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 of Florida,
Fourth District

Respondent's Answer Brief

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INTRODUCTION

The plaintiff alleges that the defendants, Donald Streeter and Edward Melcher, the president and the senior vice president for operations of Atlantic Federal Savings & Loan Association, undertook to protect his wife, Suzanne Sullivan, the former 28-year-old manager of Atlantic's Davie branch. He asserts that that they failed to provide security measures which would have stopped the fatal shooting of his wife even though they knew of serious security problems at the Davie branch and that the man who shot his wife had robbed the same branch of the bank and had threatened to return to kill her.

Although the exclusive remedy provision of the Worker's Compensation Law bars a negligence action against Atlantic, the plain language of thie law holds Mrs. Sullivan's fellow employees -- irrespective of rank -- accountable for gross negligence.

The Florida common law always has recognized that one employee has a personal duty to other employees which is not displaced by the employer's nondelegable duty to provide a safe work place. It is the breach of that personal duty which forms the basis for this lawsuit. The "affirmative act" rule does not alter this state of the law. It merely ensures that corporate officers are not strictly liable for all corporate failings.

Because the record before the trial court established sufficient evidence from which a jury could conclude that the defendants acted in a grossly negligent fashion, the Fourth District correctly reversed the trial court's summary judgment for the defendants and remanded this action for trial.

STATEMENT OF THE CASE AND THE FACTS

The defendants' Statement of the Case and the Facts is inaccurate in its description of the record before the trial court and omits important facts and procedural points. For these reasons, this separate complete statement is provided.

The Deceased Managed Atlantic's Davie Branch

Plaintiff's wife, Suzanne Sullivan, now deceased, was employed by Atlantic Federal Savings & Loan Association ("Atlantic"), a federally chartered savings and loan association with offices in Dade, Broward and Palm Beach counties, as manager of its branch in the Twin Oaks Plaza on Davie Boulevard in Fort Lauderdale (the "Davie branch"). (2d. amended complaint "2d. a.c." (See Appendix A-1)" ¶3A, R. 109, Melcher Complaint "Melcher c." (See Appendix A-2) ¶4 R. 251).

The Defendants are Directly Responsible for Atlantic Federal's Security

At all material times Donald Streeter was chairman of the board and president of Atlantic. (Streeter depo. R. 895). He has served on Atlantic's board since 1966. (Streeter depo. R. 912). Edward Melcher was Atlantic's senior vice president for operations whose responsibilities included supervision of security. (Streeter depo. R. 901-02). Melcher reported directly to Streeter on security matters. (Melcher depo. R. 772).

Both Streeter and Melcher maintained their offices in Atlantic's executive offices on Sunrise Boulevard in Ft. Lauderdale. (2d. a.c. ¶5C, R. 111, Melcher c. ¶6C, R. 252-53).

The Complaint & Initial Summary Judgment Motions

The plaintiff's complaint attempted to state causes of action against defendant Streeter, one of the petitioners in this appeal, for wanton and wilful disregard of Mrs. Sullivan's life, gross negligence, and negligence as an employee assigned primarily to unrelated works, that is, a different work situs.[1] The complaint also attempted to state causes of action against Atlantic for the breach of a duty independent of the employer-employee relationship and for intentional tort. (R. 109-32).

Both defendants moved to dismiss the complaint, as amended, or alternatively, for summary judgment on the theory that the exclusive remedy provisions of the Worker's Compensation Law, section 440.11(1), Florida Statutes, barred any action against either the deceased's employer or supervisory officers of the defendant's employer. (R. 134, 136).

Neither defendant filed affidavits, depositions, or other proof in support of the motions, but rather both attacked the sufficiency of the ultimate facts pled in the complaint.

Summary Judgment for Atlantic

The trial court, finding Atlantic's actions neither intentional nor arising from anything other than the employer-employee relationship, entered summary final judgment for Atlantic (R. 140). However, the trial court denied

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1. Plaintiff, Sullivan, has not made a claim for and has not accepted any Worker's Compensation benefits from Atlantic, the deceased's employer.

defendant Streeter's motion (R. 143), concluding that the plain language of the Worker's Compensation Law allowed an employee to sue a supervisor employee for willful and wanton conduct, gross negligence, or negligence as an employee "assigned primarily to unrelated works."

The Fourth District Court of Appeal affirmed the trial court's ruling for Atlantic, addressing two major legal issues. Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52 (Fla. 4th DCA 1984), pet. for rev. denied, 461 So.2d 116 (Fla. 1985). First, the court ruled that Atlantic's role as a property owner or lessee did not constitute a dual capacity from its role as employer and thus the Florida Worker's Compensation Law presented the plaintiff's exclusive remedy against the employer. Second, the court held that the plaintiff failed to state a cause of action for assault and battery against Atlantic because he had not alleged for assault the affirmative act of threatening or actually exerting force and for battery he had not alleged an actual contact upon the person of another.[2]

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2. Id. at 54. At page 3 of their initial brief in this Court, the defendants assert that their conduct was "characterized in the Atlantic Federal opinion as omissions, relating to the safety of the work place." The Fourth District's opinion made no such characterization and, indeed, made no reference to the specific actions of the individual defendants at all. Rather, the opinion dealt solely with the actions of Atlantic. In addition, the court did not characterize Atlantic's actions as "omissions." The court merely concluded that the plaintiff could not sue Atlantic for an intentional tort because the plaintiff alleged no "threat to use force, or the actual exertion of force." Id. Furthermore, in that appeal, the Fourth District had no factual record materials before it on which to base a characterization of the individual defendants' actions. The only issue before the court of appeal was the sufficiency of the allegations against Atlantic.

The Trial Court's Denial of Summary Judgment for the Defendants

During the pendency of the appeal, plaintiff had sued petitioner Melcher, alleging that he, like Streeter, had committed acts for which the Worker's Compensation Law provided no immunity.

After the Fourth District's ruling in favor of Atlantic, Streeter filed a new motion for summary judgment and Melcher also moved for summary judgment. These motions argued that the Fourth District's ruling for Atlantic must allow the individual defendants to escape liability as well because they had not committed any additional acts than Atlantic committed. As with respect to Streeter's first motion, the defendants filed no supporting affidavits, depositions or other factual materials. They merely attacked the legal sufficiency of the complaint.

The trial judge denied both of these motions, again reading the Worker's Compensation Law as expressly permitting actions against fellow employees -- without regard to their rank -- who act 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 injury or death. Sullivan v. Atlantic Federal Savings & Loan Association, 3 Fla. Supp. 2d 101 (17th Cir. 1983).

The Trial Court's Reconsideration of the Legal Principles and the Record Showing of Gross Negligence

Two weeks prior to trial, counsel for the plaintiff called the trial court's attention to Cliffin v. State Department

of Health and Rehabilitative Services, 458 So.2d 29, 30 (Fla. 1st DCA 1984), a case which had, as an alternative second basis, affirmed a summary dismissal of an employee's tort action against his employer "due to the failure of the complaint to allege affirmative acts of negligence going beyond the scope of the employer's non-delegable duty."

At a pretrial conference to consider the impact of Cliffin, the defendants' counsel orally asked the trial judge to consider for a third time whether summary judgment should be granted arguing that the complaint alleged no affirmative acts of negligence beyond a failure to perform the employer's duty to provide a safe work place. (R. 417). Defense counsel relied solely upon the holding of Cliffin for this motion and again did not file any supporting affidavits or other proof. (R. 413-20).

At the conclusion of a discussion of Cliffin, counsel for the plaintiff suggested that the court should "allow [the plaintiff] at least a week to file the depositions and the exhibits with the Court, as part of the official Court record." (R. 421). Counsel fully explained for the trial court the significance of the discovery materials. (R. 423-25).

The trial court and defense counsel agreed that the materials could be filed[3] and that they would be considered

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3. The plaintiff in fact filed all of the depositions and exhibits from the pretrial stipulation on or before December 19, 1984, well in advance of the January 2, 1985, date of the final summary judgment order. Although the Court determined at a December 4, 1984, hearing that summary judgment should be entered, the transcript of the hearing clearly reflects that all of the depositions and the exhibits were a part of the record considered by the trial court. (R. 412, 421, 425).

prior to entry of a judgment. (R. 425). The trial judge's order expressly stated that the "parties have stipulated, for purposes of the record, . . . that the Court shall receive in evidence the depositions in this cause and the exhibits listed in the parties' amended unilateral pretrial stipulations."

