, this included the nine individuals Juliano claimed were negligent. (T.13-14). Judge Shea ruled: "DOT is entitled to have one representative and they have a representative Officer Wyse here. The others will have to remain outside." (T. 14).

Later, when defense counsel again raised the fact that the plaintiff had to prove certain individuals were negligent under the unrelated works exception, plaintiff's counsel resisted:

> Now what I am having problems with if he is trying to pin me down right now as to how I am going to argue my closing argument and who I am going to say was the good guy and you keep producing this list of people and saying the plaintiff has said he is making it as Your Honor indicates appear to be a trial of, against some individuals which it truly isn't, **it is just a minor quirk in the statute** that says by and through employees and we are trying to identify the employees.

(T. 97). The court agreed: "It sounded like you were saying individual defendant's which really isn't the case. They are basically agents that may have caused the employer to be liable." (T. 96). Plaintiff's counsel agreed:

Juliano presented his case--including the testimony of only **six** of the nine allegedly negligent fellow employees: Wyse, DeFeo, Rulison, Mitchell, Reynolds, and McPherson.[4] The defense put on the testimony of two others: Mickler and Smith.

The story that unfolded through their testimony was one

[4]Juliano also presented testimony from medical and economic experts.

not of individual negligence, but was at most one of institutional or employer negligence. Sergeant Wyse testified that the floor of the weigh station trailer had buckled about two years before Juliano's accident and gradually developed humps and dips in it. (T. 53, 58). It eventually developed what he described as a "real large, large hump," (T. 53), about eight to ten inches high and a foot in diameter with depressions of several inches in front of it. (T. 54).

There is a strict chain of command within the DOT. The officer on duty had to bring it to the attention of his supervisor and "through the chain of command it goes up and then somebody at high level would decide what actions would be taken." (T. 104). When asked by plaintiff's counsel, "Who is, in your estimation, responsible for the safety of people that walk into that weigh station?" Lt.Col. McPherson replied: "I would say it's a joint thing. We all -- we all were. Me from my remote seat in Tallahassee through the chain of command to whomever is at the scene and who is in contact with the local maintenance people." (T. 170).

Sergeant Wyse testified that he did what he was supposed to do: He had conversations with several people, including DOT maintenance to try to get the floor fixed, and also requested

it in writing.[5] (T. 55-56, 171). Sergeant Wyse spoke with Robert Rulison at DOT maintenance about a half a dozen times. (T. 57, 63, 117). Rulison sent out Sam Smith, a maintenance mechanic, in October 1990 to investigate and make an assessment. (T. 118, 122-23). Smith's report indicated that the flooring was not the real problem, but that the trailer was structurally unsound, and that was what was causing the flooring to buckle. (T. 122-23). Temporary repairs were not done at that time because of concerns voiced by Sam Smith that it would be very expensive and could create structural problems for the trailer. (T. 64, 124, 127). Smith thought they should replace the trailer. (T. 306).

Sergeant Wyse wrote a memorandum to his supervisor, Lieutenant DeFeo, in October 1990 requesting that the floor be repaired because it could cause an injury if someone tripped and fell. (T. 64-65, 67). DeFeo forwarded the memorandum to central headquarters in Tallahassee. (T. 103, 105).

In July of 1991, Captain Robert Reynolds inspected the trailer at the request of Lt.Col. Jack McPherson. (T. 81, 157). Captain Reynolds was assisting in the process of

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[5]Sergeant Wyse also put up warning sighns, although there was conflicting testimony about whether the signs were posted before Juliano's accident. See (T. 76-77, 225-27).

getting the problems with the trailer addressed, including the floor. (T. 82, 109). Reynolds wrote a memorandum to Lt.Col. McPherson reporting on the condition of the trailer. (T. 157-59, 166). Reynolds did not make any recommendation or request to repair the floor because he did not believe repair was economically feasible. (T. 159-61). He did not have the authority to order DOT maintenance to repair the floor; he was not in that chain of command. (T. 161). However, he "recommended that the trailer be given top priority for replacement." (T.159). McPherson also wanted to get a replacement trailer there. (T. 172-73).

The wheels were then set in motion to get a replacement trailer. (T. 109, 169, 278). Wyse, Rulison, and McPherson were told that another trailer was on the way. (T. 84, 109, 294). Unfortunately, there was an unanticipated delay in setting up a replacement trailer. See (T. 172).

Juliano's accident occurred in September 1991. (T. 197). The flooring was later patched by DOT maintenance, but not through Rulison. (T. 70). They cut out some of the bumps and laid down plywood that stuck about an inch above the flooring. (T. 83). In Sergeant Wyse's opinion, the patch made the sitution worse because "it was much easier to trip on that because it was lower. You couldn't see it as well as the Mt.

St. Helen's." (T. 83). The construction department eventually replaced the trailer with a permanent structure. (T. 147).

It was uncontradicted that neither Sgt. Wyse nor Lt. DeFeo had the authority to order DOT maintenance to make repairs. See (T. 68-69, 105, 146). They could simply request it. (T. 68-69). Rulison had the authority to make temporary repairs, (T. 124), but not to spend the large amount of money that appeared to be required. See (T. 121, 127-28). Rulison thought that it was probably the cost center manager or someone in that chain of command who would authorize the repairs. (T. 121). Neither Capt. Reynolds nor Lt.Col. McPherson could order Rulison to do any repairs because they were not in Rulison's chain of command. (T. 161, 171). Rulison never received the authorization to proceed with repairs. (T. 127). Major Mickler was supervising the replacement and construction of weigh stations. (T. 273). However, his unit was not responsible for maintaining the safety of the existing trailer. (T. 281).

DOT moved for a directed verdict at the end of the plaintiff's case and at the close of all evidence. (T. 247, 366). In those motions, DOT renewed its position that DOT was entitled to workers' compensation immunity under § 440.11(1). (T. 250-51, 375). DOT then argued that if the unrelated works

exception applied, the plaintiffs were required to meet the higher standard of criminal negligence because the fellow employees who were involved were supervisors. (T. 252-53). As the plaintiffs did not present evidence of criminal negligence, DOT argued that it was entitled to judgment as a matter of law.[6] (T. 253). Plaintiff's counsel responded that this was covered by the earlier motions and was law of the case. (T. 256). Judge Shea agreed and denied the motions. (T. 376, 379).

