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Florida Workers' Compensation: Does Common Employer Concept Unjustly Limits Employee's Claims Against Third-Party Tortfeasors?

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CASE COMMENTS

FLORIDA WORKERS' COMPENSATION: DOES COMMON EMPLOYER CONCEPT UNJUSTLY LIMIT EMPLOYEES' CLAIMS AGAINST THIRD-PARTY TORTFEASORS?*

Motchkavitz v. Boggs Industries, Inc.
407 So. 2d 910 (Fla. 1981)

Rather than engaging a general contractor, the owner-builder of a condominium project contracted directly with the contractors necessary to construct the building.[1] Petitioner was an employee of a contractor the owner-builder hired to perform the plumbing work on the project.[2] The petitioner's employer, in turn, subcontracted with respondent for the installation of catch basins.[3] Due to the alleged negligence of the subcontractor's employee petitioner was injured on the job.[4] After receiving workers' compensation from his employer, petitioner sued his employer's subcontractor to recover damages for his injuries.[5] Respondent moved for summary judgment, claiming immunity from suit under the exclusive remedy provision of Florida's workers' compensation law.[6] The trial court granted the motion,[7] and the district court of appeal affirmed.[8] On certification,[9] the Florida Supreme Court approved[10] and HELD, a subcontractor, a statutory common employer indirectly responsible

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*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the Spring 1982 semester.

1. Motchkavitz v. L.C. Boggs Indus., Inc., 384 So. 2d 259, 260 (Fla. 4th D.C.A. 1980). The owner-builder of the project, Zuckerman & Vernon Corp., utilized the general contractor's license of its vice president to secure the necessary permits. *Id.*

2. The petitioner, Ronald Motchkavitz, was an employee of May Plumbing Company, a contractor engaged in the construction of Gulfstream Garden Apartments. *Id.*

3. *Id.* The respondent was L.C. Boggs Industries, Inc.

4. Brief of Petitioners at 2, Motchkavitz v. L.C. Boggs Indus., Inc., 407 So. 2d 910 (Fla. 1981).

5. 407 So. 2d 910-11. Petitioner also sued the owner-builder, Zuckerman & Vernon Corp., and Theodore Faber, the allegedly negligent employee of Boggs Industries. *Id.*

6. FLA STAT. § 440.11(1) (1981).

7. 384 So. 2d 259, 260 (Fla. 4th D.C.A. 1980). In the same proceeding, the Broward County Circuit Court denied the motions for summary judgment made by Theodore Faber, employee of the subcontractor, and Zuckerman & Vernon Corp., the owner-builder. *Id.* at 259; Brief of Petitioners at 3, 407 So. 2d 910.

8. 384 So. 2d 259 (Fla. 4th D.C.A. 1980).

9. *Id.* at 261. The district court certified the following question to the Supreme Court of Florida as a matter of public importance: "Can the employee of a 'contractor,' having received workmen's compensation benefits from his employer, sue his employer's subcontractor for damages arising out of the negligence of the latter's employee?" *Id.* The district court also certified that its decision was in conflict with C & S Crane Serv., Inc. v. Negron, 287 So. 2d 108 (3d D.C.A. 1973), *cert. denied,* 296 So. 2d 49 (Fla. 1974). *Id.*

10. 407 So. 2d at 914. The supreme court approved the decision of the district court and stated that *C & S Crane* was wrongly decided. *Id.*

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for securing workers' compensation,[11] is immune from suit for injuries his employees negligently cause his contractor's employees.[12]

Florida enacted its first workers' compensation laws[13] in 1935 to modify the common law[14] with a system that compensated workers for injuries arising out of employment, regardless of negligence or fault.[15] The underlying purpose of workers' compensation was to provide prompt benefits,[16] to reduce

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11. *Id.*

12. *Id.*

13. The 1935 Workmen's Compensation Law was passed in the following three bills: 1935 Fla. Laws, ch. 17481, §§ 1-55 (current version at FLA. STAT. § 440.01 (1981)); 1935 Fla. Laws, ch. 17482, §§ 1-3 (current version at FLA. STAT. § 440.01 (1981)); 1935 Fla. Laws, ch. 17483, §§ 1-3 (current version at FLA. STAT. § 440.02 (1981)). In this comment, the law will be referred to by its present name, Workers' Compensation Law, as amended in 1979 Fla. Laws 40, § 10.

14. For a history of the development of workers' compensation, see H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 17-37 (1954) [hereinafter cited as H. SOMERS]; Larson, *The Nature and Origins of Workmen's Compensation,* 37 CORNELL L.Q. 206 (1952). At common law, a master had the following limited duties to his servants: to provide a safe work environment and safe tools and equipment; to provide a sufficient number of fellow servants; to establish and enforce safety rules; and to warn of dangers of which the servants might reasonably be unaware. Larson, *supra,* at 225. The injured worker's recovery was limited by the burden of proving that the employer failed to use reasonable care in the foregoing duties. *Id.* In addition, the worker had to overcome the employer's common law defenses, namely, contributory negligence, the fellow servant doctrine, and assumption of risk. *Id.* at 223-24. Under contributory negligence, the employee's negligence, however slight, would bar recovery regardless of the extent of the employer's negligence. Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). The defenses of contributory negligence and the fellow servant doctrine evolved from Priestley v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837). Under the fellow servant doctrine, the employer escaped liability if the employee's injuries resulted from the negligence of a co-employee. *Id.* at 1032-33. Assumption of the risk operated to bar recovery when the injury resulted from an inherent job hazard of which the employee had, or should have had, advance knowledge. *Id.* Larson estimated that this trio of common law defenses barred the injured employee's remedy in approximately 83% of the cases. Larson, *supra,* at 224-25.

