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, REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Rules:

ARGUMENT

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

In this case, the district court based its ruling on any worker's compensation issues on the law of the case doctrine. Florida Dept. Of Transp. v. Juliano, 744 So.2d 477, 478 (Fla. 3d DCA 1999)("Juliano II"). In order to determine if that ruling was correct, this Court must determine if the district court applied the correct rule of law. Therefore, contrary to Respondent's position, a determination of which of the conflicting rules of law of the case is correct is essential to determination of this case.[1] The lower courts did not apply the correct legal standard for law of the case here. Respondent also ignore 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.

Respondent argues at 12, without authority, that if a litigant takes an interlocutory appeal, it should be required to raise any

[1]Respondent does not appear to argue in its merits brief that there is no conflict between the rules announced in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983), and Airvac, Inc. v. Ranger Ins. Co., 330 So.2d 467 (Fla. 1976).

other "determinative legal issue that is an integral part of the issue raised on interlocutory appeal" or forever waive it, regardless of whether it was the subject of the order appealed. Respondent then claims that the issue of the proper standard of negligence for supervisory employees would have been determinative of this case, and therefore should have been raised in the earlier interlocutory appeal. There are several significant problems with this argument. First, Respondent's argument flies in the face of established law on interlocutory or non-final appeals, none of which Respondent even addresses. Florida Rule of Appellate Procedure 9.130(a)(3) provides that "[r]eview of non-final orders of lower tribunals **is limited to** those" in a very specific list. (Emphasis added.) It is well-settled that interlocutory appeals are limited to the precise rulings permitted under the rules. See RD & G Leasing, Inc. v. Strebnicki, 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). If it was not part of the precise ruling appealed, it is not reviewable on interlocutory appeal.

Second, Respondent ignores the fact that the first appeal was from an order denying summary judgment. (R. 360-68; A. 37-38). "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). Affirming that denial of summary judgment does not change the nature of the order appealed. See Steinhardt v. Steinhardt, 445 So.2d 352, 356-57 (Fla. 3d DCA 1984). The trial court did not deny workers' compensation immunity as a matter of law. Essentially, the trial court ruled that the plaintiff's naming in any way at least one DOT employee who was allegedly negligent created a disputed issue of fact sufficient to survive summary judgment.[2] (A. 38-55). According to the trial court, the plaintiff was not required to name all of the allegedly negligent employees in the complaint, or even before trial. The court was not presented with the issue of the appropriate standard for negligence under the last sentence of § 440.11(1) and therefore made no ruling on that issue. See Boucher v. First Community Bank, 626 So.2d 979, 982 (Fla. 5th DCA 1993)(court's ruling on summary judgment was limited to the grounds raised in the motion). Nor was the defendant required to argue all grounds for summary judgment at one time. Under Respondent's theory there could never be partial summary judgments. Yet that is expressly provided for in the rules. See Fla.R.Civ.P. 1.510. Moreover,

[2]Such an appeal would not be possible today. See Hastings v. Demming, 694 So.2d 718 (Fla. 1997)(amendment to Fla.R.App.P. 9.130(a)(3)(C)(vi) 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).

the rules do not prohibit a party from renewing a motion for summary judgment before trial, or from moving for directed verdict during trial, as the facts in a case become more crystallized. See id. 1.510(b)(defendant may move for summary judgment "at any time"); Fla.R.Civ.P. 1.480. Moreover, 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).

If DOT has succeeded in its first summary judgment motion, DOT would have won regardless of the standard of negligence. DOT's position in the first summary judgment motion and subsequent interlocutory appeal was that Juliano had not sufficiently identified which employees allegedly had been negligent. Until it was clear who those employees were, the standard of negligence would not be in issue. Thus, the standard of negligence was simply not an integral part of that argument--they were two separate and distinct issues.[3] Respondent's argument also ignores the crucial principle that law of the case applies in subsequent proceedings only where the material facts remain unchanged. See Toledo v. Hillsborough

[3]Respondent also makes a bizarre argument at 12 that DOT chose not to raise the standard of negligence in the interlocutory appeal as some sort of delay tactic. This makes no sense. DOT was seeking to terminate the litigation by way of summary judgment in its favor, not prolong the litigation further.

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). 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. As the facts and evidence available to the court after trial were materially different, law of the case does not apply.

