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Florida's "Unrelated Works" Exception to Workers' Compensation Immunity

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FLORIDA'S "UNRELATED WORKS" EXCEPTION TO WORKERS' COMPENSATION IMMUNITY

ROSS D. KULBERG*

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I. INTRODUCTION

An employee slips and falls in the stairwell of a hotel due to the negligence of a co-employee. Workers' compensation laws would normally award compensation to the injured employee automatically through the em-

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ployer.¹ Under Florida law, however, if the two employees are “assigned primarily to unrelated works,” then the injured employee also has a right to bring common law tort claims against the employee who was negligent.² Therefore, in Florida, employees have a chance to collect twice—under both workers’ compensation and common law tort awards—for workplace injuries caused by the negligence of an unrelated co-employee.³

Florida courts have struggled with the application of the “unrelated works” exception to workers’ compensation since it was enacted by the Florida Legislature in 1978.⁴ The Legislature did not give any guidance to the courts in defining what is meant by “unrelated works.”⁵ As a result, for many years it was left up to the courts to structure a test that will fairly interpret the law.⁶ Generally, the courts struggled with whether to interpret “unrelated works” in a broad or narrow sense, because it is unclear if the legislature intended for the exception to be applied frequently or infrequently.⁷

The Supreme Court of Florida has attempted to answer this question of statutory interpretation created by the legislature.⁸ However, two Supreme Court of Florida decisions resulted in contrary findings, meaning the test for determining whether a co-employee’s works are unrelated remains unclear.⁹

This article will discuss the evolution of the “unrelated works” exception to workers’ compensation law. Part II will discuss workers’ compensation laws in Florida and the origins of the “unrelated works” exception. Part III will discuss the different methods that Florida courts have used to define the exception. Part IV will discuss *Taylor v. School Board of Brevard County (Taylor II)*¹⁰ and its effect on the exception. Part V will discuss *Aravena v. Miami-Dade County (Aravena II)*¹¹ and its expansion of *Taylor II*. Finally, this article will propose a new test for the application of the “unrelated works” exception.

1. See ARTHUR LARSON & LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 1.01 (2006).

2. FLA. STAT. § 440.11(1)(b)(2) (2006).

3. See *id.*

4. See Act effective July 1, 1978, ch. 78-300, § 2, 1978 Fla. Laws 847.

5. See *Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 8 (Fla. 2004) (Lewis, J. concurring); see also FLA. STAT. § 440.02 (2006).

6. See *Taylor II*, 888 So. 2d at 8.

7. See *id.* at 5; see also FLA. STAT. § 440.015 (2006).

8. See *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1169 (Fla. 2006); *Taylor II*, 888 So. 2d at 5.

9. See *Aravena II*, 928 So. 2d at 1174; *Taylor II*, 888 So. 2d at 5–6.

10. 888 So. 2d 1 (Fla. 2004).

11. 928 So. 2d 1163 (Fla. 2006).

II. ORIGINS AND HISTORY OF WORKERS' COMPENSATION LAW AND THE "UNRELATED WORKS" EXCEPTION

A. *Workers' Compensation Law*

1. Generally

Workers' compensation refers to "laws [that] provide compensation for loss [resulting] from the injury, [disablement], or death of a worker caused by industrial accident, casualty, or disease . . . based on the loss or impairment of the worker's wage-earning power."¹² Workers' compensation laws are not based on tort liability.¹³ Thus, for recovery, no proof of fault is required.¹⁴ Instead, coverage turns on the relationship between the injuring event and the employment.¹⁵ Once that "course of employment" relationship is present, it is assumed that the employee will be covered automatically.¹⁶ Benefits of workers' compensation include only that amount which will allow the employee to "exist without being a burden to others."¹⁷ This is drastically different than regular tort recovery, which seeks to restore the plaintiff to where he was before the incident.¹⁸

While the amount of recovery under workers' compensation is less than an anticipated recovery under common law, it is a necessary tradeoff that mutually benefits the employer and employee.¹⁹ Employees receive the right to automatic recovery should they be injured on the job, while employers' liability is greatly reduced due to the elimination of unknown jury verdicts and potentially large sum awards.²⁰ Furthermore, some argue that if compensation payments were higher, perhaps equivalent to tort recovery, the purpose of the workers' compensation statute would be lost, because larger than necessary payments would encourage malingering.²¹

12. 82 AM. JUR. 2D *Workers' Compensation* § 4 (2003).

13. See FLA. STAT. § 440.11 (2006); LARSON & LARSON, *supra* note 1, § 1.03(1).

14. See § 440.11; LARSON & LARSON, *supra* note 1, § 1.01.

15. See LARSON & LARSON, *supra* note 1, § 1.03(1).

16. *Id.* § 1.01.

17. *Id.* § 1.03(5).

18. *Id.*

19. See FLA. STAT. § 440.015 (2006).

20. See *id.*

21. See LARSON & LARSON, *supra* note 1, § 1.03(5).

2. Purpose

Florida's Legislature has codified the purpose of workers' compensation laws.²² The statute expresses the legislature's intent "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."²³ The law "is designed to promote efficiency and fairness" between employees, employers, and insurance carriers.²⁴ Further, the legislature specifically intends "that workers' compensation cases shall be decided on their merits."²⁵ Additionally, disputes concerning the facts and workers' compensation laws are not to be interpreted liberally in favor of either the employee or the employer.²⁶ Rather, workers' compensation laws should be interpreted using "basic principles of statutory construction."²⁷

In examining this statute, the Supreme Court of Florida determined that there are two basic purposes behind workers' compensation law: "(1) [T]o see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents."²⁸

Mutual benefits for the employer, the employee and his dependants, and society as a whole have resulted from this legislation.²⁹ The employee gets an automatic reasonable recovery and the employer, as well as co-employees, receive the reduction in liability from multiple unknown and unforeseeable case outcomes.³⁰ Workers' compensation law is intended "to speed an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial proceedings."³¹ This mutual advantage has "a stabilizing influence on business and the general economy" by making definite and predictable outcomes,

22. § 440.015.

23. *Id.*

24. *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 90 (Fla. 2005).

25. *Id.*; § 440.015.

26. § 440.015.

27. *Id.*

28. *Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 3 (Fla. 2004) (citing *McLean v. Mundy*, 81 So. 2d 501, 503 (Fla. 1955)) (alteration in original).

29. See *Shaw v. Cambridge Integrated Servs. Group, Inc.*, 888 So. 2d 58, 61–62 (Fla. 4th Dist. Ct. App. 2004); see LARSON & LARSON, *supra* note 1, § 1.03(2); 57 FLA. JUR. 2D *Workers' Compensation* § 2 (2003).

30. See *Shaw*, 888 So. 2d at 61–62; see also *Zundell v. Dade County Sch. Bd.*, 636 So. 2d 8, 12 (Fla. 1994); 57 FLA. JUR. 2D *Workers' Compensation* § 2.

31. *Zundell*, 636 So. 2d at 12.

should an employee be injured on the job.³² This in turn allows for reasonable workers' compensation insurance coverage and reduces the fear of rising insurance costs or dropped coverage due to an unpredictable loss of a common law tort action.³³ Furthermore, the law relieves pressures on society by placing the burden of care of injured employees on industry rather than society itself, by preventing those that were dependent on the employee's wages from being "charges on the community."³⁴

B. "Unrelated Works" Exception

Most states recognize, within their workers' compensation statutes, that co-employees are immune from common law tort claims.³⁵ The effect of this clause bars all suits against co-employees.³⁶

While Florida follows the majority in granting immunity to co-employees, it is the only state which has two exceptions to the immunity.³⁷ First, co-employee immunity in Florida is not applicable when an employee "acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence [and] when such acts result in injury or death or such acts proximately cause such injury or death."³⁸ The second instance, in which co-employee immunity does not apply, is "when each [employee] is operating in the furtherance of the employer's business but they are *assigned primarily to unrelated works* within private or public employment."³⁹

The first exception is common among most states.⁴⁰ Co-employees who act with intent to injure or with gross negligence cannot take advantage of the immunity granted by the workers' compensation statute.⁴¹ This means that if co-employees act in such a manner, they can be sued by the injured employee under common law tort theories.⁴² Many states only exempt inten-

32. Fla. Game & Fresh Water Fish Comm'n v. Driggers, 65 So. 2d 723, 725 (Fla. 1953).

33. See *id.*

34. McCoy v. Fla. Power & Light Co., 87 So. 2d 809, 810 (Fla. 1956); see Sullivan v. Mayo, 121 So. 2d 424, 430 (Fla. 1960).

