Case No. 2D19-3091

IN THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT STATE OF FLORIDA

Tampa Electric Company,

Appellant,

v.

Donald G. & Stacy Gansner, et al., and James & Chelsea Carter,

Appellees,

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF REHEARING OR CERTIFICATION

On Appeal from the Thirteenth Judicial Circuit
L.T. Case No. 18-CA-1982

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute ("the Institute") is Florida's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in Florida's civil justice system and promoting fair and equitable legal practices. Given its representation of a broad range of business interests in Florida, including employers, the Institute has a significant interest in the outcome of this proceeding and in promoting a stable workers' compensation system that operates as intended, providing reciprocal protections to workers and employers alike.

The Court's October 16, 2020 panel decision has broad implications under Florida's Workers' Compensation Law. Specifically, this Court's decision will directly impact many Florida employers who, in reliance on longstanding decisions like *Aerovias Columbianas, LTDA v. Paiz*, 695 So. 2d 822 (Fla. 3d DCA 1997), and *Broward County v. Rodrigues*, 686 So. 2d 774 (Fla. 4th DCA 1997), have operated under the assumption that workers' compensation immunity applies to the injuries sustained by a subcontractor's workers when a contractor sublets an implicit contractual obligation under a prime contract with a third party. Thus, this Court's panel decision—decided on an issue not briefed by the parties and in a way that appears directly contrary to the decisions of other district courts of appeal—should

be reheard or, at the very least, certified on conflict grounds to the Florida Supreme Court.

SUMMARY OF ARGUMENT

The statutory employer provisions of the Workers' Compensation Law extend to implied contractual obligations. When a contractor sublets the performance of its implied contractual obligations to a subcontractor, the contractor is properly deemed a statutory employer of the subcontractor's employees with corresponding obligations and benefits derived from that status. To the extent the panel decision misapprehended or overlooked these aspects of the statutory employer provisions of the Workers' Compensation Law, the Court should grant rehearing and reverse the trial court's order denying summary judgment based on workers' compensation immunity.

Florida employers have also relied upon decisions from the First, Third, and Fourth Districts in assuring themselves that the statutory employer provisions apply to implied contractual obligations. *See Paiz*, 695 So. 2d 822; *Rodrigues*, 686 So. 2d 774; *Miami Herald Publ'g v. Hatch*, 617 So. 2d 380 (Fla. 1st DCA 1993). Because the panel decision directly conflicts with these decisions, the Court should at the very least certify its conflicting decision to the Florida Supreme Court under article V, section 3(b)(4) of the Florida Constitution.

ARGUMENT

I. THE STATUTORY EMPLOYER PROVISIONS OF THE WORKERS' COMPENSATION LAW EXTEND TO IMPLIED CONTRACTUAL OBLIGATIONS.

The Workers' Compensation Law in Chapter 440, Florida Statutes, is a "comprehensive scheme . . . that generally provides workers' benefits without proof of fault and employers immunity from tort actions based upon the same work place incident." *Taylor v. Sch. Bd. of Brevard Cty.*, 888 So. 2d 1, 2 (Fla. 2004). The system is based on a "mutual renunciation of common-law rights and defenses by employers and employees alike." § 440.015, Fla. Stat. The Florida Supreme Court has characterized this mutual renunciation as a "quid pro quo" under which "[t]he duty to provide workers' compensation benefits supplants tort liability to those injured on the job." *Halifax Paving, Inc. v. Scott & Jobalia Constr. Co.*, 565 So. 2d 1346, 1348 (Fla. 1990) (internal citation omitted). Consequently, the Workers' Compensation Law provides "employees with a swift and adequate means of compensation for injury," in exchange for "insulat[ing] employers from potentially bankrupting tort liability for work-place accidents." *Id.* at 1347.

The Workers' Compensation Law generally provides that employers are "liable for, and shall secure," payment of workers' compensation for their employees. § 440.10(1)(a), Fla. Stat. A contractor that sublets part of his or her contract work to a subcontractor is "liable for, and shall secure" payment of

compensation to all employees of the contractor ***and its subcontractors***, except to employees of a subcontractor who has secured such payment. § 440.10(1)(b), Fla. Stat. This Court has noted that the rationale underlying section 440.10(1)(b) is to "equate the situation of workmen at a job in which various subcontractors are functioning under a general contractor with that which would obtain if the general contractor itself were employing the workmen directly." *Gulf Am. Fire & Cas. Co. v. Singleton*, 265 So. 2d 720, 721 (Fla. 2d DCA 1972).

A contractor afforded workers' compensation immunity in these circumstances is often called a "statutory employer." *See Rodrigues*, 686 So. 2d at 775. Where a contractor sublets parts of the contracted work to subcontractors, the general contractor is responsible for securing workers' compensation payment for the subcontractors' employees and, when it does so (either by providing coverage itself or requiring that the subcontractor do so, as Appellant Tampa Electric Company ("Tampa Electric") required here),[1] "the statutory employer is immune from suit for the employee's personal injuries, as worker's compensation is the exclusive remedy." *Id.* (citing, *inter alia*, *Gator Freightways, Inc. v. Roberts*, 550 So. 2d 1117 (Fla. 1989)).