In their initial brief, the defendants argue that "At the time the [trial] court ruled, no depositions or other factual matter were before it. (R. 421-25). These materials were later filed." (Petitioners' Brief at 25)(the record citations are to the hearing transcript quoted above). This argument is plainly incorrect. The facts developed during discovery, discussed in the next several subsections below, all were properly before the trial court in opposition to the defendants' oral summary judgment motion.

The Defendants' Personal
Undertaking to Protect the Deceased

The allegations of the second amended complaint as well as the depositions and other proof on file with the trial court established that the defendants personally had undertaken to provide appropriate security measures for Atlantic's Davie branch. For example, in the years 1978, 1979, 1980, 1981 and 1982, it was Streeter who personally signed certifications to the Federal Home Loan Bank Board 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 direct 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." (Streeter depo. R. 943-45 and Ex. 71 & 81).

In an attempt to comply with the Bank Protection Act of 1968, 12 U.S.C. §1882, it was Melcher who personally developed Atlantic's security program in 1969. (Melcher depo. R. 718-19, 722). While Melcher was the security officer for Atlantic from February 23, 1969, through April 18, 1978, a security manual for Atlantic was drafted, (Melcher depo. R. 719-21), which contemplated that guards would be placed at every branch office. (Melcher depo. R. 731 and Ex. 1, p. 3).

In accordance with Melcher's manual, when the Davie branch first opened in June, 1980, Atlantic employed and stationed in the Davie branch an armed, uniformed security guard to protect the employees, customers and property. (2d. a.c. ¶5, R. 110, Melcher c. ¶6, R. 252). And when a bank robber eventually shot and killed Suzanne Sullivan at Atlantic's Davie Branch, the manual which had been prepared by Melcher still stated guards would be present at all branch offices.[4] (Speroni depo. R. 590, Ex. 1, p. 3).

Streeter's direct personal involvement in security matters was further ensured by his review after each robbery of

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4. After the shooting, upon deposition, Melcher claimed that at the time he developed Atlantic's security program he was told by others in the savings and loan industry that "[g]uards were useless." (Melcher depo. R. 727). Melcher also stated that law enforcement officials back in 1969 told him that they were concerned for the safety of security guards because the guard agencies provided "totally inadequate people." (Melcher depo. R. 727).

audit memos detailing what was stolen and he often saw a robbery report by employees which gave a factual description of the robbery as well as the police report. (Streeter depo. R. 934). Streeter approved the decisions of the senior vice president of operations regarding security. (Streeter depo. R. 916, 921, 922, 945, 951, 973, 974).

Melcher similarly kept himself involved with security matters by reviewing robbery reports from all branches which described the incidents and audit reports which informed him of the amount of money stolen. (Melcher depo. R. 816-17). He reported this information to Atlantic's board of directors. (Melcher depo. R. 816-17 and Streeter depo. R. 909).

Among Atlantic's management, only Streeter could require the senior vice president of operations to place security guards at a branch office, (Streeter depo. R. 951), and it was Melcher and Streeter who decided whether an Atlantic branch should have a guard. (Melcher depo. R. 738 and Streeter depo. R. 951).

Thus, this is not a case where the plaintiff is attempting to establish liability against corporate officers merely because they are charged with overall responsibility for the company. Defendants Streeter and Melcher were the officers of Atlantic who were directly responsible for making the decisions which led to the death of Mrs. Sullivan.

The Defendants Eliminate Guards to Save Money, Ignore Robbery Statistics, and File False Federal Reports

As early as 1977, Melcher and Streeter began to eliminate security guards at some of Atlantic's branches to save

money. Prior to eliminating guards, Streeter did not, however, review any statistical data regarding their effectiveness. (Streeter depo. R. 923-24). Contrary to express representations in the certifications Streeter had filed with the Federal Home Loan Bank Board, neither Streeter, Melcher, nor Atlantic's security officer had sought advice from law enforcement officials.[5] (Melcher depo. R. 848). They failed, before deciding to eliminate guards, to ask law enforcement officials whether Atlantic's security program should be updated (Melcher depo. R. 848), and the program was not amended, (Melcher depo. R. 718-19) even though the rate of robberies was increasing vastly.

If they had sought out advice, as the Bank Protection Act required them to do, they would have discovered Federal Bureau of Investigation statistics which made the dangers of an unguarded branch bank in a shopping center apparent. The FBI 1980-1982 national figures for federally insured financial institutions revealed that: "Less than ten percent of the institutions that employ guards are victimized by robbery . . . . Most robberies occur at branch offices and also at commercial shopping districts, and in areas with a population over 500,000. The majority of robberies occur on Friday, with an even proportion from Monday to Thursday . . . . Over one-fourth of the perpetrators are known narcotics users and about one-third are repeat bank robber offenders." (Flynn depo. R. 490 and Ex. 21).

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5. In fact, from 1969 until July 23, 1982, the date of Mrs. Sullivan's death Melcher never sought any advice from law enforcement officials.

Streeter also conceded upon deposition that he had no familiarity with the Bank Protection Act's provisions (Streeter depo. R. 903) and that he had not in fact reviewed Atlantic's security program before he signed the annual certifications in 1978, 1979, 1980, 1981, and 1982. (Streeter depo. R. 945).

Streeter and Melcher never consulted their regional managers, who had direct contact with the branch managers, regarding the elimination of armed, uniformed security guards at branch offices. The regional managers were told that the guards were being removed for purely economic reasons. (Smith depo. R. 1085).

Streeter and Melcher also chose to disregard an April, 1980, Wackenhut Corporation recommendation that, for branch offices without security guard coverage, an armed, uniformed guard be assigned two days a week on a rotating basis. (Ex. 2). According to The Wackenhut Corporation, "[i]t has been determined that a uniformed guard is not only an effective public relations medium, but is the best deterrent against robbery and burglary." (Ex. 2).

Melcher had heard that robberies occur on one particular day of the week (Melcher depo. R. 768) but had no recollection of discussing with anyone the possibility of providing guards on an irregular rotating basis among all Atlantic branches. (Melcher depo. R. 795).

Shortly after the Davie branch began full operation in 1980, Streeter and Melcher decided, over the objections of employees, (2d. a.c. ¶5A, R. 110, Melcher c. ¶6A, R. 252), to

withdraw the security guard which they had placed there at the opening of the branch.[6]

The decision to eliminate guards was met with a direct increase in the number of robberies at Atlantic's branches and main office. Atlantic's records showed that for the main facility and the branches there was one robbery in 1970; there was not another robbery until 1976; there were 3 robberies in 1977, 4 robberies in 1978, 2 robberies in 1979, 8 robberies in 1980 and 17 robberies in 1981. (Melcher depo. R. 765-68 and Aff. of Gagliardi, Ex. 113 (See Appendix A-3)). The records also showed a robbery was more likely to occur in July, the month of Mrs. Sullivan's murder, than in any other month. (Ex. 113).

Melcher and Streeter failed at any time to perform any comprehensive analysis of the robberies to determine whether there was a pattern. (Melcher depo. R. 769 and Streeter depo. R. 909-10). Had an analysis of the robberies been performed, the records would have shown, as indicated above, that a robbery was more likely to occur in the month of July, the month of Mrs. Sullivan's eventual murder, than in any other month. (Ex. 113).