During the charge conference, DOT requested a jury instruction on the higher standard of negligence applicable to supervisors under workers' compensation law. (T. 346). Judge Shea denied that requested instruction, (T. 348), and instructed the jury on simple negligence, (T. 453-55).

DOT also objected to the plaintiff's special instruction on governmental entities: "[I]t is very clear that what the plaintiff is intending to do by this instruction is say DOT, whoever it is, just DOT. That's not correct. They have to find an employee of DOT. And this instruction takes it out of that." (T. 337-38). Judge Shea overruled the objection and

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[6]DOT also raised this post-trial in its motion for new trial and motion for directed verdict. (R. 863). Judge Shea also denied that motion. (R. 867).

instructed the jury that the issue was whether

> Florida Department of Transportation, by and through its employees, negligently failed to maintain its premises in a reasonable safe condition, or negligently failed to correct a dangerous situation of which the defendant, Florida Department of Transportation, by and through its employees, either knew or should have known by the use of reasonable care.

(T. 453). The jury was also instructed on respondeat superior liability. (T. 459). These instructions made it clear that the jury could, indeed should, look at the institutional negligence of DOT, not the negligence of any individual employee.

Lastly, when it came time to decide on the verdict form, the plaintiff backpeddled on who was being alleged to be negligent. Plaintiffs deleted Paul Mitchell and Johnny McKnight from the list. (T. 354). Although the plaintiff considered adding more names (T. 350), the case went to the jury with seven names on the special verdict form.

Verdict and Final Judgment. The jury returned a verdict finding negligence by five of the seven men listed: Lt. William DeFeo, Sgt. Michael Wyse, Capt. Robert Reynolds, R.J. Rulison, and Lt.Col. McPherson. (R. 855). Interestingly, Plaintiff's counsel in closing argument essentially absolved Sgt. Wyse of any wrongdoing. See (T. 395)("I really would

have no problems... If you put a great big no after Sergeant Wyse's name"). The jury still included him in the group. The jury found no negligence on the part of Sam Smith or William Mickler. (R. 855). The very number of DOT employees found negligent demonstrated that this was really institutional negligence, not the negligence of particular individuals. Significantly, all the people found negligent were supervisors. See (T. 100-02, 114, 155-56, 164-65, 176-77).

The jury allocated 30% of the fault to Juliano and 70% to DOT. (R. 856). Judge Shea entered a final judgment in the amount of $402,500.00. (R. 871). This was above and beyond the workers' compensation benefits Juliano has received.

Appeal to the Third District Court. DOT filed a timely notice of appeal to the Third District Court. (R. 869). On appeal, DOT argued that under § 440.11(1) and Duffell, Juliano was required not only to plead but to prove the negligence of a fellow employee in order to travel under the unrelated works exception to workers' compensation immunity. (Initial Brief to 3d DCA at 11). Moreover, DOT argued that plaintiffs were required to plead and prove criminal negligence becaue all the employees found negligent by the jury were supervisors. However, plaintiff never presented evidence that Sgt. Wyse or any other person committed criminal negligence and the jury

was not even instructed on criminal negligence. DOT also challenged the conclusion that Juliano and the DOT employees found negligent were actually involved in "unrelated works." (Reply Brief to 3d DCA at 4-7). Therefore, DOT argued that the trial court erred in denying the second motion for summary judgment, the motions for directed verdict, its proposed jury instruction, and the motion for new trial.[7]

The Third District Court affirmed. Florida Dept. Of Transp. v. Juliano, 744 So.2d 477 (Fla. 3d DCA 1999). In discussing the workers' compensation issues, the Third District ruled "that the doctrine of res judicata precluded the DOT from raising or reraising any aspect of its workers' compensation defense on remand after the first appeal of this cause. See Thomas v. Perkins, 723 So.2d 293, 294 (Fla. 3d DCA 1998)(under the doctrine of res judicata, appellant is precluded from raising any issues which were or should have been raised on first appeal)." 744 So.2d at 478.

DOT sought discretionary review in this Court based on conflict with this Court's decision in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983), and the Second District's decision in Two M Dev. Corp. v. Mikos, 578 So.2d

[7]DOT also raised issues relating to the conduct of the trial.

829 (Fla. 2d DCA 1991). This Court granted jurisdiction.

SUMMARY OF ARGUMENT

The Third District Court held here that DOT was precluded from raising any aspect of the workers' compensation law under § 440.11(1), Fla. Stat., because that court had previously affirmed the denial of summary judgment based specifically on the "unrelated works" exception to workers' compensation immunity. The end result in this case was that Juliano was permitted double recovery for his injuries, contrary to both the plain language and intent of the workers' compensation statute. In these proceedings, this Court will determine the proper scope of the law of the case doctrine and the proper standard when co-employees are charged with negligence under the "unrelated works" exception to workers' compensation immunity.

This Court should reaffirm that law of the case applies only to questions of law actually considered and determined in a prior appeal of the same case. The district court applied the incorrect legal standard in this case. The issue relating to the appropriate negligence standard for supervisors under workers' compensation law raised in the second summary judgment motion, and later motions for directed verdict, new trial, and jury instructions was not actually or necessarily decided in the first appeal. Moreover, the first

interlocutory appeal was not a final determination of the issue of whether DOT could be held liable under the "unrelated works" exception to workers' compensation immunity, and the court could reconsider this issue given the evidence actually presented at trial. The facts presented at trial were materially different than those presented at the time of the first summary judgment motion. Therefore, it was error to rule that law of the case precluded consideration of these issues.

On the merits, DOT is entitled to workers' compensation immunity. The plaintiff neither pled nor proved that any specific fellow public employee was negligent -- let alone culpably negligent. Instead, the plaintiff and the trial court treated DOT as the defendant in fact, not as simply a surrogate for a specific DOT employee as required by the statute. At most, the evidence presented at trial showed institutional negligence by the employer, DOT, not the individual negligence of any specific DOT employees. If DOT were a private employer there would be no question that it would be entitled to workers' compensation immunity. There is no support in the statutes, case law, public policy or common sense for treating a public employer differently and allowing a public employee double recovery. This Court should quash

the decision of the Third District Court and remand for entry of judgment for DOT.

