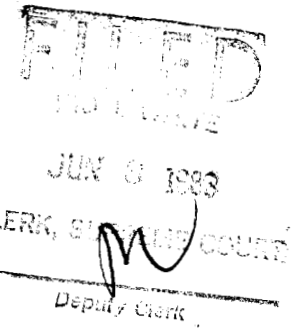
IN THE SUPREME COURT OF FLORIDA

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.

(DCA-4 NO. 85-241)

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

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case is before the court on a question certified by the Fourth District Court of Appeal. Sullivan v. Streeter, 485 So.2d 893 (Fla. 4th DCA 1986). (A. 1-4) The court's answer to the certified question will determine whether defendants Donald Streeter and Edward E. Melcher are immune from the suit instituted by plaintiff Michael Sullivan.

Plaintiff brought this suit individually and as personal representative of his deceased wife, Suzanne Sullivan. Suzanne Sullivan was employed by Atlantic Federal Savings and Loan Association as the manager of a branch office. (R. 1014-15) The branch was robbed in the fall of 1981, and again in June 1982. (R. 1020-21) On July 23, 1982, the man responsible for the June robbery returned to the branch office, and during the course of a repeat robbery, without provocation or resistance, shot and killed Suzanne Sullivan. (R. 1021)

For economic reasons Atlantic Federal had, in 1981, removed guards from most of its branch offices. (R. 921-23) There was no guard at Suzanne Sullivan's branch when the fatal incident occurred. Plaintiff initially brought suit against Atlantic Federal and its president, Donald Streeter. (R. 108-32) He alleged that they failed to provide the branch with adequate security, and that this failure proximately caused his wife's death. As to Atlantic Federal, plaintiff relied on two

theories of liability that are recognized exceptions to the exclusivity provisions of the Workers' Compensation Act: intentional tort and the doctrine of dual capacity. Plaintiff's claim as to Mr. Streeter was predicated on intentional tort as well as statutory exceptions to co-employee immunity:

> [F]ellow-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.

Section 440.11(1), Florida Statutes (1981).[1] Plaintiff pled gross negligence, willful and wanton misconduct, and "unrelated works" as separate causes of action.

Streeter and Atlantic Federal filed motions to dismiss or, alternatively, for summary judgment. (R. 136-38) In August 1983, Streeter's motion was granted as to the intentional tort

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[1] While the Fourth District's opinion cites to the 1983 statutes, this citation is incorrect because the 1983 statutes were not in effect when the incident occurred. Also, it should be noted that, as reproduced in the Fourth District's opinion, certain language is missing from the second sentence of section 440.11(1). The complete sentence is set forth above.

claim and denied as to the remaining counts. Final summary judgment was granted for Atlantic Federal. (R. 141)

Plaintiff appealed the final summary judgment for Atlantic Federal. While the appeal was pending, plaintiff sued another Atlantic Federal employee, Edward Melcher, who serves as vice president of operations. That case was consolidated with the action against Mr. Streeter. (R. 270) A motion to dismiss or for summary judgment filed on Mr. Melcher's behalf was denied. (R. 284)

The Fourth District affirmed the summary judgment for Atlantic Federal, and this court declined to entertain plaintiff's petition for certiorari. 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). Following the Atlantic Federal decision, Mr. Streeter and Mr. Melcher renewed their motions for summary judgment. (R. 288-89) Their motions were largely based on the Fourth District's ruling in the companion case.

Since the conduct attributed to the individuals is the same as that attributed to the corporation, defendants argued that they should likewise be granted summary judgment on grounds of immunity. (R. 408-27) Specifically, defendants maintained that they could not be subject to liability for conduct, characterized in the Atlantic Federal opinion as omissions, relating to the safety of the workplace. Providing a safe workplace is a non-delegable duty of the employer. Em-

ployees should not be subject to personal liability unless they commit some affirmative act unrelated to the employer's duty. The renewed motion for summary judgment was initially denied, then granted two weeks prior to the scheduled trial date. (R. 337; 361-62)

Plaintiff argued on appeal that the 1978 amendment to section 440.11(1) (reproduced infra, pp. 16-17) superseded all prior common law, including the rule that safety of the workplace is the employer's non-delegable duty. Plaintiff claimed to have an action against defendants based either on gross negligence, willful and wanton misconduct, or on the "unrelatedness" of Suzanne Sullivan's work to that of the defendants'.