Irrespective of statistics and the dangers caused by eliminating guards, by 1981, it became unlikely that Streeter and Melcher would alter their course. In that year, the savings

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6. An employee's suggestion to Streeter, as president, that new branches in partially rented shopping plazas should have a security guard as a deterrent to robberies for a few months until the plaza became busier, (Ex. 63), resulted in Melcher and Streeter deciding in July, 1978, to use the services of a security guard for a period of sixty days each time a new Atlantic branch was opened. (Ex. 63 and 64).

and loan industry experienced particularly difficult financial times in south Florida. As Streeter testified, "I don't think the industry had experienced anything like 1981 or '82 before." (Streeter depo. R. 920). The Wackenhut Corporation had increased the cost of guard service and, in an effort to save even more money, Streeter and Melcher decided to eliminate guards at all Atlantic branch offices. (Streeter depo. R. 921-22, Ex. 37 and 52). The regional manager for the area in which the Davie branch is located testified, "[i]t would [have been] beating a dead horse to fight it [elimination of guards] really." (Smith depo. R. 1085).

The Defendants Ignore the Heightened Security Risks at the Davie Branch

Streeter and Melcher knew that Atlantic's Davie branch is located in an area closely bounded by neighborhoods frequented by transients and drifters. They also knew that the branch's location in an accessible shopping center, close to a number of road networks, created serious security threats. (2d. a.c. ¶5B, R. 110-111, Melcher c. ¶6B, R. 252).

All regular employees of the Davie branch were women ranging in age from 18 years to 28 years old, another obvious security problem.[7] (2d. a.c. ¶6B(2), R. 112, Melcher c.

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7. Melcher and Streeter previously had recognized that an all female staff presents a heightened security risk when they decided to exempt Atlantic's all female staffed Hollywood branch from their 1977 order eliminating security guards at some of Atlantic's branches. (Melcher depo. R. 750-51 and Ex. 62 and 66). When a male became the manager at the Hollywood branch, Streeter agreed that the guard should be eliminated. (Ex. 66).

¶7B(2), R. 253). Suzanne Sullivan, the oldest employee on the premises at age 28, had been promoted to the position of the branch manager after only ten months with Atlantic. (2d. a.c. ¶4 R. 110, Melcher c. ¶5, R. 252).

The hypothetical danger to the Davie branch became a reality when on October 13, 1981, an armed robber held up the branch as well as another of the bank's branches. No security guards were present at the Davie branch. (2d. a.c. ¶6, R. 111, Melcher c. ¶7, R. 253 and Ex. 38). From the date of that first robbery, Streeter and Melcher knew that Atlantic's branches, particularly the Davie branch, were vulnerable to armed robbery, that armed robbers were aware of this vulnerability, and that the same criminal was likely to strike more than once at these vulnerable branches. (Melcher depo. R. 835-40, Ex. 77, 78, and 79). (2d. a.c. ¶6A(1), R. 111, Melcher c. ¶7A(1), R. 253).

With knowledge of the Davie branch's special security risk, Streeter and Melcher continued to refuse to provide security guards for the Davie branch, though they stationed an armed, uniformed security guard at the main office where they maintained their own offices in the executive suite.[8] (2d. a.c. ¶5B & C, R. 110, 111, Melcher c. ¶6B & C, R. 252, 253).

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8. Streeter and Melcher were not uniform in their refusals to provide guards when they were aware of particular security risks. For example, on March 5, 1982 a female employee was abducted from Atlantic's Lauderhill branch office at gun point and forced to accompany a male in her car. The employee was able to roll out of her car to safety. (Melcher depo. R. 835-40, Ex. 77). Based upon a request of the Atlantic regional manager, Melcher decided on March 9, 1982, to place a full-time armed, uniformed Wackenhut security guard at the Lauderhill branch and has kept him there.

The Defendants Ignore the Direct Threat to Suzanne Sullivan's Life

Streeter testified that he had been informed that there are often repeat robberies of the same financial institution after the facility has been robbed once. (Streeter depo. R. 956). This was confirmed for Streeter in dramatic fashion, when on June 9, 1981, Atlantic's One Biscayne branch office was robbed for the first time and then robbed on four additional occasions during that same year. (Streeter depo. R. 956-57, Ex. 113).

On June 1, 1982, Dickie Brandenburg again showed Streeter and Melcher that repeat robberies are the rule rather than the exception. Brandenburg entered the Davie branch while Suzanne Sullivan and another female employee were present. (2d. a.c. ¶6B & ¶6B(1), R. 111, 112, Melcher c. ¶7B & ¶7B(1), R. 253). Brandishing a gun and threatening Suzanne Sullivan's life, Brandenburg committed the second robbery at the Davie branch in less than eight months. (2d. a.c. ¶6B(4), R. 112, Melcher c. ¶7B(4), R. 254). Despite the previous robbery, Streeter and Melcher had made no provision for a guard or other security. (2d. a.c. ¶6B(2), R. 112, Melcher c. ¶7B(2), R. 253).

Brandenburg selected the Davie branch for the June 1, 1982 robbery because it was without adequate security. (2d. a.c. ¶6B(3), R. 112, Melcher c. ¶7B(3), R. 253). The robber's accomplice on the June 1, 1982 armed robbery responded to the Ft. Lauderdale police's questioning as follows:

> Q. Do you know what made him (Dickie Brandenburg) decide on this particular bank?

A. I think it was because it was small - probably there was less chance of anybody being in there to stop him.

Q. You mean security guard wise?

A. There's no security guard.

* * *

Q. Did he mention that?

A. He said there won't be any guards.

(Justynski depo., R. 702 and Ex. 47).

If nothing more than all this had happened, it would have been highly predictable that additional robberies would take place at the Davie branch in the near future because of its proven vulnerability. The June 1 robbery was unusual, however, because during the robbery, Brandenburg vowed to return and he told an employee he would "[b]low your head off." (Streeter depo. R. 954). Brandenburg was not apprehended after the robbery. (2d. a.c. ¶6B(5), R. 112, Melcher c. ¶7B(5), R. 254).

Thus, a mere probability became a virtual certainty, and what's more, the threat was not just of another robbery but, as the facts were established in the record before the trial court, directly to human life. Aware of that threat, Davie branch employees, including Suzanne Sullivan, complained that security at the Davie branch was inadequate. They pleaded for adequate security measures, including armed and uniformed guards.

Prior to July 23, 1982, Streeter and Melcher had actual knowledge of all the facts described above. (2d. a.c. ¶6B(8), R. 113, Melcher c. ¶7B(8), R. 254). In the face of those facts, and irrespective of their undertaking to make adequate security

arrangements, Streeter and Melcher both refused to provide additional security at the Davie branch. (2d. a.c. ¶6B(6), R. 112, Melcher c. ¶7B(6), R. 254).

The Foreseeable Fatal
Shooting of Suzanne Sullivan

On July 23, 1982, the fatal incident occurred. On that date, Dickie Brandenburg, who had threatened Suzanne Sullivan's life a month earlier, returned to rob the Davie branch again. (2d. a.c. ¶7, R. 113, Melcher c. ¶8, R. 254). Before going to rob the branch, Brandenburg boasted to patrons of a Ft. Lauderdale bar that the Davie branch was an easy mark. (2d. a.c. ¶7A, R. 113, Melcher c. ¶8A, R. 254).

Consistent with FBI statistics and the pattern of Atlantic robberies, Mrs. Sullivan was murdered predictably (1) on a Friday, (2) in July, (3) by a repeat bank robber, (4) at a branch office, (5) in a commercial shopping district where (6) there was no armed security guard.

Despite the two previous armed robberies, there still was no security guard at the Davie branch. Under these unprotected conditions, Brandenburg entered the branch which was still staffed solely by young women. (2d. a.c. ¶7B, R. 113, Melcher c. ¶8B, R. 254-255). Suzanne Sullivan was the only person present who had witnessed the previous June 1, 1982, robbery. (2d. a.c. ¶7E, R. 113, Melcher c. ¶8E, R. 255). Before robbing the branch this time, Brandenburg, as he had promised, killed Suzanne Sullivan by shooting her in the back with a .357 magnum revolver. (2d. a.c. ¶7C, R. 113, Melcher c. ¶8C, R. 255).