15. The test for recovery under workers' compensation is whether the injury was work connected. Neither the employee's negligence nor the employer's fault is at issue. Larson, *supra* note 14, at 208. The statutory test for determining work connectedness is whether it is an injury "arising out of and in the course of employment." FLA. STAT. § 440.02(6) (1981); Strother v. Morrison Cafeteria, 383 So. 2d 623, 628 (Fla. 1980); Fidelity & Casualty Co. of N.Y. v. Moore, 143 Fla. 103, 105, 196 So. 495, 496 (1940). For a further discussion of the work connectedness issue, see Note, *Workmen's Compensation — Arising Out Of and In the Course of an Enigma,* 9 U. FLA. L. REV. 311 (1956); Comment, *Workers' Compensation: A New Standard for Work Connectedness,* 32 U. FLA. L. REV. 828 (1980).

16. Florida Game & Fresh Water Fish Comm'n v. Driggers, 65 So. 2d 723, 725 (Fla. 1953). These benefits include prompt medical attention, hospitalization and compensation commensurate with the injury. *Id.* The payments are made in periodic installments, and are based on the nature of the disability, the wages of the worker, and the number of dependents. H. SOMERS, *supra* note 14, at 27. The compensation system, unlike a tort award, is not intended to fully reimburse the injured worker for lost wages, and compensation payments range from 60% to 66 2/3% of a worker's full wages. L. ALPERT, J. ALPERT & P. MURPHY, FLORIDA WORKMEN'S COMPENSATION LAW §§ 1-5 (3d ed. 1978) [hereinafter cited as L. ALPERT]. "That a part of the loss should fall on the employee is considered fundamental in compensation law, so that no employee shall lose one of the primary incentives to avoid accidental injury." *Preface* to 1935 Fla. Laws ch. 17481, *quoted in* L. ALPERT, *supra* §§ 1-5.

litigation,[17] and to transfer accident costs from workers to employers and ultimately to consumers through increased prices.[18] Workers' compensation created trade-offs between employers and employees.[19] Employers agreed to secure payment of workers' compensation for employees in exchange for statutory immunity from employer damage suits.[20] Employees forfeited the right to a

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Larson noted that compensation equaling actual loss could result in "malingering and trumped-up claims." Larson, *supra* note 14, at 214.

The workers' compensation system was intended to be self-executing with benefits granted to the injured worker without the necessity of a legal or administrative proceeding. A.B. Taff & Sons v. Clark, 110 So. 2d 428, 436 (Fla. 1st D.C.A. 1959). To effectuate an informal and efficient procedure, the benefits are administered through a commission rather than the courts. L. ALPERT, *supra* at 3. In 1979, the Florida Legislature made significant changes to the Workers' Compensation Law, chapter 440 of the Florida Statutes, which included abolishing the previous administrative commission, the Industrial Relations Commission. 1979 Fla. Laws 312 (currently at FLA. STAT. § 440.271 (1981)). The initial hearing for contested industrial claims are now held before deputy commissioners. FLA. STAT. § 440.45 (1981). The rights of appeals from the deputy commissioners' orders are now consolidated in the First District Court of Appeal. *Id.* § 440.271. First District Court of Appeal decisions are subject to Florida Supreme Court review by petition for a writ of certiorari. *Id. See generally* Sadowski, Herzog, Butler & Gokel, *The 1979 Florida Workers' Compensation Reform: Back to Basics,* 7 FLA. ST. U.L. REV. 641 (1979) [hereinafter cited as Sadowski].

17. 1 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 4 (3d ed. 1941). Under common law, both liability and damages were issues for the jury. H. SOMERS, *supra* note 14, at 27. As a result, the employer would contest every claim and delay settlement, thereby draining the injured worker's financial reserves. Eventually, the worker would be forced to acquiesce to the employer's terms. *Id.* Under workers' compensation, the issues of liability and damages are predetermined as much as possible to effectuate prompt settlement. Sadowski, *supra* note 16, at 642.

18. The Supreme Court of Florida has consistently stated the underlying philosophy of workers' compensation is the social responsibility of industry and consumers to the injured worker. *E.g.,* Trail Builders Supply Co. v. Reagan, 235 So. 2d 482, 484 (Fla. 1970); Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 31, 16 So. 2d 342, 343 (1944). Larson regards as the underlying social philosophy of workers' compensation the belief that society should provide to victims of work-connected injuries the most economically efficient and morally satisfactory benefits. Larson, *supra* note 14, at 209. Larson compares three alternatives available to society: it can let the worker starve or beg, it can provide a direct hand-out, or it can grant workers' compensation. Allowing the injured to starve has long since been morally unacceptable. Placing the injured on county relief not only stigmatizes him as a pauper, but also places the economic burden on his hometown, which may have had no causal connection with the injury. Clearly, workers' compensation is the best alternative, because it preserves the injured worker's dignity and properly allocates the cost to the consumers. *Id.* at 209-10.

19. This trade-off is referred to as the quid pro quo of workers' compensation. Grice v. Suwanee Lumber Mfg. Co., 113 So. 2d 742, 746 (Fla. 1st D.C.A. 1959).

20. FLA STAT. § 440.10(1) (1981) provides in part:

> Every employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption, shall be liable for and shall secure the payment to his employees of the compensation payable under §§ 440.13, 440.15, and 440.16. *In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for and shall secure the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.*

potentially more lucrative common law suit against the employer in exchange for automatic compensation.[21] The employee's common law action was preserved, however, when a "third party tortfeasor" caused his injury[22] Whether the injured employee would be limited to the exclusive remedy of workers' compensation depended upon the court's interpretation of the terms "employer" and "third party tortfeasor."[23]

The Florida Supreme Court broadly defined "employer" in *Younger v.*

Id. (emphasis added). By accepting the liability of all work-related injuries regardless of fault, the employer can reliably budget the cost of compensation into the routine cost of doing business. Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972).

