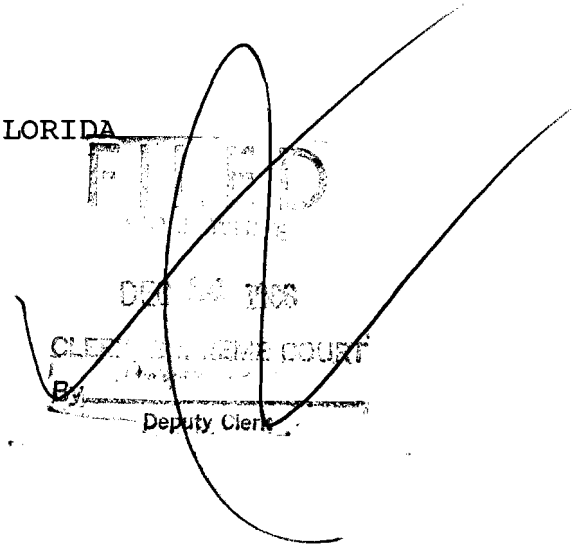
IN THE SUPREME COURT OF FLORIDA
CASE NO. 69,559



SCOTT RANDALL STANLICK, et al,

Petitioners,

vs.

DONALD KAPLAN, et al,

Respondents.
_____/

BRIEF ON AMICUS CURIAE
FLORIDA DEFENSE LAWYERS ASSOCIATION
ON BEHALF OF RESPONDENTS

Leslie King O'Neal
MARKEL, McDONOUGH & O'NEAL
Post Office Box 1991
Orlando, Florida 32802
(305) 425-7577
Counsel for Amicus Curiae
The Florida Defense
Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

STATEMENT OF THE CASE AND THE FACTS

Scott Stanlick and Laura L. Stanlick filed suit against Donald Kaplan, John Kaplan and Kaplan Industries, Inc. (Employer) seeking damages for injuries allegedly suffered by Scott Stanlick (Employee) "while engaged in his occupation".

The Kaplans are the major shareholders, directors and officers of Employer. Employee worked for Employer as a long haul, over-the-road, truck driver. He was involved in a collision while operating a truck within the scope of his employment. Plaintiffs allege that the collision and Employee's alleged injuries were caused by Employee's being required to work excessive hours in violation of unspecified federal laws, and that the Kaplans are individually liable for these alleged damages. Employee received Workers' Compensation benefits for his injuries.

Defendants answered and filed a Motion to Dismiss the Complaint on the grounds that the Workers' Compensation Act bars the claim against all the Defendants. The trial court granted the Motion to Dismiss Kaplan Industries, Inc., but denied the Motion to Dismiss the Kaplans individually.

The Kaplans filed a Petition for a Writ of Prohibition in the Second District Court of Appeal on the grounds that Workers' Compensation was the Plaintiffs'

exclusive remedy. The Second District Court of Appeal granted the writ of prohibition. It certified that its decision was in conflict with the decision in Sullivan v. Streeter, 485 So.2d 893 (Fla. 4th DCA 1986), review granted (Fla. 1986). This appeal has been consolidated with Streeter.

POINT ON APPEAL
(restated by amicus curiae)

WHETHER THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT PLAINTIFFS' CLAIM AGAINST THE EMPLOYERS' CORPORATE OFFICERS INDIVIDUALLY WAS BARRED BY SECTION 440.11(1), FLORIDA STATUTES (1981).

SUMMARY OF ARGUMENT

The common law rule that corporate officers have the corporate employer's immunity from suit while acting as corporate officers was not changed by the 1978 Amendments to the Workers' Compensation Act. Corporate officers are not co-employees when carrying out the corporate employer's duty to its employees. Corporate officers are co-employees if they commit affirmative acts of negligence which go beyond the scope of the employer's duty. Such acts require personal, direct contact between the officer and the co-employee. Mere policy-making is not an affirmative act.

Even assuming the 1978 Amendment did change the common law rule regarding corporate officers' liability, the complaint did not allege sufficient facts to state a cause of action for gross negligence or any of the other exceptions to workers' compensation immunity in Section 440.11 Florida Statutes (1985).

ARGUMENT

THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT PLAINTIFFS' CLAIM AGAINST THE EMPLOYERS' CORPORATE OFFICERS INDIVIDUALLY WAS BARRED BY SECTION 440.11(1), FLORIDA STATUTES (1981).

I. The 1978 Amendments to the Workers' Compensation Act did not change the common law rule that corporate officers are immune when acting as corporate officers.

The crux of this case is whether corporate officers, executives and supervisors, individually, owe a duty to employees to provide them with a safe place to work. Petitioners make the novel argument that in this case, unlike Streeter v. Sullivan, (Case No: 68,697), the individuals "acted affirmatively and intentionally to make the workplace far more unsafe" (Petitioners' brief at 12; emphasis in original). However, this is merely an exercise in semantics, since the record shows that Defendants acted only in a policy-making role.