Significantly, nothing in the text of section 440.10(1)(b) limits the broad

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[1] *See* Appendix to Tampa Electric's Initial Brief, Exhibit 7.3.1 at 116.

statutory phrase "any part or parts of his or her contract work" to express contractual obligations. The statute frames the obligations of a general contractor in expansive terms by deeming "all" of the employees of the contractor and subcontractors engaged on the contract work to be "employed in one and the same business or establishment" where a contractor sublets "any part or parts" of its contract work to a subcontractor. § 440.10(1)(b), Fla. Stat. Precedent from other district courts, including the First, Third, and Fourth Districts, confirms this broad reading of the statute. *See Paiz*, 695 So. 2d at 823 (holding that workers' compensation immunity applied where employee was injured preparing a cargo airplane for painting even where no existing contract provided for use of that specific aircraft to transport cargo, because which aircraft was to be used was "not the customer's concern"); *Rodrigues*, 686 So. 2d at 775 (holding that workers' compensation immunity applied to contractual duty that was not explicitly stated but "was directly related and necessary to" the fulfillment of the contractor's express contractual obligations); *see also Hatch*, 617 So. 2d at 381, 383-84 (holding that "street hawking" newspapers is an implied obligation of the newspaper's advertising contracts, because "if a newspaper and the related advertisements are not delivered to . . . readers," the publisher "will not have performed for the advertisers a service that the advertisers paid for and expected").

As noted above, the Workers' Compensation Law provides that a contractor

has a statutory obligation to secure the payment of workers' compensation to both its own employees and the employees of its subcontractors either directly or indirectly by ensuring that the subcontractor has itself secured such payment. § 440.10(1)(b), Fla. Stat. The "quid pro quo" of this broad ***liability*** under workers' compensation for statutory employers is a corresponding broad ***immunity from liability*** in tort when a subcontractor's employee is injured on the job.

Here, it was undisputed that Tampa Electric had a contractual obligation established by its tariff to provide electricity to its customers. The panel opinion appears to have overlooked or misapprehended that this explicit contractual obligation to Tampa Electric's customers includes an implicit obligation to maintain the equipment used to generate electricity because maintenance is "directly related and necessary to" providing electricity. *See Rodrigues*, 686 So. 2d at 775. Tampa Electric's decision to sublet its implicit contractual obligations to a subcontractor imposed upon it certain obligations as a statutory employer of its subcontractor's employees: liability for the payment of workers' compensation either directly or by requiring its subcontractor to do so. Under the Workers' Compensation Law, Tampa Electric's statutory assumption of these obligations to the subcontractors' employees carries with it the benefits of workers' compensation immunity from tort liability with respect to the same employees.

The panel decision appears to have overlooked or misapprehended the legal

principle that the statutory employer provisions of the Workers' Compensation Law can extend to implied contractual obligations. For example, the panel decision concluded that Tampa Electric was not the statutory employer of its subcontractor's employees because "nothing in the tariff—or in any other source that it has identified—imposes upon it a contractual obligation to its customers to maintain its electrical generating equipment." Slip Op. at 10; *see also* Slip Op. at 7 n.2 (concluding that Tampa Electric had no contractual obligation to maintain any of its electrical generating equipment). The very nature of an implicit contractual obligation, however, is that it is ***not explicitly stated*** in the contract—here, the tariff between Tampa Electric and its customers. Tampa Electric's explicit contractual obligation to provide electricity to its customers naturally and directly includes with it an implicit obligation to maintain the equipment necessary for carrying out that express obligation. As this Court framed the issue in *Green v. APAC-Fla., Inc.*, 935 So. 2d 1231, 1234 (Fla. 2d DCA 2006), the sublet duties of Tampa Electric's subcontractor in maintaining the electrical generating equipment has a "sufficient nexus" to Tampa Electric's contractual obligations to provide electricity to its customers. For the same reasons that the Third District in *Paiz* and the Fourth District in *Rodrigues* found workers' compensation immunity applied even in the absence of an explicit contractual obligation, this Court should grant Tampa Electric's motion for rehearing.

II. ALTERNATIVELY, THE COURT SHOULD CERTIFY A CONFLICT TO THE FLORIDA SUPREME COURT.

Numerous Florida employers have relied on the decisions in *Paiz*, *Rodrigues*, and *Hatch* for the well-established principle that, in order to be a statutory employer under section 440.10(1)(b) protected by workers' compensation immunity, a contractor may sublet to a subcontractor an obligation implied by the express provisions of a prime contract with a third party. The Court's October 16, 2020 panel decision directly conflicts with those decisions, notwithstanding the panel's efforts to distinguish *Paiz* and *Rodrigues* based on an erroneous determination that an exculpatory clause in Tampa Electric's tariff disavows its implied maintenance obligations—an error further explained in Tampa Electric's motion for rehearing and/or certification. (*See* Tampa Electric's Motion for Rehearing and Certification at 6-14.)

Under article V, section 3(b)(4) of the Florida Constitution, the Florida Supreme Court has the authority to review "any decision of a district court of appeal . . . that is certified by [the district court] to be in direct conflict with a decision of another district court of appeal." The Institute believes certification is warranted here, as Florida employers are left with competing, contrary obligations under this panel's decision on the one hand and decisions of the First, Third, and Fourth Districts on the other. Florida employers deserve to be afforded certainty on this issue by the Florida Supreme Court. For this reason, if the Court denies the motion

for rehearing, it should certify its decision to the Florida Supreme Court as conflicting with these other district court decisions.

CONCLUSION

This Court's decision will have far-reaching implications, including for numerous Florida employers who operate under the assumption that workers' compensation immunity extends to the circumstances in this case. The panel decision appears to confine the scope of the statutory employer provisions of section 440.10(1)(b) to circumstances involving explicit contractual obligations, notwithstanding the decisions of at least three other district courts of appeal holding to the contrary. Because the statutory employer provisions extend to implicit contractual obligations, the Court should grant rehearing or, in the alternative, certification to the Florida Supreme Court as requested in Tampa Electric Company's motion.

Respectfully submitted on November 9, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2020, a copy of the foregoing has been filed with the Florida Courts E-Filing Portal, which will provide notices of electronic filing to the following:

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