IN THE SUPREME COURT OF THE STATE OF FLORIDA
Case No. SC07-434

ON PETITION TO REVIEW DECISION FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA
4th DCA APPEAL NO. 4D05-2531

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ELIZABETH A. OSTUNI, as Personal Representative of
the Estate of ANTHONY JOHN OSTUNI, deceased
Petitioner,

vs.

MEINEKE DISCOUNT MUFFLER SHOPS, INC., WILLIAM R. UFER, SR.,
WILLIAM R. UFER, JR., REX-DOUGLAS CORPORATION, GORDON CADE,
CAROLE COLARUSSO d/b/a TRANSMISSION, BK CAPITOL GROUP, INC. and
STATE AUTO INSURANCE COMPANIES,
Respondents.

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# AMENDED JURISDICTIONAL BRIEF OF RESPONDENTS WILLIAM R. UFER, SR. and REX-DOUGLAS CORPORATION

---

FINAL APPEAL FROM THE CIRCUIT COURT FOR THE 17TH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
L.T. Case No. 00-3296


Frank R. Brady, Esq.
Florida Bar No. 0588024
Brady & Brady, P.A.
Appellate counsel in Dec. Action for
Ufer Sr. and Rex-Douglas
370 Camino Gardens Blvd., Ste 200 C
Boca Raton, FL 33432
Phone: (561) 338-9256

Jeanne C. Brady, Esq.
Florida Bar No. 0997749
Brady & Brady, P.A.
Appellate counsel in Dec. Action for
Ufer Sr. and Rex-Douglas
370 Camino Gardens Blvd., Suite 200C
Boca Raton, FL 33432
Phone: (561) 338-9256

**IN THE FLORIDA SUPREME COURT**
**500 DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927**

| | |
|---|---|
| ELIZABETH A. OSTUNI, as personal representative of the Estate of Anthony John Ostuni, deceased,<br><br>Petitioner,<br><br>-vs-<br><br>MEINEKE DISCOUNT MUFFLER SHOPS, INC., a foreign corporation, WILLIAM R. UFER, SR., WILLIAM R. UFER, JR., REX-DOUGLAS CORP-ORATION, a Florida corporation, GORDON CADE, and CAROLE COLARUSSO d/b/a TRANSMISSION KING, and STATE AUTO INSURANCE COMPANIES, a Florida corporation,<br><br>Respondents. | Case No. SC07-434<br><br>L.T. Case no. 4D05-2531 |

## PRELIMINARY STATEMENT

This petition for review arises from an opinion of the Fourth District Court of Appeals affirming summary final judgment in favor of Respondent/Employers WILLIAM UFER, SR. (AUfer Sr.@) and REX-DOUGLAS CORPORATION d/b/a Meineke Discount Muffler Shop (ARex-Douglas@), deeming them immune from liability for an alleged wrongful death under the exclusivity/immunity provisions of ' 440.11(1), Florida Statutes. Petitioner, ELIZABETH A. OSTUNI, as Personal Representative of the Estate of her late husband, ANTHONY JOHN OSTUNI, deceased (ADecedent@) sued Ufer Sr., Rex Douglas, MEINEKE DISCOUNT MUFFLER SHOPS, INC.

(AMeineke@), WILLIAM R. UFER, JR. (AUfer Jr.@), GORDON CADE (ACade@), CAROLE COLARUSSO d/b/a TRANSMISSION KING (AColarusso@) and BK CAPITOL GROUP, INC. (ABK Capitol@) for Decedent=s wrongful death. Insurance carrier STATE AUTO INSURANCE COMPANIES (AState Auto@), sued all parties to the wrongful death suit for declaratory judgment that there is no coverage for the alleged wrongful death. The trial court consolidated both cases for purposes of discovery, and the 4th DCA consolidated the record for both cases for purposes of the appeal. The summary judgment in favor of Rex Douglas and Ufer Sr. was rendered in the declaratory judgment action. The undersigned is defense counsel for Ufer Sr. and Rex Douglas in the declaratory judgment action (from which this appeal arises) and Ufer Sr.'s private counsel in the wrongful death case.

The abbreviation AIB@ herein refers to Petitioner=s jurisdictional brief. The abbreviations A(e.s.)@ and A(e.o.)@ mean emphasis supplied and emphasis original, respectively.