In its opinion containing the certified question, the Fourth District agreed with plaintiff's construction of section 440.11(1). (A. 1-4) Recognizing the far-reaching implications of its ruling, it certified to this court the issue of managerial employees' individual responsibility for alleged security shortcomings in the workplace. (A. 4)

CERTIFIED QUESTION

DOES SECTION 440.11(1), FLORIDA STATUTES (1983) [SIC], 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

In ruling that plaintiff could seek damages from Mr. Streeter and Mr. Melcher, the Fourth District misapprehended the circumstances under which one who is entitled to workers' compensation benefits can sue a fellow employee.

There is a long-standing common-law limitation on an employee's right to sue executives: an employee who is making and effecting corporate policy regarding the safety of the workplace shares in the employer's tort immunity. Workplace safety is the employer's non-delegable duty. It would undercut the purposes of workers' compensation to permit recovery against corporate officials, through whom the employer necessarily acts in matters of workplace safety, and yet grant tort immunity to the employer on whose behalf those policies and decisions are made.

This premise retains vitality despite a 1978 amendment to section 440.11(1), Florida Statutes (1981). The Fourth District construed the amendment as recasting the law of co-employee liability, brushing aside long-standing common-law principles of immunity. This construction is not supported by the legislative history, which indicates an intent to more narrowly circumscribe the tort liability of co-employees; is at odds with canons of construction which require the common law and statutory enactments to be read harmoniously; and squarely con-

flicts with at least one other district which clearly regards the common-law limitation as surviving the 1978 amendment. It is rather amazing that the Fourth District failed to address the ramifications of its expansive treatment of section 440.11 (1). Subjecting managerial employees to other employees' suits over unsafe conditions in the workplace is inimical to the purposes of workers' compensation. It defies the reasonable expectations of workers and their supervisors and imposes a species of liability never contemplated by the legislature. When an employee's allegations turn on deficiencies in workplace safety, defendants such as Mr. Streeter and Mr. Melcher are entitled to the qualified immunity recognized at common law.

It must also be recognized that the Fourth District's opinion that defendants' conduct constituted gross negligence was inappropriate. The caliber of defendants' conduct was an issue not properly before that court, because it did not have a complete record, nor was it otherwise equipped to determine whether guards actually deter bank robbers [let alone robbery-related violence, the gravamen of the instant claim].

The Fourth District's decision should be vacated, and the final summary judgment in Mr. Streeter's and Mr. Melcher's favor reinstated.

ARGUMENT

CERTIFIED QUESTION

DOES SECTION 440.11(1), FLORIDA STATUTES (1983) [SIC], 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 ERRED IN HOLDING THAT PLAINTIFF'S ACTION AGAINST MR. STREETER AND MR. MELCHER WAS PERMISSIBLE, BECAUSE SECTION 440.11(1) MUST BE READ IN CONJUNCTION WITH COMMON LAW, AND NEITHER DEFENDANT COMMITTED AN AFFIRMATIVE ACT OF NEGLIGENCE GOING BEYOND THE SCOPE OF ATLANTIC FEDERAL'S NON-DELEGABLE DUTY TO PROVIDE A SAFE WORKPLACE.