Lastly, even if this Court rules that DOT was not entitled to judgment as a matter of law, this case should still be remanded for a new trial because the jury was not instructed on the culpable negligence standard. At the very least, DOT is entitled to have a jury determine its liability under the correct standard.

ARGUMENT

I. LAW OF THE CASE DOES NOT PRECLUDE ALL WORKERS' COMPENSATION ISSUES IN THIS CASE.

This case raises the issue of the proper scope of the law of the case doctrine. The Third District ruled in this case "that the doctrine of res judicata precluded the DOT from raising or reraising **any aspect** of its workers' compensation defense on remand after the first appeal of this cause." Florida Dept. of Transp. v. Juliano, 744 So.2d 477, 478 (Fla. 3d DCA 1999)("Juliano II"). The district court relied on its decision in Thomas v. Perkins, 723 So.2d 293, 294 (Fla. 3d DCA 1998), for the proposition that "under the doctrine of res judicata, appellant is precluded from raising any issues which were or should have been raised on first appeal." Juliano II, 744 So.2d at 478. This ruling highlights a conflict in this Court's case law on the law of the case doctrine. See generally Raymond T. Elligett, Jr. & Charles P. Schropp, Law of the Case Revisited, Fla.Bar J. 48 (March 1994)(hereinafter "Elligett & Schropp"). This Court should rule, consistent with the decision in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983), that law of the case only applies to issues actually or necessarily determined in a prior appeal, and not to issues that arguably could or should have been

brought in a prior appeal.

The doctrine of law of the case is allied to res judicata, but addresses repeated rulings on the same issue within the same action. See Finston v. Finston, 37 So.2d 423, 424 (Fla. 1948); Barry Hinnant, Inc. v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986); Harris v. The Lewis State Bank, 482 So.2d 1378, 1384 (Fla. 1st DCA 1986).[8] Two conflicting lines of case law have developed in Florida on the proper scope of this doctrine. See generally Elligett & Schropp, supra. One follows the standard applied in this Court's 1983 ruling in U.S. Concrete, 437 So.2d at 1063, that "[t]he law of the case is limited to rulings on questions of law actually presented and considered on a former appeal." See, e.g., Two M Dev. Corp v. Mikos, 578 So.2d 829 (Fla. 2d DCA 1991); Barry Hinnant, 481 So.2d at 82. The other appears to derive from an older Florida Supreme Court case, Airvac, Inc. v. Ranger Ins. Co., 330 So.2d 467 (Fla. 1976), which applied a much broader standard. See, e.g., Valsecchi v. Proprietors Ins. Co., 502 So.2d 1310 (Fla. 3d DCA 1987); Marine Midland Bank Central v.Cote, 384 So.2d 658 (Fla. 5th DCA 1980). The time has come

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[8]Indeed, the two terms appear to sometimes be confused. See Barry Hinnant, 481 So.2d at 82. The Third District in this case misidentified the appropriate doctrine.

for this Court to resolve this conflict.

The lower courts applied the incorrect legal standard for law of the case here. The courts also ignored the significant distinction between an appeal from a denial of summary judgment and an appeal after final judgment. The decision of the Third District Court should be quashed.

A. Law of the Case applies only to issues actually or necessarily determined in a prior appeal.

U.S. Concrete involved an automobile accident caused by the negligence of U.S. Concrete's employee. 437 So.2d at 1062. The jury awarded plaintiffs $800,000 in punitive damages. However, the jury did not specify whether U.S. Concrete was vicariously liable, or whether liability arose from negligent hiring of U.S. Concrete's employee. Id. at 1063. The defendants filed a post-judgment interlocutory appeal challenging the excessiveness of the jury's verdict. The district court reversed and ruled the verdict was excessive. Id. This Court quashed and remanded for reinstatement of the jury's verdict. Id.

On remand, defendants challenged whether they could legally be vicariously liable for punitive damages. Id. Plaintiffs claimed that defendants were precluded from raising this issue because it was not raised in the prior appeal

regarding punitive damages. This Court disagreed: "The doctrine of law of the case is limited to rulings on questions of law **actually presented and considered** on a former appeal." Id.

U.S. Concrete followed an earlier decision in Greene v. Massey, 384 So.2d 24, 27 (Fla. 1980). Greene sought a writ of prohibition to prevent his retrial on double jeopardy grounds. Id. The district court denied the writ. On appeal from his conviction on retrial, Greene sought to raise the same double jeopardy claim. The district court refused to consider it, citing law of the case, and this Court agreed. Id. This Court held that a lower court "may in subsequent proceedings pass on issues which **have not necessarily been determined** or become law of the case." Id.

However, prior to U.S. Concrete and Greene, this Court decided Airvac, 330 So.2d 467 In Airvac, the plaintiff lost at trial, but successfully appealed the verdict. This Court ruled that the defendant's failure to cross-appeal the denial of leave to amend the answer precluded amendment after the first appeal. 330 So.2d at 469.

Thus, in Airvac, this Court precluded consideration of issues not actually or necessarily considered in the first appeal. Subsequent courts have interpreted Airvac to preclude

issues that **could** have been raised in the first appeal, effectively ruling that if the issue could have been raised in the first appeal, it should have been raised and failure to do so essentially waives the issue. See, e.g., Valsecchi, 502 So.2d at 1311.[9]

This Court's most recent opinions on law of the case do not cite either Airvac or U.S. Concrete for law of the case, so this conflict remains unresolved. See Holder v. Keller Kitchen Cabinets, 610 So.2d 1264 (Fla. 1992); Wells Fargo Armored Servs. Corp. v. Sunshine Sec. & Detective Agency, 575 So.2d 179 (Fla. 1991); Brunner Enters., Inc. v. Department of Revenue, 452So.2d 550 (Fla. 1984). However, these decisions appear to take an approach closer to that of U.S. Concrete.

