OA 3-4-87

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 69,559

SCOTT RANDALL STANLICK and LAURA L. STANLICK, THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT FOR POLK COUNTY; and the HONORABLE DENNIS P. MALONEY,	)
Petitioners,	) On Certification of Direct Conflict from the District Court of Appeal, Fourth District
vs.	)
DONALD KAPLAN and JOHN KAPLAN,	)
Respondents.	)

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONERS

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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Statement of the Case and of the Facts

Amicus Curiae the Academy of Florida Trial Lawyers ("the Academy") adopts by reference the Statement of the Case and Facts of the petitioners' initial brief.

Summary of the Argument

The Court is presented with a direct conflict between the Second and Fourth District Courts of Appeal on a narrow question of statutory interpretation. All parties agree that the two decisions under review[1/] are controlled by the 1978 amendments[2/] to the immunity provisions of the Florida Workers' Compensation Law.[3/] If the traditional canons of statutory construction are applied -- indeed, if the 1978 amendments are simply given their plain and unambiguous meaning -- then the applicable rule of law is clear: supervisory employees, like all other employees, partake of the employer's immunity from suit **unless** they act "with willful and wanton disregard or unprovoked physical aggression or with gross negligence." The Academy respectfully submits that the Second District strayed from this plain language of the controlling statute so as to reach an erroneous conclusion.

1/ Kaplan v. Circuit Court, Tenth Judicial Circuit, 495 So.2d 231 (Fla. 2d DCA, Sept. 24, 1986), rev. granted, (No. 69,559); Sullivan v. Streeter, 485 So.2d 893 (Fla. 4th DCA 1986), rev. granted, (No. 68,697). A motion to consolidate these cases is pending.

2/ 1978 Laws of Florida Chapter 78-300.

3/ Florida Statutes §§440.01 et seq. (Supp. 1979).

ARGUMENT

I. THE 1978 AMENDMENTS TO THE FLORIDA WORKERS' COMPENSATION LAW CLEARLY AUTHORIZE ACTIONS AGAINST FELLOW EMPLOYEES, WHETHER MANAGERIAL, SUPERVISORY OR OTHERWISE, FOR ACTS OF GROSS NEGLIGENCE.

Section 440.11, Florida Statutes (Supp. 1979), recognized by all parties as the controlling law, provides:

> "The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow-employee, with willful and wanton disregard or 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."

We respectfully suggest that it requires a rather convoluted rendition of the statute to come to the conclusion that certain upper level employees are **immune** for the consequences of their willful and wanton misconduct, their unprovoked physical aggression or their gross negligence.

The cardinal principle of statutory construction is, of course, that the language of the statute must, if possible, be given its plain meaning. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). To do so in the present case makes it quite clear that **no** employee is entitled to invoke the Workers' Compensation immunity when he acts with gross negligence:

> "Such fellow-employee immunities [i.e., 'the same immunities from liability enjoyed by an employer' which extend 'to each employee of the employer when such employee is acting in furtherance of the employer's business'] **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...." (Emphasis added).

The statute makes no distinction between bottom level employees, foremen, supervisors, middle managers, executives, or corporate officers; as discussed below, it would hardly be fair to do so; and clearly it would not be appropriate to graft onto the statute an additional greater immunity for officers and "supervisors".4/

4/ It is not clear from the lower Court's opinion just how far down the corporate ladder this greater immunity would extend. See Kaplan, 495 So.2d at 232.

The basis for the Second District's conclusion that such an additional, greater immunity survived the 1978 amendments is the notion that the term "employee" is ambiguous. As stated by the lower Court, "the amendment does not change the definition of a coemployee." 495 So.2d at 233. The Court then held that, because earlier decisions had limited the liability of officers and supervisors, these upper level employees were not true "coemployees" and could not be considered "employees" within the meaning of the 1978 amendments. 495 So.2d at 232-34.

This rationale for avoiding the plain language of the 1978 amendments is not persuasive. The pre-amendment decisions cited by the Second District did **not** turn on a definition of the word "employee"; rather, they rested on a judicially crafted rule of immunity for upper management. See West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976); Cliffin v. State, Dept. of Health & Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984); Albert v. Salemi, 431 So.2d 345 (Fla. 2d DCA 1983); Clark v. Better Construction Co., 420 So.2d 929 (Fla. 3d DCA 1982); Chorak v. Naughton, 409 So.2d 35 (Fla. 3d DCA 1982); Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA), pet. for review denied, 399 So.2d 1141 (Fla. 1981); and Zurich Insurance Co. v. Scofi, 366 So.2d 1193 (Fla. 2d DCA), cert.

denied, 378 So.2d 348 (Fla. 1979). Thus it begs the question to say that, because management may have previously been immune under a judicially crafted rule,[5/] then management employees therefore must not be "employees" within the meaning of the 1978 amendments.

To determine who is or is not an "employee" for purposes of the immunity granted by Section 440.11, one need only turn to the definitions set forth in Section 440.02. Not surprisingly, the specific definition of "employee" within the Workers' Compensation Law includes corporate officers, executives, managers and supervisors:

> "When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:
>
> * * *
>
> "(11)(a) 'Employee' means every person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed.

5/ Specifically, the "affirmative act of negligence" rule adopted in West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976).

> **"(b) 'Employee' includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.** However, any officer of a corporation may elect to be exempt from coverage under this chapter by filing written certification of the election with the division as provided in §440.05. Services shall be presumed to have been rendered the corporation in cases when such officer is compensated by other than dividends upon shares of stock of such corporation owned by him.
>
> "(c) 'Employee' includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and elects to be included in the definition of employee by filing notice thereof as provided in §440.05." (Emphasis added).