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## STATEMENT OF THE CASE AND FACTS

**Statement of the Case**:

This is a workers= compensation immunity case under section 440.11(1), Florida Statutes, where statutory exceptions to immunity are not at issue. Two cases were consolidated by the trial court for record purposes [Dec. p. 2]. The first case was an action for wrongful death by Petitioner [Id. p.1]. The second case was the subsequent action for declaratory judgment by the general liability insurance carrier, State Auto Insurance Companies (AState Auto@), against its insureds, Ufer Sr., Rex-Douglas, Ufer Jr., Meineke and Cade, all other defendants in the wrongful death case and Petitioner. State Auto challenged liability coverage for the wrongful death under its policies in the declaratory judgment action [Dec. pp. 1-2].

Ufer Sr. and Rex Douglas (“Respondents”) sought and obtained summary final judgment in the declaratory judgment action. The trial court deemed them immune from liability for the alleged wrongful death of Anthony Ostuni under the exclusivity/immunity provisions of ' 440.11(1), Florida Statutes [Id. p. 1]. The Fourth District Court of Appeals affirmed by written decision on January 31, 2007 (ADecision@or “Dec.”). ***Ostuni v. Meineke Discount Muffler Shops, Inc.***, 948 So. 2d 848 (Fla. 4th DCA 2007). Rehearing was denied on March 19, 2007. Petitioner seeks discretionary review of the Decision, claiming conflict jurisdiction.

**Statement of the Facts**:

Petitioner=s jurisdictional brief (AIB@) impermissibly asserts many Afacts@ found nowhere in the Decision [or the record]. ***See Hardee v. State***, 534 So. 2d 706, 708 (Fla. 1988) (Court limited to facts on face of the opinion). The facts that appear on the face of this Decision are simple. Anthony Ostuni was shot and killed during a robbery that occurred at a Meineke Muffler Shop franchise where he worked as a mechanic [Dec. at 1]. His widow (APetitioner@ herein) filed for and received workers' compensation benefits, and later filed a wrongful death suit against the Meineke franchise, the Meineke franchisor, a father and son connected to the franchise (the Ufers), and various employees of the franchise [Dec. p. 1].

To plead around the problem of workers' compensation immunity, the complaint alleged Mr. Ostuni's status as a business invitee of the franchise, <u>which was not true</u> [Dec. p. 1] (e.s.). The lawsuit alleged several theories of liability: that the franchisee was the actual or apparent agent of the franchisor; that the franchisee was the actual or apparent agent for the Ufers; that the Ufers were the actual or apparent agents for the franchisee; that the franchisor was directly negligent under the franchise agreement; that the Ufers were negligent as franchisees or directly negligent under the franchise agreement; and that the Ufers, the franchisor, and franchisees were negligent in causing Ostuni's wrongful death [Id.].

The Fourth District found that all non-insurer appellees[1] were "other persons" who acted in a "managerial or policymaking capacity" within the meaning of section 440.11(1), Florida Statutes (1998) [Dec. at 2]. It also found that:

> [t]o the extent that some of the causes of action rely on the vicarious liability of those acting through agents with workers' compensation immunity, then no cause of action exists under ***Mobil Oil Corp. v. Bransford***, 648 So. 2d 119, 121 (Fla. 1995), which holds that if an apparent "agent cannot be held liable, neither can the principal, because there is nothing to impute." Ostuni relies upon ***Gulfstream Land & Development Corp. v. Wilkerson***, 420 So. 2d 587 (Fla.1982), but we find that case to be inapplicable because it predates the 1988 revision of section 440.11(1).

[Dec. at 2].

## SUMMARY OF THE ARGUMENT

Petitioner seeks discretionary review based on "conflict" with certain decisions of this Court and those of the First, Second and Fifth Districts. The Fourth District's ruling that Respondents were "other persons" who acted in a "managerial or policy making capacity" entitled to immunity under Fla.Stat. § 440.11 (1998), does not expressly or directly conflict with any other decisions on the same point of law. Nor does the Decision involve any broad legal principle or policy question.

## JURISDICTIONAL STATEMENT

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[1] The Fourth District corrected a scrivener's error changing the phrase Anon-insurer appellants@ to Anon-insurer *appellees*@ (e.s.). ***See*** 948 So. 2d at 849. That term is clearly meant to distinguish State Auto (petitioner in the declaratory action) from the defendants in the wrongful death case.