35. LARSON & LARSON, *supra* note 1, § 111.03(1).

36. *Id.*

37. *Id.*; see FLA. STAT. § 440.11(1)(b)(2) (2006).

38. § 440.11(1)(b)(2).

39. *Id.* (emphasis added).

40. See LARSON & LARSON, *supra* note 1, § 111.03(1).

41. See § 440.11(1)(b)(2).

42. See, e.g., Aravena v. Miami-Dade County (*Aravena II*), 928 So. 2d 1163 (Fla. 2006).

tional acts, but Florida goes a bit further by exempting grossly negligent acts as well.⁴³

The second exception, the “unrelated works” exception, is what this article will focus on. This “unrelated works” exception is unique to Florida.⁴⁴ The legislature has stated that when employees are “assigned primarily to unrelated works,” co-employee immunity will not apply, meaning the injured employee can sue the co-employee under common law tort theories.⁴⁵ In most instances, even though the employee has the right to bring common law tort claims against his co-employee, the employer is added to the suit for various reasons.⁴⁶

In a case involving governmental co-employees, the civil action is automatically brought against the government employer when the “unrelated works” exception applies.⁴⁷ It has been argued that Florida’s sovereign immunity statute, which bars all claims against the state, would supersede the statute that granted standing to government employees.⁴⁸ Courts have held to the contrary, however, and thus government co-employees who fall under the “unrelated works” exception can bring their common law tort claims directly against the state employer.⁴⁹

In the case of a non-governmental employer, the outcome is generally the same.⁵⁰ When the “unrelated works” exception is found to apply, it is presumed that the employee can make common law tort claims against the employer directly based upon *respondeat superior* tort principles.⁵¹ Thus, the employer, as well as the employer’s insurer, will be liable for these “unrelated works” cases as long as the employee is acting within the scope of his employment.⁵²

With employers bearing the brunt of these “unrelated works” cases and no guidance from the Florida Legislature about what they intended “assigned primarily to unrelated works” to mean, courts have been left to establish their

43. § 440.11(1)(b)(2); see LARSON & LARSON, *supra* note 1, § 111.03(1).

44. Taylor v. Sch. Bd. of Brevard County (*Taylor II*), 888 So. 2d 1, 8 (Fla. 2004).

45. § 440.11(1)(b)(2).

46. See *id.*

47. *Aravena II*, 928 So. 2d at 1168; Holmes County Sch. Bd. v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995). See FLA. STAT. § 768.28(9)(a) (2006).

48. State Dep’t of Corr. v. Koch, 582 So. 2d 5, 6 (Fla. 1st Dist. Ct. App. 1991).

49. See *id.* at 8; see also *Duffell*, 651 So. 2d at 1179. The common law right to recovery was created by the “unrelated works” exception. *Koch*, 582 So. 2d at 8.

50. See *Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146, 1146 (Fla. 3d Dist. Ct. App. 2005).

51. See BLACK’S LAW DICTIONARY 1338 (8th ed. 2004) (defining *respondeat superior* as “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency”).

52. *Duffell*, 651 So. 2d at 1179 (Anstead, J., concurring).

own tests to determine if works are unrelated.⁵³ The next section is a summary of various Florida appellate court decisions which have dealt with this issue.

III. VARYING INTERPRETATIONS OF "UNRELATED WORKS" BEFORE *TAYLOR AND ARAVENA*

Given the lack of legislative history and definitional guidance, Florida courts in all jurisdictions have struggled with interpreting what the legislature intended "unrelated works" to mean.⁵⁴ Depending on the jurisdiction, the courts have used a variety of tests or a combination of tests to determine its meaning which, in turn, determines whether the exception to workers' compensation immunity from suits will apply.⁵⁵

It is a basic rule of statutory construction that exceptions to the rule are to be interpreted narrowly.⁵⁶ "An exception is [to be] carved out of the general rule or coverage of the statute. The coverage of the statute is the norm and the exception is the unusual"⁵⁷ Therefore, following this rule of construction, the "unrelated works" exception should be interpreted narrowly.⁵⁸ Florida courts have determined the same because "[a]n expansive construction would obliterate the legislative intent that the system operate at a 'reasonable cost' to the employer."⁵⁹ Interpreting the statute broadly would lead "to a profusion of suits and a proliferation of costs."⁶⁰ Moreover, these costs are likely to be passed on to the employer.⁶¹

Regardless of what test is used to determine what "unrelated works" are, any analysis that views "unrelated works" in a broad sense will result in fewer instances of the exception applying.⁶² Interpreting works in a broad sense means more employees of the same company are viewed as working on related works.⁶³ Thus, a broad finding which includes more employees

53. See *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1173 (Fla. 2006).

54. See *id.* at 1168.

55. See *id.* at 1168–69.

56. RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 82 (2002).

57. *Id.*

58. See *id.*

59. *Fitzgerald v. S. Broward Hosp. Dist.*, 840 So. 2d 460, 463 (Fla. 4th Dist. Ct. App. 2003).

60. *Id.*

61. *Id.* at 462; see also *Holmes County Sch. Bd. v. Duffell* 651 So. 2d 1176, 1179 (Fla. 1995) (Anstead, J., specially concurring).

62. See *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1168 (Fla. 2006).

63. See *id.*

within a related group leads to fewer instances when the “unrelated works” exception will apply.⁶⁴ This is the result of a narrow interpretation of the “unrelated works” statute.⁶⁵ Conversely, a broad view of the phrase “unrelated works,” leads to more works being deemed unrelated and, thus, is an expansive and broad interpretation of the statute.⁶⁶

The next section will discuss the different tests the courts have used and the outcomes that have resulted.

A. *Same-Project Test*

The same-project test is the analysis most widely used in Florida courts.⁶⁷ This test takes a broad approach in interpreting works by looking at the project that the co-employees are working to accomplish.⁶⁸ Under the same-project test, courts do not apply the exception if the projects that the co-employees are working to accomplish are the same.⁶⁹ If the projects are the same, then the employees are not “assigned primarily to unrelated works” or, in other words, are assigned to related works.⁷⁰

The problem becomes that a court’s application of this test can vary greatly depending on how it decides to view the employees’ projects.⁷¹ For instance, taking a big picture point-of-view, a court could decide that co-employees in a hotel are all working on the same project of providing a service to guests.⁷² Another court viewing the same case could, for example, determine that the hotel comptroller is working on the project of keeping the books and the hotel housekeeper is working on the project of cleaning rooms.⁷³ In the latter case, the employees would be working on different projects, and thus “unrelated works.”⁷⁴ In the former case, again using the same-project test, all employees of the hotel who work on the general project

64. *See id.* at 1173–74.

65. *See id.* at 1169.

66. *See id.* at 1168–69.

67. *See generally* Sanchez v. Dade County Sch. Bd., 784 So. 2d 1172 (Fla. 3d Dist. Ct. App. 2001); Taylor v. Sch. Bd. of Brevard County (*Taylor I*), 790 So. 2d 1156 (Fla. 5th Dist. Ct. App. 2001); Dade County Sch. Bd. v. Laing, 731 So. 2d 19 (Fla. 3d Dist. Ct. App. 1999); Vause v. Bay Med. Ctr., 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996); Abraham v. Dzafic, 666 So. 2d 232 (Fla. 2d Dist. Ct. App. 1995); Johnson v. Comet Steel Erection, Inc., 435 So. 2d 908 (Fla. 3d Dist. Ct. App. 1983).

68. *Vause*, 687 So. 2d at 262–63.

69. *See id.*

70. *See id.* at 261–63.

71. *See* Aravena v. Miami-Dade County (*Aravena II*), 928 So. 2d 1163, 1168 (Fla. 2006).

72. *See id.*

73. *See id.* at 1168–69.