Indeed, the way this case progressed makes it clear that the standard of negligence for supervisors was not necessarily determinative at the time of the first summary judgment motion. It was only through the first summary judgment motion that DOT was able to learn the name of any specific employee plaintiff claimed had been negligent--and that one happened to be a supervisor. See (A. 12). Then at trial, on the list of DOT employees plaintiff ultimately alleged was negligent was Sam Smith--who was not a supervisor. See (R. 840).

By the end of trial, DOT had raised the issue of the proper standard of negligence in a second summary judgment motion, in motions for directed verdict, in its requested jury instructions, and post-trial. (T. 247, 337-38, 346, 366; R. 863). DOT also had renewed its objections to permitting suit under the "unrelated works" exception, based on the evidence as presented at trial. (T. 250-51, 375). On appeal from the final judgment, DOT challenged all of these rulings under the record as perfected

at trial. See (Initial brief to 3d DCA at 12; Appendix of Respondent at 9). Yet, the Third District addressed only the denial of DOT's second summary judgment motion, 744 So.2d at 478, and Respondent continues to ignore the trial's effect on this issue here.

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 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. 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 trial court erred in not granting DOT's motions for summary judgment and directed verdict 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 Holmes County School Bd. v. Duffell, 651 So.2d 1176 (Fla. 1995). Moreover, Juliano was required to plead and prove DOT supervisors were criminally negligent. DOT is entitled to judgment as a matter of law.

It has been DOT's position all along that Juliano was required to plead and prove the negligence of specific individual DOT employees by the proper standard. DOT attempted, unsuccessfully, to raise the pleading part of this issue originally in its first motion for summary judgment. (A. 1,). DOT then raised the need for proof by directed verdict, in it's proposed jury instructions, and in post-trial motions. (T. 247, 346-48, 366, 375; R. 859-64). DOT challenged the trial court's ruling on all of these motions in its appeal after final judgment. (Initial Brief to 3d DCA at 12; Appendix of Respondent at 9). On appeal, DOT argued that under § 440.11(1) the focus must be on the individual employees, not the surrogate defendant--DOT. Where those individual employees are supervisors, the higher standard of negligence applies. DOT's raising of this issue here should be no surprise.[4]

[4]The difference in DOT's argument here is, at most, one of emphasis. Moreover, contrary to Respondent's complaint, the fact that DOT did not fully flesh out this issue in the jurisdictional brief is not a waiver. A jurisdictional brief is not the proper place to fully argue the merits of all issues involved in an appeal. See Fla.R.App.P. 9.120(d)(jurisdictional briefs "limited solely to the issue of the supreme court's jurisdiction).

First, it should be noted that Respondent repeatedly concedes that it neither plead nor proved that there was culpable, or even gross negligence by any DOT employees. See, Answer Brief at 4,7,9. Therefore, if this Court determines that the higher standard of negligence was applicable here, this case must be remanded for entry of judgment for DOT. Respondent's argument appears to be that under § 768.28(9)(a), Fla.Stat., and this Court's opinion in Duffell, DOT is the defendant, and therefore, it was not necessary to plead the negligence of specific individual employees. Respondent also appears to claim that it is irrelevant whether any employees were supervisors because DOT, and not the individual employees, is the defendant. These claims must fail.

In Duffell, this Court ruled that public employees "have a statutory right to accept workers' compensation benefits and at the same time pursue a civil action against a negligent **co-employee** who is assigned primarily to unrelated works." 651 So.2d at 1178 (emphasis added). However, because of § 768.28(9)(a), the government agency stands in the shoes of its employee for the purpose of the suit. Id. at 1179. Indeed, this Court specifically distinguishes this situation from the typical respondeat superior situation where an employer is sued directly:

> The School Board is not being sued in its capacity as Duffell's employer. Instead, pursuant to section 768.28(9)(a), it is being sued as a **surrogate defendant** based on the negligent acts of Lewis, a fellow public employee.

Id. (emphasis added).[5]

This Court emphasized that this interpretation would treat public and private employees equally under workers' compensation law. Id. at 1178. Therefore, under Duffell, although the government entity is the defendant who will be liable for any judgment, the defendant in fact in a suit by a public employee is the "negligent co-employee," just as in a suit by a private employee.