Streeter and Melcher Now Station a Guard at the Davie Branch

Despite Melcher's denial that armed uniformed security guards are a deterrent, following Mrs. Sullivan's death, Melcher made a decision to place an armed uniformed security guard at the Davie branch indefinitely. (Melcher depo. R. 854 and Ex. 40). In December, 1982, The Wackenhut Corporation performed a physical survey of the Davie branch and recommended:

> II. SECURITY
>
> Guards - There is one, armed security guard on duty during banking hours. The guard is positioned outside the building per the manager. Guard does not assist in opening each day and departs prior to branch employees. The guard performs no function inside the branch.
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> * * *
>
> III. RECOMMENDATIONS
>
> The guard should be utilized. Ideally, the guard should be the first to enter the branch and the last to leave each day. The guard should make a complete sweep of the branch interior prior to employees entering each morning and after they have departed each evening. Employees should be encouraged to park their vehicles in the same area, where they can be observed by the guard. One of the more serious threats to a small branch, such as this is the possibility of a 'hostage' situation. Strict adherence to proper procedures will greatly reduce this threat.
>
> The guard should be inside, observing, whenever there are customers in the branch. Under present procedures, a holdup could occur and the guard would be the last to know. The mere presence of an armed guard inside, would be a deterrent. (Ex. 48, emphasis added).

There have been no robberies at the Davie Branch since an armed, uniformed security guard has been stationed there. (Melcher depo. R. 856-57).

The Trial Court's Ruling

Despite all of these facts in the record, the trial judge granted summary judgment for defendants Melcher and Streeter, finding that she was bound to follow the holding of Cliffin and that Cliffin would never permit a tort action by an employee against an employer which involved a failure to provide a safe place to work. (R. 428).

The Fourth District's Opinion

The Fourth District Court of Appeal reversed the trial court's order, concluding that the plain language of section 440.11(1), Florida Statutes, permitted the plaintiff to try to prove its case of gross negligence against the defendants, notwithstanding their supervisory status at Atlantic. The court of appeal wrote: "No restriction was provided by the Legislature that would limit its effect to non-officer or non-executives. Certainly, by definition, a Chief Executive Officer of a corporation is as much an 'employee' as the newest stock clerk. . . . The only difference separating them is in the location of the decimal point on their wage -- and possibly the presence or absence of a key to the Executive wash room." 485 So.2d at 895 (emphasis in original).

The Fourth District found that such recent events as "Love Canal, Three Mile Island, and Bhopal . . . bespeak the

necessity for individual, as well as corporate, responsibility" and that "[t]he legislature, in its wisdom, spoke clearly and plainly of its intention to either grant or withhold immunity based upon the actions of the employee. The legislature expressly withheld immunity for acts of gross negligence, etc., committed by another 'employee.'" Id.

After resolving the issue regarding whether the petitioners are immune from a suit for gross negligence, the Fourth District then held, "Clearly, sufficient facts have been pled and raised by depositions in the record to establish material questions of facts as to gross negligence negating a Summary Judgment." 485 So.2d at 895-96. The Court then certified this question as of great public importance:

> 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?
>
> 485 So.2d at 896.

The defendants have misparaphrased the question in their brief as whether "managerial employees' [are] individual[ly] responsibil[e] for alleged security shortcoming in the workplace." Petitioners' Brief at 4. As can be seen from this statement of the case and the facts, however, this case does not involve a mere "security shortcoming" in the workplace. The issue here is the Legislature's attempt to hold corporate officers responsible for their conscious disregard of human life in favor of greater profits.

SUMMARY OF ARGUMENT

Point I: Plain Language of the Statute - The certified question can be answered affirmatively by reference to the plain language of section 440.11(1), Florida Statutes. There the Legislature has stated that the immunity which the Workers' Compensation Law affords to employers extends to all employees for ordinary negligence. However, the statute also expressly states that the immunity is not applicable to employees who act, with respect to fellow employees, with willful and wanton disregard, gross negligence, or negligence when they are employees assigned "primarily to unrelated works." The plain language of this statute allows the plaintiff to maintain this wrongful death action which is based on the defendants' gross negligence.

Point II: The Employee's Duty - A supervisory employee is not relieved of his duty of care towards other employees merely because an employer is liable for providing a safe place to work. Indeed, such an employee's duty to other employees antedates the employer's duty and is fully recognized today.

Point III: The Affirmative Act Rule - The defendants take the position that the Fourth District Court of Appeal erred in reversing summary judgment for them because it concluded that the plaintiff had alleged and offered proof from which a jury could find gross negligence, rather than an "affirmative act" of negligence. This argument misinterprets the "affirmative act" rule which requires only a showing that the corporate officer defendant was personally liable rather than vicariously liable because of his official title.

Point IV: The Fourth District's Opinion - The Fourth District Court of Appeal's opinion correctly concluded that the plaintiff stated a cause of action for gross negligence and, in accordance with principles of orderly judicial administration, that the evidence in the record before the trial court created an issue of gross negligence for the jury's consideration.

Point V: The "Unrelated Works" Rule - Because Suzanne Sullivan and the defendants were assigned to different works, i.e. at different locations, the Worker's Compensation Law allows the plaintiff to prevail at trial by proving that the defendants were negligent.

ARGUMENT

I.

The Plain Language of the Statute Allows an Action Against the Defendants for Willful & Wanton Acts, Gross Negligence and Negligence as Employees Assigned Primarily to Unrelated Works

The Fourth District's opinion interprets the 1978 amendment to Section 440.11(1), Florida Statutes so as to give effect to its plain language. The 1978 amendment to Florida's Workers' Compensation Law, Section 440.11(1), Florida Statutes provides:

> 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 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. (Emphasis added).

The first sentence of the amendment grants immunity to the tortfeasor employee for his ordinary negligence when acting in furtherance of the employer's business and when the injured employee is entitled to receive benefits under the Workers' Compensation Law. The accidental nature of the injury limits the injured employee to his remedy under the Act.

However, under the second sentence of the amendment, the tortfeasor-employee is left standing just as any other tortfeasor when he acts with conscious disregard for the consequences of his action or intentionally inflicts harm; that is, he acts with gross negligence, willful and wanton disregard or unprovoked physical aggression. In order for an injured employee to state a claim for gross negligence he must allege: (1) a composite of circumstances which, together constitute a clear and present danger; (2) an awareness of such danger, and (3) the tortfeasor-employee's conscious, voluntary act or omission in the face thereof which is likely to result in injury. Glaab v. Candill, 236 So.2d 180, 185 (Fla. 2d DCA 1970). Willful and wanton misconduct has been defined as reckless disregard of human life or the safety of persons exposed to dangerous conditions. Carraway v. Revell, 116 So.2d 16 (Fla. 1959).

Under such circumstances, the injured employee may seek recovery from the willful tortfeasor, the person actually responsible for his injuries, and the employer is given the

right of a set-off or reimbursement of amounts paid under the Act to his injured employee. Sections 440.11(1), 440.39, Florida Statutes (1981).

The Legislature determined that public policy requires that the law avoid shielding one who does intentional harm or who with awareness of an imminent and clear danger acts with conscious disregard of the consequences to his fellow employee. The tortfeasor-employee who acts with gross negligence, willful and wanton conduct or unprovoked physical aggression does not escape liability merely because he acts at the work place. To hold otherwise would be detrimental to employers as well as employees and the general public and would remove deterrence against such conduct.[9]

The Legislature spoke clearly of its intention to grant or withhold immunity based upon the actions of the employee and not his rank. As cogently stated by the Fourth District:

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9. The defendants argue that allowing plaintiffs to recover -- in accordance with the dictates of the statute -- is contrary to public policy because it "will surely -- and no doubt speedily -- lead to an avalanche upon the workers' compensation program." Petitioners' Brief at 23. The fallacy of this argument is revealed when the reason for extending the employer's immunity to employees is recalled. "The practical effect of allowing causes of action based on negligence against co-employees was that employers remained burdened with the weight of common-law damage judgments by reason of a legal or moral obligation to indemnify the defendant corporate officer or supervisory employee." Millison v. E. I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985). To relieve employers of this "unintended burden" states extended the employer's immunity to negligence actions against employees. However, employers have no legal or moral obligation to assume liability for the egregious conduct of gross negligence or willful and wanton misconduct by their employees. Therefore there is no reason to assume that the workers' compensation system will be affected by actions against employees based on this type of misconduct.