21. FLA STAT. § 440.11(1) (1981) provides in part:

> The liability of an employer prescribed in § 440.10 *shall be exclusive and in place of all other liability of such employer to any third party tortfeasor* and to the employee, his . . . dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative, in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death.

Id. (emphasis added). Although forfeiting a possibly larger tort remedy, the employee is spared the cost, uncertainty and delay of a common law action. Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972). The employer's statutory duty to provide workers' compensation coverage is compulsory. FLA STAT. § 440.03 (1981). If the employer fails to secure compensation, he is not only denied immunity from common law liability, but is also deprived of the common law defenses of contributory negligence, fellow-servant doctrine, and assumption of the risk. FLA STAT. § 440.06 (1981), *construed in* Baker v. Great A & P Tea Co., 212 F.2d 130, 132 (5th Cir. 1954). See *supra* text accompanying note 14.

22. FLA. STAT. § 440.11(1) (1981). Larson points out that the moral concept underlying actions against third party tortfeasors is that the ultimate loss should fall on the wrongdoer. 2A A. LARSON, WORKMEN'S COMPENSATION § 71.10 (1976) [hereinafter cited as A. LARSON]. The two objectives of any loss-adjusting system are to compensate the injured and punish the wrongdoer. Although workers' compensation focuses almost solely on the former function, it does not overlook the second aspect when the wrongdoer stands outside the employer-employee relationship. *Id.*

Until 1951, the employee injured by a third-party tortfeasor had to elect between accepting workers' compensation and pursuing common law damages from the third party. Haverty Furniture Co. v. McKesson & Robbins, Inc., 154 Fla. 722, 725, 19 So. 2d 59, 61 (1944). Presently, an employee may accept compensation benefits and still bring an action against a third-party tortfeasor. FLA. STAT. § 440.39(1) (1981), *construed in* Dickerson v. Orange State Oil Co., 123 So. 2d 562, 569-70 (Fla. 2d D.C.A. 1960). If the employee accepts the compensation and pursues the third party, then his employer or insurance carrier is subrogated to the employee's right to the amount of compensation benefits paid. FLA. STAT. § 440.39(2) (1981). If the employee does not sue the third-party tortfeasor within one year after the injury, the employer or insurance carrier may institute such suit. Fidelity & Casualty Co. of N.Y. v. Bedingfield, 60 So. 2d 489, 493-94 (Fla. 1952).

23. FLA STAT. § 440.11(1) (1981) fails to define "third party tortfeasors." Judicial interpretation is necessary, therefore, in order to determine which parties are covered under the phrase. *See generally* L. ALPERT, *supra* note 16, §§3-6; Nachwalter & Lee, *Workmen's Compensation—Liabilities of Third Parties*, 14 U. MIAMI L. REV. 169 (1959). In most states, third-party tortfeasors include all persons other than the injured worker's employer. A. LARSON, *supra* note 22, § 72.10. Some jurisdictions narrow the class of third-party tortfeasors by excluding not only the employer, but co-employees, and all contractors and their employees engaged in a common enterprise. *Id.*

Giller,[24] by introducing the common employer concept.[25] In *Younger*, a general contractor's employee, injured through the alleged negligence of a subcontractor's employee sued the subcontractor.[26] The court held a subcontractor was not a "third party tortfeasor" because he was granted reciprocal immunity under the common employer concept.[27] Under this concept, the general contractor was deemed the common employer of all workers engaged in a common enterprise.[28] The common employer was statutorily responsible for providing workers' compensation to all employees on his job or assuring that subcontractors provided their employees such coverage.[29] In return for this obligation, the general contractor was granted immunity from suits brought by any employee who was injured while engaged in the common enterprise.[30] The court found this immunity applied reciprocally to the subcontractor because the employees of both general contractor and subcontractor were engaged in a common enterprise and should be treated on an equal footing.[31] The statutory immunity of the common employer was thus stretched to cover both general contractor and subcontractor, and in effect, limited all common employees to the workers' compensation remedy.[32]

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24. 143 Fla. 335, 196 So. 690 (1940).

25. *Id.* The Florida court adopted the common employer concept from a Massachusetts Supreme Court decision, Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934).

26. 143 Fla. at 336-37, 196 So. at 691-92. Plaintiff, a carpenter for the general contractor, was injured when struck by a cement block allegedly dropped by a negligent employee of the masonry subcontractor. *Id.*

27. *Id.* at 341, 196 So. at 693. *Accord* Vargo v. Carter, 188 So. 2d 302 (Fla. 4th D.C.A. 1966); Smith v. Poston Equip. Rentals, Inc., 105 So. 2d 578 (Fla. 3d D.C.A. 1958).

28. 143 Fla. at 340, 196 So. at 693. The controlling statutory language the *Younger* court relied on stated that all employees of a contractor and his subcontractors "engaged on such contract work shall be deemed to be employed in one and the same business or establishment. . . ." 1937 Fla. Laws, ch. 18413, § 10(a). This statutory language of common employment has not been altered in the present statute, FLA. STAT. § 440.10(1) (1981). *See supra* note 20.

29. 143 Fla. at 340, 196 So. at 693.

30. *See, e.g.*, Brickley v. Gulf Coast Constr. Co., 153 Fla. 216, 14 So. 2d 265 (1943). An employee of a subcontractor was injured by the negligence of employee of the general contractor. The court, utilizing the *Younger* common employer concept, held the general contractor immune from suit and limited the plaintiff to the exclusive remedy of workers' compensation. *Id.* at 218-19, 14 So. 2d at 266.