74. *See id.*

of providing a service to guests would be considered not "assigned primarily to unrelated works."⁷⁵ Therefore, since the size of a judge's view-finder can vary greatly, this test alone has the possibility of providing inconsistent results.⁷⁶

Surprisingly, the potential variation problem outlined above has not necessarily been the case in "unrelated works" decisions. In fact, most Florida appellate courts that have applied the "same-project test" have used a big picture approach and, therefore, found that the co-employees were assigned to related works.⁷⁷

In *Dade County School Board v. Laing*,⁷⁸ the plaintiff, a teacher, was "leaving [his] classroom when he was hit by a golf cart [driven] by a school custodian."⁷⁹ The teacher, who claimed workers' compensation, could only bring a common law tort claim if co-employee immunity was exempted in one of two ways.⁸⁰ Here, the "unrelated works" exception applied, because the trial court held that the custodian and the teacher were assigned to "unrelated works."⁸¹ Therefore, this ruling, read together with Florida statutes, allowed the teacher to pursue his negligence claim against the school board.⁸² The Third District Court of Appeal, however, overturned this ruling and noted that "the fact that employees have different duties does *not* necessarily mean they are involved in 'unrelated works.'"⁸³ The court then used the "same-project test" and stated that "[t]he pertinent factor is whether the co-employees are involved in different projects, . . . [and] the focus is upon the nature of the project involved, as opposed to the specific work skills of individual employees."⁸⁴ Here, the court noted that the project the co-employees were working on was "providing education[al] related services to

75. See *id.* at 1168.

76. Compare *Miami-Dade County v. Aravena (Aravena I)*, 886 So. 2d 303, 304 (Fla. 3d Dist. Ct. App. 2004) (citing lower court decision allowing "unrelated works" exception), with *Dade County Sch. Bd. v. Laing*, 731 So. 2d 19, 20 (Fla. 3d Dist. Ct. App. 1999).

77. See generally *Sanchez v. Dade County Sch. Bd.*, 784 So. 2d 1172 (Fla. 3d Dist. Ct. App. 2001); *Taylor v. Sch. Bd. (Taylor I)*, 790 So. 2d 1156 (Fla. 5th Dist. Ct. App. 2001); *Laing*, 731 So. 2d at 19; *Vause v. Bay Med. Ctr.*, 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996); *Abraham v. Dzafic*, 666 So. 2d 232 (Fla. 2d Dist. Ct. App. 1995); *Johnson v. Comet Steel Erection, Inc.*, 435 So. 2d 908 (Fla. 3d Dist. Ct. App. 1983).

78. 731 So. 2d at 19.

79. *Id.* at 20.

80. *Id.*

81. *Id.*

82. *Id.*; see FLA. STAT. § 768.28(9)(a) (2006).

83. *Laing*, 731 So. 2d at 20 (emphasis added) (citing *Johnson v. Comet Steel Erection, Inc.*, 435 So. 2d 908 (Fla. 3d Dist. Ct. App. 1983)).

84. *Id.* (citing *Vause v. Bay Medical Ctr.*, 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996); *Abraham v. Dzafic*, 666 So. 2d 232 (Fla. 2d Dist. Ct. App. 1995)).

students at Hialeah High School.”⁸⁵ As a result of this broad language, the effect of the “same-project test” was that regardless of what jobs school employees were assigned, they were all related in the eyes of the court.⁸⁶

Johnson v. Comet Steel Erection, Inc.,⁸⁷ was the basis for the *Laing* decision.⁸⁸ In *Johnson*, however, the employees were employed by different employers even though they were both working on “the same construction project”⁸⁹ One worked for a general contractor as a common laborer, and the other worked as “a welder for [a] subcontractor.”⁹⁰ This case, which was the first to consider the meaning of the “unrelated works” statute, looked to previous cases that discussed the “broad scope of immunity afforded [to] a subcontractor for injuries to an employee of a general contractor.”⁹¹ Using this previously established theory of broad immunity, the court held that because the two employees were assigned to the same construction project, the fact that they had different employers did not matter.⁹² Thus, the “same-project test” was born, starting a trend of narrowly construing the “unrelated works” statute by looking at the general project of the employees.⁹³ Generally, other courts that have used this test have viewed the employees’ “project” in the broadest possible sense, and the result was the infrequent application of the “unrelated works” exception.⁹⁴

In *Vause v. Bay Medical Center*,⁹⁵ the First District Court of Appeal followed the *Johnson* decision.⁹⁶ The *Vause* case involved a nurse who passed away from decompression sickness after giving treatment to a patient in a

85. *Id.*

86. *See id.*; *see also* *Sanchez v. Dade County Sch. Bd.*, 784 So. 2d 1172, 1172–73 (Fla. 3d Dist. Ct. App. 2001) (holding that a teacher who was sexually assaulted by a school security guard was not assigned primarily to “unrelated works” because both the teacher and the guard were engaged in activities related to providing educational services). Thus, there was “no distinction between the teacher-custodian relationship in *Laing* and the teacher-security personnel relationship.” *Id.* at 1173.

87. 435 So. 2d at 908.

88. *Laing*, 731 So. 2d at 20.

89. *Johnson*, 435 So. 2d at 909.

90. *Id.*

91. *Id.* (citing *Motchkevitz v. L.C. Boggs Indus., Inc.*, 407 So. 2d 910 (Fla. 1981); *Younger v. Giller Contracting Co.*, 196 So. 690 (Fla. 1940); *Williams v. Corbett Cranes, Inc.*, 396 So. 2d 811 (Fla. 5th Dist. Ct. App. 1981); *Aderhold v. Blair Contracting Co.*, 350 So. 2d 550 (Fla. 1st Dist. Ct. App. 1977); *Mack v. Cook & Pruitt Masonry, Inc.*, 186 So. 2d 831 (Fla. 3d Dist. Ct. App. 1966)).

92. *Id.*

93. *See id.*

94. *See, e.g.*, *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1174 (Fla. 2006).

95. 687 So. 2d 258 (Fla. 1st Dist. Ct. App. 1996).

96. *See id.* at 262–63.

hyperbaric chamber.⁹⁷ The nurse's primary assignment within the hospital was to the obstetrics department, but on the day of the accident she was working in the hyperbaric medicine department.⁹⁸ The issue decided was whether the nurse was "assigned *primarily* to unrelated works" from her co-employees who were alleged to have been negligent, merely because the nurse's main duties in the hospital were normally in a different department of the hospital.⁹⁹ The First District Court of Appeal, relying on the "same-project test," analogized this work situation to the situation in *Johnson*.¹⁰⁰ Taking a big picture approach, the court noted that the co-employees' duties all included the "provision of health care to a patient, . . . [and they] were both involved in the same project, . . . the care of one particular patient."¹⁰¹ Furthermore, the court noted that even the administrators of the hospital, who were not present during the treatment in question, were involved in the project of "[t]he provision of health care to patients of the medical center."¹⁰² Thus, following this case, all employees working on the project of patient care would be assigned to related works, and the broad immunity against co-employee suits contemplated by the legislature was strongly intact.¹⁰³

The *Vause* dissent did not agree with this assessment.¹⁰⁴ Judge Miner opined that being "primarily assigned to unrelated works within the employment, does not mean that . . . [the employee's] work assignment *at the time of injury* must be unrelated to his primary assigned employment."¹⁰⁵ Rather, the court should look at the primary assignment of the injured, and if he is carrying out an assignment that is unrelated to his primary assignment, immunity should not be afforded.¹⁰⁶ Here, Nurse Vause was primarily assigned to the obstetrics department, unrelated to the works of those in the

97. *Id.* at 260. "Decompression sickness can result from the formation of nitrogen bubbles in the blood or body tissue due to changes of atmospheric pressure. . . . A hyperbaric chamber is an artificial environment which is used to cure decompression sickness. The hyperbaric chamber is a cylindrical metal tank." *Id.* (quoting Complaint at ¶ 12–13, *Vause*, 687 So. 2d at 260). It is standard for a nurse to "get inside the chamber with the patient during the treatment process to administer medication or provide other necessary assistance to the patient." *Id.* (quoting Complaint ¶ 13, *Vause*, 687 So. 2d at 260).

98. *Vause*, 687 So. 2d at 261 (citing Complaint ¶ 16, *Vause*, 687 So. 2d at 261).

99. *Id.* at 262 (emphasis added) (quoting FLA. STAT. § 440.11(1) (1991) (codified as amended at FLA. STAT. § 440.11(1)(b)(2) (2006))).

100. *Id.* at 263.

101. *Id.*

102. *Id.*

103. *See Vause*, 687 So. 2d at 261.

104. *Id.* at 266–700 (Miner, J., concurring in part and dissenting in part).

105. *Id.* at 267 (emphasis added).