> No restriction was provided by the Legislature that would limit its (the amendment's) effect to non-officers or non-executives. Certainly by definition, a Chief Executive Officer of a corporation is as much an "employee" as the newest stock clerk. This is a fact of today's economic life which is within the common understanding of the average layman and all ex-chief executive officers. (See Florida Power Corporation v. Barron, 481 So.2d 1309 (Fla. 2d DCA 1986). The only difference separating them is in the location of the decimal point on their wage - and possibly the presence or absence of a key to the Executive wash room.

Sullivan v. Streeter, 485 So.2d 893, 895 (Fla. 4th DCA 1986) (bracketed language supplied).

This Court has repeatedly held that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." See A. R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (1931). Had the Legislature intended the statute to have a limitation on the liability of a corporate officer-employee as opposed to other employees, it could easily have chosen words to express such a limitation. This Court should not abrogate legislative power by limiting the express terms of an unambiguous statute.

This rule applies with particular force here where the construction of the statute advocated by the defendants would have the anomalous result of subjecting low level employees -- whose actions generally affect a fairly limited number of fellow employees -- to liability for their willful and wanton and grossly negligent acts while allowing supervisory employees --

whose actions generally can result in harm to many of their fellow employees -- to escape liability for their willful and wanton and grossly negligent acts. The plain language of the statute makes no distinction between the janitor whose consciously errant use of a mop fells a plant worker and the corporate president whose reckless choice of security precautions permits the foreseeable murder of a bank branch manager and endangers the lives of many others. This Court should not now inject such a distinction into the statute.

II.

A Corporate Officer has a Common Law Duty to his Fellow Employee of Preventing an Unsafe Workplace

Contrary to petitioners' assertions, there is no question that at common law where an employer could be held liable for damages caused by negligence arising from his breach of the nondelegable duty to provide a safe place to work, a supervisory employee could be additionally held liable for his personal failure to perform his duty to his fellow employee of preventing conditions which caused an unsafe workplace.[10]

At common law, an agent or servant who negligently injured a third person while acting in furtherance of his

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10. The early Florida decisions cited by Amicus Curiae Florida Defense Lawyers Association as recognizing that an employer owed a nondelegable duty to his employees to provide a safe place to work do not address the issue of the liability of the negligent supervisor to fellow employees. See Putnam Lumber Co. v. Berry, 146 Fla. 595, 2 So.2d 133 (1941); Tampa Shipbuilding & Engineering Co. v. Thomas, 131 Fla. 650, 179 So. 705 (Fla. 1938).

master's business was personally liable, irrespective of whether the master owed that third person a special duty, if the agent or servant's actions constituted negligence when he was acting under the same conditions on his own account. Mechem, Law of Agency §1460, p. 1081-1082, second edition (1914). The agent or servant's liability did not depend upon privity, but upon the general duty imposed on everyone not to negligently injure another. Mechem, Law of Agency §1461, p. 1083.

Under the common law all employees, including supervisory employees, owed to their fellow employees the same duty of care owed to third persons. In this Court's seminal opinion determining that an employee may be sued for his negligence in injuring a fellow employee, in those cases where the injured person's remedy against the common employer is exclusively under the Florida Workers' Compensation Law, the Court opined:

> There can be no doubt that, at common law, servants mutually owed to each other the duty of exercising ordinary care in the performance of their service and were liable for failure in that respect which resulted in injury to a fellow servant.
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> Frantz v. McBee Company, 77 So.2d 796 (Fla. 1955)

In Frantz, this Court refused, in the absence of an express statutory provision in the Workers' Compensation Law, to abrogate the common law doctrine that employees mutually owe to each other the duty of exercising ordinary care in the performance of their service for the employer and are liable for a breach of that duty which injures a fellow employee. The

Frantz court provided as an example of a statute which expressly modified the common law North Carolina and Virginia acts creating immunity from liability for corporate officers:

> Thus, the North Carolina, G.S. §97-9, and Virginia, Code 1950, §65-99 Workmen's Compensation Acts expressly provide that "* * * while such insurance remains in force he [the employer] or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified." (Emphasis supplied.) 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 therefor, is entitled to the immunity given by the Act to the employer "'or those conducting his business.'"

Id. at 798. The clear implication of the Frantz' example is that under the common law doctrine a corporate officer, like all other employees, is liable for his ordinary negligence in performing his executive or supervisory duties when he injures a fellow employee. As discussed below in Part IV, it is for the gross breach of this personal duty that the plaintiff seeks damages against the defendants.

Before turning to the specific facts which demonstrate that the defendants breached a personal duty to the deceased, it warrants emphasis that the nondelegability of the employer's duty to provide a safe place to work in no way immunizes a corporate officer against liability for his personal negligence.

In contrast to an employee's duty of care which was owed equally to third person's and fellow employees, the

employer under the common law "fellow servant doctrine" was generally exempt from liability for injuries to a servant caused by the negligence of a fellow servant in common employment. The "fellow servant doctrine," granting employer immunity from liability, reasoned that an employee accepted the risk of injury from other employees upon undertaking employment and took the risk into consideration in negotiating his compensation with the employer. Northern Pacific R.R. Co. v. Herbert, 116 U.S. 642, 6 S.Ct. 590, 29 L.Ed. 755, 758 (1886).

The "fellow servant doctrine" was a harsh rule and the courts carved out many exceptions to its applicability in order to devolve upon the employer a just share of the responsibility for the safety of his employees. One of these exceptions was the employer's nondelegable duty to provide a safe place to work; "this duty he [the employer] cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission." 29 L.Ed. at at 758 (bracketed language added).

The imposition of liability upon the employer pursuant to the nondelegable duty to provide a safe place to work did not relieve from personal liability an agent-employee "who in exercising the master's authority has violated the duty he owes as well to the servant as to the corporation." 29 L.Ed. at 759.

For example in Wright v. McCord, 8 Div. 188, 88 So. 150 (S.Ct. Ala. 1920), the plaintiff-employee was injured when a cotton seed bin which he was constructing with other employees collapsed. The injured employee sued his employer and the

employer's superintendent "for failure to use ordinary care to furnish a safe place in which to work, for negligence of the superintendent in charge of the work in which the injury occurred, for the negligent order of such superintendent that proximately caused the injury, and for a 'defect in said bin . . .'" 88 So. at 151. The plaintiff-employee settled his claim against the employer and proceeded with his action against the superintendent. The trial court initially dismissed the claim against the superintendent on the ground he owed no duty to the plaintiff-employee.

On appeal the Supreme Court of Alabama stated that "[u]nder the common law it [liability of the superintendent-employee] rested on the independent duty of the servant to so use such properties or agencies under his control as not to injure third parties, and irrespective of his relation to his principal. . . . The mere relation of agency does not exempt a person from liability for an injury to a third person proximately resulting form the neglect of duty of such agent for which he would otherwise be liable." 88 So. at 153 (bracketed language added). Recognizing that the superintendent-employee owed the same duty to the plaintiff-employee as to other third persons, the Alabama Supreme Court held that the superintendent was duty bound to use reasonable care in providing a safe place to work.

Again, in Givens v. Savona Mfg. Co. et al., 196 N.C. 377, 145 S.E. 681, 682 (S.Ct. 1928), an employee in a cotton factory sued his employer and his employer's superintendent and

foreman alleging that his injuries were caused by "the negligence of said defendants (1) in failing to exercise due care to provide for him a reasonably safe place to work; (2) in ordering and requiring him to work in such place, when defendants, and each of them, knew that it was not at the time a reasonably safe place . . . ." The North Carolina Supreme Court held that the superintendent and foreman "owed him (the fellow employee) the duty, while he was at work at a place which would become unsafe, under certain conditions, to exercise due care to prevent the happening of these conditions. . .The fact that they were not present at the time of his injury, giving to plaintiff specific orders with respect to his work, does not relieve them of liability. Plaintiff was at work under their orders, at a place which they knew was dangerous, under conditions then existing, which they could have prevented by the exercise of due care for the safety of Plaintiff." 145 S.E. at 680-81 (bracketed language added).