The second issue in this case, as in Streeter, is whether corporate officers are considered to be co-employees when they are acting in furtherance of the corporate employers' non-delegable duties. It is the position of amicus curiae, the Florida Defense Lawyers Association, that the answer to both of these questions is "no" and that the District Court of Appeal was correct in holding that Plaintiffs' exclusive remedy was workers' compensation.

McDaniel v. Sheffield, 431 So.2d 230 (Fla. 1st DCA 1983), pet. for rev. den. 440 So.2d 352 (Fla. 1983) was a wrongful death suit against the corporate officers and majority shareholders of Sheffield Oil Company. The decedent, who was employed by the company as a clerk at a combination convenience store and service station, was shot and killed there by an unknown armed robber. After receiving workers' compensation benefits, his estate sued the Sheffields individually, alleging they were negligent in failing to protect the decedent from criminal conduct on the premises. The trial court granted summary judgment in favor of the Sheffields, which the First District affirmed, stating:

> However, even if we assume the Sheffields were co-lessees of the property, they 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, agents and employees. The Sheffields had no duty to the decedent as a result of any acts performed as corporate officers. 431 So.2d at 231.

In West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976) the Second District Court of Appeal held that a corporate officer is not considered to be a co-employee when he is carrying out a duty owed by the corporate employer to its employees. When acting in such capacity, the officer is clothed with the corporation's immunity from suit. However, the court held that if the corporate officer

commits an affirmative act of negligence which goes beyond the scope of the employer's nondelegable duty, the officer may be liable. This rule was followed in several other decisions. Zurich Insurance v. Scofi, 366 So.2d 1193 (Fla. 2d DCA 1979), cert. den. 378 So.2d 348 (Fla. 1979); Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA 1981); Clark v. Better Construction Co., 420 So.2d 929 (Fla. 3d DCA 1982). This was the common law of the State of Florida when the 1978 Amendments to the Workers' Compensation Act were adopted.

Plaintiffs argue that the rule in Frantz v. McBee, 77 So.2d 796 (1955) was the only common law in existence at the time of the 1978 Amendment to the Workers' Compensation Act. However, this is not the case. The common law rule in Frantz v. McBee, supra, had been modified by West v. Jessop, supra, at the time of the 1978 Amendments.[1] The 1978 Amendment must be read in light of all of the common law which existed at the time of its passage, not only the decisions which Plaintiffs prefer.[1]

Plaintiffs argue that they alleged sufficient affirmative acts of negligence to satisfy the West v. Jessop test. However, Plaintiffs concede that all of the Kaplans' acts were " . . . creation and enforcement of . .

---

1. Black's Law Dictionary (rev. 4th Ed.) defines "common law" as: ". . . the common law comprises the body of those principles and rules of action . . . which derive their authority solely from usages and customs . . . or from the judgments and decrees of the courts . . ."

policy." (Petitioners' brief, page 12). A policy decision is simply not an affirmative act. In Zurich v. Scofi, 3600 So. 2d 1195 (Fla. 2d DCA 1979) the decedent was killed in a trench cave-in. Although the facts are not clearly stated in the opinion, apparently the trench was not properly braced, in violation of state safety rules. The trial court instructed the jury that violation of these rules was negligence. The Second District reversed, stating:

> This was the negligence charged to the appellant. If a state safety statute 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. Thus, under such circumstances, the supervisor should be entitled to the immunity of the employer. 366 So.2d at 1195.

Thus, the Second District held that "making the workplace more unsafe" by failing to enforce a safety rule did not constitute an affirmative act which would make a supervisory employee personally liable. This is exactly the situation here. Plaintiffs allege that Employer had a policy which violated certain unspecified federal laws and regulations. The employer's responsibility can be discharged only through its officers and employees. They are the alter ego of the employer and are entitled to the same immunity.

In Kruse v. Schieve, 61 Wis.2d 64, 213 N.W. 2d 64 (Wis. 1983) the Wisconsin Supreme Court discussed the question of "how does a corporate officer become also a co-employee?" The court stated that "clearly, something extra is needed over and beyond the duty owed to the employer." Id. at 67. The court went on to discuss the cases of Hoeverman v. Feldman, 220 Wis. 557, 265 N.W. 580 (1936) and Wasley v. Kostmakar, 50 Wis. 2d 738, 184 N.W. 2d 821 (1971) as examples of a corporate officer acting as a co-employee. The court stated: "In Hoeverman that added element was provided by the company president directing a particular employee to operate a particular machine in a particular manner. In Wasley, that additional factor was provided by the corporate officer actually driving the truck which caused the fatal injury. In both cases we deal not with any general duty of responsibility owed the employees but an affirmative act which increased the risk of injury." 213 N.W.2d at 67, 68.