Brunner involved the issue of when courts have the authority to modify rulings that were law of the case. 452

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[9]Interestingly, the Third District's decision in Thomas v. Perkins, 723 So.2d 292 (Fla. 3d DCA 1998), relied on in the decision below, does not cite Airvac. Instead, the opinion cites two res judicata cases involving collateral proceedings after final judgment: Walker v. Walker, 566 So.2d 1350 (Fla. 1st DCA 1990), and Braden v. Braden, 436 So.2d 914 (Fla. 2d DCA 1983). Although law of the case is a limited form of res judicata, there is a significant difference between the finality expected after final judgment and interlocutory review, where it is expected that there will be subsequent proceedings in that case.

So.2d at 552. This Court stated that "[I]t is the general rule in Florida that **all questions of law which have been decided** by the highest appellate court become the law of the case." Id. There is no mention of issues which could or should have been decided in the prior appeal.

Next, in Wells Fargo, Wells Fargo sued a security company hired to protect its armored vehicles because one of the security guards participated in a robbery of a Wells Fargo vehicle. 575 So.2d at 179. The defendant appealed a default judgment, arguing it did not receive proper service of process. The district court ignored the default issues and ruled that the original complaint had failed to state a cause of action because the security guard was acting beyond the scope of his agency relationship with the defendant security company. Id. at 180. On remand, the trial court dismissed the complaint.

Wells Fargo then filed an amended complaint adding new parties and theories of recovery. Id. The trial court dismissed the amended complaint on statute of limitations grounds. The district court affirmed the result, but based its decision on law of the case stating that the amended complaint "'contain[ed] the same causes of action ruled upon

in the prior appeal and add[ed] new, different theories of recovery not previously asserted.'" Id. This Court disagreed: "The law-of-the-case doctrine was meant to apply to matters litigated to finality, not to matters that remain essentially unresolved due to the erroneous ruling of a lower court." Id.

Wells Fargo conflicts with Airvac in that Airvac held that the law of the case precluded amending a pleading after remand. See 330 So.2d at 469. Moreover, Wells Fargo has been cited for the proposition that law of the case does not apply to an issue not raised or litigated by the parties in a prior appeal -- essentially the U.S. Concrete standard. See McWilliams v. State, 620 So.2d 222, 225 n.2 (Fla. 1st DCA 1993).

Later in Holder, this Court held that neither law of the case, estoppel by judgment, or res judicata apply "to a compensation claim that was premature at the time of the prior proceedings and therefore was not adjudicated." 610 So.2d at 1267. In so doing, this Court cited to 32 Fla.Jur.2d, Judgments and Decrees § 105 (1981), which states that "the doctrine of law of the case may be invoked by either party as to the questions that were **actually considered and decided** on a former appeal involving the same action" -- again, the U.S. Concrete standard.

The U.S. Concrete approach simply makes sense. A broader standard would require parties involved in an interlocutory appeal to raise every conceivable alternative issue or cross-appeal every unfavorable interlocutory order out of fear that it would later be determined that those issues or rulings could have been included in the interlocutory appeal and thus are barred by law of the case. This would fly in the face of established law that trial courts retain the ability to reconsider interlocutory rulings until final judgment, see Anders v. McGowen, 739 So.2d 132, 135 (Fla. 5th DCA 1999); Bettez v. City of Miami, 510 So.2d 1242, 1243 (Fla. 3d DCA 1987), and that interlocutory appeals are limited to the precise rulings permitted under the rules, see RD & G Leasing, Inc. v. Stebnicki, 626 So.2d 1002 (Fla. 3d DCA 1993); Supal v. Pelot, 469 So.2d 949 (Fla. 5th DCA 1985); Chesler v. Hendler, 428 So.2d 730 (Fla. 4th DCA 1983).

It would also potentially be a tremendous waste of judicial resources. See Travelers Ins. Co. v. Bruns, 443 So.2d 959, 960-61 (Fla. 1984)(reason for limited review of interlocutory orders is to avoid waste of judicial resources). Often, as here, the court's ruling in the first appeal determines whether it is even necessary to consider alternative claims. For example, in Two M, the plaintiff

challenged a tax assessment on two grounds: (1) that the property was not substantially completed at the time of the assessment, and (2) that even if the property was substantially completed, the assessment was still excessive under the statutory criteria. 578 So.2d at 830. The trial court ruled the property was not substantially completed. That decision was reversed on appeal.

The trial court ruled on remand that it had no jurisdiction to consider the excessiveness of the assessment. Id. On appeal, the Second District reversed because the first appeal did not address the propriety of the assessment as substantially completed property, so law of the case did not apply. Id. at 830-31. Essentially, it was only after the first appeal that the issue of the assessment of substantially completed property could properly be addressed. If the property was not substantially completed, that determination was unnecessary.

This Court set out the proper standard for law of the case in U.S. Concrete. Only issues actually or by necessary implication decided in a prior appeal should be precluded by law of the case. In effect, U.S. Concrete sub silentio overruled Airvac. This Court should reaffirm the rule in U.S. Concrete and disapprove all decisions in conflict with it.

The decision of the Third District in this case must be quashed because the court applied the wrong standard.

B. The first interlocutory appeal in this case did not actually or necessarily decide all issues relating to workers' compensation immunity.

The first appeal in this case was an interlocutory appeal of denial of summary judgment based on workers' compensation immunity. (R. 360-68; A. 37-38). DOT argued that it was entitled to immunity unless Juliano named all the specific employees alleged to be negligent, thereby bring this suit under the "unrelated works" exception in the next to the last sentence of § 440.11(1), Fla.Stat. (A. 38-55). In response, Juliano argued that he had named a specific employee, Sgt. Wyse, and therefore summary judgment was inappropriate. (A. 56-69). Thus, the only issue before the Third District in the first appeal was the propriety of summary judgment. The Third District affirmed without opinion, merely citing Holmes County School Bd. v. Duffell, 651 So.2d 1176 (Fla. 1995). Florida Dept.of Transp. v. Juliano, 664 So.2d 77 (Fla. 3d DCA 1995)("Juliano I").

