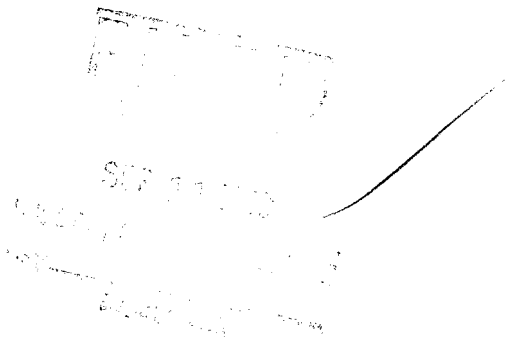
IN THE SUPREME COURT OF FLORIDA

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' REPLY BRIEF

REX CONRAD, ESQ.
VALERIE SHEA, ESQ.
CONRAD, SCHERER & JAMES
Attorneys for Petitioners
633 South Federal Highway
Post Office Box 14723
Fort Lauderdale, Florida 33302
Telephone: (305) 462-5500

TABLE OF CONTENTS

PAGE

Table of Authorities ..... ii-iv

Statement of the Case and Facts 1

Summary of Argument 12

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? 13

Conclusion 29

Certificate of Service 30

TABLE OF AUTHORITIES

PAGE

Adams v. Brickell Townhouse, Inc., 388 So.2d 1279 (Fla. 3d DCA 1980) 18

Blumhardt v. Hartung, 283 N.W.2d 229 (S.D. 1979) 23, 24

Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985) 25

Chambers v. Gibson, 145 Ga. App. 27, 243 S.E.2d 309 (1978) 25

Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1981) 25

Clark v. Better Construction Co., Inc., 420 So.2d 929 (Fla. 3d DCA 1982) 7

Cliffin v. State Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984) 2, 17, 26

Crawford v. Dickman, 72 Wis. 2d 151, 240 N.W.2d 165 (1976) 21

Cunningham v. Heard, 134 Ga. App. 276, 214 S.E.2d 190 (1975) 25

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) 17, 19, 20, 26

Ferraro v. Marr, 467 So.2d 809 (Fla. 2d DCA 1985), appeal after remand, 490 So.2d 188 (Fla. 2d DCA 1986) 26

Fisher v. Shenandoah General Construction, Co., Inc., 472 So.2d 871 (Fla. 4th DCA 1985) 18

Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955) 15, 16

TABLE OF AUTHORITIES
(continued)

PAGE

Garchek v. Norton Co.,
67 Wis. 2d 125, 226 N.W.2d 432 (1975) 21

Gerger v. Campbell,
98 Wis. 2d 282, 297 N.W.2d 183 (1980) 21, 22

Greathead v. Asplundh Tree Expert Co.,
473 So.2d 1380 (Fla. 1st DCA 1985) 26

Kranig v. Richer,
98 Wis. 2d 438, 297 N.W.2d 26 (1980) 21, 22, 23

Kranski v. Skowlund,
98 Wis. 2d 435, 297 N.W.2d 189 (1980) 21

Kruse v. Schieve,
61 Wis. 2d 421, 213 N.W.2d 64 (1973) 21

Laffin v. Chemical Supply Co.,
77 Wis. 2d 353, 253 N.W.2d 51 (1977) 21

McDaniel v. Sheffield,
431 So.2d 230 (Fla. 1st DCA 1983),
pet. for rev. denied, 440 So.2d
352 (Fla. 1983) 17, 18, 26

Mullarkey v. Florida Feed Mills, Inc.,
268 So.2d 363 (Fla. 1972) 15

Neal v. Oliver,
246 Ark. 377, 438 S.W.2d 313 (1969) 24

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) 1

Sullivan v. Streeter,
485 So.2d 893 (Fla. 4th DCA 1986) 19

Sunshine State News Co. v. State,
121 So.2d 705 (Fla. 3d DCA 1960) 14

TABLE OF AUTHORITIES
(continued)

PAGE

Vaughn v. Jernigan,
144 Ga. App. 745, 242 S.E.2d 482 (1978) 24, 25

West v. Jessop,
339 So.2d 1136 (Fla. 2d DCA 1976) 17, 21, 25

White-Wilson Medical Center v. Dayta Consultants,
486 So.2d 659 (Fla. 1st DCA 1986) 18

Wilson v. Hasvold,
86 S.D. 286, 194 N.W.2d 251 (1972) 23

Zurich Insurance Co. v. Scofi,
366 So.2d 1193 (Fla. 2d DCA 1979),
cert. denied, 378 So.2d 348 (Fla.
1979) 17, 19, 20, 26

Section 440.11(1), Florida Statutes (as
amended 1978) 14

Section 440.11, Florida Statutes (1981) 12

Section 440.11(1), Florida Statutes (1981) 13, 28

Section 440.11(1), Florida Statutes (1983) 13, 18

Malone, Workmen's Compensation Law and
Practice, section 366 (1981) 27

STATEMENT OF THE CASE AND FACTS

Certain representations in respondent/plaintiff Sullivan's brief require reply.