As was true of the supervisory employee's duty to all third persons at early common law,[11] he was held liable to fellow employees for his misfeasance but not for his nonfeasance.

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11. The distinction between nonfeasance and misfeasance was explained: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not

(Footnote continued on next page)

See, e.g., Wright v. McCord, 8 Div. 188, 88 So. 150 (S.Ct. Ala. 1920), Givens v. Savona Mfg. Co. et al., 196 N.C. 377, 146 S.E. 681 (1928). However, this distinction between a supervisory employee's acts of commission and omission with regard to fellow employees was rapidly rejected by the American courts. See, e.g., Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376 (S.Ct. Miss. 1934).

Today, Florida courts apply the principle of law that "[a]n agent is liable to third persons for damages resulting from a violation of a duty which the agent owes to the third person, and it does not matter whether that violation is one of malfeasance, misfeasance or nonfeasance. Scott v. Sun Bank of Volusia County, 408 So.2d 591 (Fla. 5th DCA 1982). A corporate officer's liability to employees should be consistent with his duty to third persons in general;[12] there is no reason to

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to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance or doing nothing, but is misfeasance, doing improperly." Osborn v. Morgan, 130 Mass. 102, 39 Am.Rep. 437; Mechem, Law of Agency §1465 p. 1086-1087. Liability to third persons for misfeasance also arose when an agent neglected to keep in repair premises under his control where he was charged by his principal with the duty to repair and had the necessary means. The agent's control of the premises was a doing, a feasance, and his failure to properly control, a misfeasance. Mechem, Law of Agency §1474 p. 1093-1094.

12. Restatement (Second) of Agency §359 states: "The liability of a servant or other agent to a fellow servant or other agent employed by the employer is the same as to third persons."

maintain the anachronistic omission-commission distinction solely in the area of a supervisor's liability to employees.

III.

The "Affirmative Act" Rule Requires the Plaintiff to Prove Only Ordinary Personal Negligence

Relying on a handful of district court of appeal decisions, the defendants argue strenuously that the plaintiffs must show that the defendants 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. This, they contend, the plaintiff cannot do in this case because the defendants' "duty, as all parties understood it, was to do a job for the corporation, within financial and other constraints imposed by it. To the extent that security was arguably inadequate, this was a corporate inadequacy, not one for which Mr. Streeter and Mr. Melcher can be deemed directly responsible." Petitioners' Brief at 14-15.

This argument is based on a fundamental misunderstanding of the so-called "affirmative act" rule. The rule merely precludes imposition of strict liability on a corporate officer. A plaintiff, under the rule, must establish, as in any other negligence action, that the defendant was personally rather than vicariously liable for the corporate employer's failings.

As explained herein, the gross negligence requirement of the 1978 amendment to the Workers' Compensation Law imposes a more difficult hurdle for the plaintiff to overcome than the "affirmative act" standard urged by the defendants. If a

plaintiff establishes gross negligence then he has proved circumstances which constitute a clear and present danger, that the defendant corporate officer was aware of the danger, and that the officer committed a conscious act or omission in the face of the danger, see Part I, supra. The complaint and the record before the trial court established that a jury could conclude the instant defendants acted grossly negligently in ignoring a direct threat to the life of Suzanne Sullivan.

The leading decision cited by the defendants in support of their "affirmative act" argument is Kruse v. Schieve, 61 Wis.2d 421, 213 N.W.2d 64 (Wis. 1973). In that case, a plaintiff employee who was injured when her left hand became caught in the rollers of a textile carding machine sued the "person in charge of production and control of the employment" for ordinary negligence. The plaintiff did not, however, allege facts to show that the defendant had personal knowledge of the danger the plaintiff faced, any direct control over the events which led to the injury, or any other personal involvement with the injury.

The Kruse court concluded that an action could be brought against a corporate officer for ordinary negligence, but that mere failure to supervise an employee properly and to provide a safe place to work -- duties owed to the employee by the corporate employer -- did not establish an ordinary negligence claim against the corporate officer. Thus, the court found that where a corporate officer personally directed an employee to operate a machine or operated a truck, then the officer could be held responsible, as a co-employee, for any

resulting injuries because his involvement in the injury causing events was sufficiently direct.

The distinction which the Kruse case makes between an officer acting in his corporate capacity and acting in his capacity as a co-employee is only a distinction based upon his personal involvement with the events which led to the injury. If the corporate officer is directly involved -- he has his hands on the wheel of the car or he directs the plaintiff how to use a machine -- he is deemed to be acting as a co-employee. If he has no direct personal involvement, he is deemed to be acting in his corporate capacity.[13]

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13. Subsequent Wisconsin Supreme Court decisions such as Laffin v. Chemical Supply Co., 77 Wis.2d 353, 253 N.W.2d 51 (Wis. 1977), not discussed in the petitioners' brief, are consistent with Kruse in endorsing the view that corporate officers may be sued for ordinary acts of negligence in failing to provide a safe place to work, but that there is no strict liability against the officer where the work place is unsafe. In this case, the Wisconsin Court again observed that "liability of the corporate officers arises from a breach of duty owed to the employee and must rest upon the common-law failure to exercise ordinary care." Id. at 53. In disallowing the action against the individuals in this case, the court emphasized that "At the time of the accident [defendant] Arthur Flashinski was not on the premises -- he was on vacation. [Defendant] Laurence Niederhofer was in the building but was unaware of the problem with the PVC valve and had no direct contact with [plaintiff] Laffin." Id. at 52. The court commented that "If an officer or supervisor breaches a personal duty, it does not offend the policy of the Worker's Compensation Act to permit recovery from the officer or supervisor." Id. at 53-54. In analyzing prior Wisconsin cases, including the Kruse decision, the Laffin court pointed out that it is "direct involvement beyond the typical duty of a corporate president that created the duty owed to the employee." According to Laffin, it is "clear, however, that common-law standards of negligence would apply to an officer or supervisor acting as a co-employee." See also Lupovici v. Hunzinger Construction Co., 79 Wis.2d 491, 255 N.W.2d 590 (Wis. 1977)(no liability against officer unless plaintiff could allege negligence other than corporation's failure to provide safe work place).

The underlying rationale of Kruse is that a corporate officer should not be subject to the same type of strict liability as the safe place to work statutes impose on the employer. Characterization of the rule as an "affirmative act" rule is a misnomer because it requires only that the plaintiff demonstrate the defendant is guilty of personal negligence.

A number of other state court decisions have expressly recognized that a fellow employee may prevail in a negligence action notwithstanding that the only evidence he can offer shows that the defendant personally failed to act to provide a safe place to work. For example, in Miller v. Muscarelle, 67 N.J. Super. 305, 170 A.2d 437 (N.J. 1961), the New Jersey Supreme explained: "[M]any employment functions, e.g., those of a safety inspector, are of such nature that they are usually incapable of misperformance otherwise than by nonperformance. At the same time such nonperformance may quite foreseeably subject other employees to the risk of harm resulting therefrom, thereby implicating a tort duty to avoid such nonperformance, under well settled modern doctrine. Id. at 449.

Similarly, in Canter v. Koehring Co., 283 So.2d 716, 721 (La. 1973), the Louisiana Supreme Court held liability could be imposed on an officer-employee for injury he causes to a fellow employee in the work place when:

1. The employer owes a duty of care to the co-employee, breach of which has caused the damage for which recovery is sought.

2. The duty is delegated by the employer to the officer-employee who is the defendant.

3. The defendant officer-employee has breached his duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances whether such failure be due to malfeasance, misfeasance or nonfeasance, including when the failure results from not acting upon actual knowledge of risk to others.

4. With regard to personal fault, if the defendant's general responsibility has been delegated with due care to some responsible subordinate he is not personally at fault for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance, or mal-performance and has nevertheless failed to cure the risk of harm.

See also Craven v. Oggero, 213 N.W.2d 678 (Iowa 1973); Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966). All of these cases recognize that modern tort law no longer requires the finding of an "affirmative act" of negligence.

In at least one of the states which has accepted this line of reasoning, Iowa, the legislature has adopted a worker's compensation law which, in pertinent part, is substantively identical to the Florida statute. It provides that the employer's immunity would extend to employees "provided that such injury or occupational disease . . . is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." Section 85.20, Iowa Code.