The Fourth District's opinion took the extraordinary leap of creating a tort action against a corporate employee on the theory that a managerial or executive supervisor is individually and personally responsible for assuring a safe place to work. If the security of the workplace is breached--as it was in the instant case through an armed robber--the supervisor may be liable when the employer itself is not, even though the supervisor's conduct fell entirely within the scope of his official activities. The court made passing mention to, but failed to perceive the importance of, the well-settled common-law doc-

trine that establishes a two-part predicate before an employee may recover tort damages from a supervisor. Under this test, recovery is permissible only when it is first determined that the supervisor (1) actively breached a duty that (2) he owed to his fellow employee in his individual capacity. Here, regardless of how the conduct is characterized, this first hurdle requires the answer to the certified question to be "no." An overview of the pertinent case law is essential to the court's understanding of the sound reason for the doctrine, its continued vitality, and the result which it compels in this case.

A. An Unbroken Line of Case Law Demonstrates the Defendants' Entitlement to Immunity.

The circumstances under which an employee could sue his supervisor were not always explicit. At one time, Florida and many other states' compensation laws were silent as to an employee's right to maintain a direct action against a co-employee. Consequently, courts were divided: about half the states extended employers' immunity to co-employees, while the remainder recognized a common-law cause of action. See Annot., 21 A.L.R. 3d 845 (1968). Florida fell into the latter category by virtue of Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955). That case involved a wrongful death action against the decedent's employer and the allegedly negligent fellow employee. The court determined that, in the absence of any legislative man-

date in the field, a fellow servant is a third-party tort-feasor entitled to no special immunity from suit.

In West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976), an important limitation on one employee's right to sue another was recognized. Following the Wisconsin Supreme Court case, Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W.2d 64 (1973), the West court determined that an employer's immunity must be extended to corporate officers who are acting in their official capacity. A direct action against this limited class of co-employees is precluded unless the officer "commit[s] 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." 339 So.2d at 1137. There are important policy reasons for making this distinction relative to executives:

> To blindly hold that a corporate officer always occupies the position of a co-employee because he is a separate "entity" from the corporate employer would jeopardize the concept of workmen's compensation which is designed to impose a certain but exclusive obligation upon employers whenever their employees suffer on-the-job injuries. A corporate employer must necessarily conduct its business through its corporate officers, and to permit in every case a third party action against these officers, particularly when they also own the corporate stock, would often reduce the protection of "exclusiveness" to only a theoretical refuge.

Id.

To be amenable to suit, the court concluded, a corporate officer's conduct must be unrelated to his official responsi-

bilities. The defendant in that case, a corporate president, was deemed subject to suit because he breached a personal duty to the plaintiff by wrenching her neck.

Subsequent Florida cases reiterate and refine the West criteria. Zurich Insurance Co. v. Scofi, 366 So.2d 1193 (Fla. 2d DCA 1979), cert. denied, 378 So.2d 348 (Fla. 1979), for example, elaborated on the concept of the employer's non-delegable duty to provide a safe workplace. In finding a supervisory employee immune from personal liability for the death of a worker following a cave-in, the court explained:

> If a state safety rule was violated at the job site, this was a responsibility of the employer which it can only discharge (or fail to discharge) through its supervisory employee. The supervisor merely carries out the responsibility or duty of the employer. For this purpose he is the employer's alter ego.

Id. at 1195. If an officer fails to perform the employer's duty, the failure is the employer's and the remedy is exclusively against the employer. The Zurich court relied on a second Wisconsin case in which, pertinent to the instant case, the worker's allegations were that his supervisor failed to warn of, guard, or correct hazardous conditions in the workplace. These allegations were ruled insufficient. Lupovici v. Hunzinger Construction Co., 79 Wis. 2d 491, 255 N.W.2d 590 (1977).

Managerial immunity was also approved in Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th

DCA 1981), pet. for rev. denied, 399 So.2d 1141 (Fla. 1981), and Clark v. Better Construction Co., Inc., 420 So.2d 929 (Fla. 3d DCA 1982). In both cases, employees injured by allegedly hazardous conditions in the workplace brought suit against the executives bearing responsibility for on-the-job safety. In Dessert, the court rejected plaintiff's theory that the safety supervisor breached a personal duty to report or remedy the dangerous condition precipitating her fall. Likewise, in Clark, a directed verdict in a supervisor's favor was affirmed, the evidence failing to show conduct which, "by direct involvement on his part, constitute[d] an affirmative act of negligence ... ." Id. at 931.

