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IN THE SUPREME COURT OF FLORIDA
CASE NO. 68,697

DONALD STREETER,
individually and
EDWARD E. MELCHER,
individually,

Petitioners,

vs.

MICHAEL SULLIVAN,
individually and as
personal representative
of the ESTATE OF SUZANNE
SULLIVAN, his deceased wife,

Respondent.
_____/

ON CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL,
STATE OF FLORIDA, FOURTH DISTRICT

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, ON BEHALF OF RESPONDENT

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DOES SECTION 440.11(1), FLORIDA STATUTES (1983) PERMIT SUITS AGAINST CORPORATE EMPLOYER OFFICERS, EXECUTIVES AND SUPERVISORS AS "EMPLOYEES" FOR ACTS OF GROSS NEGLIGENCE IN FAILING TO PROVIDE A REASONABLY SAFE PLACE IN WHICH OTHER EMPLOYEES MAY WORK?

SUMMARY OF ARGUMENT

At common law, an employee could bring an action in tort against co-employees, including officers, for negligence or tortious acts committed within the scope of the co-employees' employment. This common law cause of action remained unchanged by the Workmen's Compensation Act until 1978, when the legislature extended immunity to co-employees for ordinary negligence on the job site. The 1978 amendment to s. 440.11 expressly preserved the employee's common law cause of action against co-employees for willful, wanton, grossly negligent or physically aggressive conduct. The personal liability of an officer co-employee for such conduct exists even when the tort is committed while the officer is discharging a non-delegable duty of the employer.

The intent of the legislature to preserve the common law cause of action for gross negligence is clearly expressed in the language of the s. 440.11(1) Fla. Stat. (1981) and the statute is not susceptible to the interpretation urged by petitioners.

The "affirmative act" analysis of West v. Jessop, 339 So.2d 1136 (Fla. 2d D.C.A. 1976), does not represent the status of the common law at the time the legislature enacted the 1978 amendment. West merely construed the pre-1978 Workmen's Compensation Law and, in the absence of any statutory guidance or common law precedent, construed the statute in accordance with a case construing the Wisconsin worker's compensation statute. Any

effect that West v. Jessop may have had on the right of an injured employee to bring suit against an officer co-employee was abolished in 1978 when the legislature intervened in the issue of co-employee liability, extending a limited immunity to co-employees but expressly preserving the common law cause of action for gross negligence.

To the extent that Cliffin v. State, Department of Health and Rehabilitation Service, 458 So.2d 29 (Fla. 1st D.C.A. 1984), held that West v. Jessop controlled co-employee immunity after the 1978 amendment, the decision is wrong and should be disapproved. Cliffin is also distinguishable from the instant case, wherein the plaintiff alleged gross negligence in the breach of the defendants' personal responsibility to provide adequate security for the protection of the decedent.

ARGUMENT

CERTIFIED QUESTION

> DOES SECTION 440.11(1), FLORIDA STATUTES (1983) PERMIT SUITS AGAINST CORPORATE EMPLOYER OFFICERS, EXECUTIVES AND SUPERVISORS AS "EMPLOYEES" FOR ACTS OF GROSS NEGLIGENCE IN FAILING TO PROVIDE A REASONABLY SAFE PLACE IN WHICH OTHER EMPLOYEES MAY WORK?

> THE FOURTH DISTRICT CORRECTLY PERMITTED THE PLAINTIFF'S ACTION AGAINST STREETER AND MELCHER BECAUSE SECTION 440.11(1) PRESERVES PLAINTIFF'S COMMON LAW CAUSE OF ACTION AGAINST CO-EMPLOYEE OFFICERS FOR GROSS NEGLIGENCE.

In the 1978 legislative session, the Florida Legislature intervened for the first time in the right of an injured employee to bring suit against a co-employee tortfeasor. The legislature took one more step in the direction of substituting the no-fault workers' compensation system for the employee's common law cause of action by providing a limited statutory immunity for co-employees. The legislature did not totally abrogate the employee's common law rights, however. In the clearest language possible, the legislature preserved the right of an injured employee to bring suit against a co-employee for intentional torts, acts of gross negligence, and even ordinary negligence if the co-employees were engaged in unrelated works. The exclusion applies to "each employee," without distinguishing between employees on the basis of rank or job title.

> The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the

> injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

s. 440.11(1) Fla. Stat. (1981), emphasis added.

