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

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

Petitioners,

DCA-4-NO: 85-241

vs.

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

Respondent.
_____/

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

REPLY BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION ON BEHALF OF PETITIONERS

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STATEMENT OF THE CASE AND THE FACTS

Amicus curiae, the Florida Defense Lawyers Association, adopts and incorporates by reference the statement of the case and the facts in its initial brief.

CERTIFIED QUESTION

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The Fourth District was incorrect in characterizing Defendants actions as "gross negligence". The facts do not show that Defendants engaged in conduct which would make the exception to worker's compensation immunity applicable.

II. Corporate Officers Do Not Owe a Personal Duty to Co-Employees to Prevent an Unsafe Workplace.

An unbroken line of Florida cases holds that corporate officers do not owe a duty to employees to provide a safe workplace. This duty is owed to the corporation.

III. Affirmative Act is required.

The cases uniformly hold that a corporate officer must engage in an "affirmative act" of negligence to be personally liable.

IV. Gross Negligence

The Fourth District was incorrect in holding that the complaint stated a claim for gross negligence or that there were issues of fact to preclude summary judgment.

V. Unrelated Works

The "line of business" test rather than the "separate location" test should be used to determine whether employees are assigned to "unrelated works".

ARGUMENT

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 MR. STREETER AND MR. MELCHER INDIVIDUALLY OWED A DUTY TO CO-EMPLOYEES TO PROVIDE A SAFE PLACE TO WORK.

I. Plain Language of the Statute

Amicus curiae respectfully suggests that the Fourth District Court of Appeal erred in characterizing the actions of Defendant Streeter and Defendant Melcher as "gross negligence". The facts regarding Streeter's and Melcher's conduct are set forth in Petitioner's brief and reply brief and will not be restated at length here. There is no question that both Defendants were executives responsible for corporate policy decisions and that other employees were responsible for carrying out these decisions.

Defendants' actions do not constitute "gross negligence". The Fifth District Court of Appeal in Weller v. Reitz, 419 So.2d 739 (Fla. 5th DCA 1982) upheld a summary judgment in favor of a co-employee based on the

worker's compensation exclusive remedy. The Court held that the fact that the defendant co-employee: (a) started the vehicle without getting inside it; (b) started the vehicle without knowing what gear it was in; (c) started the vehicle while plaintiff was in front of it; (d) started the vehicle without checking to see if the brakes were on; (e) was sorry the accident happened and "should have known better," did not consititute gross negligence to come within the exception to Section 440.11, Florida Statutes.

The facts in Weiler v. Reitz come much closer to the requisites for a claim for gross negligence[1] than the facts here. Even assuming that the defendants were co-employees of Suzanne Sullivan, they were not guilty of the type of conduct which would make the exception to worker's compensation immunity applicable.

II. Corporate Officers Do Not Owe a Personal Duty to Co-Employees to Prevent an Unsafe Workplace

As stated in amicus curiae's initial brief, the 1978 amendment to Section 440.11 must be considered in light

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(1) a composite of circumstances which, together, constitute a clear and present danger; (2) an awareness of such danger, and (3) the tortfeasor's conscious, voluntary act or omission in the face thereof which is likely to result in injury. Glaab v. Caudill, 236 So.2d 180, 185 (Fla. 2d DCA 1970).

of the common law which existed at the time the statute was enacted.

The law at that time was that corporate officers and supervisors were not liable in tort to co-employees when carrying out a duty owed by the corporate employer to its employees, Zurich Insurance v. Scofi, 366 So.2d 1193 (Fla. 2d DCA 1979); Dessert v. Electric Mutual Insurance Co., 392 So. 2d 340 (Fla. 5th DCA 1981); Clark v. Better Construction, 420 So.2d 929 (Fla. 3d DCA 1982); however, if the corporate officers or supervisors breached a personal duty to the co-employee or committed an affirmative act of negligence, then he could be held liable. West v. Jessop, 339 So.2d 1976); Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1982).

In Clark and Dessert, supra, the court held that supervisors or executives have no individual duty to provide employees a safe place to work, but that this was the employer's non-delegable duty.

The cases cited by Respondent, Wright v. McCord, 8 Div. 188, 88 So.150 (S. Ct. Ala. 1920) and Givens v. Savona Mfg. Co., 196 N.C. 377, 145 S.E. 681 (N.C. 1928) do not alter the holdings in Clark and Dessert. Further, these cases were decided prior to the enactment of

worker's compensation statutes in Alabama or North Carolina.[2]

Respondent asserts 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 ..." (citing Scott v. Sun Bank of Volusia County, 408 So.2d 591 (Fla. 5th DCA 1982). Amicus curiae asserts that under Florida law corporate officers, as agents of the corporation, do not owe a personal duty to third parties, such as employees, to provide a safe place to work. This duty is owed by the employer.

Respondent seeks to "bootstrap" himself by assuming that a duty exists. This is the fallacy in his argument. Without a duty, there can be no negligence.

There is no duty here, therefore, there is no liability.

III. Plaintiff must prove an "affirmative act" of negligence.

Petitioner misconstrues the holding in West v. Jessop by saying that "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

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(2) See Title 25, Chapter 5, Code of Alabama; Chapter 97-1, General Statutes of North Carolina.

have been held liable. The West court noted that

> A corporate entity must necessarily conduct its business through its corporate officers and to permit in every case a third party action against these officers ... would often reduce the protection of "exclusiveness" to only a theoretical refuge.