Sullivan's statement (p. 4) that the Fourth District in Sullivan v. Atlantic Federal did not characterize Atlantic Federal's conduct as omissions is plainly wrong. "Because the complaint in this case purports to establish the intentional tort of assault and battery on the basis of an omission [meaning, the failure to provide a security guard], it is insufficient as a matter of law to state a cause of action against Atlantic Federal." Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52, 54 (Fla. 4th DCA 1984), pet. for rev. denied, 461 So.2d 116 (Fla. 1985). While it is true that the court was not specifically discussing defendants Streeter and Melcher, it was their conduct for which plaintiff attempted to hold Atlantic Federal liable. As a result of his unsuccessful appeal, plaintiff's remedy against Atlantic Federal was limited to workers' compensation benefits. Plaintiff now seeks to hold petitioners/defendants Donald Streeter and Edward E. Melcher personally liable for the very same conduct.

Mr. Streeter and Mr. Melcher adhere to their original description of the procedural posture of the case when it was decided in the trial court. After the court orally granted summary judgment for defendants, plaintiff's counsel asked

permission to file depositions, and the court replied, "You do what you think is necessary to preserve your appellate position, because I'm making the decision based on [Cliffin] and what has been said here today, and I can't pretend that I based it on having read all the depositions that are not in the file." (R. 423) Plaintiff's representation that the court must have considered the material because its order was not entered for a month after the hearing is not faithful to the record. In truth, the delay is explained by the fact that plaintiff submitted, and the judge inadvertently signed, an order that incorporated factual rulings the court did not make. A month had elapsed by the time the order was vacated and an accurate order substituted. (See R. 355-60; 363-64; 428-29.)

Plaintiff now picks and chooses from the depositions and the allegations which, whether or not they were borne out in deposition, favor his position. A scrutiny of plaintiff's statement reveals that many of the "facts" he claims give rise to a gross negligence issue are dependent on the complaints for citation, notwithstanding the combined 329 pages of deposition testimony given by Mr. Streeter and Mr. Melcher. In many cases, knowledge with which plaintiff charged defendants in the complaint was simply not substantiated. Nonetheless, the unusual posture of the record has enabled plaintiff to select the "best of both" in an effort to create a source of a personal duty owed by the Atlantic Federal officials to Suzanne Sullivan. The result is a distorted picture of security at Atlantic Fed-

eral and the role of Mr. Streeter and Mr. Melcher with respect to it. Accuracy requires a brief reply statement.

A. Atlantic Federal's Organization Regarding Security.

The depositions plaintiff filed refute any notion that Mr. Streeter and Mr. Melcher had exclusive responsibility for security at Atlantic Federal. Atlantic Federal had a hierarchy of employees with responsibility in the area of security. Although Mr. Streeter and Mr. Melcher had authority over security, most security-related functions were delegated to responsible subordinates. Atlantic Federal had a full-time security officer at the vice president level, and several strata of individuals below her had security responsibilities as well:

Security Officer (Laura Speroni): This woman, a vice president, was in charge of Atlantic Federal's security at the time of Suzanne Sullivan's death. Her mandate was to attend seminars, read literature and otherwise stay abreast of developments in the field so that security at Atlantic Federal would be adequate. (R. 546, pp. 9-21) She was responsible for updating and circulating the security manual written by Mr. Melcher when, in 1969, he held the position filled by Laura Speroni in 1982. (R. 546, pp. 45-53) Ms. Speroni selected security devices to be used at each new branch. (R. 546, pp. 21-22) She monitored tests done regularly on the equipment, and completed forms regarding each branch's security which the

federal government required. (R. 546, pp. 37-44) Ms. Speroni had line responsibility for reporting on and evaluating robberies. (R. 546, p. 66) She made sure other branches were notified and filled out reporting forms required by federal law. (R. 546, p. 70)

Regional Manager (Robert Smith): About the only security measure not under Ms. Speroni's control was guards. At the time of Suzanne Sullivan's death, Atlantic Federal exercised discretion in the matter of security guards, assigning them to branches on request. (R. 705, pp. 73-75) Such requests would go from branch managers to Mr. Smith, their supervisor. (R. 1033, p. 45) Mr. Smith, who oversaw nineteen branches, was the intermediary between branch managers and Mr. Melcher, who would approve such requests. (R. 1033, p. 31) Mr. Smith conducted regular security meetings for the branch managers. (R. 1033, p. 27) He was responsible for monthly testing of all the security devices in each branch. (R. 1033, p. 20)

Branch Managers: Suzanne Sullivan and her counterparts had line responsibility for security in their branches. They were responsible for operating the security devices in their branches and for training their employees in holdup procedures. (R. 1033, pp. 27-28) They attended the regular security meetings conducted by Robert Smith. (R. 1033, p. 28)