At most, Juliano I decided that the plaintiff was not required to specifically plead who the negligent fellow employee was to survive summary judgment under the "unrelated works" exception in the next to the last sentence of §

440.11(1). It was sufficient that at some point the plaintiff claims at least one specific fellow employee was negligent.[10] The court essentially ruled that Juliano's belated allegation that Sgt. Wyse had been negligent created an issue of disputed fact sufficient to survive summary judgment.[11] The court was not presented with the issue of the appropriate standard for negligence under the last sentence of § 440.11(1) where the fellow employee was a supervisor--the issue raised in the second summary judgment motion. Nonetheless, the Third District ruled that because DOT unsuccessfully appealed one aspect of workers' compensation immunity, it could not raise "**any** aspect" of workers' compensation immunity. Juliano II. This extremely broad ruling was error. See McWilliams, 620 So.2d at 225 (issues not presented to court in interlocutory appeal were not precluded from consideration in proceedings after remand).

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[10]As discussed infra note 15, DOT does not concede the correctness of this ruling.

[11]It is important to remember that the first appeal in this case was taken before Fla.R.App.P. 9.130(a)(3)(C)(vi) was amended. The amendment clarified that interlocutory appeal is available only when a trial court denies summary judgment expressly on the basis that workers' compensation immunity is inapplicable as a matter of law not, as was the case in the first appeal here, because there are disputed issues of fact. See Hastings v. Demming, 694 So.2d 718 (Fla. 1997).

Nor was a determination of the proper standard of negligence for a supervisor necessary for the outcome of the first appeal. As in Two M, if the Third District had ruled that DOT was entitled to summary judgment because Juliano had failed to specifically plead that Sgt. Wyse or others were negligent, the issue of the proper standard of negligence would never need to be addressed. Therefore, both the trial court and the Third District erred in ruling that law of the case precluded consideration of the second summary judgment motion--the two motions simply addressed different aspects, indeed completely different sentences of § 440.11(1).[12]

Moreover, DOT not only raised the issue of the proper standard of negligence in its second summary judgment motion; DOT also raised it in motions for directed verdict at the end of the plaintiff's case-in-chief, at the close of all evidence, and post-trial. (T. 247, 366; R. 863). DOT raised it during the charge conference in proposing its jury instructions and objecting to the plaintiff's proposed jury instructions. (T. 337-38, 346). DOT also renewed its objection to permitting suit under the "unrelated works"

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[12]Furthermore, DOT's second motion was not frivolous. The order granting fees and costs under § 57.105, Fla.Stat., should be vacated on remand.

exception, based on the evidence as presented at trial. (T. 250-51, 375).

This was proper. "The failure to grant a summary judgment does not establish the law of the case; [it] merely defers the matter until final hearing." City of Coral Gables v. Baljet, 250 So.2d 653, 654 (Fla. 3d DCA 1971); see also Hastings v. Demming, 694 So.2d 718, 720 (Fla. 1997)(Unless court ruled that employer was not entitled to workers' compensation immunity as a matter of law, it may be raised at trial). Affirming that denial of summary judgment does not do anything more. See Steinhardt v.Steinhardt, 445 So.2d 352, 356-57 (Fla. 3d DCA 1984)(quoting Baljet).

On appeal after final judgment, DOT challenged all of these rulings under the record as perfected at trial. See (Initial Brief to 3d DCA). Yet, the Third District addressed only the denial of DOT's second summary judgment motion. Juliano II, 744 So.2d at 478.

Law of the case applies in subsequent proceedings only where the material facts remain unchanged. See Toledo v. Hillsborough County Hosp. Auth., 747 So.2d 958, 960 (Fla. 2d DCA 1999); Saudi Arabian Airlines Corp. v. Dunn, 438 So.2d 116, 123 n.9 (Fla. 1st DCA 1983). For example, in Saudi

Arabian Airlines, the plaintiff filed suit against an employer for injuries allegedly caused by the negligent driving of Saudi's employee. The first appeal was on denial of a motion to abate and to dismiss for failure to state a cause of action against employer Saudi under the doctrine of respondeat superior. 438 So.2d at 118. The district court found that the allegations were sufficient to charge that Saudi's employee was acting within the scope of his employment at the time of the accident. The jury found for the plaintiff. Id. at 119. Saudi appealed the final judgment. The plaintiff argued that the ruling in the first appeal was law of the case as to whether the driver was acting within the scope of his employment. The Second District disagreed. "Since this court's prior decision was determined on the basis of allegations and not proof, the law of the case doctrine does not bar this court's review of the proof presented at trial." Id. at 123 n.9.

Similarly here, the Third District's ruling in the first appeal only determined whether DOT was entitled to summary judgment based on the allegations and facts presented at that time. By the end of trial, the record was far different from what was available to the trial court and the Third District in the first appeal. In the interlocutory appeal, Juliano had

alleged only Sgt. Wyse was negligent. See (A. 10, 56-69). By the beginning of trial, Juliano had alleged nine men, including Sgt. Wyse, had been negligent. (R. 840). Then by the end of trial, Juliano had lowered that number to seven, including Sgt. Wyse. Those seven were listed on the verdict form. (R. 855). However, in closing argument, Juliano's attorney essentially gave the jury permission to absolve Sgt. Wyse of any wrongdoing. (T. 395)("I would really have no problems . .. If you put a great big no after Sergeant Michael Wyse's name"). The jury returned a verdict finding five of the seven, including Sgt. Wyse, had been negligent. (R. 855). All those found negligent were supervisors. (T. 100-02, 114, 155-56, 164-65, 176-77). As the facts and evidence available to the court after trial were materially different, law of the case does not apply.