The petitioners now ask this court to rule that the legislature did not mean what it clearly said. The petitioners torture the express legislative mandate to support their argument that officer employees should be treated differently than other employees--that officers may act with wanton and willful disregard, unprovoked physical aggression or gross negligence and enjoy total immunity from suit by an injured co-employee.

Over the years, this court has established logical guidelines for interpreting and applying statutory langauge. The underlying principle governing all statutory interpretation is that where the legislative intent is clearly expressed in the language of the statute, the statute must be enforced according to the plain meaning of its terms.

> Surely, the purpose of all rules relating to the construction of statutes is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it. Where the legislative intent as evidenced by a statute is

> plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.

State v. Egan, 287 So.2d 1, 4 (Fla. 1973).

The Clear Intent of the Legislature in Enacting the 1978 Amendment to s. 440.11 was to Preserve the Common Law Cause of Action Against Co-Employees for Gross Negligence and Intentional Torts.

The unambiguous intent of the legislature, as expressed in the 1978 amendment, was to provide co-employees with immunity for ordinary negligence resulting in jobsite accidents. Co-employee immunity for accidental injuries must have appeared to the legislature to be consistent with the compromise inherent in the Workers' Compensation system--the employee is guaranteed reasonably complete and efficient compensation, without regard to fault, in exchange for giving up his common law right to sue his employer. The legislature was careful, however, to preserve intact the common law cause of action for intentional torts and acts of gross negligence. The legislature made a rational decision that to provide immunity to an employee, any employee, who commits an intentional tort or acts with gross negligence would not only fail to further the objectives of the Workers' Compensation system but could produce carnage in the workplace by permitting employees to recklessly endanger the lives and safety of co-employees without fear of civil liability.

The legislative history of the 1978 amendment demonstrates the importance that the legislature ascribed to the preservation of the common law right to sue co-employees for willful, wanton, grossly negligent or physically aggressive conduct. Two earlier versions of the amendment, House Bill 721 and Senate Bill 407, would have provided total co-employee immunity. House Bill 721 stated in pertinent part:

> 440.11 Exclusiveness of liability.
>
> (2) An employee shall not be liable as a third party tortfeasor for any injury to or the death of a fellow servant due to the negligence or wrongful act of the employee in the course of his employment if his employer secures payment of compensation for the injury of death as required by this chapter.

House Bill 721 was rejected by the legislature. The initial Senate version, Senate Bill 407, provided:

> The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business.

This bill was rejected as well. Finally, Senate Bill 636 was introduced, providing limited co-employee immunity but expressly preserving a cause of action for intentional torts, gross negligence, etc. This was the version that was finally enacted as section 2, Chapter 78-300, Laws of Florida.

Twice the legislature had the opportunity to extend total immunity to co-employees acting in the course and scope of their employment and twice it refused to do so. The legislative

history clearly reflects the legislature's intent to preserve the common law cause of action against co-employees for intentional torts, gross negligence, etc.

The exclusionary language of s. 440.11(1) makes no distinction between officers and non-officers. All employees, regardless of rank, remain liable for gross negligence and intentional torts. The legislature undoubtedly recognized that corporate officers and other supervisory personnel often make decisions with far-reaching implications for the health and safety of their co-employees, and that officers are particularly susceptible to the influence of economic considerations inimical to employee safety.

It is undisputed that a corporate officer may be liable to a non-employee third party for torts committed within the course and scope of his employment. Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th D.C.A. 1981). The officer's personal liability is not effected by the fact that the officer is performing the corporation's non-delegable duty. Id.; 7 C.B. LaBatt, Commentaries on the Law of Master and Servant 7714-7715 (1913).

It is also well established that gross negligence and intentional torts on the part of a servant may be within the course and scope of the servant's employment. Columbia by the Sea, Inc. v. Petty, 157 So.2d 190 (Fla. 2d D.C.A. 1963)

(intentional torts may be within course and scope of servant's employment); Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981) (willful and wanton misconduct of servant while acting within scope of employment justifies imposition of punitive damages against master if there was some fault on part of master that foreseeably contributed to plaintiff's harm).

Thus at common law, an officer was personally liable for injuries to a co-employee resulting from the officer's negligence in performing a non-delegable duty of the corporation. The injured employee's cause of action against an officer for torts committed within the course and scope of employement remained unchanged by the enactment of the Workmen's Compensation Act, Frantz v. McBee, supra, and it still exists today for willful, wanton, grossly negligent or physically violent conduct.