Mr. Streeter and Mr. Melcher undisputedly had authority over security, just as they had over all aspects of Atlantic Federal's operations. Mr. Melcher, as Vice President of Opera-

tions, oversaw Laura Speroni, monitored robbery reports and made decisions regarding guards. (R. 705, pp. 68, 75-81, 42-44) He, in turn, reported to Mr. Streeter, who, as Atlantic Federal's President and chief executive, had power over the security budget, and who signed the certificate of compliance filed annually with the federal banking authorities. (R. 893, pp. 25-28, 52)

In an effort to create a more "hands-on" role for the defendants, plaintiff has, in Mr. Melcher's case, relied largely on things Mr. Melcher did years before Suzanne Sullivan's death, when he held a different position. For example, Mr. Melcher oversaw the drafting of Atlantic Federal's security manual in 1969. (R. 705, pp. 12-13) At the time of Suzanne Sullivan's death in 1982, he had not been directly responsible for Atlantic Federal's security program in many years. (R. 705, p. 13) In Mr. Streeter's case, plaintiff harps on the fact that Mr. Streeter signed the annual form without personally conferring with law enforcement officials on security matters. (R. 1033, p. 52) Yet he had a responsible subordinate whose job it was to keep current in security matters, and Atlantic Federal <u>was</u> in compliance with the standard of the Bank Protection Act. For the sound reasons discussed in defendants' initial brief, that Act did not require guards. (R. 705, p. 77) At the relevant times, in 1981 and 1982, Mr. Streeter and Mr. Melcher bore high-level administrative responsibility for security, including use of guards. Their experience with secu-

rity in general and guards in particular is quite different than plaintiff has depicted.

B. Atlantic Federal's Security Program and History of Using Guards.

Atlantic Federal is nearly totally reliant on electronic and other passive security devices. Each Atlantic Federal branch had an array of equipment, including exploding dye packs, surveillance cameras and an alarm system. (R. 546, p. 129; R. 103, p. 19; R. 705, p. 100) According to regional manager Robert Smith, Atlantic Federal's reliance on such devices is consistent with most other institutions. (R. 1033, p. 190)

Guards do not figure prominently in Atlantic Federal's system of security, and for good reason. The Atlantic Federal security officials were unanimous in their criticism of guards. Atlantic Federal did have guards at every branch for a time prior to 1981. Guards were hired from Wackenhut or a similar outside agency. (R. 1033, p. 50) They were expensive, and Atlantic Federal was displeased with the caliber of personnel. (R. 705, p. 23) They were not viewed as effective robbery deterrents; instead, their function was more in the nature of public relations. (R. 1033, p. 52) Guards would control parking, open doors and greet customers.

In 1981, guards became the exception rather than the rule at Atlantic Federal. The savings and loan industry was experiencing hard economic times, and all Atlantic Federal management

was asked to consider ways in which costs could be cut. (R. 893, pp. 28-29) The suggestion that regular guards be eliminated came from various sources. A number of branch managers proposed the idea, and it was endorsed by Laura Speroni. (R. 546, p. 100; R. 705, pp. 81-84) As a result, the decision was made to no longer employ guards at every branch. This decision met with no security-related opposition, although some managers were sorry to lose the customer relations assistance. (R. 1033, p. 52) Mr. Streeter and Mr. Melcher did not regard this decision as increasing the branches' vulnerability.

A number of exceptions were created to the general rule against use of guards. A decision was made to temporarily station a guard at each new branch, to assist with public relations during the grand opening phase. (R. 705, p. 25) The Davie branch had a guard during this period, but his removal was routine and was not accompanied by any protests. (R. 1033, p. 36)

A second exception was made for those branches which, for some reason, needed a full-time guard on hand. A guard was retained at one branch to assist the large number of elderly people that banked there. (R. 1033, p. 82) Another branch, Lauderhill, was permitted to retain a guard because it was in a bad area and there had been a number of crimes in the parking lot. (R. 1033, p. 76)

The 1981 policy change also placed discretion in branch managers to request guards as they felt necessary. Mr. Melcher

was adamant that, notwithstanding the elimination of regular guards, no individual manager's request for a guard was ever refused. (R. 705, pp. 73-76) This included a request from Suzanne Sullivan.