The rule that personal liability does not arise from acts performed as a corporate officer also found recognition in McDaniel v. Sheffield, 431 So.2d 230 (Fla. 1st DCA 1983), pet. for rev. denied, 440 So.2d 352 (Fla. 1983). There defendants, a husband and wife, were officers/owners of a corporation doing business as a convenience store and gas station. The decedent, a clerk, was shot and killed by an unknown armed robber. After receiving workers' compensation benefits, the decedent's personal representative sued the couple individually, alleging they were negligent in failing to protect the decedent from criminal conduct. These allegations were insufficient:

> [The couple] did not individually owe the decedent any duty unless they were also in possession and control of premises in their

> individual capacities and not as corporate officers. The only way a corporation can act is through its officers, agents, and employees. [The couple] had no duty to the decedent as a result of any acts performed as corporate officers.

Id. at 231.

Finally, Cliffin v. State Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984), a case strikingly similar on its facts, involved a suit against three mental hospital supervisors in their individual capacities. It was alleged that their failure to provide a safe workplace precipitated the murder of a custodial worker who was attacked by an inmate of the facility. Citing Clark and Dessert, the court affirmed summary judgment for the supervisors on the grounds that no affirmative acts of negligence going beyond the scope of the employer's non-delegable duty were alleged. Id. at 30.

These cases impose a common sense limitation on the liability of corporate officers, managers and supervisors. Because corporations must act through employees, allowing workers who are entitled to workers' compensation benefits to collect from their supervisors as well in effect allows a double recovery.[2] At the same time, it permits workers to recover from

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[2] Plaintiff noted below that he had not accepted any workers' compensation benefits relative to his wife's death. According to the statute, however, the exclusiveness of one's remedy is determined by his entitlement to benefits, rather than whether he elects to accept them.

supervisors when their conduct is a departure from their responsibilities. West v. Jessop is one example of circumstances in which an executive was not shielded from personal liability. Another is Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1981). There the defendant/supervisor tried to apply his right to immunity to a suit alleging battery. The court cast a skeptical eye on the supervisor's argument that he was immune because he struck plaintiff with a paddle (hard enough to cause severe injuries) in furtherance of an employee contest, and concluded the paddling was unrelated to his duty to maintain a safe workplace. Id. at 39.

In such cases, courts have been able to satisfy the basic tenet of all negligence law: that a duty flow from the particular defendant to the particular plaintiff. As West and Chorak illustrate, a supervisor shares with all persons the duty to refrain from touching another in a harmful or offensive manner. If the supervisor breaches this duty, his act is independent of his corporate role. He cannot reasonably expect immunity, and there are no policy reasons for insulating him from suit. On the other hand, it is well-settled that the duty to provide a safe workplace is exclusive to the employer. Mr. Streeter and Mr. Melcher could not reasonably expect to assume personal responsibility for the safety of Atlantic Federal's employees; nor is it likely that the employees looked to them individually. Their duty, as all parties understood it, was to do a job for the corporation, within financial and other constraints im-

posed 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.

The analysis and policy reasons pertinent here are analogous to those applied by the Fourth District in the Atlantic Federal decision. Reduced to its essentials, the instant claim is an attempt to impose a dual capacity doctrine on the individual defendants. However, plaintiff cannot isolate Mr. Streeter's and Mr. Melcher's conduct from their corporate responsibilities. The Fourth District acknowledged that security-related decisions were based on financial constraints; Mr. Streeter and Mr. Melcher ARE NOT ACCUSED OF ANY PERSONAL MALICE.