This Decision does not expressly or directly conflict with any decision of another district court of appeal or of this Court on the same question of law. Nor is there any implied conflict. The law is not only harmonious on the issues in this case C it is well settled. Accordingly, there is no jurisdiction under Fla.Const. Art. V § 3(b)(3) or Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

## ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION AND DEEN V. QUANTUM RESOURCES, INC. [restated by Respondents]

This Decision only involves the question of who is entitled to immunity under Fla.Stat. § 440.11 (West=s 1998). It does not involve any type of statutory exception to workers= compensation immunity (e.g., intentional acts, gross or culpable negligence, unrelated works, etc.). Petitioner impermissibly delves well into the underlying record [IB pp. 2-4]. There can be no examination of the underlying record, no second-guessing of the facts stated by the Decision and no use of extrinsic materials to clarify the purported conflict. ***See Hardee***, 534 So. 2d at 708. ***Reaves v. State***, 485 So. 2d 829, 830 (Fla. 1986) (explaining Afour corners@ rule) (e.s.); ***Art. 5, ' 3(b)(3), Fla. Const***. Conflict jurisdiction exists only if the decision to be reviewed expressly and directly conflicts with a decision of this Court or another district court of appeals. ***See Florida Appellate Practice*** (2007 Ed.), Padovano, Phillip J., ' 3.10 p. 68; ***Jenkins v. State***, 385 So. 2d 1356 (Fla. 1980).

Petitioner asserts conflict with ***Deen v. Quantum Resources, Inc***., 750 So. 2d 616 (Fla. 1999), reasoning that ***Deen*** referred to ***Gulfstream*** and ***Jones v. Florida Power Corp***., 72 So. 2d 285 (Fla. 1954) [IB pp. 5-6]. This so called Aderivative@ or Adaisy-chain@ conflict jurisdiction does not exist. ***See The Operation and Jurisdiction of the Supreme Court of Florida***, 29 NOVALR 431, 515 (updated 12/28/05) (so stating).

Unfortunately, as the Decision explains, Petitioner tried to Aplead around the immunity problem" by making untrue statements in her complaint [Dec. at 1]. With false pleadings, there is no broad legal principle or public policy question to address. ***Id***. at 523; ***see, also, Florida Appellate Practice***, ' 16.13 p.314 (brief on jurisdiction should focus on need to resolve broad legal issue or policy question).

Petitioner=s assertion of an alleged conflict with ***Deen*** and ***Jones*** has no merit. Neither case is mentioned in this Decision. The legal principle in ***Deen*** was whether a *self-insured public utility* that provided workers= compensation insurance to an employee of a subcontractor working on the utility=s property was immune from the employee=s suit under section 440.11(4) because, as a self-insurer, the utility was a Acarrier@ under Fla. Stat. § 440.02(3). ***Id***., 750 So. 2d at 616, 621 (e.s.). Conversely, this Decision has nothing to do with any self-insured public utility, an employee of a subcontractor or anyone else claiming immunity under section 440.02(3) or 440.11(4) as a Acarrier@. Rather, as stated on the face of this Decision, Mr. Ostuni was employed

as a mechanic by a Meineke franchise operated by a father and son (the Ufers) connected to the franchise [Dec. at 1]. Moreover, when ***Deen*** referred to ***Jones***, it specifically noted that the statutory provision at issue in ***Jones*** was later superseded by statute. ***See Deen***, 750 So. 2d at 618-19 (subsequent to ***Jones*** and its progeny, legislature enacted statute at issue in ***Deen*** (Fla.Stat. § 440.571, dealing with self-insured public utilities)). Thus, there is no conflict with either case.

As to ***Gulfstream***, the Decision merely states the obvious. ***Gulfstream*** plainly predated the 1988 amendments of section 440.11(1) by some six years [Dec. at 2]. That correct statement of the statute's temporal evolution is not a conflict with any case. The legal principle addressed in ***Gulfstream*** was whether *section 440.04(2),* operates to extend immunity to a parent corporation when an employee of its subsidiary is injured and both the parent and subsidiary are insured by the same workers= compensation insurance policy. ***Id.***, 420 So. 2d at 590 (e.s.). In contrast, the Decision does not deal with or remotely address either section 440.04(2) or section 440.571. Rather, the narrow legal issue here is that Aother persons@ who plainly acted in a Amanagerial or policy making capacity@ are within the ambit of section 440.11(1) (1998) [Dec. at 2]. The Aother person@ immunity provision did not exist yet when this Court issued ***Gulfstream***. The immunity conferred upon Aother persons who act in a managerial or policy making capacity@ was later added to section 440.11 by the 1988 amendments. ***See Laws 1988, c. 88-284*** '

*1*. It is not possible that the Decision conflicts with ***Gulfstream***, as that case passes on an entirely different point of law.