106. *See id.* at 267–68.

hyperbaric medicine department, her secondary assignment.¹⁰⁷ This is in sharp contrast to the majority opinion, which compared the works of co-employees rather than the works of the primary and secondary assignments.¹⁰⁸ But even using that model, Judge Miner disagreed that the co-employees' works were related.¹⁰⁹ "In terms of relatedness, it seems to me that providing nursing service . . . is light-years away from overseeing the turning of dials and gauges . . . or establishing protocols for operation . . . or administering the overall affairs of the hospital."¹¹⁰ Furthermore, Judge Miner concluded that under the majority opinion's broad construction of the hospital employees' works, he could not "conceive of any situation . . . [where the exception would] ever apply."¹¹¹

In many instances, the "same-project test" does not deliver consistent outcomes when determining whether works are unrelated because it may be unclear as to which project the employees are working. In *State Department of Corrections v. Koch*,¹¹² looking at two co-employees who worked for the State of Florida, the court noted that it was obvious they were assigned primarily to "unrelated works" because the injured employee worked for the Department of Transportation (DOT), and the allegedly negligent employee worked for the Department of Corrections (DOC).¹¹³ The DOC employee had just picked up a truck used to transport inmates, and while leaving, fatally hit the "DOT employee who was crossing the street on his way to work."¹¹⁴

The *Koch* court never decided on the "unrelated works" issue because neither party disputed that the works were unrelated.¹¹⁵ However, had they disputed the claim, the "same-project test" would have resulted in different interpretations of the same situation.¹¹⁶ One interpretation could be that the employees were assigned primarily to different projects and "unrelated works," because the DOC employee was responsible for prisoner care and the DOT employee was responsible for road maintenance.¹¹⁷ However, a second interpretation could broaden the view of the DOC employee's work

107. *Id.* at 269.

108. *Vause*, 687 So. 2d at 263.

109. *See id.* at 269 (Miner, J., concurring in part and dissenting in part).

110. *Id.*

111. *Id.*

112. 582 So. 2d 5 (Fla. 1st Dist. Ct. App. 1991).

113. *Id.* at 6.

114. *Id.* n.1.

115. *Id.* at 7.

116. *See id.* at 6 n.1.

117. *See Koch*, 582 So. 2d at 6 n.1.

to show that he was working on the same project as the DOT employee.¹¹⁸ Expanding one's view of the scope of the DOC employee's work shows that he was using the truck to pick up prisoners for the purpose of transporting them to road-side maintenance locations, the very same project that the DOT employee was assigned.¹¹⁹ Thus, different work projects and purposes will be determinative, depending on whether the view of an employee's work is broad or narrow.¹²⁰

Furthermore, if one follows the *Vause* dissent, which suggested looking at the workers' *primary* assignments regardless of what they were doing on the day in question, a court could determine that the two employees' works were unrelated.¹²¹ If the primary assignments purposes did not match, then the employees would be considered "primarily assigned to unrelated works."¹²² As illustrated by the different applications of the same-project test, there is a lot of room for inconsistent interpretation.

B. *Bright-Line Test*

The bright-line test was developed as an attempt to break through what appeared to be inconsistent rulings about the "unrelated works" exception.¹²³ In an effort to make decisions consistent across the board, it was held in *Lopez v. Vilches*,¹²⁴ that inconsistent decisions "might be reconciled by applying a test based on the physical location where the employees were primarily assigned and the unity of their business purpose."¹²⁵

In *Lopez*, the plaintiff was injured while operating a vehicle maintained by his co-employees.¹²⁶ The Second District Court of Appeal looked to the meaning of the word "works" in the dictionary and found one of the defini-

118. *See id.*

119. *See id.*

120. *Compare Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1165 (Fla. 2006) (using a narrow view of the employees' work), *with Dade County Sch. Bd. v. Laing*, 731 So. 2d 19, 20 (Fla. 3d Dist. Ct. App. 1999) (using a broad view of the employees' work).

121. *See Vause v. Bay Med. Ctr.*, 687 So. 2d 258, 267-68 (Fla. 1st Dist. Ct. App. 1996) (Miner, J., dissenting in part and concurring in part).

122. *Id.* at 269.

123. *Compare Vause*, 687 So. 2d 258, 263 (holding that immunity applied because the co-employees were both assigned to the same-project of "provision of health care to patients of the medical center"), *with Holmes County Sch. Bd. v. Duffell*, 651 So. 2d 1176, 1179 (Fla. 1995) (affirming a decision which found that a school bus driver and a custodian were engaged in unrelated works).

124. 734 So. 2d 1095 (Fla. 2d Dist. Ct. App. 1999), *overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1 (Fla. 2004).

125. *Id.* at 1097.

126. *Id.* at 1096.

tions to be “[a] factory, plant, or similar building or system of buildings where a specific type of business or industry is carried on.”¹²⁷ Using this definition, the court applied a physical location test to determine if works were unrelated.¹²⁸ If the primarily assigned location of work was different for the co-employees, then the immunity granted to co-employees may not apply.¹²⁹ Applying this new rule to the current case, the court noted that the location of the workers was different and compared their duties against each other.¹³⁰ One was involved in vehicle maintenance and the other was involved in “general funeral home duties.”¹³¹ Consequently, since the locations and the duties were different, the court found that their works were unrelated and the exception to co-employee immunity could apply, and remanded the case for trial.¹³²

It is important to note here that the dissent did not agree with the bright-line test used by the majority.¹³³ Judge Quince used the same-project test to determine that both co-employees’ works were related because each of them had duties relating to the vehicle in question.¹³⁴ The location, in the Dissent’s view, was irrelevant.¹³⁵

The Fourth District Court of Appeal has also used the bright-line test to determine whether the works were unrelated, and thus, whether the exception would apply.¹³⁶ In *Palm Beach County v. Kelly*,¹³⁷ a county employee on his way home from work in his car was struck by another county employee’s car.¹³⁸ The plaintiff worked in maintenance at the Palm Beach Airport and the allegedly negligent co-employee worked as an equipment operator for the airport.¹³⁹ Their reporting locations were the same, but they worked on different projects in different locations during the work day and had unrelated duties.¹⁴⁰ The court held that because the employees were primarily in different locations throughout the day and had two separate purposes, mainte-

127. *Id.* (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2056 (3d ed. 1992)).

128. *See id.* at 1097.

129. *See Lopez*, 734 So. 2d at 1097.

130. *Id.*

131. *Id.*

132. *See id.* at 1098.

133. *Id.* (Quince, J., dissenting).

134. *Lopez*, 734 So. 2d at 1098 (Quince, J., dissenting).

135. *See id.*

136. *Fitzgerald v. S. Broward Hosp. Dist.*, 840 So. 2d 460, 464 (Fla. 4th Dist. Ct. App. 2003); *Palm Beach County v. Kelly*, 810 So. 2d 560, 562 (Fla. 4th Dist. Ct. App. 2002).

137. *Kelly*, 810 So. 2d at 560.

138. *Id.* at 561.

139. *Id.*

140. *Id.* at 562.

nance and operation, they were unrelated and the co-employee immunity would stand.¹⁴¹ The court also used the same-project test and determined that the same outcome would result because "Kelly and John had different job duties and did not work cooperatively as a team but, rather, worked on two entirely different projects."¹⁴²

In *Fitzgerald v. South Broward Hospital District*,¹⁴³ the Fourth District Court of Appeal agreed with the approach used in *Kelly*.¹⁴⁴ The plaintiff, a nurse, was injured while using the restroom when a bathroom stall's door fell off its hinges.¹⁴⁵ The plaintiff's complaint alleged that but for the negligent acts of her co-employee, she would not have been injured.¹⁴⁶ To determine if the co-employees' works were unrelated, the court used the same-project test and the bright-line test and came up with the same result under both tests.¹⁴⁷ While the plaintiff and his co-employee had different duties in the hospital, the projects of each were broadly held as "the treatment of patients."¹⁴⁸ Furthermore, applying the bright-line test, the court held that the employees worked in the same physical location with a "unified business purpose."¹⁴⁹ Therefore, because the application of both tests reached the same result, the court held that the works were related and the co-employee immunity would remain.¹⁵⁰

IV. *TAYLOR V. SCHOOL BOARD OF BREVARD COUNTY*

In *Taylor v. School Board of Brevard County (Taylor I)*,¹⁵¹ the plaintiff, Lawrence Taylor, was injured when a wheelchair lift fell on him while working as a bus attendant.¹⁵² He claimed that his employer, the School Board, was responsible for his common law tort claim against his co-employees based on the "unrelated works" exception.¹⁵³ "The trial court granted a summary judgment in favor of the school board on the grounds that the alleged negligent employees, school board transportation department mechan-

141. *Id.*

142. *Kelly*, 810 So. 2d at 562.