The Fourth District realized it would undermine the purposes of workers' compensation laws to permit a recovery in tort from Atlantic Federal. Erroneously, however, it ruled that Mr. Streeter and Mr. Melcher were not entitled to the same result. It concluded that a 1978 amendment to section 440.11(1) displaced the historic dual criteria for loss of immunity (a personal duty coupled with an affirmative act), substituting three new inroads on the concept of co-employee immunity. A scrutiny of the statute reveals fatal flaws in the court's reasoning and, thus, its conclusion.

B. The 1978 Amendment to Section 440.11 does not Expand Supervisors' Liability.

The Fourth District's analysis of the 1978 amendment to section 440.11 was cursory, at best. After reciting the proposition that the legislature is presumed to have some object when it amends a statute, the court jumped to the conclusion that because the legislature did not limit the amendment to nonexecutives, it intended to confer or withhold immunity without regard to the nature of the duty involved.

This conclusion is indefensible for several reasons. First, the Fourth District ignored the amendment's legislative history, which demonstrates that the legislature's object was to restrict, not broaden, the scope of co-employee immunity. Second, the court disregarded pertinent canons of construction, under which both statutes and common law must be deemed to exist harmoniously. Third, it ignored the Cliffin case, in which the First District concluded that managerial or executive immunity survived the amendment process. Finally, the court's error is clearly signaled by its failure to discuss the policy ramifications of its decision. These points are discussed in turn below.

Prior to 1978, section 440.11(1) simply provided that an employer's workers' compensation liability to an injured employee was exclusive, so long as an insurance policy was in effect. The section was silent with respect to co-employees. The 1978 session saw the following two sentences added:

> 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.

Section 2, Chapter 78-300, Laws of Florida (1978); section 440.11(1), Florida Statutes (1981).

Plaintiff contended, and the Fourth District evidently agreed, that this amendment created new sources of co-employee liability by sweeping all prior case law aside. This argument is belied by the language of the statute and its legislative history.

The first sentence of the amendment does supersede the common-law cause of action recognized in Frantz. As explained in a staff analysis to the bill, "[a]n injured employee would lose his cause of action against certain fellow employee third party tort-feasors." (A. 9) The primary legislative intent in passing this bill was clearly to restrict co-employee liability. Such legislation is not unique to Florida. Often, in response to decisions such as Frantz which allow suits against fellow employees, legislatures have passed measures barring or limiting such suits. Annot., 21 A.L.R. 3d 845, 864.

The language selected by the legislature to effect this purpose is noteworthy. Conduct that is "in furtherance of the employer's business" is not subject to suit. In its next sentence, however, the legislature elected to leave common-law rights intact with respect to willful, wanton, grossly negligent or physically aggressive conduct. This sentence describes conduct traditionally viewed as outside the course and scope of employment--the very antithesis of conduct in the furtherance of business.[3]

We have maintained, and plaintiff has not controverted, that defendants' conduct was entirely and consistently in furtherance of Atlantic Federal's business. It was not outside the scope of employment in any sense, and it was not the type of conduct which the legislature intended to reach. The cardinal rule of statutory construction is that courts must give effect to legislative intent. City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984). The legislative history of section 440.11(1) is revealing as to the intent behind it.

Enacted as Section 2 of Chapter 78-300, Laws of Florida (1978), originated as two pre-filled bills: House Bill 721 and Senate Bill 407. (A. 5-8) House Bill 721 died with no action

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[3] The amendment left common-law rights intact with respect to suits against co-employees engaged in unrelated works--a concept discussed at pp. 23-24, infra.

being taken on it; Senate Bill 407 also died, but its language was incorporated into Senate Bill 636. (A. 19-24) In a special session of the legislature, Senate Bill 636 was reintroduced and passed.

A copy of House Bill 721 is attached. (A. 5-6) The title of the bill notes its subject matter as "exempting employees from liability as third party tortfeasors." The proposed amendment immunized an employee from suit for an injury "due to the negligence or wrongful act of the employee in the course of his employment." It was designed to abrogate the Frantz cause of action. Significantly, it relied on a classic scope-of-employment analysis. Its approach was completely consistent with the preexisting case law regarding immunity of executives.