C. The Robberies at the Davie Branch.

Although the Davie branch did have a guard at the grand opening, no guard was stationed there during the October 1981 and June 1982 robberies. The second occurred on June 1, 1982, the first banking day after the three-day Memorial Day weekend. No guard had been requested between the first and second robberies. (R. 1033, p. 42) After the second robbery, Suzanne Sullivan made a number of calls to the FBI agent who investigated the robbery. The purpose of the calls was to ask his opinions on security. (R. 480, pp. 37-38) Mrs. Sullivan also spoke with a robbery detective with the City of Fort Lauderdale. (R. 678, pp. 16-23) As the upshot of these calls, and presumably on the advice of the two consultants, Suzanne Sullivan put in a request for a temporary guard. All the Atlantic Federal executives recall this request. (R. 546, p. 114; R. 1033, p. 40; R. 705, p. 120)

Mrs. Sullivan did not request a permanent guard. Reasoning that a repeat robbery would be most likely to occur on the next long weekend, she asked that a guard be stationed at her branch the day before and the day after the Fourth of July weekend. (R. 705, pp. 119-121) This request went up the line

to Mr. Melcher, who personally approved it. (R. 1033, p. 46)

Contrary to plaintiff's characterization that Mr. Streeter and Mr. Melcher ignored employee pleas, the record shows that when law enforcement officials recommended a guard, and Suzanne Sullivan requested one, her request was taken seriously.

D. Reply to the Ten Events Allegedly Demonstrating a Personal Undertaking.

On pages 44-45 of his brief, plaintiff lists ten factors which allegedly show conduct that subjects Mr. Streeter and Mr. Melcher to personal liability. In the argument section which follows, defendants will demonstrate that, on their face, these factors are an insufficient basis on which to hold Mr. Streeter and Mr. Melcher personally liable for Suzanne Sullivan's death. A brief reply is necessary for purposes of clarification, however.

1. Vulnerability of Branch: Neither Mr. Streeter nor Mr. Melcher testified as to any awareness that the Davie branch was particularly vulnerable.

2. Previous Robberies: Mr. Streeter and Mr. Melcher were aware of the two previous robberies. (R. 705, pp. 127-138)

3. Robbery Statistics: Mr. Streeter was not aware of such statistics, as he would refer such material to the security officer or other responsible individual. (R. 893, pp. 43-44) Mr. Streeter was aware of an increase of robbery incidents

at Atlantic Federal (including the guarded branch in which his own office was located), but did not monitor literature in the field. Mr. Melcher had more familiarity with robbery patterns, but regarded Atlantic Federal's security as adequate. (R. 705, pp. 64-67)

4. Fear of Employees: This allegation is a complete distortion. When specific requests for guards were made, they were always granted. (R. 705, pp. 73-79)

5. Guards Withdrawn: This is also a distortion. A guard was stationed at the Davie branch during the grand opening phase. This was in accordance with Atlantic Federal policy, and no one at the Davie branch protested the routine removal.

6. Security Certification: Mr. Streeter did sign security compliance forms annually. (R. 893, p. 52) He did not personally consult with law enforcement officials, but Atlantic Federal had a full-time security officer whose job it was to stay abreast of developments. (R. 893, p. 52) In point of fact, Atlantic Federal's security program did comply with federal requirements. (R. 705, p. 100)

7. Repeat Robberies: Neither Mr. Streeter nor Mr. Melcher testified to any awareness of individual robbers' likelihood to commit repeat robberies.

8. and 9. Robber at Large and Lives Directly Threatened: Neither Mr. Streeter nor Mr. Melcher had seen the report describing the June 1982 robbery prior to Suzanne Sullivan's

death. (R. 705, p. 136; R. 893, p. 108)

10. Additional Security Recommended: When Suzanne Sullivan, on the advice of law enforcement officials, requested a temporary guard at the Davie branch, her request was granted. (R. 1033, p. 46)

In sum, the record does not bear out plaintiff's characterizations. It does reflect an institution that, through its officials, took security seriously. Each branch had a full complement of security devices and a full-time security officer was employed to ensure the adequacy of Atlantic Federal's precautions. Its executives were legitimately skeptical of the value of guards. When the economic realities of 1981 and 1982 forced cutbacks, guards were targeted because they were not regarded as integral to security. Nonetheless, a guard would always be furnished on request, and Mr. Melcher personally approved a request by Suzanne Sullivan.

The most salient feature of the factual record is that it establishes that Mr. Streeter and Mr. Melcher's conduct, whether described as direct or indirect, occurred exclusively within the scope of their responsibilities as officers of the corporation. As is demonstrated in defendants' argument, plaintiff's inability to point to any out-of-role conduct on defendants' part disposes of his right to seek a tort recovery from them.

SUMMARY OF ARGUMENT

There is a sphere of conduct which, although in furtherance of a corporation's interests and duties, must be undertaken by individuals. To the extent that individuals function as the alter ego of their corporate employer, they are not truly third persons with respect to other employees of the corporation. Section 440.11, Florida Statutes (1981), does not even impact on corporate officials acting on the administrative level, because their conduct, no matter how direct, is chargeable to the corporation and shares in the corporation's tort immunity. This distinction between those conducting corporate business and other co-employees, although misapprehended by the Fourth District, is established in Florida law. Mr. Streeter and Mr. Melcher are not accused of operational-level negligence, or of breaching a duty owed independently of the employment context. Because all the acts alleged occurred on the policy level, and in connection with the discharge of a duty inalienably belonging to Atlantic Federal, the Fourth District erred as characterizing Mr. Streeter and Mr. Melcher as co-employees who may be subject to personal liability.