Interestingly, Respondent concedes at 13 that under § 768.28(9)(a) "DOT stands in the shoes of their employee" without apparently understanding what that entails. By "standing in the shoes" of its employee, DOT has the same liabilities and defenses as that employee, no more and no less. That is what that phrase means. See, e.g., Foster v. Foster, 703 So.2d 1007 (Fla. 2d DCA 1997); Allstate Ins. Co. v. Metropolitan Dade County, 436 So.2d 976 (Fla. 3d DCA 1983).

What happened in this case is that the plaintiff was permitted to turn this from a suit against DOT as a surrogate defendant, to a suit against DOT as an employer under respondeat superior. That was error. Juliano did not plead the negligence of specific employees and resisted identifying which employees he was claiming were negligent right up until the time the case was

[5]The quoted language from Duffell also defeats amicus' unsupported argument at 13 that the "unrelated works" exception somehow does not involve "fellow employees."

submitted to the jury. (R. 1-7); (T. 97)("I am having problems with it 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"). Up until right before trial, the only employee mentioned by Juliano was Sgt. Wyse. Then right before trial, he sent a letter with a list of nine potentially negligent DOT employees. (R. 840). The jury was given a verdict form with the names of seven DOT employees, but in closing argument, Juliano changed his mind and told the jury that Sgt. Wyse had not been negligent. (R. 855). The jury was instructed on respondeat superior, and found five of the seven DOT employees negligent. (T. 459; R. 855). The employees found negligent were all supervisors, encompassing the various stages of the relevant DOT chains of command. See (T. 100-02, 114, 155-56, 164-65, 176-77). The evidence was uncontradicted that the proper procedures and chain of command were followed; it was the system represented by these employees that failed, not the employees themselves. See (T. 53, 55-57, 157-59, 166, 278). Because it is the negligence of the individual employees that is significant, the plaintiff must plead and prove negligence under the standard appropriate to the type of employee involved. A regular employee engaged in related works is judged under the gross negligence standard. § 440.11(1). A regular employee engaged in unrelated works is judged under a simple negligence

standard. Id. A corporate officer or supervisor is judged under a culpable or criminal negligence standard, regardless of whether the supervisor is engaged in related or unrelated works. See id. Respondent never really addresses this. None of the cases cited by Respondent to support his position involved supervisors acting in a managerial or policymaking capacity at the time of the injury. See Austin v. Duval County Sch. Bd., 657 So.2d 945 (Fla. 1995)(Bus driver); Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991)(driving a car). Moreover, this Court in Duffell did not even address the last sentence of § 440.11(1) which contains the 1988 amendment regarding the standard of negligence for supervisors and similar employees. See 651 So.2d 1176. Duffell simply does not control this aspect of the case. Furthermore, the argument of the amicus, Academy of Florida Trial Lawyers, is largely irrelevant.[6] First, contrary to amicus' claim, DOT is not seeking to merge together claims against fellow employees engaged in related and unrelated works. There is no question that where regular fellow employees are involved, the applicable standards of negligence are quite different depending on whether the fellow employee was engaged in related or unrelated works. See § 440.11(1).

[6]DOT objected to AFTL coming in as amicus and continues to object. However, as this Court had not yet ruled on the amicus at the time this brief was filed, DOT addresses the argument of amicus in an abundance of caution.

The problem with the amicus' argument is that it assumes either that the employees involved in this case were not supervisors or that the standard set out for supervisors in the last sentence of § 440.11(1) does not apply where the supervisors were engaged in unrelated works. Neither of these assumptions is supported by the facts or the law.

First, the amicus claims that "supervisors" under § 440.11(1) must be the supervisor of the injured employee. The amicus cites no authority for that interpretation, and there is none. DOT has found no Florida case interpreting § 440.11(1) in that way.