31. 143 Fla. at 341, 196 So. at 693. The court determined that the legislative intent was to "abrogate the common law to the extent of making all of the employees engaged in a common enterprise statutory fellow servants. *They were never to be considered inter se third parties as to each other* or to the immediate contractual employers." *Id.* (emphasis added). In addition to holding a subcontractor immune from suit by the general contractor's employee, the *Younger* court utilized this dictum to grant immunity to employees from suits by their co-employees. *Id.* The Florida court based its decision on a Massachusetts case that conferred immunity from suit on co-employees. Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934). The Florida Supreme Court later overruled this co-employee immunity under the common employment doctrine in Frantz v. McBee, 77 So. 2d 796 (Fla. 1955). *See infra* note 50.

32. The court in *Younger* adopted verbatim the common employer doctrine expressed in Bresnahan v. Barre, 286 Mass. at 597, 190 N.E. at 817. The *Younger* court endorsed the circuit court's assertion that the legislature intended the workers' compensation law

In *Miami Roofing & Sheet Metal v. Kindt*,[33] the Supreme Court of Florida extended the *Younger* common employer concept. The court barred a common law action one subcontractor's employee brought against another subcontractor working under the same general contractor.[34] The court reasoned the employees of the general contractor and his subcontractors were engaged in a common enterprise under a common employer.[35] Because the general contractor's employees were limited to the exclusive remedy of workers' compensation, the subcontractors' employees should not be allowed to bring additional common law suits.[36] The court therefore expanded the common employer umbrella of immunity[37] to protect one subcontractor from suit by another subcontractor's employee.[38]

In *Jones v. Florida Power Corp.*,[39] the court narrowed the common employer concept by limiting the application to those who were statutorily obligated to provide workers' compensation.[40] In *Jones*, an owner-builder contracted with plaintiff's employer for plumbing work and with another

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> to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer, and to provide for all employees, whether of a general contractor or its sub-contractors, equal rights and benefits under the Act, and to give to none of these employees greater rights than others employed in the same common business or establishment might or could have pursuant to the provisions of the statute.

143 Fla. at 339, 196 So. at 693. Larson, a preeminent authority on workers' compensation, labeled this the "new-broom" image or "sweeping" metaphor. A LARSON, *supra* note 22, at § 72.32 n.75.

33. 48 So. 2d 840 (Fla. 1950).

34. *Id.* at 843. The court again cited a Massachusetts decision which held all common employers on the job were protected, including a subcontractor whose employee's negligence injured another subcontractor's employee. Dresser v. New Hampshire Structural Steel Co., 296 Mass. 97, 101, 4 N.E.2d 1012, 1013-14 (1936).

35. 48 So. 2d at 842.

36. *Id.* The court found the decisive elements of the *Younger* rule, a "common employer" and "engaged in the same contract work," to exist in *Miami Roofing*. Existence of these elements justified extension of the common employer concept to grant one subcontractor immunity from suit by another. *Id.*

37. Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973). The court used the expression "umbrella of immunity" to describe the protection the common employer is granted against third party suits. *Id.* at 62.

38. *But see, e.g.*, Womble v. Raber, 334 So. 2d 827 (Fla. 2d D.C.A. 1976). The employee of one contractor was allowed to sue another subcontractor working under the same general contractor. The court stated the distinguishing factor was that the negligent subcontractor had no employees and was thus to be considered a fellow servant. Fellow servants, unlike common employers, were not immune from suit. Id. at 829.

39. 72 So. 2d 285 (Fla. 1954).

40. *Id.* at 287. Again, the court based its decision on an analogous Massachusetts case that also restricted the common employer concept, with the immunity based on liability rule. Pimental v. John E. Cox Co., 299 Mass. 579, 13 N.E.2d 441 (Mass. 1938). The *Pimental* court stated that a group of independent contractors whose insurance combined to cover all employees on the site was not a substitute for a common employer who gave the character of a common job or employment to the work as a whole. 299 Mass. at 585-86, 13 N.E.2d at 446. The court said the absence of such a common employer was fatal to the defendant contractor's contention of immunity. *Id.*

contractor for general construction work.[41] When a crane the owner-builder owned and the other contractor's employee operated[42] struck and injured plaintiff, he sued both the owner-builder and the contractor in negligence.[43] Defendants claimed they were not third-party tortfeasors because they were engaged in a common enterprise with plaintiff.[44] In allowing suit against both the owner-builder and the negligent contractor, the majority found that not all common employers were immune,[45] only those contractors with the statutory duty to secure workers' compensation for their employees and their subcontractors' employees would be considered common employers.[46] The court then defined a contractor as one who sublet a portion of his contractual obligation to another.[47] The owner-builder had no such contractual obligation in the construction, and therefore was not a contractor responsible for providing workers' compensation.[48] Without such responsibility, the owner-builder could not be afforded common employer immunity.[49] Without a common employer, there was no umbrella of immunity to protect the negligent contractor, and he, too, was found to be a third-party tortfeasor.[50]

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41. 72 So. 2d 286. Florida Power Corporation, the owner-builder, contracted with plaintiff's employer as an independent plumbing contractor. Florida Power Corporation hired the other contractor separately as the general contractor in the construction and erection of an addition to the company plant. *Id.*

42. Plaintiff received workers' compensation from his employer, the plumbing contractor. *Id.*

43. *Id.* The trial court classified the owner-builder as a common employer, and granted summary judgment for both defendants. Noting that owner-builder required both contractors to secure workers' compensation, the trial court stated it would be unfair to deny immunity that would certainly have been granted if the owner-builder had first employed the general contractor and let him hire the plumbing subcontractor. *Id.* at 286-87.

