DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

TAMPA ELECTRIC COMPANY,

Appellant,

v.

DONALD G. GANSNER and STACY GANSNER, individually, and as parents and next friends of BREANNA GANSNER and KARSEN GANSNER, minors; and JAMES CARTER and CHELSEA CARTER,

Appellees.

No. 2D19-3091

November 10, 2021

BY ORDER OF THE COURT:

Upon consideration of Appellant Tampa Electric Company's motion for rehearing and alternative motion for certification, filed on November 2, 2020,

IT IS ORDERED that the motion for rehearing is granted to the extent that the opinion dated October 16, 2020, is withdrawn and the attached opinion is substituted therefor. Appellant's alternative motion for certification is denied as moot. Appellees' response has been noted.

No further motions for rehearing will be entertained in this appeal.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

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Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Ralph C. Stoddard, Judge.

Jason Gonzalez and Amber S. Nunnally of Shutts & Bowen LLP, Tallahassee; Adam D. Griffin and Timothy C. Conley of Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, for Appellant.

Robert F. Jordan of Jordan Law Firm, PLLC, Lake City; and Richard Perlini, Jeffrey L. Meldon, and Carey W. Meldon of Meldon Law, Gainesville, for Appellees.

Tiffany A. Roddenberry of Holland & Knight LLP, Tallahassee; and William W. Large of Florida Justice Reform Institute, Tallahassee, for Amicus Curiae Florida Justice Reform Institute.

PER CURIAM.

Tampa Electric Company ("Tampa Electric") appeals the trial court's order denying its motion for summary judgment and determining that it is not entitled to workers' compensation immunity in two lawsuits brought against it. To the extent that the court concluded that Tampa Electric was not entitled to immunity as a matter of law, we have jurisdiction, *see* Fla. R. App. P. 9.130(a)(3)(C)(v), and we reverse. To the extent that Tampa Electric challenges the court's alternative conclusion that a disputed question of material fact precludes summary judgment in Tampa Electric's favor, we lack jurisdiction and dismiss.[1] *See Fla.*

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[1] In its summary judgment order, the trial court reasoned that Tampa Electric was not entitled to immunity as a matter of law because there was no prime contract between Tampa Electric and a third party that obligated Tampa Electric to maintain the equipment that it uses to generate electricity, i.e., Tampa Electric did not qualify as a "contractor" under section 440.10(1)(b), Florida Statutes (2017). The order, however, also included the sentence, "There are material issues of fact as to what work related to the accident in this action was subcontracted to Zachry Industrial."

Tampa Electric moved for clarification, seeking entry of an amended order that did not include this "errant sentence." In its order on the motion for clarification, however, the trial court confirmed:

> As an alternative basis of denial, the July 12, 2019, Order ruled that, even if the defense of workers' compensation immunity was available to Tampa Electric in this action, an issue of fact would prevent summary judgment in favor of Tampa Electric. The issue of fact is

Highway Patrol v. Jackson, 238 So. 3d 430, 436 (Fla. 1st DCA 2018) (noting that "FHP makes a sound argument that the trial court erred in finding that issues of material fact precluded a ruling that it was immune from suit" but concluding that "[a]n erroneous conclusion that issues of fact exist is not a 'matter of law' in this context"), *approved*, 288 So. 3d 1179 (Fla. 2020).

Tampa Electric, a public utility, owns Big Bend Power Station, an electrical generating facility in Hillsborough County. Donald Gansner and James Carter are actual employees of Zachry Industrial Inc., an entity with which Tampa Electric had contracted to provide maintenance work at Big Bend. In October 2017, Gansner and Carter were about to perform work on an access door of one of Big Bend's condenser units when the door blew open, unleashing a massive column of water. These lawsuits arose out of their resulting injuries.

Tampa Electric raised an affirmative defense of workers' compensation immunity in both lawsuits, and the suits were

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whether at the time of the accident the plaintiffs were performing work under a contract between Tampa Electric and Zachry Industrial.

consolidated for pretrial purposes. Tampa Electric then moved for summary judgment on the ground that it is the statutory employer of Gansner and Carter pursuant to section 440.10(1)(b), Florida Statutes (2017). It further asserted that because it is their statutory employer, the exclusivity provision of section 440.11 limits Gansner's and Carter's remedies to workers' compensation benefits, which they had received through Zachry Industrial. As set forth above, the trial court denied the motion. To the extent that we have jurisdiction, we review the court's order de novo. *See Green v. APAC–Fla., Inc.*, 935 So. 2d 1231, 1233 (Fla. 2d DCA 2006).