Despite the clear intent of the legislature as expressed in the statute, and the logical result reached thereby, the petitioners insist that the statute must be construed to mean something other than what it says. Petitioners cite the rule expressed in State v. Webb, 398 So.2d 820 (Fla. 1981), that legislative intent must be given effect even though it may contradict the strict letter of the statute. As mentioned previously, however, legislative intent must be determined primarily from the language of the statute itself. State v. Egan, supra.

Recently, this court was called upon to construe a provision of the Wrongful Death Act in a manner contradicting the strict letter of the statute in Vildibill v. Johnson, 11 F.L.W. 275 (Fla. 1986). There the court held that an decedent's estate may recover loss of net accumulations where the decedent is survived only by parents who are not dependent upon him for support or services, and who are not otherwise entitled to recover damages for his death in their own right, despite the fact that a literal reading of the statute seemed to compel the opposite result. In Vildibill the legislative intent could not be derived from the strict letter of the statute because the section of the statute that purported to provide for recovery by the estate included a cross reference to another section, the effect of which was to preclude recovery. In addition to the inherent inconsistency in the statutory language, the court held that a strict, literal construction of the statute would create an irrational classification violative of the constitutional guarantee of equal protection of law. Moreover, the court found explicit legislative intent to provide for the estate's recovery, in the form of Senate Commerce Committee testimony and proceedings.

The statute under review here, s. 440.11(1), suffers from none of the ambiguity and inconsistency that precluded a strict construction of the statute in Vildibill. The exclusionary

language of the statute is clear, both in its meaning and application. The result reached by a literal interpretation of the statute comports with logic and reason and is consistent with the common law right of an employee to bring an action against a co-employee for gross negligence or intentional tort.

The petitioners concede, at page 20 of their initial brief, that there is no evidence as to the legislature's intent in drafting the exclusionary provision of s. 440.11(1) except for the language of the statute itself. In an attempt to avoid the clear legislative intent to preserve the liability of all co-employees for the tortious acts specified, petitioners suggest that the exclusionary provision should be ignored because it contradicts the overall intent of the Workers' Compensation Act; i.e., to substitute the exclusive remedy of workers' compensation benefits for the employee's common law cause of action. Obviously, the purpose of any exclusion contained in a statute is to create a specific effect contrary to the overall intent of the statute. If the court adopted the petitioners' approach to statutory construction, the thousands of exceptions and exclusions carefully drafted into the Florida statutes would be rendered meaningless.

<u>There is no Common Law Immunity for Officers Acting Within the Scope of Employment</u>.

The petitioners attempt to place the exclusionary language

of s. 440.11(1) into the context of common law principles, arguing that the Fourth District's construction of the statute violated long-standing common law precedents and created an entirely new cause of action. In doing so, the petitioners stand the common law on its head.

It is clear that at common law, an injured employee could bring an action against his employer or any co-employee for ordinary negligence, gross negligence or intentional torts. The Florida Workmen's Compensation Act was enacted to provide a no-fault compensation system for persons suffering accidental injuries on the job. The statute abrogated the employee's common law cause of action against the employer, substituting workmen's compensation benefits as the exclusive remedy against the employer. The statute was silent as to the injured employee's cause of action against co-employees. In Frantz v. McBee, 77 So.2d 796 (Fla. 1955), the court was first called upon to decide whether a co-employee could be sued for his negligence in injuring a fellow employee in a case where the injured person's exclusive remedy against the common employer was entitlement to workmen's compensation benefits. The court held that nothing in the statute indicated a legislative intent to abrogate the employee's common law cause of action against a negligent co-employee, therefore the co-employee remained liable.

More than twenty years later, a case arose in the Second District concerning whether a co-employee who was also president and sole stockholder of the corporate employer is liable as a co-employee or immune as the employer. West v. Jessop, 339 So.2d 1136 (Fla. 2d D.C.A. 1976). The court construed the 1973 version of s. 440.11 which granted immunity to the employer but was silent as to co-employees. The Second District noted that the issue was one of first impression in Florida; the statute contained no legislative guidance and there existed no applicable Florida case law other than the Frantz v. McBee rule that co-employees were subject to suit. The Second District adopted the reasoning of a case construing the Wisconsin workers' compensation statute, Kruse v. Schieve, 213 N.W.2d 64 (Wis. 1973). The Second District held that the Defendant's mere status as an officer of the corporation was not a proper basis for liability as a co-employee. Otherwise, the court reasoned, the immunity granted to the employer would be meaningless. The court held that an officer could be liable only for his individual negligence, "when he has committed an affirmative act of negligence which goes beyond the scope of the nondelegable duty of the employer to provide his employees with a safe place to work." Id. at 1137.