44. *Id.* at 286.

45. *Id.* at 289. The court stated that the fact plaintiff and the negligent crane operator were working on the same project did not make them employees of a common employer. *Id.*

46. *Id.* at 287. The court stated: "It is the *liability* to secure compensation which gives the employer immunity from suit as a third party tort-feasor. His immunity from suit is commensurate with his liability for securing compensation—no more and no less." *Id.* (emphasis in original). The court found irrelevant the fact that the owner-builder required both contractors to provide workers' compensation for their employees. The question was not whether the owner-builder secured workers' compensation, directly or indirectly, but whether the statute required the owner-builder to do so. *Id.*

47. *Id.* at 289.

48. *Id.*

49. *Id.* The *Jones* immunity based on liability rule has been consistently applied. *See, e.g.,* Little v. Jim Santi, Inc., 334 So. 2d 558 (Fla. 3d D.C.A.), *cert. dismissed,* 338 So. 2d 842 (Fla. 1976); State *ex rel.* Auchter Co. v. Luckie, 145 So. 2d 239 (Fla. 1st D.C.A.), *cert. denied,* 148 So. 2d 278 (Fla. 1962); Smith v. Ussery, 261 So. 2d 164 (Fla. 1972).

50. 72 So. 2d at 287-88. The court made passing reference to the common employer concept in determining the negligent contractor's immunity. The majority noted that if plaintiff and the negligent contractor's employee had been engaged in the same contract work under a common employer, then the contractor would have been given immunity. The decisive element barring immunity to the contractor was the application of the immunity based on liability principle to find that the owner-builder was not a common employer. *Id.*

In a landmark decision, the Florida Supreme Court applied the *Jones* immunity based on liability rule to hold an employee was a third-party tortfeasor amenable to a suit by a co-employee. Frantz v. McBee, 77 So. 2d 796, 800 (1955). The court labeled the *Younger*

The court in *Carter v. Sims Crane Service, Inc.*[51] attempted to reconcile the restrictive *Jones* liability rule with the broader common employer concept of *Younger*.[52] In *Carter*, an injured subcontractor's employee was barred from suing another subcontractor.[53] The court reaffirmed the common employer concept of *Younger* and *Miami Roofing*[54] by holding the subcontractor was granted employer's immunity.[55] The majority also accepted the *Jones* rule that the employer's immunity was contingent upon his having statutory liability to provide workers' compensation,[56] but explained this liability could be indirect.[57] For instance, subcontractors have indirect liability through their contractual relationship with the general contractor, who is responsible for securing workers' compensation for all employees in the common enterprise.[58] By recognizing indirect liability, the court expanded the *Jones* liability rule so that it would have the same effect as the common employer concept in granting immunity between subcontractors.[59] Subsequent to *Carter*, in 1974, the Florida Legislature amended the workers' compensation statute to allow

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court's finding that employees were "never to be considered inter se third parties as to each other . . ." as dictum and overruled the case. 143 Fla. at 341, 196 So. at 693. *See supra* note 31. The court stated that because an employee had no liability to secure compensation for a co-employee, there was no immunity from suit. *Frantz*, 77 So. 2d at 799.

51. 198 So. 2d 25 (Fla. 1967).

52. *Id.* at 26-27.

53. *Id.* at 28. *Carter* involved a fact situation similar to that in *Miami Roofing*, with the employee of one subcontractor suing another subcontractor for his employee's negligence.

54. *Id.* at 26. Plaintiff contended that the court erred by holding the subcontractor immune in *Younger* and *Miami Roofing*. In conclusory language, the court stated that upon reconsideration of the statute and cited cases, there was no basis for a departure from precedent. *Id.*

55. *Id.*

56. *Id.* at 27. The court found the common employer concept did not collide with the immunity based on liability rule. *Id.* The court reaffirmed the application of the *Jones* rule in *Frantz v. McBee* to deny immunity to one employee who had no liability to secure workers' compensation to a co-employee. Frantz v. McBee, 77 So. 2d 796, 799 (Fla. 1955). The majority, however, distinguished *McBee* stating that it applied to employees only, and held that the immunity based on liability rule should not be interpreted as granting immunity solely to the general contractor, who has the primary liability for compensation. *Carter*, 198 So. 2d at 27.

57. 198 So. 2d at 27. The immunity of a subcontractor could also be based on the direct assumption of liability for coverage for his own employees. *Id.* This was essentially the principle expressed in *Jones*. *See supra* note 46.

58. 198 So. 2d at 27. Although the general contractor was ultimately responsible for providing workers' compensation to the subcontractor's employees, the court reasoned that if the subcontractor agreed to provide his own compensation, this would be reflected in an increased subcontract price. Should the general contractor provide the coverage for the subcontractor's employees, the result would be a discounted subcontract price because of the increase in the general contractor's liability. *Id.*

59. *See* A. LARSON, *supra* note 32, § 72.33. Chiding the court for not reversing the common employer concept, Larson criticized the *Carter* decision as expanding the immunity based on liability principle to include assumption of liability to anyone, not just the injured employee. *Id.* Larson interpreted the *Jones* immunity based on liability rule as two-sided, not open-ended: "If A has a liability as to B he also has an immunity as to B, not that if A has a liability as to X (but not as to B) he has an immunity as to B." *Id.*

one subcontractor's employees to sue other subcontractors of the same general contractor.[60]