Pursuant to section 440.10(1)(b):

> In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

Accordingly, Tampa Electric would be entitled to workers' compensation immunity as Gansner's and Carter's statutory employer if it is considered a "contractor" that "sublet[ ] any part" of its "contract work" to Zachry Industrial, the "subcontractor." *See*

id. To be considered a contractor under section 440.10, Tampa Electric's "primary obligation in performing a job or providing a service must arise out of a contract." *Sotomayor v. Huntington Broward Assocs. L.P.*, 697 So. 2d 1006, 1007 (Fla. 4th DCA 1997) (quoting *Gator Freightways, Inc. v. Roberts*, 550 So. 2d 1117, 1119 (Fla. 1989)). This primary obligation is "an obligation under the prime contract between the contractor and a third party," *id.* (quoting *Miami Herald Publ'g v. Hatch*, 617 So. 2d 380, 383 (Fla. 1st DCA 1993)), which is "sublet" when it is "pass[ed] on to another," *Jones v. Fla. Power Corp.*, 72 So. 2d 285, 289 (Fla. 1954).

In support of its argument that it is a contractor within the meaning of section 440.10(1)(b), Tampa Electric asserts that it has a contractual obligation to its customers to supply them with electricity and that that obligation arises out of its tariff. A tariff is a document setting forth a public utility's services, the rates for those services, and the rules and regulations that govern the utility's relationship with its customers. *See* Fla. Admin. Code R. 25-6.033(1), (2). A tariff is subject to review and approval by the Public Service Commission, Fla. Admin. Code R. 25-6.033(3), and if approved, it is recognized as a contract between the utility and its

customers with the force and effect of law. *See Landrum v. Fla. Power & Light Co.*, 505 So. 2d 552, 554 (Fla. 3d DCA 1987); *see also Potts v. Fla. Power & Light Co.*, 841 So. 2d 671, 672 (Fla. 4th DCA 2003) (concluding that a customer was bound by Florida Power & Light's tariff, which included a limitation of liability clause); *cf. Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A. (Viasa Airlines)*, 459 So. 2d 440, 441 (Fla. 3d DCA 1984) (explaining, in an action for damages brought by a company against a shipper for lost cargo, that "[a] validly filed tariff constitutes the contract of carriage between the parties and conclusively and exclusively governs the rights and liabilities between the parties" (citing *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973))).

Tampa Electric's tariff, which was filed with and approved by the Public Service Commission, is therefore considered a contract between Tampa Electric and its customers. As Tampa Electric points out, section 2.2.2 of the tariff provides that Tampa Electric will "use reasonable diligence at all times to provide continuous service at the agreed nominal voltage."

Notwithstanding Tampa Electric's contractual obligation to supply electricity to its customers, however, the trial court concluded that Tampa Electric does not qualify as a contractor because it has no contractual obligation, explicit or implied, to maintain the equipment that it uses to generate that electricity, either generally or at Big Bend in particular. *See generally Mitchell v. Osceola Cnty. Sch. Bd.*, 159 So. 3d 334, 336 (Fla. 1st DCA 2015) ("It is well established . . . that to satisfy section 440.10(1)(b), the contractual obligation may be implied, and does not need to be pursuant to an express provision in a written contract."). Rather, the court concluded, Tampa Electric's obligation to maintain its equipment is solely regulatory. Tampa Electric argues that this was error because its obligation to maintain the equipment that it uses to generate electricity is implicit in its explicit obligation to supply electricity.

We agree with Tampa Electric. To be sure, as the trial court observed, Tampa Electric *does* have a regulatory duty to maintain its generating equipment. *See* Fla. Admin. Code R. 25-6.037(1) (requiring electric public utilities to operate their "equipment used in connection with the production, transmission, distribution,

regulation, and delivery of electricity to any customer" in a manner that is "safe, efficient, and proper"); *see also* § 366.05(1)(a), Fla. Stat. (2017) (authorizing the Public Service Commission to adopt "rules and regulations to be observed by each public utility"). But Tampa Electric's status as a statutory employer would not be defeated by the existence of a regulatory obligation that overlaps with a corresponding contractual obligation to maintain the equipment. *See Roberts v. Gator Freightways, Inc.*, 538 So. 2d 55, 59 (Fla. 1st DCA 1989) (concluding that a party that contracts with another for a service that is subject to an administrative regulation would not be precluded from being considered a statutory employer simply because the service is regulated by the state). And Tampa Electric has an implicit contractual obligation to maintain its equipment under its tariff because maintaining its equipment is essential to its fulfillment of its explicit obligation under the tariff to supply electricity. Therefore, when Tampa Electric subcontracted with Zachry Industrial for the purposes of maintaining its equipment, it sublet to Zachry Industrial its implied obligation to maintain in working condition the equipment it uses to generate the electricity it is contractually obligated to supply.