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.

Petitioners/defendants Donald Streeter and Edward E. Melcher assert, in reply to the argument of plaintiff and his amicus, that all the arguments and authorities cited by both sides and the lower courts can be synthesized in the following statement: A corporate official is not a co-employee, or fellow servant on whom personal liability can be imposed, when he is operating on the administrative or policy level, in furtherance of a duty owed to the corporation. Such an official's immunity is functional, rather than definitional or absolute. He may be subject to liability under either of two circum-

stances: gross negligence in connection with an operational-level aspect of his job, or for breach of a duty owed independently of the employment relationship. This analysis, expanded upon below, is consistent with workers' compensation concepts, the reasonable expectations of employees, and the law of Florida and national case law.

Preliminarily, to reply to the treatment by plaintiff and his amicus of section 440.11(1), Florida Statutes (as amended 1978), defendants disagree that the legislative history should be ignored. Effecting the intent of the legislature is the cardinal rule of statutory construction; surpassing in prominence the plain language and other canons of construction. Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). This is a case certified as being of great public importance, and it would be folly for the court to disregard the history that is available. Of course, that history reveals the legislature's intent to be diametrically opposed to that ascribed to it by plaintiff. The undisputed purpose of the 1978 amendment was to restrict the circumstances under which one employee may sue another, not create a species of liability that had not previously existed. That it did not incorporate a provision expressly including the limitation against corporate officials is explained by the analysis made by amicus for petitioner in its initial brief: an official qua official is categorically not a co-employee, as that term has historically been understood in workers' compensation law.

This leads to the crux of defendants' reply, and to the flaws which inhere in plaintiff's argument. The proposition that certain duties inalienably belong to the employer lies at the heart of workers' compensation law. Among them is the duty to provide a safe place in which to work. Harsh doctrines such as the fellow servant rule were put aside by legislatures which determined that responsibility for injuries in the workplace should be placed squarely on the employer, without regard to fault. Employers have assumed this burden and, as this court has repeatedly affirmed, the resulting system has been of great benefit to workers. Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363, 366 (Fla. 1972).

That responsibility for unsafe conditions lies with the employer does not mean that a fellow servant is absolved of individual responsibility under all circumstances. Pre-1978 amendment, a fellow servant could be subject to liability for ordinary negligence under Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955). Notably, Frantz involved the conduct of a company manager who caused the death of a worker--not by negligent management--but by driving negligently while the two were out on a field trip. In the quotation relied on by Sullivan (p. 28), the Frantz court surveyed other states' laws before concluding that the defendant could be liable as a fellow employee notwithstanding the fact that he was an officer or agent within the scope of his employment at the time.

The Frantz court did not touch the question of whether a corporate officer would have been liable for conduct that exclusively occurred on the policy level, for example, selection of a particular line of vehicles rather than the careless driving of an individual officer on an isolated occasion. Had the Frantz court confronted the former situation, it would have undertaken a different analysis--the analysis in later Florida cases and in the supreme courts of many other states.

Those states--and the Florida cases to which plaintiff devotes a scant three of fifty pages--acknowledge a distinction between the conduct of an official qua official and an official acting as a fellow servant engaged in a common undertaking to a master. While in the former capacity, an official is the master, and the scope of his tort liability or immunity must be measured accordingly.

Plaintiff attempts to reduce this distinction to simply whether the official's responsibility for an area is direct, or whether by virtue of delegation to a subordinate his responsibility is purely vicarious. This distinction is legitimate, for the concept of vicarious fault certainly is at odds with the exceptions to tort immunity in workers' compensation law. Even if a plaintiff demonstrates direct responsibility, however, the law of Florida and other states require him to make a further showing that the conduct occurred outside the sphere of protected policy-level activities.

This second requirement is firmly entrenched in Florida

law by way of the West-Zurich-Dessert-Clark-McDaniel-Cliffin sequence surveyed in petitioners' initial brief. West v. Jessop, 339 So.2d 1136, 1137 (Fla. 2d DCA 1976), first acknowledged this distinction by holding that a corporate official could not seek refuge in the exclusivity provisions when the act of which he was accused (wrenching plaintiff's neck) was clearly divorced from his official duties. At the other end of the spectrum, and instructive for present purposes, is McDaniel v. Sheffield, 431 So.2d 230 (Fla. 1st DCA 1983), pet. for rev. denied, 440 So.2d 352 (Fla. 1983), in which tort immunity was held applicable to corporate officials whose alleged negligence occurred entirely within that role. Defendants, Sheffields, owned nearly all the stock in the Sheffield Oil Company. Their employee, a clerk at a convenience store, was shot and killed by an unknown armed robber. Although entitled to workers' compensation benefits, the estate brought suit against the Sheffields individually, claiming they were negligent in failing to exercise their duty to protect the decedent from criminal conduct occurring on the premises.