In the instant case, the court continued to apply the common employer concept and the expanded liability rule to distinguish between employers and third-party tortfeasors.[61] The court noted the plumbing contractor fulfilled his statutory duty and received immunity from common law suit[62] by securing workers' compensation for his employees.[63] He also had a statutory duty to provide compensation to employees of subcontractors who had not secured coverage for their employees.[64] The court concluded that the statute compelled the contractor to either hire responsible subcontractors or extend his own workers' compensation to cover all employees on the site.[65]

Relying on *Younger*, the court stated the contractor's statutory duty to provide compensation for all employees rendered him immune from suits brought by a subcontractor's employee.[66] Subcontractors were reciprocally immunized from suits brought by the contractor's employees.[67] The majority noted this common employer concept was created to place all employees in a common enterprise on an equal footing.[68] The court cited *Miami Roofing*, which barred suits by employees of one subcontractor against another, as consistent with this equal footing objective.[69]

Petitioner in the instant case contended the *Jones* liability rule was incon-

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60. 1974 Fla. Laws, ch. 74-197, § 6 (amending FLA. STAT. § 440.10(1) (1937)) provides: "A subcontractor is not liable for the payment of compensation to the employees of another subcontractor on such contract work and is not protected by the exclusiveness of liability provisions of s. 440.11 from action at law or in admiralty on account of injury of such employee of another subcontractor." *Id.* Finding no express legislative mandate to apply the amendment retroactively, the Florida Supreme Court held the amendment's application to be prospective. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 242 (1977).

61. 407 So. 2d at 912-13.

62. FLA. STAT. §§ 440.10(1), .11(1) (1971). *See supra* notes 20-21.

63. 407 So. 2d at 913.

64. *Id.* The contractor's statutory duty to secure compensation extends only to the employees of his subcontractor, while the subcontractor has an obligation to secure compensation to employees of his subcontractor. Fidelity Constr. Co. v. Arthur J. Collins & Sons, Inc., 130 So. 2d 612, 614 (Fla. 1961).

65. 407 So. 2d at 913. *See, e.g.*, Fidelity Constr. Co. v. Arthur J. Collins & Son, Inc., 130 So. 2d 612 (Fla. 1961). The court determined that the purpose of FLA. STAT. § 440.10(1) was to protect employees of uninsured subcontractors by imposing ultimate liability on the general contractor who had the power to insist on compensation for the subcontractor's employees. *Collins*, 130 So. 2d at 614.

66. 407 So. 2d at 913.

67. *Id. But see, e.g.*, Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958). An employee of a general contractor sued for injuries received when a truck the defendant corporation owned struck him. The defendant delivered concrete to the job site under an oral agreement with the general contractor. *Id.* at 203-04. In allowing the suit, the court held defendant was a materialman, not a subcontractor. The court further stated that the rule restricting injured workers to the exclusive remedy of workers' compensation was extreme and should not be extended to materialman. *Id.* at 205.

68. 407 So. 2d at 912. Emphasizing fairness among employees, the court explained that the common employer concept evolved to give two men, "working shoulder to shoulder in a common enterprise" equal rights and remedies if injured. *Id.* at 913.

69. *Id.* at 913. *See supra* note 36 and accompanying text.

sistent with the *Younger* common employer concept.[70] In *Younger* and *Miami Roofing,* subcontractors were granted immunity under the common employer concept, yet were not liable for securing workers' compensation.[71] By contrast, the owner-builder in *Jones* was denied immunity because he was not obligated to provide workers' compensation.[72] Despite petitioner's claim that *Jones* and *Younger* were inconsistent,[73] the court affirmed the validity of both decisions. Relying on *Carter's* expansion of the *Jones* liability rule, the court found the subcontractor was statutorily recognized as a common employer along with the contractor.[74] Like the *Carter* court, which found a subcontractor immune because he was indirectly liable for workers' compensation,[75] the instant court granted the subcontractor immunity because he was indirectly liable for securing workers' compensation.[76]

Petitioner also argued the 1974 amendment,[77] which allowed suits against subcontractors, represented legislative abrogation of reciprocal immunity among common employers.[78] The court declined to explain the amendment's effect because the facts giving rise to the instant case occurred before the amendment

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70. 407 So. 2d at 913. Petitioner also argued that in an effort to mesh the rationale of *Jones* and *Younger,* the courts have interpreted "contractor" in FLA. STAT. § 440.10(1) (1981) to mean "general contractor." Moreover, only actions against conventional general contractors and their subcontractors, not independent contractors, would be barred. Brief of Petitioners at 30, 407 So. 2d 910. Petitioner cited C & S Crane Serv., Inc. v. Negron, 287 So. 2d 108 (Fla. 3d D.C.A. 1973), *cert. denied,* 296 So. 2d 49 (1974) for support. In *C & S Crane,* an owner-builder contracted with several independent contractors for the construction of an apartment building. One independent contractor then sublet to three subcontractors. The employee of one subcontractor, C & S Crane Service, negligently injured another subcontractor's employee. In holding C & S Crane Service amenable to suit, the court found that the contract between an owner-builder and an independent contractor, rather than between a true contractor and subcontractor, was insufficient to invoke immunity under workers' compensation. 287 So. 2d at 108-09. The instant court rejected petitioner's argument and found there was no statutory distinction made between independent and general contractors. Stating that the statute speaks only of contractors, those under a contractual obligation to perform work for someone else. 407 So. 2d at 914. The court then stated that *C & S Crane* was wrongly decided. *Id.*

71. 407 So. 2d at 913. See *supra* text accompanying note 31-36.

72. See *supra* text accompanying note 48.

73. At least one judge has insisted that *Jones* was inconsistent with and had overruled *Younger* and *Miami Roofing. See* Cuyler v. Elliott, 182 So. 2d 55, 55-56 (Fla. 4th D.C.A. 1965) (dissenting opinion).