143. 840 So. 2d 460 (Fla. 4th Dist. Ct. App. 2003).

144. *Id.* at 464.

145. *Id.* at 461.

146. *See id.*

147. *Id.* at 464.

148. *Fitzgerald*, 840 So. 2d at 464.

149. *Id.*

150. *Id.*

151. 790 So. 2d 1156 (Fla. 5th Dist. Ct. App. 2001).

152. *Id.* at 1157.

153. *Id.*

ics, and Taylor, a school bus attendant whose responsibilities included operation of the wheelchair lift which caused his injury, *were assigned to related works*.¹⁵⁴ On appeal, the Fifth District Court of Appeal noted that Taylor and the alleged negligent mechanics worked at the same location that Taylor “was responsible for the operation of the wheelchair lift” and the mechanics were responsible for the maintenance and repair of the wheelchair lift.¹⁵⁵ Since Taylor and his co-employee were involved in some way with the wheelchair lift, the court affirmed the trial court’s opinion that the co-employees were working on related projects.¹⁵⁶ However, the court noted that its opinion did not follow the bright-line test used by the recent *Lopez* Court to determine if the co-employees’ works were unrelated.¹⁵⁷

Because of this conflict, the Supreme Court of Florida granted review of the *Taylor I* and *Lopez* decisions.¹⁵⁸ In the Supreme Court’s per curiam opinion, the justices attempted to resolve the inconsistent opinions and tests by determining “whether the Legislature intended that the unrelated works exception be construed liberally or narrowly.”¹⁵⁹ Looking to the intent of the legislature, the only clause referring to their intent in enacting the workers compensation statutes was that, because this is a “mutual renunciation of common-law rights and defenses by employers and employees alike,”¹⁶⁰ workers’ compensation laws should not be construed “liberally in favor of the employee or the employer.”¹⁶¹ Furthermore, workers’ compensation is intended to be self-executing and “not an economic or administrative burden.”¹⁶² The Legislature further points out ambiguous laws should be interpreted using “the basic principles of statutory construction.”¹⁶³

[T]he basic purpose behind workers’ compensation law [is] two-fold: (1) [T]o see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy

154. *Id.* (emphasis added).

155. *Id.* at 1157–58.

156. *See Taylor I*, 790 So. 2d at 1158.

157. *See id.*; *see also Lopez v. Vilches*, 734 So. 2d 1095, 1098 (Fla. 2d Dist. Ct. App. 1999), *overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1 (Fla. 2004) (holding that two co-employees whose responsibilities both involved the same funeral home vehicle but worked in different locations were assigned to unrelated works).

158. *Taylor II*, 888 So. 2d at 2.

159. *Id.* at 4.

160. FLA. STAT. § 440.015 (2006).

161. *Id.*

162. *Id.*

163. *Id.*; *see also BROWN & BROWN*, *supra* note 56, at 82.

tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.¹⁶⁴

The *Taylor II* court was faced with the decision of whether to interpret the "unrelated works" exception liberally or narrowly.¹⁶⁵ A liberal construction would include more work situations as unrelated, and a narrow construction would result in fewer work situations deemed to be unrelated.¹⁶⁶ The court determined that the statute should be narrowly interpreted in its per curiam opinion; however, Justice Lewis and Justice Pariente did not believe that lower courts were given enough guidance on how to interpret the statute in the future.¹⁶⁷

A. *Per Curiam Opinion*

The *Taylor II* court's analysis began by pointing out how easy it is to view any two co-employees' positions as either related or unrelated, depending on how the works are viewed.¹⁶⁸ On the one hand, "all employees of the same employer could always be considered engaged in related works since they are all charged to carry out the mission of the employer."¹⁶⁹ On the other hand, "some distinction could always be drawn between the work of most employees so as to make their work unrelated."¹⁷⁰ This point is the reason why the "unrelated works" exception has been so hard to interpret, and why the varying interpretations have come up with a wide variety of conclusions.¹⁷¹

The Court then held that the statute must be interpreted narrowly.¹⁷² The Court observed that applying the exception liberally would handicap the purpose of workers' compensation.¹⁷³ This interpretation compensates employees based on the fault of their co-employees.¹⁷⁴ The Court explained that while the exception should be applied narrowly, they could not illustrate

164. *Taylor II*, 888 So. 2d at 3 (citing *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989)).

165. *Id.* at 4.

166. *See id.* at 4–5.

167. *Id.* at 6 (Lewis, J., concurring).

168. *Id.* at 5.

169. *Taylor II*, 888 So. 2d at 5.

170. *Id.*

171. *See id.* at 13 (Lewis, J., concurring).

172. *Id.* at 5.

173. *Id.*

174. *See Taylor II*, 888 So. 2d at 5.

a test to encompass the many factual circumstances that could arise under the “unrelated works” exception.¹⁷⁵ Instead, the Court noted that only when it is clearly demonstrated that the works are unrelated will the exception apply.¹⁷⁶ The Court also noted that the *Lopez* bright-line location test is disapproved, agreeing with the dissent that all of the employees had duties related to the vehicle in question.¹⁷⁷

B. Justice Lewis’ Concurrence

Justice Lewis, while agreeing with the majority in *Taylor II*, wrote an opinion that lays out a new test to determine if works are unrelated and greatly expands upon the application of the “unrelated works” exception.¹⁷⁸ Justice Lewis felt that the majority opinion applied the exception too narrowly and said that the majority “fails to adopt parameters to provide assistance to the lower courts in the application” of the exception.¹⁷⁹ He also said that difficulty in applying one test to a myriad of factual occurrences should not result in a failure to provide analytical parameters to the lower courts.¹⁸⁰ This concurrence, illustrating the varying opinions on this issue, then attempted to develop the parameters that were overlooked in the majority opinion.¹⁸¹

Justice Lewis notes that the majority opinion is based on a faulty premise that co-employee immunity principles result from a “mutual renunciation of common law rights.”¹⁸² There was not a mutual renunciation because negligent employees did not give up any rights since their employers are the ones that provide benefits.¹⁸³ He also noted that the legislature could have provided a broad immunity to co-employees if they had intended to, but

175. *Id.* The “unrelated works” exception to the workers compensation scheme: should be applied only when it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee. While we would like to be more precise in providing guidance to those initially charged with deciding disputes based upon this exception, we are limited by our lack of precise knowledge of the legislative intent behind the exception and the reality that we could not hope to contemplate the myriad of factual circumstances that may give rise to the issue.

Id.

176. *Id.*

177. *Id.* at 6; see also *Lopez v. Vilches*, 734 So. 2d 1095, 1098 (Fla. 2d Dist. Ct. App. 1999) (Quince, J., dissenting), *overruled by Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1 (Fla. 2004).

178. *Taylor II*, 888 So. 2d at 6 (Lewis, J., concurring).

179. *Id.*

180. *Id.* at 13.

181. *Id.* at 6.

182. *Id.* at 8.

183. See *Taylor II*, 888 So. 2d at 8–9.

since they added the “unrelated works’ exception . . . to immunity,” they did not intend for it to be so broad.¹⁸⁴ Therefore, in determining the new parameters, Justice Lewis wanted the exception to apply more often than it would under the *Taylor II* majority opinion.¹⁸⁵

In doing so, he defined works as having two components, operational and locational.¹⁸⁶ Noting this, he split up the myriad of factual occurrences into four categories to determine whether each would fall under the “unrelated works” exception.¹⁸⁷ First, co-employees with the same workplace location and assigned to the same project or team would be related.¹⁸⁸ Second, co-employees with different workplace locations but still assigned to the same project or team would also be related.¹⁸⁹ Third, co-employees with both different workplace locations and assigned to different projects or teams would be unrelated.¹⁹⁰ Finally, co-employees that worked at the same location, but were assigned to different projects or teams, would probably be unrelated, but the court should first view factors to necessarily determine the relatedness of the works.¹⁹¹ The factors include “the size of the facility, the diversity of the acts performed there, and the relationship of the diverse activities being performed at the location.”¹⁹² Furthermore, the concept of team or project “should not be so broadly defined as to render the exception meaningless, nor defined so narrowly as to permit the exception to totally eviscerate the fundamental rule of co-employee immunity.”¹⁹³

C. *Reaction to Taylor II*

The *Taylor II* decision’s effect on the “unrelated works” exception is clear. The Court has made it known that the exception should be interpreted narrowly.¹⁹⁴ Further, the exception is only applied when it is clear that works are unrelated.¹⁹⁵ The reason for this narrow construction of the exception is clear because “[a]n expansive construction would obliterate the [legis-

184. *Id.* at 9.