As in the instant case, the Sheffields undoubtedly had authority over and some involvement in matters pertaining to security. Yet the court affirmed a summary judgment based on the pragmatic realization that the Sheffields did not individually owe the decedent any duty so long as they acted in their official, rather than individual, capacities. The Sheffields had no individual duty as a result of their conduct as corpo-

rate officers, because benefits available through workers' compensation superseded it.[1]

The need to distinguish alter ego from true agency conduct is most glaring in a Sheffield situation, where there is complete identity between the defendants and the corporation. For some reason, despite its mentions of Bhopal and Three Mile Island, the Fourth District did not discuss the Sheffield case or the potential for injustice that exists when an officer, who is not really a third person to the plaintiff, is subjected to liability for corporate negligence. Mr. Streeter's and Mr. Melcher's role vis-a-vis security parallels the Sheffields'. The constitution of the corporate entity may be different, but the immunity analysis should not be.[2]

---

[1] The Sheffield case was relied on by the court in White-Wilson Medical Center v. Dayta Consultants, 486 So.2d 659 (Fla. 1st DCA 1986), to explain that even under the line of cases permitting a third party to sue a corporate officer for a corporate tort, the officer "must be alleged to have acted tortiously in his individual capacity in order to be individually liable." 486 So.2d at 661. Adams v. Brickell Townhouse Inc., 388 So.2d 1279, 1280 (Fla. 3d DCA 1980), and like cases cited by plaintiff and his amicus, do not advance his argument because the instant conduct of Mr. Streeter and Mr. Melcher was undertaken qua officers.

[2] In Fisher v. Shenandoah General Construction Co., Inc., 472 So.2d 871 (Fla. 4th DCA 1985), the Fourth District held that the exclusivity provisions of section 440.11(1), Florida Statutes (1983), protects employees from tort liability even for allegedly intentional torts. It then added in passing, "we

Another case consistent with the requirement that an officer's conduct take place outside the sphere of policy, yet inexplicably passed over by the Fourth District and plaintiff, is 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). This decision squarely undercuts any contention that plaintiff's personal-versus-vicarious distinction is the only one required by Florida law. In Dessert, the defendant was even more close to the safety situation than were Mr. Streeter and Mr. Melcher. He had the title of "Supervisory Representative of Security Control," was responsible for administering a security program, made determinations of whether a particular condition was a hazard, and was allegedly "the individual that would have initiated any remedial action if that was deemed necessary." Id. at 341. Yet he was deemed to be filling the role of corporate alter ego for purposes of a suit involving a workplace injury. Dessert followed the reasoning of Zurich Insurance Co. v. Scofi, 366 So.2d 1193 (Fla. 2d DCA 1979), cert. denied, 378 So.2d 348 (Fla. 1979), put in subsequent history, which held that employers can only meet or not

---

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." By the time Sullivan v. Streeter was decided, the Fourth District apparently abandoned this legitimate concern.

meet their duties to employees through supervisors. The employer's immunity must logically extend to supervisors who have committed no affirmative act of negligence beyond the scope of the employer's non-delegable duty.[3]

Zurich, also shunned by the Fourth District, disposes of any notion that the immunity defendants seek to invoke here is an elitist construct. The Fourth District seemed to react to the distinction defendants draw as one designed to relieve them of a standard of care to which lower-level employees are subject. The Zurich court emphasizes, however, that "[tort immunity] would apply to any employee, regardless of rank or title, so long as that employee was the agency for carrying out the employer's duties." 366 So.2d at 1195. Practically speaking, this immunity may be more frequently available to those in the upper echelons, but this is because of their alter ego role rather than job classification.

The national case law is strikingly consistent, drawing the personal-versus-vicarious distinction but additionally requiring an official to be acting outside his official role

---

[3] Plaintiff takes pains to critique the "affirmative act" terminology because it allegedly does not encompass nonfeasance. However, Dessert, not cited by plaintiff, contains a lengthy analysis of this very issue. It concludes that affirmative act really means independent act--breach of a personal duty owed--and includes non as well as misfeasance. 392 So.2d at 342-43.

before he will even be considered a co-employee. The law of Wisconsin, relied on in West and other Florida cases, has probably gone furthest in defining the type of conduct for which an official can properly invoke immunity.

Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W.2d 64 (1973), established the proposition that a corporate official can subject himself to liability when he commits an affirmative (i.e., independent) act of negligence, not associated with his general duty to his employer, that increases the risk of injury. After several intervening decisions,[4] the Wisconsin Supreme Court, in 1980, decided a trilogy of cases concerning the personal liability of corporate officials. Gerger v. Campbell, 98 Wis. 2d 282, 297 N.W.2d 183 (1980); Kranski v. Skowlund, 98 Wis. 2d 435, 297 N.W.2d 189 (1980); Kranig v. Richer, 98 Wis. 2d 438, 297 N.W.2d 26 (1980).