The counterpart to House Bill 721, Senate Bill 407, has also been preserved. (A. 7-8) Even more brief than the House version, the Senate's proposal simply added the language "[t]he 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." Again, this proposal incorporates a common sense scope-of-employment standard for determining liability, and is completely faithful to the case law on which we rely. Indeed, a staff analysis of Senate Bill 407 confirms that the bill is a grant of immunity, under which employees would lose many causes of action against fellow employees. This illustrates an unequivo-

cal intent to restrict, rather than expand, the scope of co-employee liability.

The history then reflects that a provision "for fellow-employee tort immunity" was incorporated into Senate Bill 636. (A. 19-24) This bill contained many changes to the Workers' Compensation Act. The pertinent provision, designated Section 2, is described in a staff analysis as being designed to "change the law to provide for fellow-employee tort immunity." (A. 15) This description conclusively demonstrates the legislature's awareness of the Frantz line of cases and its intent to impose tighter controls on the situation.

The bill ultimately passed during a special session. Its final version contains the additional sentence setting forth three exceptions to the immunity rule. (A. 22) There are no staff analyses or other materials which amplify on the origin and purpose of this eleventh-hour addition. The available history, however, points to a conservative legislature that was intent on tightening the circumstances under which one employee could sue another. It would make no sense, in light of this overriding intent, to find that the legislature imposed on executives acting in furtherance of their employer's business liabilities to which they had never previously been subjected. A statute must be interpreted with reference to controlling law, to the terms and intendments of the statute and to the object designed by the enactment. DeBowes v. DeBowes, 7 So.2d 4 (Fla. 1942).

"When [a] statute intercepts the common law, it must be strictly construed, if it is supplementary to the common law it does not displace it any further than is clearly necessary." Sullivan v. Leatherman, 48 So.2d 836, 838 (Fla. 1950). The limitation on an employee's common-law right to sue a corporate officer was part and parcel of the common law in effect when the amendment was passed. The legislative history reflects no intent to abrogate it and, therefore, it has not been displaced by the amendment. See Ellis v. Brown, 77 So.2d 845 (Fla. 1955) (construe statute as harmonious with common law); City of Hialeah v. State, 183 So. 745, 747 (Fla. 1938) ("[a]n intention to change the rule of the common law ... will not be presumed ... . The presumption is that no such change is intended unless the statute is explicit and clear in that regard.").

It is true that the 1978 amendment did not contain an explicit mention of "executives." Although seized on by the Fourth District as support for its interpretation of the statute, we do not regard the legislature's failure to expressly incorporate the common-law restriction as dispositive. As has been repeatedly recognized, "[l]egislative intent is of such paramount importance that it must be given effect even though it may contradict the strict letter of the statute." State v. Webb, 398 So.2d 820 (Fla. 1981).

Applying the foregoing principles, it is evident that the common-law limitation on employees' rights to sue managerial personnel or executives survived the 1978 amendment to section

440.11(1). The legislature meant to and did limit employees' rights to sue. They did not intend to create new and expanded liabilities for supervisors. The final version of the bill retains scope-of-employment language, indicating an intent to continue the immunity which previously attached to corporate executives' official functions.

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) discussed supra, p. 13. The incident underlying Cliffin occurred in 1979, post-amendment, yet the First District's analysis of whether a supervisor may be subjected to suit incorporated the limitations previously recognized.

The subject opinion expressly relates a goal of holding executives personally accountable for corporate catastrophes such as Three Mile Island, Love Canal and Bhopal.[4] It makes no distinction between employees and others, however, and overlooks the policy ramifications of permitting workers to sue their supervisors for breaches in the security of the workplace.

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[4] The hyperbole and emotional rhetoric which the lower court utilized in ignoring, rather than addressing, long-standing principles of corporate structure and business realities, reflect the lack of analysis that this case demands. Little jurisprudential or other intellectual reasoning accompanies these strange and emotional sophomoric references.