The common thread of these cases is personal, direct contact between the corporate officers and the employee which causes injury. If a corporate officer wrenches an employee's neck, this is an affirmative act, West v. Jessop, supra; if a corporate officer paddles an employee, this is an affirmative act, Chorak v. Naughton, 409 So.2d 35 (Fla. DCA 1981); if a corporate officer engages in

loading a truck and causes an accident, this is an affirmative act, Pitrowski v. Taylor, 55 Wis.2d 615, 201 N.W.2d 52 (Wis. 1972).

However, when a corporate officer or supervisor merely makes or carries out company policy, this is not an affirmative act which makes him personally liable. Zurich v. Scofi, supra; Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA 1981). There were no allegations of any "affirmative acts" by Respondents which would make them personally liable. Consequently, the District Court of Appeal was correct in holding that Plaintiffs' exclusive remedy was workers' compensation and correctly issued the writ of prohibition.

II. The complaint did not contain sufficient allegations of ultimate fact to state a cause of action for gross negligence or willful and wanton misconduct.

The elements of gross negligence are: (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, Glaab v. Caudill, 236 So.2d 180 (Fla. 2d DCA 1970). In Glaab the court gave examples of what constitute a "clear and present danger", such as operation of a vehicle while under the influence of alcohol or drugs; driving while subject to blackouts or fainting spells; driving while extremely fatigued. These examples indicate that a "clear and present danger" is one which is

immediate and observable. The facts alleged here show, at most, a possibility of danger.

In Lil Champ Food Stores v. Holton, 475 So.2d 726 (Fla. 1st DCA 1985), pet. for rev. den. 484 So.2d 352 (Fla. 1986), a customer of a convenience store was killed in the store's parking lot 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 install silent alarms in stores; and in failing to hire any security consulting services, notwithstanding the fact that Lil Champs' 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." 475 So.2d at 726.

Similarly in Weller v. Reitz, 419 So.2d 739 (Fla. 5th DCA 1982) the Fifth District court of Appeal upheld a summary judgment based on workers' compensation immunity in favor of a co-employee who: (1) started a vehicle without getting inside it; (2) started a vehicle without knowing what gear it was in; (3) started a vehicle while a co-worker (the plaintiff) was in front of it; (4) started a vehicle without checking to see if the brake was on.

The Fifth District stated:

> The circumstances and facts support the conclusion that appellee was guilty of simple negligence. Appellant has not met the burden of showing facts from which gross negligence could reasonably be inferred. Thus the [workers' compensation] statute applies to provide immunity for appellee since appellant has already received his workers' compensation benefits. 419 So.2d at 741.

The facts alleged here do not show "a conscious and voluntary act or omission which is likely to result in grave injury when in the face of a clear and present danger of which the alleged tortfeasor is aware." Weller v. Reitz, supra at 741, quoting Glaab v. Caudill, 236 So.2d 780 (Fla. 2d DCA 1970).

In the recent case of Fisher v. Shenandoah General Construction Co., 11 FLW 602 (Fla. 1986) this court held that an employer did not commit an intentional tort by ordering an employee to work inside a pipe which the employer knew to be filled with dangerous gas that would in all probability result in injury to the employee. Accord, Lawton v. Alpine Engineered Products, Inc. 11 FLW 619 (Fla. 1986). Although both these cases dealt with the liability of the corporate employer rather than that of corporate officers, if the corporation does not commit an intentional tort by such acts, neither do the corporate officers.

Consequently, the complaint fails to allege

sufficient ultimate facts to state a cause of action for gross negligence or willful and wanton misconduct or for any of the other exceptions to workers' compensation immunity in Section 440.11 (1985).[2] Therefore, the District Court of appeal was correct in holding that workers' compensation was Plaintiffs' exclusive remedy and in issuing the writ of prohibition. This order should be affirmed.

---

2. Section 440.11 Florida Statutes (1985) provides "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 . . ."

CONCLUSION

The District Court of Appeal was correct in granting the writ of prohibition because Plaintiffs' exclusive remedy was workers' compensation. This ruling should be affirmed.

Respectfully submitted,

Leslie King O'Neal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joel S. Perwin, Esquire, Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; Wanger, Cunningham, Vaghan & McLaughlin, 708 Jackson Street, Tampa, Florida 33602; and Steven D. Merryday, Esquire, Post Office Box 3333, Tampa, Florida 33601 this 22nd day of December, 1986.

LESLIE KING O'NEAL, ESQUIRE
MARKEL, McDONOUGH & O'NEAL
19 East Central Boulevard
Post Office Drawer 1991
Orlando, Florida 32802
(305) 425-7577
Counsel for Amicus Curiae
The Florida Defense
Lawyers Association