185. *See id.*

186. *Id.*

187. *See id.* at 14.

188. *Taylor II*, 888 So. 2d at 14.

189. *Id.*

190. *Id.*

191. *Id.* at 14–15.

192. *Id.* at 15.

193. *Taylor II*, 888 So. 2d at 14–15.

194. *See id.* at 6.

195. *Id.* at 5.

lature's] intent that the system operate at 'a reasonable cost' to the employer."¹⁹⁶

However, there are many unanswered questions regarding what the definition of "works" is, and what exactly is considered "unrelated works."¹⁹⁷ These questions and the fact that the Court stated that the application should be narrow makes it difficult to apply the exception at all.¹⁹⁸ Thus, the clear result following *Taylor II* is less cases where the co-employee's immunity is removed.¹⁹⁹

Defense attorneys were happy with this decision and its outcome.²⁰⁰ Plaintiff's attorneys believe the decision was "essentially a judicial repeal of the unrelated works exception."²⁰¹ Furthermore, employers and their insurance providers are better off because of this opinion due to the limited application of the exception.²⁰²

The *Taylor II* holding did not last long. Due largely to the lack of guidance given to the lower courts, the Supreme Court decided to revisit the "unrelated works" exception in *Aravena II*.²⁰³ The *Taylor II* holding was not overturned, but the narrow application of the *Taylor II* case, described above, was greatly expanded, and the exception was given a new test to determine its application.²⁰⁴

V. ARAVENA V. MIAMI-DADE COUNTY

In *Aravena I*, a school crossing guard was killed when a car veered off the road due to the traffic lights malfunctioning at that intersection.²⁰⁵ The traffic lights were maintained by the county but were not repaired even though the county was aware of the malfunction.²⁰⁶ The trial court denied a

196. *Id.* at 6 (quoting *Fitzgerald v. S. Broward Hosp. Dist.*, 840 So. 2d 460, 463 (Fla. 4th Dist. Ct. App. 2003)).

197. See William S. Dufoe, *The "Unrelated Works" Exception to Workers' Compensation Immunity*, 79 FLA. B.J. 45, 48 (Jan. 2005).

198. Recent Developments, *Florida Case Law: Worker's Compensation*, 32 FLA. ST. U. L. REV. 983, 987 (2005).

199. See *id.* at 988.

200. See Tracy Raffles Gunn, *Amicus Case Highlight: Taylor v. School Board of Brevard County*, TRIAL ADVOC. Q., Spring 2005, at 6.

201. See Joseph H. Williams, Letter, *More on Unrelated Works Exception*, 79 FLA B.J. 4, 4 (Mar. 2005).

202. See Gunn, *supra* note 200, at 6.

203. *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1164 (Fla. 2006).

204. See *Miami-Dade County v. Aravena (Aravena I)*, 886 So. 2d 303, 305 (Fla. 3d Dist. Ct. App. 2004).

205. *Id.* at 304.

206. *Id.*

motion for judgment, notwithstanding the verdict for the county, saying that the two county employees, the traffic signal repair personnel and the crossing guard, were assigned primarily to unrelated works.²⁰⁷ Thus, the exception would apply and Aravena, the husband of the crossing guard, would be able to bring a wrongful death action against the county.²⁰⁸

On appeal, the Third District Court of Appeal did not agree with the trial court.²⁰⁹ Citing *Taylor II*, the court noted that the co-employees here worked on somewhat similar projects and their work could not be deemed unrelated.²¹⁰ Both co-employees worked on projects relating to the regulation of pedestrian and vehicular traffic.²¹¹ Each relied on the other in this situation, in order to fulfill the county's goal of safe moving traffic.²¹² The court opined, "[t]o hold otherwise would contravene the overall legislative intent of the workers' compensation law, which 'was meant to systematically resolve *nearly every* workplace injury case on behalf of both the employee and the employer.'"²¹³ Thus, the Third District Court of Appeal reversed the trial court's ruling and ruled in favor of the employer.²¹⁴

The Third District Court of Appeal, looking at recent "unrelated works" cases, compared the *Kelly* case from the Fourth District Court of Appeal to its holding.²¹⁵ *Kelly* held that the exception would apply to the plaintiff, who worked in maintenance at the Palm Beach Airport, and his co-employee, who worked as an equipment operator for the airport, because their works were unrelated.²¹⁶ While they had the same job location, the co-employees worked on entirely different projects and had different duties, according to the court, and was a clear example of "unrelated works."²¹⁷

Aravena I, when taking a broad approach to viewing the jobs of the co-employees, is distinguishable from *Kelly*.²¹⁸ The employees had similar gen-

207. *Id.*

208. *See id.*

209. *Aravena I*, 886 So. 2d at 304.

210. *Id.* at 305.

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added) (citing *Taylor v. Sch. Bd. Of Brevard County (Taylor II)*, 888 So. 2d 1, 6 (Fla. 2004)).

214. *Aravena I*, 886 So. 2d at 305.

215. *Compare id.* (holding inapplicable the "unrelated works" exception to workers' compensation immunity), with *Palm Beach County v. Kelly*, 810 So. 2d 560, 562 (Fla. 4th Dist. Ct. App. 2002) (holding that the "unrelated works" exception applied to the workers' compensation case).

216. *Kelly*, 810 So. 2d at 562.

217. *See id.*

218. *Compare Aravena I*, 886 So. 2d at 303, with *Kelly*, 810 So. 2d at 560.

eral purposes of regulating vehicular and pedestrian traffic.²¹⁹ However, the Third District Court of Appeal in *Aravena I* said that it was not clearly demonstrated that the employees' works were unrelated as required by *Taylor II*.²²⁰

A. *Majority Opinion by Justice Pariente*

The *Aravena II* opinion was written by Justice Pariente, who concurred with Justice Lewis' opinion in *Taylor II*.²²¹ The Court noted that *Aravena I* "expressly and directly conflicts with the Fourth District Court of Appeal's decision in" *Kelly*.²²² The conflict existed because the Court described the *Aravena I* case and the *Kelly* case as having similar factual situations.²²³ Both the *Aravena I* and *Kelly* facts were described as "employees who work at different physical locations for different departments, have different supervisors, and perform different duties and functions in their primary assignments."²²⁴ The Court disagreed with the prior *Aravena I* decision, which viewed the co-employees as having related purposes, essentially a broad use of the same-project test.²²⁵ The *Aravena II* Court also noted that the facts in *Kelly* showed more of a connection between the employees as the employees "in *Kelly* began and ended their days at the same location."²²⁶ Because the Court found the facts to be similar, and the *Kelly* case held the works were unrelated, and the *Aravena I* court held that there was a stronger connection between the *Aravena* employees, the Court held the two decisions were irreconcilable.²²⁷ This finding of conflict is what gave the Court jurisdiction to decide on the issue of "unrelated works."²²⁸

The Court reviewed the decisions from all of the district courts of appeal.²²⁹ The Court then reviewed the previous Supreme Court of Florida

219. *Aravena I*, 886 So. 2d at 305.

220. *Id.*

221. *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1164 (Fla. 2006); *see Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 6 (Fla. 2004).

222. *Aravena II*, 928 So. 2d at 1164.

223. *See id.* at 1166.

224. *Id.* at 1164–65.

225. *See id.* at 1174; *see also Aravena I*, 886 So. 2d at 305.

226. *Aravena II*, 928 So. 2d at 1166.

227. *Id.*

228. *See id.* at 1167.

229. *Id.* at 1168–70.