In Gerger, the plaintiff's complaint contained clear allegations of personal and direct responsibility on the part of the defendant, a company president who designed and installed a modification to a punch press. Negligence in these tasks allegedly led to plaintiff's injuries. The court held the defendant's conduct took place within his official capacity,

---

[4] Laffin v. Chemical Supply Co., 77 Wis. 2d 353, 253 N.W.2d 51 (1977); Crawford v. Dickman, 72 Wis. 2d 151, 240 N.W.2d 165 (1976); Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975).

and was protected notwithstanding the assertion that he personally put the employee at risk.

> What we have in the factual posture of this case is a situation where the president of the corporation, as a result of a corporate decision, modified a machine, a tool furnished by the employer, and negligently did so in a manner that made it unsafe. This was a corporate decision undertaken in the course of the employer's nondelegable duty to furnish equipment and machinery to be used by the employee. This was corporate negligence, not co-employee negligence; and it does not differ in any legally significant manner from any other negligence perpetrated by the employer, against whom the only remedy is worker's compensation. Here there was no doffing of the hat of an officer or supervisory employee of the corporation and the donning of the hat of a co-employee. Everything that [defendant] did was as a consequence of his function in the discharge of his duties to his employer, the corporation. It did not constitute the negligence of a co-employee, even though his affirmative act increased the risk to a corporate employee who subsequently used the machine. [Citation omitted.] There was no departure from the corporate and supervisory function to that of the function of a co-employee.

98 Wis. 2d at ____, 297 N.W.2d at 187.

Likewise, in Kranig v. Richer, 98 Wis. 2d 438, 297 N.W.2d 26, the court concluded that allegations of increased risk are not enough, unless the conduct of the official is undertaken in a personal capacity.

> The fact that [defendant] may have acted negligently or affirmatively in a way that increased the risk of harm to [plaintiff] is insufficient to make him personally

> liable. The affirmative risk-causing acts which would impose liability must be performed in a capacity other than in the performance of a nondelegable duty on behalf of the employer. [Citation omitted.] The breach of duty must occur in the performance of personal--not employer's--duties owed another employee.

98 Wis. 2d at ____, 297 N.W.2d at 28.

South Dakota courts have drawn a distinction between conduct within and outside the corporate capacity. Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d 251 (1972), involved a company president who was operating a tractor at a work site when it collapsed and injured the plaintiff. The court found he could be liable as a co-employee for any personal negligence in connection with the tractor's operation; he could not be liable for any conduct or conditions falling within the ambit of responsibility of the corporate employer.

Subsequently, in Blumhardt v. Hartung, 283 N.W.2d 229 (S.D. 1979), plaintiff sued the company president and secretary, who were also safety officers, after he was injured in a fall through a floor. The court began its analysis by stating that actionable negligence must be founded on a duty of care owed by the person injured or to the class of which he is a member. It then reasoned,

> The negligence the appellant complains of is [defendant's] failure to provide a safe place for her to work as required by state law. ... [I]f [defendant] was merely a third party fellow-employee, he had no duty to furnish a place for appellant to work--

> safe or otherwise. If the corporation was the employer and [defendant] was the mere president, he was not personally liable in tort or under the compensation act for injuries sustained by corporate employees who are injured on defective corporate owned and maintained machines and equipment.

Blumhardt, 283 N.W.2d at 232, quoting Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969). The Blumhardt court concluded that the Hartungs were not individually responsible, despite their security duties, for working conditions which were the responsibility of the company. They had duties as officers, but injuries resulting from failures in that capacity were subject to workers' compensation. The defendants came within that umbrella of immunity.

Georgia law is similarly consistent. Vaughn v. Jernigan, 144 Ga. App. 745, 242 S.E.2d 482 (1978), involved a defendant/company president who frequently visited the workplace and knew plaintiff was operating a saw in an unsafe condition. Workers' compensation was held to represent plaintiff's only remedy because

> appellant's knowledge of the allegedly defective condition, as well as his authority to correct it, came to him ... through his active involvement in the management of the employer corporation as its chief executive officer. Whatever breach of duty he may have committed ... [was] solely through nonfeasance and while acting as "alter ego" of the corporation ... . Accordingly, he cannot properly be labeled a "third-party tortfeasor."

144 Ga. App. ___, 242 So.2d at 483. Accord Chambers v. Gibson, 145 Ga. App. 27, 243 S.E.2d 309 (1978); Cunningham v. Heard, 134 Ga. App. 276, 214 S.E.2d 190 (1975).