Our decision in *Green*, 935 So. 2d at 1233–34, is instructive on this point. In *Green*, the Florida Department of Transportation (FDOT) entered into a contract with APAC-Florida, Inc. (APAC), "to mill, widen, and resurface a section of a state road." *Id.* at 1232. APAC, in turn, contracted with Florida Tank Lines, Inc. (FTL), to transport liquid asphalt to APAC for further processing into "a final asphalt product meeting FDOT specifications." *Id.* Green, a truck driver for FTL, had delivered a load of liquid asphalt to APAC's Okeechobee plant and was injured while off-loading it. *Id.* at 1232–33. He and his wife then sued APAC. *Id.* at 1233. The trial court concluded that APAC was entitled to summary judgment as Green's statutory employer because "a contractual obligation between APAC and FDOT" had been "passed on to [FTL]." *Id.* (alteration in original).

Although we ultimately reversed the grant of summary judgment on the ground that disputed questions of material fact existed, we noted that the prime contract—the contract between APAC and FDOT—"did not require APAC to manufacture the specific asphalt used on the road project," but that "[i]mplicit in [APAC's obligation to resurface the road] was APAC's duty to provide

the necessary asphalt." *Id.* We noted further that to provide the necessary asphalt, APAC "chose to manufacture the product itself." *Id.* The "central factual dispute" that precluded summary judgment pertained to whether "there was a sufficient nexus between FTL's services for APAC and the FDOT project to support a finding that APAC was Mr. Green's statutory employer." *Id.* at 1234.

Just as APAC's contract with FDOT did not require it to manufacture asphalt, Tampa Electric's tariff does not require it to generate electricity. But just as APAC was obligated to resurface the road, Tampa Electric is obligated to supply electricity. And just as APAC chose to manufacture the asphalt needed to fulfill its obligation to FDOT to resurface the road, Tampa Electric has chosen to generate the electricity needed to fulfill its obligation to its customers to supply them with electricity. To do that, it needs generating equipment that works.

Accordingly, we reverse the trial court's order denying summary judgment to the extent that it determined, as a matter of law, that Tampa Electric is not entitled to workers' compensation immunity. As to the court's alternative conclusion that disputed issues of material fact preclude a determination that Tampa Electric

is entitled to such immunity, we have no jurisdiction to review that conclusion at this time. *See Jackson*, 238 So. 3d at 436. To that extent, therefore, we dismiss.

Reversed in part; dismissed in part; remanded for further proceedings.

LaROSE and KHOUZAM, JJ., Concur.
ROTHSTEIN-YOUAKIM, J., Concurs specially.

ROTHSTEIN-YOUAKIM, Judge, Specially concurring.

I join fully in the majority's decision and write separately only to express a concern triggered by part of Tampa Electric's argument in its brief. Specifically, Tampa Electric argues that it undertook an implied contractual obligation to its customers to maintain its electrical generating equipment at Big Bend because the maintenance of such equipment "contributes to the performance" of its express contractual obligation to supply electricity.

Section 440.10(1)(b), however, applies to "contract work," not "work that contributes to the performance of the contract." Thus, section 440.10(1)(b) does not create statutory employer status whenever a party enters into a contract with another that "contributes to" or "facilitates" its work under a separate contract;

surely, that could be said of nearly every contract that a business enters into except those for the most incidental of services. *See Sotomayor*, 697 So. 2d at 1008 ("[T]he legislature could have granted a broader statutory employer immunity by creating statutory employer status in any circumstance in which a business engages a subcontractor to perform a part of the business' regular trade or work." (quoting *Rabon v. Inn of Lake City, Inc.*, 693 So. 2d 1126, 1130 (Fla. 1st DCA 1997))). Although it is well established in the workers' compensation context that a contractual obligation may be implied, *see Mitchell*, 159 So. 3d at 336, we must be careful not to infer so much that we lose sight of what the statute actually says.