In Taylor v. Peck, 382 N.W.2d 123 (Iowa 1986), the Supreme Court of Iowa examined the statute as applied in a

negligence action by an injured employee against the vice president of the corporate employer and the general manager of the plant in which the employee was injured. The Iowa Court concluded that only these three factors were necessary to establish the supervisory employee's liability:

> (1) knowledge of the peril to be apprehended;
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> (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and
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> (3) a conscious failure to avoid the peril.

Id. at 126.

The court found no need to determine whether there was some other "affirmative act" in order to establish liability, the Iowa Legislature, like the Florida Legislature, having expressly stated that employees could be sued for acts of gross negligence. See also Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981); Larson v. Massey-Ferguson, Inc., 328 N.W.2d 343 (Iowa App. 1982).

The Florida district court of appeal decisions which are said by the defendants to have adopted the reasoning in these Wisconsin cases[14] are consistent in holding that a showing of

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14. McDaniel v. Sheffield, 431 So.2d 230 (Fla. 1st DCA 1983); Clark v. Better Const. Co., Inc., 420 So.2d 929 (Fla.3d DCA 1982), Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA 1981); West v. Jessop, 339 So.2d 1136, 1137 (Fla. 2d DCA 1976). Of these cases, only the first, West, was decided prior to the 1978 amendment to section 440.11(1), Florida Statutes. The petitioners' argument at page 20-21 of their brief that the statute must be read as incorporating "controlling law" is of little force because only the Second District Court of Appeal had adopted the "affirmative act" rule at the time that the statute was enacted. The rule had not been accepted by any of the four other district courts of appeal at the time of the 1978 amendment.

ordinary negligence in failing to provide a safe place to work is all that is necessary to establish liability against a corporate officer and that a corporate officer is not held strictly liable when there is lack of safety in the work place.

The first case to rely upon a Wisconsin decision, West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976), most dramatically illustrates this point because there the Second District concluded that liability could be imposed on the corporate officer for committing an ordinary act of negligence. The defendant in that case had not simply failed to perform some task which the employer was required by statute to perform. He had personally and directly caused an injury to the plaintiff by wrenching her head. Nothing in the case suggests that if the officer had personally caused injury by failing to perform a duty to keep the workplace safe for fellow employees in the face of an obvious danger, that he would not have been held liable.

In Zurich Insurance Company v. Scofi, 366 So.2d 1193 (Fla. 2d DCA 1979), an employee sued a supervisor for injuries he received when a trench caved in. The employee claimed the supervisor had been negligent solely because the corporate employer violated state safety rules. The employee did not claim that the defendant had any direct, personal involvement in the cave in and therefore the court of appeal directed a verdict for the defendant. The Zurich decision thus does not recognize any broad immunity for supervisory employees, but simply followed the rule that ordinary negligence on the part of the

supervisor is not established merely by showing that a corporation did not follow state imposed safety guidelines.

At page 22 of the petitioners' brief they assert that "The Fourth District made no attempt to reconcile its construction of the statute with the First District's clearly contrary construction in Cliffin v. State Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984)." The Fourth District's opinion is in no way contrary to Cliffin. In that case, an employee of the North Florida Evaluation and Treatment Center was attacked, murdered, and sexually assaulted by a resident of the Mentally Disordered Sex Offender Unit. The plaintiff sued the state, the administrator of the NFETC and the District Administrator of the HRS where the NFETC were located.

The court of appeal first held that the action was barred by the statute of limitations and, as an alternative holding, that summary judgment for the individual defendants must be affirmed "due to the failure of the complaint to allege affirmative acts of negligence going beyond the scope of the employer's nondelegable duty." The court of appeal explained: "Although the concept is subject to interpretation and may, in a particular case, involve questions of fact for the jury, no material issues of fact were presented here which would preclude entry of summary judgment on this ground." Id.

Had the plaintiff in Cliffin been able to allege that the administrator of NFETC or the District Director of HRS had knowledge that the deceased's assailant had made direct threats to her life and that security at NFETC would be inadequate to

stop the assailant from carrying out his threats, then it seems likely that the judgment for the defendants would have been reversed rather than affirmed.

All of these decisions interpreting the Worker's Compensation Law are consistent with the general principle that an officer of a corporation has a duty towards third persons when his failure to act in accordance with his employment duty to the corporation would deprive third persons of a protection owed them by the corporate employer.[15] See Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981).

In Orlovsky, the Fourth District held a corporate officer could be liable for his negligent omission in failing to prevent injuries at a skateboard park, writing as follows:

> A corporate officer is potentially individually liable for his tortious acts even though such acts were committed in the scope of his employment by the corporation. [citations omitted]. 19 Am.Jur.2d, Corporations, §1382 succinctly sets forth this rule and its underlying rationale as follows:
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> > A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated

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15. See also Restatement (Second) of Agency §354 which provides: "An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize."

> in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort. A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible.
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> 405 So.2d at 1364 (footnotes omitted, emphasis added).

Similarly, the Third District in Adams v. Brickell Townhouse, Inc., 388 So.2d 1279 (Fla. 3d DCA 1980), held that corporate officers could be liable in tort for "inconveniences" inflicted on tenants incident to a condominium conversion. In Adams, the plaintiffs alleged nuisance, trespass and retaliatory eviction. The trial court dismissed the individual defendants, finding their status as officers insulate them from liability." Id. at 1280. The appellate court reversed, reasoning:

> One purpose of the corporate fiction is to insulate stockholders from liability for corporate acts; however, officers of a corporation are no less personally responsible for their tortious acts by virtue of those acts having been performed in the corporate name.16

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16. Id. at 1280 (emphasis original). See Naranja Lakes Condominium No. One, Inc. v. Rizzo, 422 So.2d 1080 (Fla. 3d DCA 1982); see also Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (Fla. 3d DCA 1983); Dade Roofing and Insulation Corp. v. Torres, 369 So.2d 98 (Fla. 3d DCA 1979); CIC Leasing Corp. v. Dade Linen and Furniture Co., 279 So.2d 73 (Fla. 3d DCA 1973).

Moreover, a corporate officer is liable for his negligent (or as in the case at bar grossly negligent and/or willful and wanton) failure to act, just as he would be for an "affirmative act." As the court wrote in In re Firestone, 26 Bankr. 706 (S.D. Fla. 1982):

> Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party, is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.

Id. at 714 (emphasis added).

The cases relied on by the defendants for the affirmative act rule merely impose the requirement that a corporate officer is personally at fault rather than vicariously at fault through his corporate title. This test then imposes a lesser burden than the gross negligence test which the Legislature chose to incorporate in the statute.

As demonstrated, the defendants actually are arguing for imposition of liability on a corporate officer based on ordinary personal negligence. Because the Fourth District has concluded that the plaintiff has established a jury issue regarding gross negligence,[17] remand for trial is appropriate.

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17. Assuming arguendo that the "affirmative act" rule is interpreted to require plaintiffs to prove something more than gross negligence, then the rule should be rejected as inconsistent with the Legislature's clear mandate in section 440.11(1), Florida Statutes, as well as contrary to modern tort law.

IV.

The Complaint Seeks to Impose Liability Against the Defendants for their Personal Breach of Duty, Rather than the Employer's Failure to Provide a Safe Place to Work

The plaintiff seeks to impose liability on the defendants in this case based upon their personal undertaking to provide Suzanne Sullivan with protection and their direct relationship to her physical well-being by virtue of the specific tasks which they performed. The plaintiff makes no attempt to establish liability merely because Atlantic failed to provide Suzanne Sullivan a safe place.

Streeter and Melcher personally participated in and personally made numerous decisions which constituted actions and omissions to act which proximately caused Suzanne Sullivan's death. Each of the following factors, which are described more fully in the statement of the case and the facts,[18] clearly demonstrates the direct, personal involvement of the two defendants in the events which led to Suzanne Sullivan's death:

1. Vulnerability of Branch. Streeter and Melcher knew that the location of the Davie branch in an accessible shopping center, frequented by drifters, near many roadways, made it particularly susceptible to robbery.