In sum, this Court should reaffirm its decision in U.S. Concrete that law of the case applies only to questions of law actually considered and determined in a prior appeal of the same case. The district court applied the incorrect legal standard in this case. The issue relating to the appropriate negligence standard for supervisors under workers' compensation law raised in the second summary judgment motion, and later motions for directed verdict, new trial, and jury

instructions was not actually or necessarily decided in the first appeal. Moreover, the first interlocutory appeal was not a final determination of the issue of whether DOT could be held liable under the "unrelated works" exception to workers' compensation immunity, and the court could reconsider this issue given the evidence actually presented at trial. The facts presented at trial were materially different than those presented at the time of the first summary judgment motion. Therefore, it was error to rule that law of the case precluded consideration of these issues. The decision of the Third District in this case should be quashed.

II. UNDER WORKERS' COMPENSATION LAW, DOT COULD NOT BE HELD LIABLE IN THIS CASE FOR ITS SIMPLE INSTITUTIONAL NEGLIGENCE.

The analysis of this issue "must begin with the premise, now well established in our law, that workers' compensation generally is the sole tort remedy available to a worker injured in a manner that falls within the broad scope and policies of the workers' compensation statute."[13] Byrd v.

[13]As discussed above, law of the case does not apply and this case must be decided on its merits. Even if this Court finds that law of the case could apply, this Court should still decide the workers' compensation law issues on their merits because strict adherence to law of the case would cause a manifest injustice. See Strazzula v. Hendrick, 177 So.2d 1, 4 (Fla. 1965).

Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 1100 (Fla. 1989). Juliano has received, and is continuing to receive, workers' compensation benefits for this injury. The evidence presented at trial made it clear that Juliano is seeking double recovery from the State of Florida for the failure of the system to correct a potentially hazardous condition in time to prevent the plaintiff's injury. This is not the type of fellow employee negligence contemplated by the "unrelated works" exception to workers' compensation immunity. This case should be remanded for entry of judgment for DOT.

Under § 440.11(1), workers' compensation benefits are an exclusive remedy and are "in place of all other liability of employers. Employees of the same employer also receive immunity. Id. However, the injured employee may sue fellow-employees who "are assigned primarily to unrelated works within public or private employment" for simple negligence. Id.

In Holmes County School Rd. v. Duffell, 651 So.2d 1176 (Fla. 1995), this Court ruled that the "unrelated works" exception should be read in pari materia with § 768.28(9)(a), Fla.Stat., part of the sovereign immunity statute. 651 So.2d at 1178-79. Section 768.28(9)(a) requires that all actions for negligence of public employees be maintained against the

government employer--effectively immunizing public employees. Therefore, in cases of governmental employees involved in unrelated works, the agency may be sued as a surrogate defendant. Id. at 1179.

As this Court noted, "[a] contrary interpretation facilitates unequal treatment among pubic and private employees." Id. Indeed, the plain language of both statutes indicates that the legislature intended to treat public and private employees the same. "[I]t is illogical to assume . . . section 768.28(9) was intended to eviscerate the public employee's statutory right to redress injury under section 440.11(1), while the private employee's statutory right to redress injury under the same section remains intact." Id. In addition, use of the language in § 440.11(1) "'within public or private employment' can only be read as conferring the same statutory rights to both public and private employees." Id. The case at bar involves precisely that, i.e., granting the same rights, no more and no less, to public and private employees under the statutory scheme.

The trial court in this case erred in not granting the second summary judgment or directed verdict motions for DOT because what Juliano plead and proved was at best institutional negligence--not the individual negligence of any

particular employees involved in unrelated works as required by § 440.11(1), Fla.Stat., and this Court's decision in Duffell. Moreover, there was no evidence on which a jury could lawfully have found the DOT supervisors involved criminally negligent. DOT is entitled to judgment as a matter of law.

A. Juliano failed to plead or prove the negligence of specific individual employees caused his injury.

If Juliano had been a private employee, he would have been required to plead and prove that a specific named fellow-employee involved in unrelated works was negligent. See, e.g., Johnson v. Comet Steel Erection, Inc., 435 So.2d 908 (Fla. 3d DCA 1983). Indeed, that fellow-employee would be the defendant in the case. See id. Under § 768.28(9)(a) and Duffell, a government employer like DOT stands in the shoes of the fellow-employee "as a surrogate defendant." 651 So.2d at 1179. However, nothing in that statute or Duffell indicates that plaintiff Juliano thereby becomes exempt from pleading and proving the negligence of an individual fellow public employee involved in unrelated works.

A contrary interpretation would eviscerate the workers' compensation immunity statute where there is a public employer. Institutional employers like governmental agencies

operate only through their employees. If plaintiffs are permitted to plead and prove merely that the agency "by and through its employees" acted negligently, that would encompass virtually any conceivable situation. Governmental entities would no longer be protected by workers' compensation immunity and public employees would be entitled to double recovery.

As this Court noted in Duffell, public and private employees should be treated equally under the statutory scheme. It is illogical to assume that the legislature intended to allow double recovery where taxpayer dollars are involved while prohibiting double recovery for private employees.

Yet that is precisely what occurred here. Juliano accepted workers' compensation benefits, but still sued DOT to recover for his injuries. Juliano should have been required to plead and prove individual negligence by specific DOT employees. He did not.

First, the complaint named no specific employee whose negligence allegedly caused Juliano's injuries. (R. 1-7). The first time any specific name was mentioned in a pleading was in the response to DOT's first motion for summary judgment. See (A. 12). That name was Sgt. Wyse. Even then, Juliano did not plead facts sufficient to show Sgt. Wyse was involved in

unrelated works. Nonetheless, the trial court and Third District Court ruled that this was sufficient to survive the first motion for summary judgment. Juliano I. That was error. See Dade County School Bd. v. Laing, 731 So.2d 19 (Fla. 3D DCA 1999)(teacher and custodian not primarily assigned to unrelated works; summary judgment for school board).[14]

Even assuming, however, that the lower courts' rulings on summary judgment were correct, however, Juliano still had to prove it at trial. He did not.

In the interim between the remand from the first appeal in 1995 and the trial in December 1997, DOT repeatedly requested a complete list of those fellow public employees Juliano alleged were negligent. See (R. 571, 803). It was only on the eve of trial that Juliano's counsel finally supplied a letter with nine names on it: Paul Mitchell, Lt. Bill DeFeo, Sgt Michael Wyse, Capt. Robert Reynolds, R.J. Rulison, Lt Col. McPherson, Johnny McKnight, Samuel Smith, and Maj. William Mickler. See (R. 840).