The scope of the unrelated works exception has been addressed by all of the district courts of appeal The First, Third, and Fifth District Courts of Appeal applied a broad "same-project" test

. . . .

decision, *Taylor II*, and confirmed its holdings that “the unrelated works exception must be interpreted narrowly”²³⁰ and should only be applied when “it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee.”²³¹ According to *Taylor II*, the common goal between the employees, a bus driver and a bus mechanic, was to provide safe transportation to the students.²³² Clearly, the *Taylor II* Court utilized a broad approach in viewing these employees’ works.²³³

However, in *Aravena II*, the Supreme Court of Florida, after recognizing and agreeing with the Court’s broad approach in *Taylor II*, held that “regulat[ing] vehicular and pedestrian traffic” was an overly broad definition of the co-employees duties in *Aravena*, and found their works to be unrelated.²³⁴ The Court then rationalized why one broad definition of duties was not the same as another in a different case.²³⁵ In *Taylor*, both “had duties relating to the same equipment,” which caused the injury and both worked out of the same facility.²³⁶ Here, the Court noted, plaintiff “and the traffic signal repair personnel did not work out of the same facility or with the same equipment.”²³⁷ Therefore, reliance solely on a broad definition of duties, the Court notes, without regard to other factors, is not supported by *Taylor II*.²³⁸ “[T]he Third District erred in holding that [plaintiff] and the

... [T]he Second District Court of Appeal in *Lopez* applied a narrower bright-line test that focused on the physical location of the coemployees and the scope of their duties [and] [t]he Fourth District has noted the two differing approaches of the other district courts [but] has declined to adopt either approach

Id. at 1168–69 (citations omitted).

230. *Aravena II*, 928 So. 2d at 1169; see *Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 4–5 (Fla. 2004).

231. *Taylor II*, 888 So. 2d at 5.

232. *Id.* at 5–6.

233. See *id.*

234. *Aravena II*, 928 So. 2d at 1170 (quoting *Aravena v. Miami-Dade County (Aravena I)*, 886 So. 2d 303, 305 (Fla. 3d Dist. Ct. App. 2004)).

235. See *id.*

236. *Id.*

237. *Id.*

238. *Id.*; see *Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146, 1149–50 (Fla. 3d Dist. Ct. App. 2005) (holding that co-employees whose duties had nothing in common, worked in separate locations, and took directions from different supervisors were assigned primarily to unrelated works). The Supreme Court of Florida noted that *Lluch* was similar to *Aravena* in that they each worked for different employers, they were not supervised by the same people, and they did not have similar duties. *Aravena II*, 928 So. 2d at 1172. There was further distinction to the fact that the co-employees did not work in the same location, whereas in *Lluch* they did, and were still considered assigned primarily to unrelated works. *Id.*

traffic signal repair personnel were engaged in related works”²³⁹ and “ignored the other factors”²⁴⁰ considered in *Lluch v. American Airlines, Inc.*²⁴¹

This led the Supreme Court of Florida to adopt a new factors test which includes both location and operational components that must be considered when a court is determining whether co-employees are “assigned primarily to unrelated works.”²⁴²

These include: (1) whether the coemployees work at the same location; (2) whether the coemployees must cooperate as a team to accomplish a specific mission; (3) the size of the employer; (4) whether the coemployees have similar job duties; (5) whether the coemployees have the same supervisor; and (6) whether the coemployees work with the same equipment.²⁴³

In order to determine whether works were unrelated, this Court instructed lower courts on how to apply the new factors test.²⁴⁴ First, a court must look to whether the co-employees are working at the same location, and then determine if they are working on the same team in order to accomplish a specific mission for the employer.²⁴⁵ The Court noted that if the co-employees are working at the same location, then they are more likely to have related works.²⁴⁶ If the employees are not, then they are less likely to have related works.²⁴⁷ Once the location is determined, a court must then look to whether or not a team exists by analyzing the last four factors: 1) employer size; 2) job duties of the co-employees; 3) supervisor; and 4) equipment used.²⁴⁸

Thus, *Aravena II* gave birth to a new factors test.²⁴⁹ As compared to *Taylor II*, the result of this test is an expansion in the application of the “unrelated works” exception.²⁵⁰ The majority in *Aravena II* stated “we hope that

239. *Aravena II*, 928 So. 2d at 1173.

240. *Id.* at 1172.

241. *Id.*; see *Lluch*, 899 So. 2d at 1146; see also *supra* note 238 and accompanying text.

242. *Aravena II*, 928 So. 2d at 1173 (quoting FLA. STAT. § 440.11(b)(2) (2006)).

243. *Id.*

244. See *id.*

245. *Id.*

246. *Id.*

247. See *Aravena II*, 928 So. 2d at 1173.

248. *Id.*

249. See *id.*

250. See *id.* at 1176 (Wells, J., dissenting). In comparing the decision in *Taylor II* to the majority opinion in *Aravena II*, Justice Wells stated “By broadening this exception so that many county employees will not be subject to workers' compensation immunity, the majority

the factors we have identified will provide guidance to the lower courts in applying this exception narrowly without eviscerating it."²⁵¹

B. Justice Wells' Dissent

Justice Wells did not approve of the majority opinion in *Aravena II*, because it was "a substantial variance from the majority opinion . . . in *Taylor [II]*."²⁵² The *Taylor II* opinion was characterized as narrowly interpreting the exception so as not to "obliterate the legislative intent that the [workers' compensation scheme] . . . operate at "a reasonable cost" to the employer."²⁵³ Agreeing with this, Justice Wells indicated that the Third District Court of Appeal interpreted it correctly in *Aravena I*.²⁵⁴ The *Aravena I* court could not clearly demonstrate that the works of the traffic signal repair personnel and the crossing guard were assigned to "unrelated works," because each co-employee was responsible in some way for regulating vehicular and pedestrian traffic.²⁵⁵ Justice Wells concluded that the decision of "[t]he district court should not be quashed for following this Court's majority opinion."²⁵⁶

Furthermore, Justice Wells noted that the majority opinion greatly expanded the application of the exception.²⁵⁷ This expansion "subjects counties to many employees collecting both workers' compensation benefits and common law damages from counties."²⁵⁸ In turn, if the exception is applied more frequently, lawsuits will become even more unpredictable and expensive, thus causing increased liability for employers.²⁵⁹ In Justice Wells' view, this result is contrary to prior decisions issued by the Supreme Court of Florida.²⁶⁰

subjects counties to many employees collecting both workers' compensation benefits and common law damages from counties." *Id.* at 1175–76.

251. *Aravena II*, 928 So. 2d at 1174.

252. *Id.* at 1175 (Wells, J., dissenting).

253. *Id.* (quoting *Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 6 (Fla. 2004)).

254. *Id.*; see *Miami-Dade County v. Aravena (Aravena I)*, 886 So. 2d 303, 305 (Fla. 3d Dist. Ct. App. 2004).

255. *Aravena II*, 928 So. 2d at 1175 (Wells, J., dissenting) (citing *Aravena I*, 886 So. 2d at 305).

256. *Id.* at 1175.

257. *Id.* at 1175–76.

258. *Id.*

259. *Id.* (Wells, J., dissenting).

260. *Aravena II*, 928 So. 2d at 1175–76 (Wells, J., dissenting). Justice Wells cited *Holmes County School Board v. Duffell*, 651 So. 2d 1176 (Fla. 1995), stating that it "only made sense

Justice Wells also thought the Court should have held the “unrelated works” cases to be a question of law, rather than, as in *Lluch*, a question of fact.²⁶¹ However, the majority did not resolve this issue and left it to the lower courts for decision.²⁶² To regard the issue as a question of fact would put the determination into the hands of a jury.²⁶³ However, “different juries can conclude that the same jobs are both within the unrelated works exception and not within the unrelated works exception . . . [thus] lead[ing] to inequitable results.”²⁶⁴

VI. *ARAVENA*’S EFFECT ON THE “UNRELATED WORKS” EXCEPTION

The clear result of *Aravena II* is an expansion of the “unrelated works” exception when compared to the *Taylor II* holding.²⁶⁵ The *Aravena II* Court laid out the factors to use when determining whether the exception will apply.²⁶⁶ However, it appears that the majority decision opened the legal floodgates and put employers under great liability for their employees’ workplace torts.²⁶⁷ It appears that the *Aravena II* majority held that in order to effectuate the *Taylor II* holding, “the exception should be narrowly tailored.”²⁶⁸ To be narrowly tailored, “courts should . . . consider whether the coemployees must cooperate as a team to further a *specific* mission of the employer, not . . . [a] *general* mission.”²⁶⁹ This is faulty logic, because when comparing the specific missions of employees, the outcome will most likely be that the works are unrelated and, therefore, the exception will not be applied narrowly. For example, in the hypothetical outlined briefly in the introduction of this paper, only if the co-employees of the hotel participated in the same project or specific mission, would their works be considered related.²⁷⁰ If the injured employee was a front desk clerk and the negligent employee was a housekeeper, their general missions of providing guest services would be the

because the unrelated works exception was very narrow and only a few county employees would have the right to both.” *Id.* at 1176.