It is an axiom of all tort law that a duty cannot be defined absent reference to the status of the plaintiff. Non-employees victimized by such incidents as Bhopal are perfectly free to sue corporate executives in their individual capacities, on negligence or any other grounds. It is settled law that corporate officials may be liable to third parties for the torts of the corporation. See, e.g., Orlovsky v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981).

Employees have been treated differently since the advent of the workers' compensation system. In imposing a no-fault system, state legislatures intended to reduce litigation while ensuring that benefits would be made available to those injured or killed in the course of their occupations. The supreme court, in Seaboard Coast Line Railroad Co. v. Smith, 359 So.2d 427, 429 (Fla. 1978), affirmed the purposes of workers' compensation: "[Employer] immunity is the heart and soul of this legislation which has, over the years been of highly significant social and economic benefit to the working man, the employer, and the State."

The legitimate reasons for limiting employees' rights to sue are as vital today as they were when workers' compensation was enacted. This court cannot countenance the novel theory of plaintiff's suit without setting foot on a rocky and precipitous slope that will surely--and no doubt speedily--lead to an avalanche upon the workers' compensation program.

The statutory construction urged by plaintiff--and promis-

cuously embraced by the Fourth District--is particularly dangerous as it applies to the "unrelated works" exception. Plaintiff contended below that mere negligence is the standard for recovery so long as the fellow employee is geographically removed from the work site in question. The vast run of injured employees could target some supervisor at some level who was headquartered at a different site. To allow workers to sue their off-site supervisors on grounds of mere negligence related to the security of the workplace would be to invite cases over every conceivable type of hazard.

With perplexing naivete, the Fourth District acknowledged, but failed to address, some of the problems its expansive version of the statute will lead to: "[w]e hope the Supreme Court will also address the question of whether resourceful lawyers can circumvent the Statute by simply alleging intentional torts against the employer's officers as individuals." (A. 4) The answer to this question is obvious: the construction given the statute by the Fourth District is an open invitation for workers to storm the citadel and successfully create tort claims against executives with impunity.

It cannot be the policy of this state to immunize corporations from tort liability for certain policies or acts, while simultaneously subjecting executives who necessarily help adopt those policies or perform those acts to personal liability. The common-law rule is reasonable and necessary, and it was not displaced by the 1978 amendment.

After holding that the 1978 amendment precludes any analysis of the nature of the duty involved, the Fourth District went on to characterize Mr. Streeter's and Mr. Melcher's conduct as grossly negligent. A brief response to this gratuitous characterization is necessary.

C. The Fourth District's Characterization of Defendants' Conduct as Grossly Negligent was Gratuitous and Unwarranted.

The Fourth District framed its certified question in terms of executives who commit acts of gross negligence regarding safety in the workplace. Whether Mr. Streeter's or Mr. Melcher's conduct constituted gross negligence would be, of course, the ultimate issue of fact to be determined by a jury if this court decides that the duty element is satisfied. In response to the Fourth District's characterization, however, defendants point out that the factual record was never considered by the trial court, is far from complete, and the court's assumptions regarding the standard of care are open to challenge.

The issue adjudicated by the trial court was the pure legal question of whether Mr. Streeter and Mr. Melcher owed a personal duty to Suzanne Sullivan. At the time the court ruled, no depositions or other factual matter were before it. (R. 421-25) These materials were filed later. No party asked the trial court or appellate court to rule on the factual issue of whether the record showed gross negligence, and defendants

maintain that the Fourth District's consideration of and conclusions regarding the record are improper.

No expert testimony was incorporated in the record. The Fourth District's characterization of the absence of a guard as amounting to gross negligence flows from the assumed premise that guards in financial institutions deter criminals. Whether guards reduce incidents of violence and deter criminals is, however, open to sharp debate.