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[14]Under § 440.11(a), if the fellow employee is not primarily assigned to "unrelated words," the plaintiff must show the fellow employee acted "with willful and wanton disregard or unprovoked physical aggression or with gross negligence." Simple negligence would not be sufficient. Simple negligence is all that was claimed in this case.

Then, at trial, it became excruciatingly clear that DOT was not merely the defendant on paper--it was the negligent party on trial. Plaintiff's counsel resisted any implication that plaintiff had to prove the negligence of any specific individual because DOT was the defendant:

> Now what I am having problems with is he is trying to pin me down right now as to how I am going to argue my closing argument and who I am going to say was the good guy and you keep producing this list of people and saying the plaintiff has said he is making it as Your Honor indicates appear to be a trial of, against some individuals which it truly isn't, **it is just a minor quirk in the statute** that says by and through employees.

(T. 97). The trial court agreed: "It sounded like you were saying individual defendants which really isn't the case. They are basically agents that may have caused the employer to be liable." (T. 96).

Juliano then presented his case--including the testimony of only six of the nine allegedly negligent fellow employees from the list provided right before trial.

The story that unfolded through their testimony was one at most of institutional employer negligence. Sergeant Wyse and the other DOT supervisors were aware of the poor condition of the floor and were in the process of doing something about it when Juliano was injured. (T. 53, 55-57, 157-59, 166,

278). Each of them followed the strict chain of command used by the agency. Assessments were made, reports were written, and plans were made to replace the weigh station trailer. Juliano's accident unfortunately occurred in the interim. See (T. 172). There was no evidence that any individual DOT employees failed to do what they were required to do as part of their job.

Perhaps most significantly, the jury was instructed that it had to find negligence by **DOT** acting through its employees, i.e., institutional rather than individual negligence. Over objection, the trial court instructed the jury that the issue was whether

> Florida Department of Transportation, by and through its employees, negligently failed to maintain its premises in a reasonable safe condition, or negligently failed to correct a dangerous situation of which the defendant, Florida Department of Transportation, by and through its employees, either knew or should have known by the use of reasonable care.

(T. 453). The jury was also instructed on respondeat superior liability. (T. 459). These instructions made it clear that the jury could, indeed should, look at the institutional negligence of employer DOT, not the negligence of any individual employee.

Indeed, the very fact that the verdict form went to the

jury with seven names of potentially negligent employees, and the jury returned a verdict finding five of them negligent, shows that it was the system that failed, not any individual employee. Not surprisingly, all of the fellow public employees found negligent were supervisors. "Providing a safe place to work is the essence of the employer's responsibility to its employees; its officers and directors are not subject to a third-party lawsuit for the failure of the employer to provide a safe workplace. Such an exception would essentially obliterate the immunity provided by the statute." Kennedy v. Moree, 650 So.2d 1102, 1107 (Fla. 4th DCA 1995)(citations omitted). Because the plaintiff proved only institutional negligence by the employer in failing to provide a safe workplace, DOT was entitled to judgment as a matter of law.[15] See Swilley v. Economy Cab Co., 56 So.2d 914 (Fla. 1951); Ogden v. Department of Transp., 601 So.2d 1300 (Fla. 3d DCA 1992).

Therefore, the trial court and the Third District erred in denying the first motion for summary judgment because Juliano failed to plead facts sufficient to allege negligence

[15]Moreover, arguably all were involved in different aspects of the related work of maintaining and operating weigh stations, and not "unrelated work" under the statute. See Vause v. Bay Med. Ctr., 687 So.2d 258 (Fla. 1st DCA 1996).

by a specific fellow employee primarily assigned to unrelated works. To the extent that ruling is law of the case, this Court should still rule because strict adherence to that doctrine would cause manifest injustice. However, even if the ruling on the first summary judgment motion is left undisturbed, this Court should rule that the trial court erred in denying DOT's motions for directed verdict because the plaintiff failed to prove individual negligence by a specific DOT employee at trial.

B. Juliano did not plead or prove culpable negligence by DOT employees.

Duffell did not involve the alleged negligence of a manager or supervisor. See 651 So.2d 1176. Therefore, this Court did not have occasion to address the last sentence of § 440.11(1) which provides a higher standard of negligence when the fellow public employee is a "sole propriety, partner, corporate officer or director, **supervisor**, or other person who in the course and scope of his or her duties acts in **a managerial or policymaking** capacity."

Prior to 1988, an injured employee could sue a corporate officer or supervisor under the same standard as any other fellow employee. See Kennedy, 650 So.2d at 1106. However in 1988, the legislature differentiated between the two types of

employees and provided that a supervisor cannot be held liable unless his or her conduct rose to the level of culpable or criminal negligence. See 1988 Fla. Laws ch. 88-284; see also Eller v. Shova, 630 So.2d 537 (Fla. 1993); Sublieau v. Southern Forming, Inc., 664 So.2d 11 (Fla. 3d DCA 1995); Kennedy, 650 So.2d at 1106. As fellow employees of any type generally share the employer's workers' compensation immunity unless they act intentionally or with gross negligence, see § 440.11(1), the additional provision must only apply when the supervisory employee is engaged in "unrelated work." Thus, it is when the plaintiff is travelling under the "unrelated work" exception to workers' compensation immunity that the next sentence of § 440.11(1) becomes applicable. Otherwise, it is mere surplusage. See Unruh v. State, 669 So.2d 242, 245 (Fla. 1996)(courts should read statutes to give all parts effect).

A private employee would be required to prove culpable negligence by the supervisory fellow private employee. See, e.g., Eller, 630 So.2d 537; Kennedy, 650 So.2d 1102; Sublineau, 664 So.2d 11; Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994). Of course, under § 768.28(9)(a), the state agency will still be listed as the surrogate defendant for the supervisory public employee as with any other public employee.

Again, however, there is nothing in either § 440.11(1) or § 768.28(9)(a) that implies that this substitution of defendants somehow changes the standard of negligence applicable to that class of employees. To rule otherwise would be to treat public and private employees differently; public employees would only have to show that their supervisor was negligent, whereas the private employee would have to show culpable negligence.