74. 407 So. 2d at 914. The court stated in conclusory language that "*Jones* did not overrule *Younger.*" *Id.* Unfortunately, the court did not elaborate any further to explain the *Carter* holding that a subcontractor was statutorily recognized as a common employer, even though he was not liable for securing coverage. *Id.*

75. *See supra* notes 58-59.

76. 407 So. 2d at 914.

77. 1974. Laws 197, § 6 (amending FLA. STAT. § 440.10(1) (1937)).

78. 407 So. 2d at 914. Significantly the Massachusetts legislature abolished the common employer immunity upon which both *Younger* and *Miami Roofing* were based in 1972. MASS. STAT. § 941 (1971) (amending 1965 Mass. Laws, ch. 152, § 15). *See supra* notes 31-34. Florida is now the only state that grants the *Younger* reciprocal immunity to subcontractors. *See* A. LARSON, *supra* note 22, § 72.33.

was enacted.[79] The court stated, however, that *Miami Roofing* seemed to have been overruled, but distinguished it from *Younger* and the instant case.[80] Whereas *Miami Roofing* involved liability between a subcontractor's employee and another subcontractor,[81] *Younger* and the instant case concerned liability between a contractor's employee and a subcontractor.[82]

Chief Justice Sundberg, writing for the dissent, argued the majority result was neither supported in logic nor compelled by statute.[83] The dissenting Chief Justice advocated a retreat from the common employer concept developed in *Younger* and *Miami Roofing*.[84] Unfortunately, the short dissenting opinion offers little analysis beyond citing Professor Larson's criticisms of Florida's common employment scheme.[85]

The majority opinion followed previous Florida Supreme Court decisions[86] barring an injured worker's common law suit against his employer's subcontractor. The *Younger* reciprocal immunity concept was applied consistently in the instant case.[87] The court also used the *Jones* liability rule,[88] as expanded by *Carter*,[89] to find the subcontractor immune from suit based upon this indirect assumption of workers' compensation responsibility.[90] Nonetheless, continued reliance on both the common employer concept and the *Jones* liability rule ignores analytical inconsistencies in both the judicial and the legislative definitions of employer immunity under the workers' compensation laws.

First, the equal footing policy behind the common employer concept degenerates under the *Jones* liability rule. *Younger* established that all employees engaged in a common enterprise should be on equal footing regarding rights to common law suit for job related injuries.[91] According to *Jones'* liability

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79. 407 So. 2d at 914. The 1974 amendment was judicially interpreted to have a prospective effect. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 242 (Fla. 1977).

80. 407 So. 2d at 914. The court merely alluded to the amendment's effect on the common employer concept in one sentence: "Thus the amendment did not explicitly deal with the situation presented in *Younger* and in the present case, although it seems to have overruled *Miami Roofing*." *Id.*

81. See *supra* text accompanying note 36.

82. *Younger* involved a negligence action brought by the general contractor's employee against his employer's subcontractor. See *supra* text accompanying note 28. The instant case involved an action brought by an independent contractor's employee against employer's subcontractor. Although the plaintiff argued that the distinction between general and independent contractors was a key factor in determining liability, the instant court focused on the contractor-subcontractor relationship not the nomenclature of a contractor. 407 So. 2d at 914. *See supra* note 70.

85. 407 So. 2d at 914 (Sundberg, C.J., dissenting). Unfortunately, the Chief Justice's four sentence opinion, although correct in result, does little to illuminate the darkness and confusion surrounding the classification of third-party tort-feasors. *Id*

84. *Id.*

85. *See generally*, A. LARSON, *supra* note 22, § 72.32-.33.

86. *See, e.g.*, Favre v. Capeletti Bros., Inc., 381 So. 2d 1356 (Fla. 1980); Carter v. Sims Crane Serv., Inc., 198 So. 2d 25 (Fla. 1967); Miami Roofing & Sheet Metal Co. v. Kindt, 48 So. 2d 840 (Fla. 1950).

87. See *supra* text accompanying note 27.

88. See *supra* text accompanying note 46.

89. See *supra* text accompanying notes 56-57.

90. 407 So. 2d at 914.

91. *See supra* note 31 and accompanying text.

rule, equal footing applied only to those employees working under a contractor who had sublet a portion of his contractual obligation.[92] Under the facts of *Jones*[93] and the instant case,[94] there was no general contractor who was responsible for providing workers' compensation to all employees on the job site. In both cases, therefore, the employees of a contractor and his subcontractor were on an equal footing with each other, but on an unequal footing with the employees of other contractors on the same job site; an employee could not sue his employer's subcontractor, but could sue another contractor.[95]

In addition, a second inconsistency developed when the *Carter* court attempted to expand the *Jones* liability rule to achieve results consistent with the broader common employer concept.[96] In *Miami Roofing*,[97] a subcontractor was immune from suit by another subcontractor's employee because all employees were engaged in a common enterprise under a common employer. However, strictly applying the *Jones* rule would have denied immunity to such a subcontractor because he had no responsibility to secure workers' compensation for the other subcontractor's employees.[98] The *Carter* court, faced with facts analogous to those in *Miami Roofing*, introduced the indirect liability test to render the subcontractor immune.[99] The subcontractor was held indirectly responsible for securing workers' compensation coverage to all employees engaged in the common enterprise through his subcontract with the contractor who was directly responsible.[100] Applying the indirect liability test to the facts of *Jones* could lead to opposite results. In *Jones*, the owner-builder, however, did incur indirect liability,[101] reflected in increased prices for the contractors' services,[102] when he required his contractors to provide workers' compensation for their employees.[103]