Also, such an interpretation is contrary to the rules of statutory construction. "Supervisor" is part of a list of types of people: "sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his duties acts in a managerial or policymaking capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties." § 440.11(1). The legislature in no way limited these types of individuals based on their relationship to the injured employee, merely by the type of duties they perform. Moreover, "supervisor" should be read in the context of and consistent with the other types of employees on that list, not all of which would involve supervising the particular injured employee. See Cepcot Corp. v. Department of Business & Professional Regulation, 658

So.2d 1092 (Fla. 2d DCA 1995)(noscitur a sociis); Smith v. State, 606 So.2d 427, 429 n.2 (Fla. 1St DCA 1992)(ejusdem generis). The language of the list emphasizes not people, but policymaking. This simply makes sense because suit against personnel acting in a managerial or policymaking capacity is essentially a suit against the employer itself. As this Court noted in Eller v. Shova. 630 So.2d 541, 542 (Fla. 1993), the purpose of the 1988 amendment adding this heightened standard of negligence was "to clarify that **all** policymakers, regardless of their positions as either employers or co-employees, are treated equally." (Emphasis added.) The concerns underlying the 1988 amendment apply equally to supervisors and other similar employees engaged in related and unrelated works. Indeed, the need for the heightened standard is even greater for supervisors involved in unrelated works because otherwise their policymaking activities would only be judged under a simple negligence standard, instead of the gross negligence standard applicable for employees involved in related works.

Further, the standard for supervisors is set out in a completely different sentence from the one listing claims against the other two categories of fellow employees. Nothing in the statute limits that heightened standard to claims only under the first clause of the previous sentence (related works), and not the second clause (unrelated works). Logically, it should apply to

both. To interpret it otherwise would improperly add words and a limitation to the statute not put there by the legislature. See In re Order on Prosecution of Criminal Appeals, 561 So.2d 1130, 1137 (Fla. 1990).

The evidence is uncontradicted that all of the employees found negligent were supervisors or managers who were acting in the course and scope of their managerial or policymaking duties in making the decisions regarding repairing the trailer floor. This is precisely the type of situation encompassed by the 1988 amendment.

It is ironic that Respondents and amicus try to convince this Court that plaintiff would not be receiving double recovery. If plaintiff did not expect to recover more than what he already has received from workers' compensation, no suit would have been filed. The order determining workman's compensation lien included in Respondent's appendix proves this point. (Appendix of Respondent at 24). Plaintiff's $64,780.08 recovery from this case will be reduced by only 11.27%, or $7,300.71, to partially compensate for medical expenses paid under workers' compensation. The state does not receive any set off for the nearly three hundred thousand dollars, also paid to Juliano under workers' compensation. (Appendix 1-24).[7]

[7]Petitioner has attached an appendix specifically to address the workers' compensation recovery issues raised by the Respondent. The Respondent has accused the Petitioner of erroneously asserting that the Respondent continues to receive

Additionally, Respondent implies that because the DOC filed and had been adjudicated entitled to that lien, this somehow proves that DOT and DOC are separate entities for workers' compensation purposes. Not so. The Notice of Lien filed by the DOC can best be described as an accounting function for the State of Florida to recover its own funds. The destination of any funds potentially recoverable by the DOC is the same place the funds will come from to pay this judgment -- The Florida Casualty Insurance Risk Management Trust Fund.[8]

In sum, DOT is entitled to workers' compensation immunity. The plaintiff neither plead nor proved that any specific fellow public employee was negligent--let alone criminally 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

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workers' compensation benefits. Respondent's **wage loss** benefits have been suspended pursuant to § 440.15(3)(b), Fla. Stat. However, Petitioner continues to receive medical benefits paid as recently as July 25, 2000. (Appendix 1-24)

[8]Pursuant to § 284.30, Fla. Stat., the state self-insurance fund is set up by the Department of Insurance and administered with a program of risk management to provide insurance for workers' compensation, general liability, fleet automotive liability, civil rights actions, and various attorney's fees proceedings. Section 284.31, Fla. Stat., further provides in pertinent part, that the Insurance Risk Management Trust Fund shall, unless specifically excluded, cover **all** departments of the State of Florida and their employees, agents, and volunteers.

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.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the __ day of August, 2000, the original and seven copies of the foregoing motion was

furnished via Federal Express to the Clerk of Court and copies of the motion were furnished via U.S. mail to L. Barry Keyfetz, Esq., Attorney for Plaintiff, KEYFETZ, ASNIS & SREBNICK, P.A., 44 West Flagler Street, Suite 2400, Miami, FL 33130-1856 and to Joseph H. Williams, Esq., attorney for The Academy of Florida Trial Lawyers, TROUTMAN, WILLIAMS, IRVIN, GREEN & HELMS, P.A., 311 West Fairbanks Avenue, Winter Park, Florida 32789.

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INDEX TO APPENDIX