The court went on to say, "... there is no reason why a stockholding corporate officer should come under the umbrella of exclusive protection when he negligently injures another employee through an affirmative act."

Contrary to Petitioner's assertion, West does require an affirmative act of negligence on the part of a corporate officer to avoid the workers' compensation exclusive remedy provisions.

In Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1982) in which the company president paddled a company manager with a board, causing him injury, the court, in holding that the company president was not immune from suit, note that "... the willful affirmative nature of his action place him sufficiently beyond his corporate capacity and subjected him to liability as a co-employee for his negligence.

In Zurich Ins. Co. v. Scofi, 366 So.2d 1193, 1194 (Fla. 2d DCA 1979), a wrongful death case against a

supervisor as a result of a trench cave-in, the court stated:

> ...there is nothing in the record to indicate that the supervisor committed any such affirmative act of negligence which went beyond the scope of his employer's duties. Simply stated, the "something extra" as required by Kruse was missing in the instant case.

The same rule was followed in Cliffin v. State Department of Health & Rehabilitative Services, 458 So. 2d 29 (Fla. 1st DCA 1984). As an alternative ground for affirming summary judgment in favor of the defendants, who were the Department of Health & Rehabilitative Services, the director of the Mentally Disordered Sex Offender Unit; the administrator of the North Florida Evaluation and Treatment Center and the District Adminstrator of HRS, District III, the court noted "the failure of the complaint to allege affirmative acts of negligence going eyond the scope of the empoyer's non-delegable duty." The opinion does not state what was alleged in the complaint, so the statements in Respondent's brief as to what could have been alleged are pure speculation.

Respondent seeks to cloud the issue by inserting the question of whether a corporate officer can be held individually liable for his torts. This is not an issue

in this case. The issue is whether Defendants are immune from liability under the workers' compensation statute.

IV. There are no allegations of a personal breach of duty.

All of the facts listed by Respondent to support the contention that Defendants breached a personal duty show only that Defendants were acting as corporate officers and making corporate decisions. The fact that Defendants personally made the decisions does not change the nature of their acts. Respondent cites no cases in support of this contention; which is contrary to the line of cases cited in Subsection 11.

V. The Fourth District erred in holding the complaint states a cause of action and that there is a fact issue regarding your negligence.

In Glaab v. Caudill, 236 So.2d 180 (Fla. 2d DCA 1970), which involved an auto accident and the Florida guest statute, the Second District stated the elements of gross negligence: (1) a composite of circumstances which, together, constitute a clear and present danger; (2) chargeable knowledge or awareness of danger; (3) a conscious disregard of consequences.

The Glaab court gave examples of what constitutes a "clear and present danger", such as operation of a vehicle under the influence of alcohol or drugs,; driving

while subject to blackouts or fainting spells, driving while extremely fatigued. These illustrate that a "clear and present danger" means a danger which is immediate and observable. The facts alleged here show at most a possiblity of danger.

In Lil' champ Food Stores v. Holton, 475 So. 2d 726 (Fla. 1st DCA 1985) rev. den. 484 So.2d (Fla. 1986) a customer of a convenience store was killed in the parking lot of the store by a robber. Her estate sued Lil' Champ, alleging that Lil' Champ was "grossly negligent" in failing to institute a formal security program to prevent armed robberies, in failing to hire any security consulting services and in failing to install silent alarms in stores, notwithstanding the fact that Lil' Champ's officers knew that armed robberies had occurred in the past, were likely to recur and had resulted in injury to employees and customers.

The First District stated that: "In our view the evidence in this case fails to demonstrate even "gross negligence" much less willful and wanton misconduct. Id at 729.

Similarly, the evidence and facts pleaded here do not demonstrate "gross negligence".

VI. Defendants were not assigned to "unrelated works".

Respondents ask this court to adopt a definition if "unrelated works" which would make employees at a separate work site "assigned to unrelated works". Under this definition any business with more than one office or location would have employees assigned to "unrelated works". Amicus curiae respectfully suggest that such a definition will result in a rash of lawsuits and the virtual elimination of the co-employee immunity.

Amicus curiae asserts that the "same line of business test" proposed in its initial brief is more practical and more fair.

CONCLUSION

Amicus curiae, the Florida Defense Lawyers Association, respectfully request the court to answer the question certified by the Fourth District in the negative; to vacate the decision of the Fourth District Court of Appeals; and to reinstate the final summary judgment in favor of defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing amicus curiae brief has been furnished by U.S. Mail to Judith M. Korchin, Esquire, Steel, Hector & Davis, Attorneys for Respondent Sullivan, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398; Talbot D'Alemberte, Esquire, Co-counsel for Respondent Sullivan, 320 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 33201; Robert M. Curtis, Esquire, Saunders, Curtis, Ginestra & Gore, Suite 302, 1750 East Sunrise Boulevard, Ft. Lauderdale, Florida 33338; and Valerie Shea, Esquire, Conrad, Scherer & James, Attorneys for Petitioners, Post Office Box 14723, Ft. Lauderdale, Florida 33302, this 10th day of September, 1986.

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