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92. *See supra* note 46.
93. *See supra* note 41.
94. *See supra* notes 1-3.
95. *See, e.g.*, Rhines v. Ploof Transfer Co., 313 So. 2d 791 (Fla. 1st D.C.A. 1975); Foulk v. Perkins, 181 So. 2d 704 (Fla. 2d D.C.A. 1966).
96. *See supra* note 59.
97. *See supra* note 36.
98. The Florida Supreme Court has rejected this argument without any cogent explanation. *See supra* note 56.
99. *See supra* note 57 and accompanying text.
100. *Id.*
101 In the instant case, the court emphasized the *Jones* liability principle did not undercut the *Younger* common employer concept. 407 So. 2d at 914. The court, however, failed to identify the inconsistencies between the *Jones* liability based on immunity rule and the *Carter* indirect liability expansion. *Id.*
102. The *Carter* court did not fully explain the effect and application of indirect liability. The following passage illustrates this:

> Immunity of a subcontractor in this situation is in fact based upon his sharing the burdens of the act, either directly by the assumption of coverage for some of the employees on the job or indirectly because of the effect of compensation liabilities upon the terms of his subcontract and relations with the general contractor.

198 So. 2d at 27-28.
103. The *Jones* court, however, determined it was irrelevant that the owner-builder required the contractors to provide their own workers' compensation. 72 So. 2d at 287.

Another disturbing feature of the instant case was the majority's cursory treatment of the 1974 statutory amendment.[104] Although conceding that *Miami Roofing* seemed to have been overruled, the court failed to question *Carter's* validity.[105] The *Carter* case tied the common employer concept and the *Jones* liability rule together.[106] By ignoring *Carter* the court was able to perpetuate its tenuous synthesis of the two concepts. The instant court also ignored the shadow the legislative rejection of *Miami Roofing* cast upon the efficacy of *Younger* and the common employer concept.[107]

Florida is among a handful of states that grant subcontractors such broad immunity from suits a general contractor's employee brings against them in negligence.[108] Under rules of statutory construction, the Florida Supreme Court should not abrogate the employee's common law right to sue third party tortfeasors without statutory language to that effect.[109] In order to achieve the objectives of workers' compensation,[110] an unambiguous statutory test is needed for determining employer immunity. If it remains unclear which employers are immune, litigation expenses could undermine the compensation system and increase costs throughout industry.[111] Furthermore, such stringent restrictions of their common law rights may deprive employees of just compensation for job related injuries.[112]

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104. *See supra* note 80.

105. 407 So. 2d at 914. *But see, e.g.,* McDonald v. Wilson Welding Works, Inc., 370 So. 2d 863 (Fla. 1st D.C.A. 1979). In a special concurrence, Justice Ervin reasoned that the 1974 amendment applied to entities in a horizontal or independent relationship with each other, and cited both *Miami Roofing* and *Carter* as being affected by the amendment. *Id.* at 865.

106. *See supra* note 59 and accompanying text.

107. Both *Younger* and *Miami Roofing* were premised on the common employer concept granting equal rights and remedies to all employees on a common job site.

108. The following cases are in accord with Florida's minority view that a subcontractor is not a third-party tortfeasor; Kieffer v. Walsh Constr. Co., 140 F. Supp. 318 (E.D. Pa. 1956); Scott v. Savannah Elec. & Power Co., 84 Ga. App. 553, 66 S.E.2d 179 (Ct. App. 1951). The following cases adhere to the majority view that a subcontractor is subject to common lawsuit: Brown v. Arrington Constr. Co., 74 Idaho 338, 262 P.2d 789 (1953); Davison v. Martin K. Eby Constr. Co., 169 Kan. 256, 218 P.2d 219 (1950); Benoit v. Hunt Tool Co., 219 La. 380, 53 So. 2d 137 (1951); Olsen v. Sharpe, 191 Tenn. 503, 235 S.W.2d 11 (1950).

109. The Florida Supreme Court has stated in numerous decisions that statutes should be strictly construed to preserve common law rights, unless the statute explicitly expresses such a change. *See, e.g.,* Carlile v. Game & Freshwater Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977); Trail Builders Supply Co. v. Reagan, 235 So. 2d 482, 485 (Fla. 1970); Frantz v. McBee Co., 77 So. 2d 796, 799 (Fla. 1955).

110. *See supra* notes 16-18 and accompanying text.

111. For a discussion of the allocation of industrial accident costs throughout the system, see *supra* note 18. *See generally,* G. CALEBRESI, THE COSTS OF ACCIDENTS 34-37 (1970).

112. The instant decision seems to violate the trade-off principle underlying workers' compensation. *See supra* note 19 and accompanying text (employer and employee each giving up certain common law rights and remedies for the new remedies of workers' compensation). The injured plaintiff gave up his common law right to sue a third party tortfeasor, while the subcontractor gained immunity without incurring any additional obligation. *But see* Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975), where the court held unconstitutional an amendment to FLA. STAT. § 440.11(1) barring third-party suits by passive tort-feasors against actively negligent employers. The majority found the amendment was arbitrary and capricious because the passive tort-feasor seeking indemnity "re-

The legislature has correctly indicated the direction the court should take. The 1974 amendment's enactment undercut the broad, judicially created common employer immunity concept.[113] In order to safeguard the employee's common law rights against third-party tortfeasors, the Supreme Court of Florida should follow the legislature's directive and Chief Justice Sundberg's position,[114] by overruling *Younger*, and abolishing the common employer concept.

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ceives no alternative benefits but is shorn of his common law right to sue the employer." *Id.* at 8.

113. *See supra* note 60 and accompanying text.

114. *See supra* note 83 and accompanying text.