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18. These factors are based on the allegations of the complaint and the proof in the record. The allegations of the complaint must be taken as true because the defendants filed no affidavits, depositions, or other proof in support of their original motion or in support of their request that the trial court reconsider the denial of that motion. See Blum v. Morgan Guaranty Trust Co. of New York, 709 F.2d 1463, 1466 (11th Cir. 1983); Sheradsky v. Basadre, 452 So.2d 599 (Fla. 3d DCA 1984).

2. Previous Robberies. Streeter and Melcher knew that the Davie branch was a target for robberies, having been robbed at least two (2) times previously by armed robbers within a span of eight (8) months.

3. Robbery Statistics. In recent years, an increasing number of armed robberies had been committed at banks and savings and loan branches in the south Florida area, especially at Atlantic.

4. Fear of Employees. Streeter and Melcher knew that personnel at the branches of Atlantic, and in particular the Davie branch, were very fearful for their safety and they had made specific requests to Streeter and Melcher for adequate security including armed and uniformed security guards.

5. Guards Withdrawn. Streeter and Melcher previously had stationed armed and uniformed security guards at branches, but withdrew them from the Davie branch for economic reasons and without consulting law enforcement officials.

6. Personal Review of Security Program Certified. Streeter annually filed a certification with the Federal Home Loan Bank Board indicating he had reviewed Atlantic's security program and consulted law enforcement officials although he had not.

7. Repeat Robberies. Streeter and Melcher both knew there is a propensity for criminals to return to branches known to be without adequate security.

8. Robber at Large. The armed robber who had committed the June 1, 1982 second robbery of the Davie branch had not been apprehended and was still at large.

9. Lives Directly Threatened. Streeter and Melcher knew the lives of the people who had witnessed the June 1, 1982 second armed robbery of the Davie branch, including Suzanne Sullivan, were particularly at risk if the same robber returned and the witnesses to the previous (June 1, 1982) robbery were still present at the Davie branch.

10. Additional Security Recommended. The branch personnel, those persons closest to the problem, as well as persons having security expertise such as law enforcement personnel, had previously requested and recommended adequate security measures for the Davie branch including an armed security guard.

Streeter and Melcher's personal refusal and failure, under these particular circumstances, to provide adequate security measures at the Davie branch premises proximately caused Suzanne Sullivan's wrongful death. All of those cases relied on by the defendants for the proposition that they breached no duty by ignoring direct threats to Suzanne Sullivan's life are easily distinguishable.

V.

The Fourth District Correctly Held the Complaint States a Cause of Action and that There is a Fact Issue Regarding Gross Negligence

On page 25 of their initial brief, petitioners argue that the Fourth District's characterization of the defendants' conduct as "grossly negligent" was "gratuitous and unwarranted." These claims misread the holding of the Fourth District Court of Appeal, ignore the record and the express rulings of the trial judge, and contradict the petitioners' own subsequent arguments.

The Fourth District, after holding the defendants are not immune from suit, then held only that "Clearly, sufficient facts have been pled and raised by depositions in the record to establish material questions of facts as to gross negligence negating a Summary Judgment." 485 So.2d at 895-96. The court properly did not rule upon whether the defendants' acts actually amounted to gross negligence, a question for the jury, but rather limited its decision to (1) whether the complaint stated a cause of action for gross negligence and (2) whether the record materials established a fact issue regarding gross negligence.

A. The Fourth District Correctly Held the Complaint States a Cause of Action

The Fourth District's first holding -- that the complaint states a cause of action -- was essential to the Fourth District's conclusion that the summary judgment for the defendants should be reversed. If the plaintiff had not stated a cause of action, then the summary judgment should have been upheld notwithstanding that the trial judge entered the summary judgment for the wrong reasons. "A judgment must be affirmed . . . if it is legally justified for any reason, even one which was not adopted below." Henriquez v. Publix Super Markets, Inc., 434 So.2d 53, 53 (Fla. 3d DCA 1983)(affirming judgment because defendant entitled to summary judgment on other grounds); see also Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967), pet. for rev. denied, 210 So.2d 222 (Fla. 1968).

B. The Fourth District Correctly Held Gross Negligence is a Jury Question

The Fourth District's second holding -- that the depositions and other exhibits establish material questions of fact regarding gross negligence -- although perhaps not essential to the Fourth District's reversal, was properly a matter for the Court's consideration. The court of appeal had no obligation to wait for the defendants to return to the trial court to lodge a successive motion for summary judgment, to raise a ground which could have been raised in the first motion, before determining that the plaintiff had established the existence of a fact issue regarding gross negligence as a matter

of law. Principles of orderly judicial administration fully support the Fourth District's decision to articulate its conclusion that the matters of record established that a jury must decide whether the defendants were grossly negligent.

The petitioners' representation regarding the insufficiency of the record are incorrect. The plaintiff filed all of the depositions and exhibits from the pretrial stipulation well in advance of the final summary judgment order.

Ironically, petitioners themselves attempt to rely upon matters which are not of record to persuade the Court that it should overturn the Fourth District's conclusion that this case presents issues for jury resolution. The petitioners cite a newspaper article, a magazine article, and the legislative history of the Bank Protection Act of 1968 -- none of which were put before the trial court or the Fourth District.

Finally, the defendants turn to the depositions which they claim are not in the record to argue they were not grossly negligent. Their unqualified reliance on these materials admits that they were before the trial court and properly formed the basis for the Fourth District's finding of a jury issue.

VI.

An Action Exists Against Streeter and Melcher for Their Negligence as a Fellow Employee "Assigned Primarily to Unrelated Works"

The 1978 amendment to the Florida law provides that immunity from ordinary negligence shall not exist for "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." No legislative history has been located explaining this provision nor has any court decision been found analyzing the scope and purpose of this section of the amendment.[19] However, the language of the statute is self-explanatory. "Works" is defined by Webster's Third New International Dictionary, as "a place where industrial labor is carried on."[20] "Unrelated" is defined as "discrete, disjoined, separate."[21] Thus, when employees perform their services at a separate work situs they are liable for their ordinary negligence which injures to a fellow employee. Defendants were working in Atantic's executive offices on Sunrise Boulevard while Suzanne Sullivan, worked in the Davie Boulevard branch. Under these facts, plaintiff Sullivan possesses claims against Streeter and Melcher for their ordinary negligence as fellow employees "assigned primarily to unrelated works," which proximately caused Mrs. Sullivan's death.

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19. See Johnson v. Comet Steel Erection Inc., 435 So.2d 908, 909 (Fla. 3d DCA 1983)(noting lack of precedent to determine what is "related work" and holding employees who "were employed on-site in the same construction project" were not "assigned primarily to unrelated works").

20. Webster's Third New International Dictionary at 2634, work as noun, col. 1 (1981).

21. Id. at 2507.

CONCLUSION

The decision of the Fourth District Court of Appeal should be affirmed and this case should be remanded for trial.

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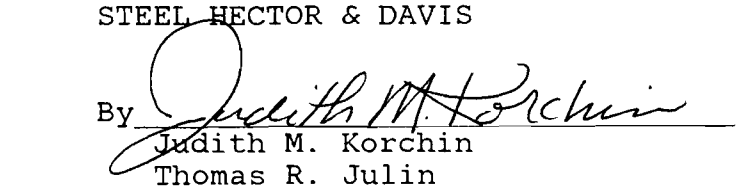
By 
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I hereby certify that a true and correct copy of this brief was mailed August 7, 1986, to:

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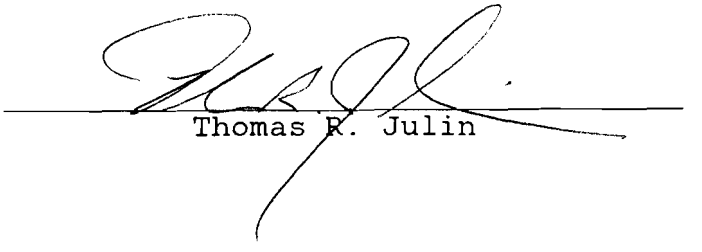

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