The distinction between general and supervisory employees simply makes sense. Suit against supervisory personnel acting in a managerial or policymaking capacity is essentially a suit against the employer itself. As this Court noted in Eller, the purpose of the 1988 amendment adding this hightened standard of negligence was "to clarify that all policymakers, regardless of their positions as either employers or co-employees, are treated equally." 630 So.2 at 542.

Without this distinction, the exception would essentially swallow the rule, i.e., a plaintiff could avoid workers' compensation immunity simply by suing those in control of the agency or corporate employer for personal negligence. See Kennedy, 650 So.2d at 1107. The type of double recovery permitted by the lower courts' ruling in this case is precisely what the workers' compensation statutes are designed

to avoid.

The higher standard of negligence applicable to supervisory employees represents a compromise, balancing the policies underlying workers' compensation immunity with the rights of injured employees. The legislature permitted injured employees to sue supervisors personally, but only if their actions were so egregious as to constitute criminal or culpable negligence. Moreover, where the employer is a governmental agency, like the DOT, this higher standard becomes even more significant because recovery will be against the agency itself.

In this case, Juliano neither plead nor proved that any fellow public employee had committed culpable negligence. Yet the only employee alleged at the time of the second motion for summary judgment to be negligent (Sgt. Wyse), (R. 497; A. 80), and all of the five employees found negligent by the jury, were supervisors acting in their supervisory capacity, see (T. 100-02, 114, 155-56, 164-65, 176-77).

The courts have defined culpable negligence as "negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others." Ross, 632 So.2d at 225. This conduct "must be equivalent to a violation of

law constituting a first-degree misdemeanor or higher crime." Kennedy, 650 So.2d at 1106.

Here, the evidence showed that despite the efforts of Sgt. Wyse and other DOT supervisors, the floor was not repaired or the trailer replaced before Juliano was injured. On this record, there was no evidence on which a jury could lawfully find that the DOT supervisors were criminally negligent. See Swilley, 56 So.2d 914; Ogden, 601 So.2d 1300.

The Second District addressed a similar situation in Ross, 632 So.2d 224. In that case, the plaintiff was painting on a construction site near a hole. A co-worker suggested using a nearby piece of plywood to cover the hole. Unbeknownst to them, that plywood was being used to cover another hole. The plaintiff fell through the hidden hole while attempting to move the plywood. Id. at 225. The plaintiff sued the site superintendant and the president of the construction company, alleging they negligently failed to adequately provide a safe job site. At least one of the defendants knew that additional safety precautions were needed at that construction site.

The Second District Court noted that for either man to lose the protection of workers' compensation immunity, their conduct had to rise to the level of culpable negligence. Id.

The court ruled that it did not and reversed the denial of summary judgment.

> In this case, it is arguable that the danger presented by the hole could have, and should have, been protected by a better method than a loose sheet of plywood. Nevertheless, under the culpable negligence standard, we conclude there is no question of fact and that these defendants were entitled to judgment as a matter of law. Assuming that both men had actual knowledge of this problem, the corporations efforts to cover the hole were sufficient to show a degree of care that exceeded the culpable negligence standard.

Id. at 226. Thus, even if the defendants actually knew additional steps were necessary to make the site safe, that was insufficient to show culpable negligence as a matter of law.

Similarly here, the uncontradicted evidence was that Sgt. Wyse and the other DOT supervisors were aware of the poor condition of the floor and were making efforts to replace the trailer. See (T. 53, 55-57, 157-59,166, 278). At the time, it appeared that a simple repair would be very expensive and could make the situation worse by jeopardizing the structural integrity of the whole trailer. See (T. 64, 124, 127). Unfortunately, despite their efforts, the trailer was not replaced before Juliano was injured. Moreover, the bumps and dips in the floor were an obvious, not a hidden, hazard. (T.

60).

Although it is arguable that more could, and perhaps should, have been done more quickly to remedy the situation, the evidence in this record simply does not show that this hazard, or the delay in repairing it, was the result of culpable negligence by any DOT employee. Their negligence, if any, was not "of a gross and flagrant character which evinces a reckless disregard for the safety of others." See Ross, 632 So.2d at 225. DOT is entitled to judgment as a matter of law. The court erred in denying DOT's second motion for summary judgment and the motions for directed verdict.

Lastly, even if this Court rules that DOT was not entitled to judgment as a matter of law, this case should still be remanded for a new trial because the jury was not instructed on the culpable negligence standard. At the very least, DOT is entitled to have a jury determine its liability under the correct standard. See Luster v. Moore, 78 So.2d 87, 88 (Fla. 1955); Ketchen v. Dunn, 619 So.2d 1010, 1012 (Fla. 2d DCA 1993).

In sum, DOT is entitled to workers' compensation immunity. The plaintiff neither pled nor proved that any specific fellow public employee was negligent -- let alone culpably negligent. Instead, the plaintiff and the trial

court treated DOT as the defendant in fact, not as simply a surrogate for a specific DOT employee as required by the statute. At most, the evidence presented at trial showed institutional negligence by the employer, DOT, not the individual negligence of any specific DOT employees. If DOT were a private employer there would be no question that it would be entitled to workers' compensation immunity. There is no support in the statutes, case law, public policy or common sense for treating a public employer differently and allowing a public employee double recovery. DOT is entitled to judgment as a matter of law. This Court should quash the decision of the Third District Court and remand for entry of judgment for DOT.

CONCLUSION

For the foregoing reasons, Petitioner FLORIDA DEPARTMENT OF TRANSPORTATION respectfully requests this Court to quash the decision of the Third District Court of Appeal and remand for entry of judgment for Petitioner. In the alternative, Petitioner respectfully requests this Court to remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original copy of the foregoing has been filed with the court and a true and correct copy was mailed to L Barry Keyfetz, Esq. KEYFETZ, ASNIS & SREBNICK, P.A., 44 West Flagler Street, Suite 2400, Miami, Florida, 33130, on this _____ day June, 2000.

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