Thus, the Second District was simply incorrect; the definition of "employee" as it is used in Section 440.11 is not ambiguous and it definitely includes officers and supervisors.

Even if there were any ambiguity in the term "employee" (and in light of the statutory definition, there clearly is none), then the Second District would nevertheless have erred in construing the 1978 amendments against the plaintiff: the Workers' Compensation employer's immunity is in derogation of the

common law[6] and should therefore be **narrowly** construed, see, e.g., Ellis v. Brown, 77 So.2d 845, 847 (Fla. 1955); and as a general matter the Workers' Compensation Law is always to be liberally construed in favor of the injured worker. Hardaway Construction Co. v. Brooks, 416 So.2d 837 (Fla. 1st DCA 1982). See Rogers Enterprises v. Williams, 401 So.2d 138 (Fla. 1st DCA 1981).

Surely, an interpretation of the 1978 amendments which runs counter to the express language of the statute and which overlooks the express legislative definition of the key term "employee" cannot be said to follow these established principles of statutory interpretation.[7]

6/ At common law, employees were liable for their negligent injury of fellow workers. Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955).

7/ In view of the clear legislative pronouncement on employee liability in the 1978 amendments, we submit that the completely different "affirmative act of negligence" standard adopted in West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976) and later decisions is no longer germane or even good law. This follows from the fact that the 1978 amendments use the statutorily defined term "employee" and preclude assertion of the "employee's" immunity in cases of "gross negligence." Moreover, it is clear that the Legislature specifically intended to provide for employee liability for gross negligence because in defining the immunity of a workers compensation insurance carrier, adopted (footnote continued on next page)

II. SOUND POLICY CONSIDERATIONS SUPPORT THE PLAIN LANGUAGE OF THE STATUTE.

If one accepts the view that legislative intent "is determined primarily from the language of the statute" and that the "plain meaning of the statutory language is the first consideration," St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982), then perhaps it is unnecessary to argue that a straightforward interpretation of Section 440.11 is supported by logic and by sound policy considerations. However, given the mischief that would result from the Second District's holding, we think it appropriate to comment briefly on these subjects.

The Florida Workers' Compensation Law is intended to be remedial; to ameliorate the harshness of early common law doctrines; and to assure prompt and certain compensation to the injured worker. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203, 209 (Fla. 1st DCA 1981). Under present law, the injured worker receives substantially less compensation than he

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7/ [Continued.]
in 1970, see 1970 Laws of Florida Chapter 70-25 §1, the immunity was abrogated only in the case of "willful and unprovoked physical aggression." Florida Statutes, Section 440.11(2). Thus, the Legislature has clearly distinguished between fellow employees (who **may** be liable for their gross negligence) and workers' compensation carriers (who are not).

would be entitled to as a plaintiff in a negligence suit, but he is also relieved from the obligation to prove fault on the part of the employer. Theoretically, the employer's liability for compensation for work-related injuries should provide an incentive to maintain a reasonably safe workplace.8/

None of these policy considerations which underly the employer's immunity, however, extend to the case of an employee who acts with gross negligence or willful and wanton misconduct. Indeed, it is only in the most extraordinary circumstances that the law provides immunity for such conduct. To hold otherwise would permit the extremely rare manager who is guilty of outrageous wrongdoing to hide behind the employer's immunity; such a holding would contradict the remedial purpose of the Workers' Compensation Law and would eliminate any check on the Workers' Compensation system; and it would under certain conditions be a disincentive to provide a safe workplace.

The facts of this case present an ideal illustration. If there is no possible exposure to the Kaplans beyond their limited

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8/ The theoretical incentive to maintain a safe workplace will make economic sense as long as it is more costly to compensate the injured worker than it is to maintain a safe workplace. As long as another employee's ordinary negligence is the operative cause of a worker's injury, it makes sense to extend the employer's immunity to him.

liability for medical and compensation benefits under the Workers' Compensation Law (and which limited liability presumably is or could have been covered by insurance), and if the Kaplans conclude that because of that limited liability it is profitable to subject their fellow employees to the illegal conditions alleged in the complaint, then the assumptions supporting the workers' compensation system break down; the "willful and wanton" manager subjects his fellow employees to unlawful and highly dangerous conditions; and when the fellow employees are injured or killed as a result, the original remedial purposes of the law are not only defeated, but are subverted. As stated by Judge Wentworth of the First District Court of Appeal in a closely analogous context:

> "While the legal and moral reasons for allowing a civil suit may collapse when a corporate employer has no prior notice of an employee's offensive propensities, as is generally the case when an injury results from an isolated incident of assaultive behavior, **that rationale does not extend to situations where the employer knows of persistent abusive behavior and passively condones the situation.**
>
> **"... I perceive no legislative intent to shield employers, individual or corporate, from direct civil liability for intentional torts or actions based on employer conduct which might**

inferentially support a finding of willful intent." Schwartz v. Zippy Mart, Inc., 470 So.2d 720, 725 (Fla. 1st DCA 1985)(en banc)(Wentworth, J., concurring) (Emphasis added).

CONCLUSION

The Second District Court of Appeal erroneously failed to apply the plain meaning of the 1978 amendments to Section 440.11; in so doing, the Court granted a blanket immunity to management tortfeasors that the Legislature never intended and which has the potential to do great harm. We respectfully urge the Court to quash the decision of the district court and to remand with instructions to further remand to the trial court for further consistent proceedings.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY a copy of the foregoing has been furnished to Joel S. Perwin, Esquire, Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida, 33130; Wagner, Cunningham, Vaghan & McLaughlin, P.A., 708 Jackson Street, Tampa, Florida, 33602; and Steven D. Merryday, Esquire, Post Office Box 3333, Tampa, Florida, 33601, by mail, this 1st day of December, 1986.

ATTORNEY