Literature in the field reflects a growing awareness that guards do not deter violent robberies, and actually increase the likelihood that violence will occur. Katzeff, "Banks Moving Away From Armed Guards In Branches," Boston Herald, April 7, 1986, at 32 ("[i]ncreasingly, bankers believe the presence of armed guards increases the chances of violence during a robbery ... ."); Wolff, "Vigilance Against Violent Crime Is Not Old-Fashioned," Bottomline 13, 15 (April 1986) ("[t]oday, however, more institutions view the armed guard as someone whose presence may provoke rather than prevent an outbreak of violence.").

Further, this school of thought is bolstered by the Bank Protection Act of 1968, 12 U.S.C. section 1882, which does not mandate armed guards. Its legislative history contains a report that "[a]rmed guards have been effective in discouraging crimes, although some bankers theorize that the presence of armed guards encourages violence." Sen. Rep. No. 1263, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Ad. News,

2530, 2534. There appears to be an emerging consensus within the industry that devices such as video cameras, silent alarms, bulletproof teller cages and exploding dye packs provide adequate security.

Atlantic Federal's testimony and conduct regarding guards are consistent with the legitimate, perhaps more persuasive, view that guards are of little or no benefit in preventing bank robberies and certainly increase the likelihood of serious injury or death if a robbery occurs. In the few Atlantic Federal branches to which guards were assigned, their main function was to control traffic, help "little old ladies" and otherwise promote good relations with the public. (R. 1084) New branches were temporarily assigned guards, not because of fear of robberies, but precisely because of the goodwill guards could generate. (R. 729-30; 1069) In the one branch to which a guard was assigned specifically because of a crime, the concern was not bank robberies but purse-snatchings and other incidents which happened in the parking lot. (R. 1087-89)

Each Atlantic Federal branch had an array of electronic security devices, which were carefully monitored and maintained. (R. 567-68; 1052-53) None of the Atlantic Federal managerial personnel associated the elimination of guards with a decrease in security. Atlantic Federal had a firm policy of cooperating with, not resisting, robbers. An armed guard would not have attempted to apprehend the robber. Nonetheless, Mr. Melcher testified that no branch manager's specific request for a guard

was ever turned down. (R. 777-79) This included a request by Suzanne Sullivan. The June 1, 1982 robbery occurred the Tuesday after Memorial Day. (R. 1075-77) Suzanne Sullivan requested a guard for the day after the July 4th weekend, and this request was approved. (R. 1075-77) No other such request was made. (R. 1080)

No clear industry standard associates armed guards with increased safety in banks. To the extent that the Fourth District made that assumption, or that its opinion gives the impression that not having a guard is grossly negligent on its face, it is unsubstantiated by the record or the law.

We come back to the narrow question certified by the Fourth District. This court's mission is to determine whether Mr. Streeter's and Mr. Melcher's security decisions, made within the scope of their corporate roles and responsibilities, can be a source of personal liability in tort to the plaintiff. That the corporation is immune from tort liability has already been determined. The same result should apply to the executives who, in all respects, functioned as alter egos for Atlantic Federal. The liability urged by plaintiff undermines the no-fault scheme of worker's compensation and imposes, on officials, a burden unjustified by fairness or policy considerations.

CONCLUSION

This court should answer the certified question in the negative. Summary judgment was properly granted for Mr. Streeter and Mr. Melcher because workplace safety is not an area for which an executive can be held personally responsible. The decision of the Fourth District should be quashed, and the final summary judgment for defendants Donald Streeter and Edward E. Melcher reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioners' Brief on the Merits has been furnished by mail, this 2nd day of June, 1986, to: JUDITH M. KORCHIN, ESQ., Steel Hector & Davis, Attorneys for Respondent Sullivan, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398; TALBOT D'ALEMBERTE, ESQ., Cocounsel for Respondent Sullivan, 320 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 33201; and ROBERT M. CURTIS, ESQ., Saunders, Curtis, Ginestra & Gore, Suite 302, 1750 East Sunrise Boulevard, Fort Lauderdale, Florida 33338.

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