## II. THERE IS NO CONFLICT JURISDICTION ON THE MEANING OF AOTHER PERSONS@UNDER SECTION 440.11, NOR IS THERE CONFLICT WITH MOBIL OIL v. BRANFORD [restated by Respondents]

Petitioner contends that the Decision conflicts with ***Streeter v. Sullivan***, 509 So. 2d 268 (Fla. 1987), ***Eller v. Shova***, 630 So. 2d 537 (Fla. 1993); ***Woodson v. Ivey***, 917 So. 2d 993 (Fla. 5th DCA 2005), ***Madaffer v. Managed Logistics Systems, Inc***., 601 So. 2d 1328 (Fla. 2nd DCA 1992), ***Vause v. Bay Medical Center***, 687 So. 2d 258 (Fla. 1st DCA 1997), ***Weber v. Dobbins***, 616 So. 2d 956 (Fla. 1993), and ***Mobil Oil Corp. v. Bransford***, 648 So. 2d 119 (Fla. 1995) [IB pp. 6-10]. Not so.

In ***Eller***, this Court explained many years ago that the *1988 amendments* were enacted in direct response to ***Streeter***. ***See Eller***, 630 So. 2d at 540. The legal principle in ***Streeter*** was whether the *1978 amendment* of section 440.11 eliminated immunity for corporate officers or supervisors. ***Id***., 509 So. 2d at 271. Under that version of the statute, the employer=s corporate officers could be held liable for acts of gross negligence for an employee=s job related injuries as fellow employees. ***Id***. Even so, as recognized in ***Streeter***, the 1978 version of section 440.11 and the ***Streeter*** case itself were both superseded by the *1988 amendments*. ***See Eller***, at 540. Thus, this Decision does not conflict with ***Streeter*** B or any other current case.

***Eller*** is not even referred to in this Decision. Petitioner=s arguments are contradictory and misplaced. Petitioner argues that the Decision somehow expands Aother person@ immunity to include parties that are unconnected to the employer in any managerial capacity, while conversely conceding that the Decision confers immunity upon parties with Amanagerial functions@ [IB pp. 6-7]. The Decision does not confer immunity on anyone unconnected to the employer. Rather, it affirms immunity based on each non-insurer Respondent=s Aconnection to the franchise employer@, all of whom plainly fall under the ambit of the immunity statute under the facts of this case [Dec. at 2]. ***Eller*** addressed the constitutionality of the 1988 amendments of section 440.11. ***Id.***, 630 So. 2d at 539. This Decision does not remotely address that issue. There is simply no conflict with ***Eller=s*** requirement that Aall policy makers@ of the employer be treated equally. ***Id.***, 630 So. 2d at 542 (1988 amendment enacted to clarify that all policymakers, regardless of position as employers or co-employees, treated equally). There is no conflict with ***Eller***.

As to alleged conflict with ***Woodson***, ***Madaffer***, ***Vause***, and ***Weber***, Petitioner makes no argument as to how or why that is so. Rather, Petitioner merely announces, without analysis, that other districts have also required a relationship to the employer in order to invoke Aother person@ immunity [IB p. 7]. As discussed above, the Decision is in full concert with the plain words of the statute because it simply affirms Aother person@

immunity for all non-insurer appellees based on their connection to the immune employer (the Meineke franchise) [Dec. at 2].

In ***Weber***, this Court rejected a similar attempt to limit the immunity provisions of ' 440.11 to the statutory definition of Aemployee@ set out in the definitions at ' 440.02. ***Id***., 616 So. 2d at 959 (e.s.). This Decision is consistent with ***Weber***, as it looked to the plain words of the amendments and declined to reach an absurd result. There is no conflict with ***Woodson***, ***Madaffer***, ***Weber*** or ***Vause***.