These cases are compatible with Florida's Workers' Compensation Act, and common law before and after the 1978 amendment. They can also be reconciled with the cases relied on by plaintiff, which, for the most part, involved negligence by persons acting as foremen or direct supervisors. Because line supervisors are most likely to act in a mixed alter ego/co-employee capacity, they are most vulnerable to liability. Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985), recognized this, citing Larson for the proposition that employers can avoid liability for the tortious conduct of someone "[who] is not the employer in person nor a person who is realistically the alter ego of the corporation, but merely a foreman, supervisor, or manager." In such a case, according to Larson, "the legal and moral reasons for permitting a common-law suit against the employer collapse ... ." 469 So.2d at 157. In Brown, a supervisor was held subject to liability for fondling a coworker. His status in the company gave him no automatic refuge from personal liability.

The test for distinguishing protected corporate conduct from true co-employee conduct is not difficult to apply. As one would expect, an official cannot invoke immunity for a well-meaning battery (West); a paddling (Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1981); or fondling (Brown). A super-

visory employee may also be personally accountable for negligence (post-amendment, gross negligence) in connection with the operational-level aspects of his job. Ferraro v. Marr, 467 So.2d 809 (Fla. 2d DCA 1985), appeal after remand, 490 So.2d 188 (Fla. 2d DCA 1986); and Greathead v. Asplundh Tree Expert Co., 473 So.2d 1380 (Fla. 1st DCA 1985), both involve supervisors who drove unsafely. Greathead's supervisor allowed him to sit on top of a moving piece of equipment; Ferraro's supervisor ran over him while moving a car in a parking lot. It does not offend workers' compensation precepts to hold these individuals individually accountable if, indeed, they were grossly negligent or fell within one of the other exceptions.

By contrast, Florida courts have reasoned that an official is not personally liable for the shooting death of an employee by an armed robber (McDaniel). In Cliffin v. State Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984), officials were found immune from liability for conditions which permitted a custodial worker in a mental hospital to be murdered. Dessert and Zurich both relieve individuals, whose corporate responsibilities included safety, from liability to plaintiffs injured by allegedly unsafe conditions.[5]

---

[5]In a footnoted reference, plaintiff claims that imposing liability on officials such as Mr. Melcher and Mr. Streeter will not affect employers, as they will be under no onus to insure against or indemnify for gross negligence (p. 24). This unsupported assertion is naive. Mr. Melcher was not asked the question,

The sense and symmetry of these decisions are clear. An employer, under workers' compensation, bears responsibility for any failure of those who do its business to properly discharge its non-delegable duties. It can disassociate itself from co-employee conduct that is intentional or grossly negligent; however, the responsibility for corporate negligence remains with it under all circumstances. Plaintiff should not be able to drive a wedge between a Florida employer and its executives in this case, simply because the law importunes him. Mr. Streeter's and Mr. Melcher's conduct occurred, in total, on the policy level and as alter egos for Atlantic Federal. Because there is no additional conduct on their part which departs from their

---

but Mr. Streeter, in deposition, testified that he does have an indemnity agreement with Atlantic Federal that pertains to the instant suit. (R. 893, p. 119) It is difficult to conceive of an executive officer who would serve without one:

> If officers in the upper echelons of management find themselves exposed to the often disastrous prospect of liability for the almost unlimited number of employee accidents that could be in some way attributed to their neglect, they will be impelled in practice to exact liability insurance from the corporate employer. The result may be a denial to the insurer of much of the practical advantage of the exclusive remedy provision.

Malone, Workmen's Compensation Law and Practice, section 366 (1981).

official roles, plaintiff's remedy is limited to those benefits available from the corporation.

Far from agreeing with the plaintiff's description of the lower court's opinion as "cogent," we perceive it to be reactionary and unsound. It fails to recognize the dichotomy between an official's operational-level or personal duties, and those which arise from his policy functions and have no private counterpart. Even though humans must be the instruments of corporate functions, it is inimical to workers' compensation and to employment relationships to hold they can be personally liable for corporate breaches of corporate duties. The Fourth District failed to apprehend the subtleties of the issue before it. Its certified question should be answered in the negative because officials, as such, are not co-employees within section 440.11(1), Florida Statutes (1981), and should not be subjected to tort actions.

CONCLUSION

Petitioners/defendants Donald Streeter and Edward E. Melcher respectfully request the court to answer in the negative the question certified by the Fourth District; to vacate the Fourth District's opinion; and reinstate the final summary judgment in defendants' favor.

Respectfully submitted,

CONRAD, SCHERER & JAMES
Attorneys for Petitioners
633 South Federal Highway
Post Office Box 14723
Fort Lauderdale, Florida 33302
Telephone: (305) 462-5500

By: VALERIE SHEA for
REX CONRAD
VALERIE SHEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioners' Reply Brief has been furnished by mail, this 10th day of September, 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.

CONRAD, SCHERER & JAMES
Attorneys for Petitioners
633 South Federal Highway
Post Office Box 14723
Fort Lauderdale, Florida 33302
Telephone: (305) 462-5500

By: VALERIE SHEA for
REX CONRAD
VALERIE SHEA