When the 1978 legislature convened to consider co-employee liability, the issue was well settled at common law. Frantz v.

McBee had established that the Workmen's Compensation Act had not abrogated an injured employee's right to sue a co-employee tortfeasor.

Moreover, Frantz had expressly considered the issue of officers' liability for torts committed within the scope of employment and rejected the rule urged by petitioners. The Frantz opinion first surveyed cases from other jurisdictions holding that an employee's common law cause of action against a co-employee had been abrogated by a workmen's compensation statute:

> It is therefore held in these states that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation and whose acts are such as to render the corporation liable therefore, is entitled to the immunity given by the Act to the employer "'or those conducting his business.'"

77 So.2d at 798.

The Frantz court rejected this minority rule, finding nothing in the Florida Workmen's Compensation Act to abrogate the employee's common law right to bring suit against co-employees.

Thus the well settled common law in existence when the legislature enacted the 1978 amendment was the rule expressed in Frantz v. McBee; that co-employees, including officers acting within the scope of their employment, were subject to liability. The only case before the legislature in 1979 that had even suggested the existence of officer immunity was West v. Jessop,

supra, a single Second D.C.A. case that had been decided less then two years earlier. The West holding had not been adopted by the Supreme Court nor followed by any other district courts. As the West opinion makes clear, the court considered the case to be one of first impression, without precedent in Florida case law. The West decision was not grounded on common law principles at all; it merely construed the pre-1978 Workmen's Compensation Act and applied the holding of a case construing the Wisconsin workmen's compensation statute.

The subsequent "affirmative act" cases cited by petitioners, Clark v. Better Construction Co., Inc., 420 So.2d 299 (Fla. 3d D.C.A. 1982); Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th D.C.A. 1981) and Zurich Insurance Co. v. Scofi, 366 So.2d 1193 (Fla. 2d D.C.A. 1979), were not decided until after the 1978 amendment was enacted, although because the causes of action arose prior to the effective date of the amendment, the decisions were not effected by the amendment. Each of these cases construed and applied the pre-1978 Workmen's Compensation Act.

The foregoing analysis demonstrates that despite the petitioners' attempts to characterize the affirmative act theory of West v. Jessop as the "well settled common law rule" in existence long before the 1978 amendment, the West decision was merely a single case construing the pre-1978 statute. Any effect

West had on the issue of co-employee immunity failed to survive the 1978 amendement.

The common law rule as to co-employee liability in existence when the 1978 amendment was considered and enacted was that co-employees, including officers, were subject to suit to the same extent as third party tortfeasors. Frantz v. McBee, supra. As petitioners point out, a statute in derogation of the common law must be strictly construed. The statute should not be construed to change the common law anymore than the case absolutely requires. Ellis v. Brown, 77 So.2d 845 (Fla. 1955); Sullivan v. Leatherman, 48 So.2d 836 (Fla. 1960); City of Hialeah v. State, 183 So. 745 (Fla. 1938). When s. 440.11(1) Fla. Stat. (1981) is interpreted in light of these principles, the necessary conclusion is that although the 1978 amendment abrogated the employee's common law right to sue a fellow employee for acts of ordinary negligence on the job site, it expressly preserved the common law cause of action against co-employees for gross negligence, intentional torts and ordinary negligence where the co-employees are engaged in unrelated works. Since corporate officers acting within the scope of their employment were considered at common law to be subject to suit by an injured co-employee, Frantz v. McBee, supra at 798, the 1978 amendment must be construed so as to preserve the common law cause of action against an officer for gross negligence, intentional torts, etc., committed within the scope of employment.