There is no conflict with ***Mobil Oil*** [IB pp. 8-9]. The Decision *relies* on ***Mobil Oil***, holding that "to the extent that some of the causes of action@ alleged by Petitioner Arely on vicarious liability@ then no cause of action exists under ***Mobil Oil***. As stated in the Decision, Petitioner not only made false pleadings, she asserted all sorts of agency/principle theories of liability [Dec. at 1]. Petitioner cannot ignore her own pleadings. Obviously, if there is no liability on the agent's part due to immunity, there can be no derivative liability either because there is nothing to impute to the principal. ***Id***., 648 So. 2d at 122; ***see also Fla. Stat. ' 440.11(1)*** (West 1998) (liability of employer prescribed in section 440.10 shall be *exclusive* and *in place of all other liability*) (e.s.). This Decision does not rule that a franchisor can never be liable for its own negligence. That premise is nowhere within the four corners of this Decision. This Decision does not conflict ***Mobil Oil*** <u>or</u> section 440.11(1).

Even if this Court finds conflict jurisdiction, it should decline to exercise it. There is no broad legal issue or unanswered policy question involved. This Court already addressed the scope of the 1988 amendments in ***Weber*** and ***Eller***.

## CONCLUSION

For the foregoing reasons, Ufer Sr. and Rex Douglas respectfully assert that there is no discretionary conflict jurisdiction to review the Decision. Alternatively, even if this Court determines that conflict jurisdiction exists, it should decline to exercise review.

Respectfully submitted,

Brady & Brady, P.A.
Appellate counsel in Dec. Action
for Ufer Sr. and Rex Douglas
370 Camino Gardens Blvd., Ste 200C
Boca Raton, FL 33432
Phone: (561) 338-9256

By:_____________________________
Jeanne C. Brady, Esq.
Florida Bar No. 0997749

_________________________________
Frank R. Brady, Esq.
Florida Bar no. 0588024

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and authentic copy of this Jurisdictional Answer Brief has been furnished via U.S. Mail, first class postage prepaid, to the persons on the attached service list this 11th day of April, 2007.

**BRADY & BRADY, P.A.**
Appellate counsel in Dec. Action
for Ufer Sr. and Rex Douglas

370 Camino Gardens Blvd., Suite 200C
Boca Raton, Florida 33432
Phone: (561) 338-9256

By:________________________________
Jeanne C. Brady, Esq.
Florida Bar No. 0997749

**CERTIFICATE COMPLIANCE WITH**
**FONT REQUIREMENTS OF RULE 9.210**

The undersigned certifies that this Brief complies with the font requirements of Rule 9.210(a)(2), Fla.R.App.P., as it is typed with times new roman 14 point font in MS Word 2002 for windows format.

____________________________
Jeanne C. Brady, Esq.
Florida Bar No. 0997749

Service List

**John E. Herndon, Jr., Esq.**
Conroy, Simberg & Ganon, P.A.
Atrium Building Suite 105
325 John Knox Road
Tallahassee, Florida 32303

**Fred Land Fulmer, Esq.**
The International Bldg., Suite 1216
2455 E Sunrise Blvd.
Fort Lauderdale, FL 33304

**Hinda Klein, Esq.**
Conroy, Simberg & Ganon, P.A.
3440 Hollywood Blvd., 2nd Floor
Hollywood, Florida 33021

**Howard T. Sutter, Esq.**
Boyd & Sutter, P.A.
6817 Southpoint Pkwy, Suite 1801
Jacksonville, FL 32216

**Richard Gomez, Esq.**
Law Offices of Roland Gomez
4300 Biscayne Blvd., Suite 305
Miami, Florida 33137-3255

**Gordon Cade** (pro se dec. action)
c/o Bulls Eye Automotive
1540 SW 7th Rd
Ocala FL 34474-3164

**Steven M. Pesso, Esq.**
Steven M. Pesso, P.A.
370 Camino Gardens Blvd., Suite 336
Boca Raton, Florida 33432

**Joseph M. Loughren, Esq.**
Loughren & Doyle, P.A.
506 SE 8th Street
Fort Lauderdale, FL 33316

**James G. Salerno, Esq.**
Peterson Bernard, PA
707 SE 3rd Avenue, Suite 500
Fort Lauderdale, FL 33302