261. *Id.*; see *Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146, 1146 (Fla. 3d Dist. Ct. App. 2005).

262. *Aravena II*, 928 So. 2d at 1176 (Wells, J., dissenting).

263. *Id.*

264. *Id.*

265. *Id.* at 1175.

266. *Id.* at 1173.

267. *Aravena II*, 928 So. 2d at 1175–76 (Wells, J., dissenting).

268. *Id.* at 1173.

269. *Id.*

270. *See, e.g., id.*

same.²⁷¹ However, their specific missions would be different.²⁷² Therefore, when looking at the number of different positions in one hotel, it is easy to see the unlikelihood that a negligent employee would work on the same specific mission as an injured employee.²⁷³ Thus, most co-employees' works will be unrelated, allowing the "unrelated works" exception to be frequently applied, and leading to many more common law claims to be filed against employers.²⁷⁴ This result does not comport with the *Taylor II* holding that the exception should be narrowly tailored. Rather, *Aravena II* will result in a broad application of the exception.²⁷⁵

The great divide in interpreting the "unrelated works" exception lies in the above analysis. Courts that compare the specific missions of employees instead of the general missions are going to apply the exception more frequently.²⁷⁶ This leads to frequent litigation and increased liability for the employer.²⁷⁷ The purpose of workers' compensation is therefore defeated.²⁷⁸ There is no reasonable cost to the employer when the employer is subject to common law tort claims where the outcomes are impossible to predict.²⁷⁹ Furthermore, there is no quick and efficient delivery of benefits when so many cases are stuck in the court system creating an economic and administrative burden.

VII. CONCLUSION AND PROPOSAL

The "unrelated works" exception has been puzzling Florida courts for years.²⁸⁰ Many courts have established tests in attempts to define what the legislature meant by "assigned primarily to unrelated works."²⁸¹ Since the *Aravena II* interpretation is contrary to the Supreme Court of Florida's previous *Taylor II* decision, controversy is sure to remain within the courts. There

271. *Id.*

272. *Aravena II*, 928 So. 2d at 1173.

273. *Id.* at 1170.

274. *See id.*

275. *See id.* at 1173; *see Taylor v. Sch. Bd. of Brevard County (Taylor II)*, 888 So. 2d 1, 6 (Fla. 2004).

276. *See Dufoe, supra* note 197, at 46–47.

277. *See id.* at 48.

278. *Id.*

279. *See Gunn, supra* note 200, at 6 (stating that case law reflects inconsistency in the application of the "unrelated works" exception); *Dufoe, supra* note 197, at 45–46 (discussing various outcomes that reflect the unpredictability of workers' compensation claims and common law tort claims).

280. *See, e.g., Aravena II*, 928 So. 2d at 1163; *Taylor II*, 888 So. 2d at 1; *Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146 (Fla. 3d Dist. Ct. App. 2005).

281. *See supra* Parts III–V.

is no disagreement that the Florida Legislature should enact a statute which defines “unrelated works.”²⁸² Until that is done, courts must look to case law that defines the “unrelated works” exception. Unfortunately, the case law is inconsistent.²⁸³ *Taylor II* prescribes that the exception should be narrowly tailored, and *Aravena II* develops a test in which the outcome is a broad application of the exception.²⁸⁴ Florida courts now need to reconcile both holdings.

Perhaps the factors test can still be used from the *Aravena II* case.²⁸⁵ However, instead of looking to the specific missions the employees are working to accomplish, courts should analyze the employee’s general mission.²⁸⁶ Furthermore, when viewing the general mission of employees, courts should be careful not to include every person working for the employer.²⁸⁷ Courts should also be mindful not to be too specific when defining an employee’s general mission.²⁸⁸ For example, in the hypothetical dealing with the hotel discussed earlier, the general mission of the housekeeper and the front desk clerk is to provide guest service.²⁸⁹ However, a comptroller for the same hotel, or someone working completely behind the scenes with no guest contact, has a different general purpose.²⁹⁰ In this case, the comptroller will have the general mission of behind the scenes management.²⁹¹ A general mission of making a profit for the hotel is too broad because it would include all employees working for the hotel. Similarly, a general mission to input revenue statistics is too specific, excluding all others in his workplace. Certainly, the makeup of each business is different. However, using the employer’s organizational chart and these general principles as a guide, the right balance between too specific and too general can be achieved.

282. See *Aravena II*, 928 So. 2d at 1174, 1176 (Bell, J., specially concurring & Wells, J., dissenting); *Taylor II*, 888 So. 2d at 1, 13 (Lewis, J., concurring in result only).

283. See *supra* Part VI.

284. Compare *Taylor II*, 888 So. 2d at 6 (“[T]he unrelated works exception should be narrowly construed.”), with *Aravena II*, 928 So. 2d at 1173 (“[T]he courts should also consider whether the coemployees must cooperate as a team to further a *specific* mission of the employer, [and] not . . . the same *general* mission.”).

285. See *Aravena II*, 928 So. 2d at 1173.

286. See *supra* Part VI.

287. See, e.g., *Taylor II*, 888 So. 2d at 14–15 (Lewis, J., concurring in result only) (“[T]he concept . . . should not be so broadly defined as to render the exception meaningless nor defined so narrowly as to permit the exception to totally eviscerate the fundamental rule of co-employee immunity.”).

288. See *id.*

289. See *Aravena II*, 928 So. 2d at 1163 (outlining how to differentiate between an employee’s specific and general missions).

290. See *id.*

291. See *id.*

Moreover, this test, if applied to the facts of *Aravena II*, will recognize that both the crossing guard and the traffic signal repair personnel each had a general mission of regulating pedestrian and vehicular traffic.²⁹² This recognition, that the co-employees were each regulating pedestrian and vehicular traffic, would have led to the correct result of finding the co-employees' works to be related. Applying this same test to *Lluch*, on which the *Aravena II* decision was based, would also lead to the correct result that the employee's general missions were unrelated.²⁹³ *Lluch* was primarily responsible for the cleaning and maintenance of offices, whereas his co-employee was a baggage handler.²⁹⁴ It is clear that their works were unrelated, because their general missions were different.²⁹⁵ Furthermore, applying the factors provided in *Aravena II* shows that the co-employees worked at different locations and had different employers.²⁹⁶ Thus, using the general mission test, along with the factors test, results in the co-employees' works in *Lluch* to be completely unrelated.²⁹⁷

Without this proposed general mission test, Florida courts will continue to struggle with the interpretation of the "unrelated works" exception.²⁹⁸ When interpreting this exception, courts must recognize that while the legislature did not define "unrelated works," they have indicated that the workers' compensation scheme should operate "at a reasonable cost" to employers.²⁹⁹ Without any change, the "unrelated works" exception will be applied more frequently and will greatly increase employers' liabilities and costs,³⁰⁰ thereby defeating the initial purpose for enacting workers' compensation.³⁰¹ With this in mind, courts can now narrowly apply the "unrelated works" exception without eviscerating it completely.³⁰² This would ensure that the exception is accurately tailored to the existing legislative intent.

292. *See id.* at 1170.

293. *See Lluch v. Am. Airlines, Inc.*, 899 So. 2d 1146 (Fla. 3d Dist. Ct. App. 2005).

294. *Id.* at 1149.

295. *Id.* at 1146–47. *Lluch's* general mission was the maintenance and cleanliness of ramps, offices, gates, and common areas, whereas *ABM's* general mission involved maintaining the baggage loading area and conveyor belt. *Id.*

296. *See id.* at 1146.

297. *See Lluch*, 899 So. 2d at 1146–47.

298. *See Dufoe*, *supra* note 197, at 48.

299. *See* FLA. STAT. § 440.015 (2006).

300. *See Dufoe*, *supra* note 197, at 47–48.

301. § 440.015.

302. *Aravena v. Miami-Dade County (Aravena II)*, 928 So. 2d 1163, 1174 (Fla. 2006).