The petitioners argue that the Fourth District's decision conflicts with Cliffin v. State, Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st D.C.A. 1984), wherein the First District applied the West v. Jessop affirmative act analysis to a cause of action arising after the effective date of the 1978 amendment. To the extent that Cliffin impliedly holds that West v. Jessop and the other affirmative act cases were not effected by the 1978 amendment, the decision is simply wrong. Nevertheless, there is no actual conflict between Cliffin and the instant case. Cliffin is distinguishable because there the plaintiff did not allege that the defendant officers had committed acts of gross negligence or intentional torts, for which the 1978 amendment expressly authorizes a cause of action against co-employees.

Moreover, the Cliffin decision is distinguishable because the plaintiff based his cause of action against the three co-employees merely on the basis of their status as supervisors. There is nothing in the Cliffin opinion to suggest that the supervisors had any individual responsibility for the decedent's safety. In contrast, the Record in the instant case establishes that the petitioners personally undertook to provide security measures for the protection of Suzanne Sullivan.

Petitioner Melcher was personally responsible for supervision of bank security (R. 901-902). Melcher developed

Atlantic's security program himself in 1969 while Melcher was the security officer for Atlantic, a security manual was prepared which contemplated that guards would be placed at every branch (R. 719-722; Ex. 1, p. 3). Melcher reviewed incident reports filed after each robbery and reported this information to Atlantic's Board of Directors (R. 816-817; 909).

Petitioner Streeter personally certified to the Federal Home Loan Bank Board each year from 1979 through 1982 that Atlantic's security program equaled or exceeded the standards of the Bank Protection Act of 1968. These certifications provided federal authorities with Streeter's personal assurance that Atlantic's "security officer after seeking the advice of law enforcement officers, has provided for the installation, maintenance and operation of appropriate security devices... in each of this institution's offices." (R. 943-945; Ex. 71, 81). After each robbery, Streeter reviewed audit memos detailing what was stolen and he often reviewed robbery reports by employees which gave a factual description of the robbery as well as the police report (R. 934). Streeter approved the decisions of the senior vice-president of operations regarding security (R. 916, 921, 922, 945, 951, 973, 974).

Streeter and Melcher were not sued merely because they were officers charged with overall responsibility of the company. Street and Melcher personally assumed a duty to provide

adequate security measures at the branch office where Suzanne Sullivan worked. Had the defendants in Cliffin undertaken a similar personal responsibility, it would have supplied the "affirmative act" element necessary to impose liability on the supervisors under the West v. Jessop analysis, assuming that the plaintiff alleged either gross negligence, intentional tort or ordinary negligence while engaged in unrelated works. In contrast to Cliffin, Sullivan alleged that Streeter and Melcher assumed personal responsibility for the safety of Suzanne Sullivan and were grossly negligent in their failure to discharge their responsiblity. These allegations satisfy both the exclusion provision of s. 440.11(1) as well as the pre-amendment affirmative act theory applied in West v. Jessop.

CONCLUSION

The Fourth District correctly interpreted s. 440.11(1) Fla. Stat. (1981) to allow the plaintiff to bring suit against the defendant officers for gross negligence in failing to discharge their personal responsibility for the safety of the decedent. To extend the employer's statutory immunity for gross negligence to employees merely on the basis of their job title would contradict the clear intent of the legislature and violate the common law principle that an officer is personally liable for negligence for which he is personally involved. The certified question should be answered in the affirmative and the opinion of the district court affirmed.

DATED this 7th day of August, 1986.

Respectfully submitted,

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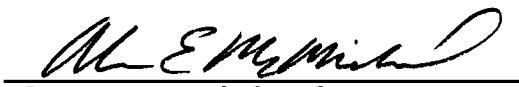
BY: 
Alan E. McMichael

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Judith M. Korchin, Esq., Thomas R. Julin, Esq., Steel Hector & Davis, 4000 S.E. Financial Center, Miami, FL 33131, Counsel for Respondent Sullivan; Talbot D'Alemberte, Esq., 201 S. Monroe Street, Ste. 200, Tallahassee, FL 32301, Counsel for Respondent Sullivan; Rex Conrad, Esq., Valerie Shea, Esq., Conrad, Scherer & James, Post Office Box 14723, Ft. Lauderdale, FL 33302, Counsel for Petitioners Streeter and Melcher; Leslie King O'Neal, Esq., Larry P. Studer, Esq., Markel McDonough & O'Neal, Post Office Drawer 1991, Orlando, FL 32802, Counsel for Amicus Curiae, Florida Defense Lawyers Association by U.S. Mail, this 7th day of August, 1986.

Alan E. McMichael