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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,559

SCOTT RANDALL STANLICK, et al.,

Petitioners,

vs.

DONALD KAPLAN, et al.,

Respondents.

_____/

PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

AUTHORITIES

I
STATEMENT OF THE CASE AND FACTS

This case presents a single question--whether the workers' compensation statute, §440.11(1), Fla. Stat. (1981)--which incorporates a 1978 amendment to that sub-section--deprived the trial court of jurisdiction to entertain a worker's claim against the two major owners and officers of his corporate employer, for gross negligence and wanton recklessness causing serious personal injury. A similar question is presently before the Court in *Streeter v. Sullivan*, Case No. 86,697, which has been briefed and is awaiting oral argument.[1/]

The complaint was brought by Scott Stanlick and his wife against Kaplan Industries, Inc., and the respondents, Donald and John Kaplan (hereinafter "the Kaplans") (A. 1). It alleged that Stanlick drove a truck for Kaplan Industries, and while engaged in that occupation "fell asleep at the wheel of the truck and was involved in a serious collision which resulted in the Plaintiff becoming permanently and totally disabled from his occupation . . ." (*id.*). For our purposes, it is vital to note that the Stanlicks' complaint did not simply charge Donald and John Kaplan with the negligent failure to provide a safe working environment. To the contrary, it charged them with having affirmatively and intentionally created an unsafe working environment, in direct violation of applicable federal regulations. The complaint charged (A. 2):

> (6) That such accident and injury occurred as the direct and proximate result of the Plaintiff being required to work excessively long hours in direct violation of Federal law

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[1/] The respondents in the instant case have filed a motion to consolidate the instant proceeding with the *Streeter* case, because both cases "present the same issue of statutory interpretation and should be considered together." The undersigned counsel has agreed to this motion, because it seems to make sense that the two cases should be argued and considered together. That does not mean, however, that both cases necessarily should be resolved in the same way. To the contrary, as we will demonstrate, the instant case is significantly more favorable to the plaintiff's position than is *Streeter*, in light of the significant allegations of affirmative wanton and reckless conduct in the instant case. *See* discussion *infra*.

> regarding the times when he was allowed to drive trucks over the road under the rules of the Interstate Commerce Commission.
>
> (7) That the Defendants, DONALD KAPLAN and JOHN KAPLAN, for a number of months prior to the above incident willfully, intentionally and regularly required their drivers for KAPLAN INDUSTRIES, INC. to operate the trucks in violation of Federal law, required the drivers to falsify their driving time, required the drivers to drive when they were tired and ill, and requiring them thus to drive heavy over-the-road trucks under extremely dangerous circumstances.

Thus, the complaint charged the Kaplans with having affirmatively made the drivers' jobs more dangerous, in violation of federal law.

In addition, the complaint charged that the defendants had acted affirmatively to enforce their reckless and unlawful policy, despite actual knowledge that its enforcement would pose a danger to Scott Stanlick in the particular instance in which that policy was imposed upon him (A. 2):

> (8) That at the time the Plaintiff fell asleep, the Defendants had been notified and were well aware that the Plaintiff had operated the truck far in excess of the amount of time allowed by law; that Defendants knew that Plaintiff had driven through extremely bad weather on the return trip to Florida but insisted that Plaintiff drive the load directly to Miami and Defendants expected Plaintiff to do so within a time frame that made it impossible to accomplish without driving in excess of the amount of time allowed by law; and that the Plaintiff knew that if he did not do so he would lose his job and the Plaintiff being required to support his family and himself and fearful of losing his job if he did not comply, attempted to drive such truck but, nevertheless, fell asleep at the wheel and crashed causing the serious injuries herein involved.

Thus, the complaint alleged that the Kaplans had acted affirmatively in creating a reckless policy in willful violation of the law; and had acted affirmatively in enforcing that policy against Scott Stanlick despite actual knowledge of the danger. It is not surprising, therefore, that the complaint charged the Kaplans with "wilfull and wanton misconduct which directly and proximately caused the plaintiff's injury," and with "wilfully and intentionally violat[ing] such laws for personal and corporate economic self-

gain" (A. 3). On the basis of the factual allegations of the complaint, there can be little question that a reasonable jury might agree with the Stanlicks' charge of wanton and reckless misconduct. Indeed, it is vital to note that the Kaplans conceded this point in their Petition for Writ of Prohibition in the district court, by acknowledging that the only issue for the court was "whether the immunity granted employers by Florida's Workers' Compensation Act bars an action by an employee against a corporate officer for injuries resulting from the officer's gross negligence in failing to provide a safe place to work." In short, the Kaplans have acknowledged that the Stanlicks' complaint is facially sufficient to make out a case of gross negligence. On the basis of the foregoing, that is an understatement.[2/]

The trial court granted Kaplan Industries' motion to dismiss, but denied the Kaplans' (A. 5). The Kaplans filed a Petition for Writ of Prohibition in the District Court of Appeal of Florida, Second District, which granted the petition to prohibit the trial court from exercising jurisdiction over the Stanlicks' claim against the Kaplans (A. 6-12). The district court concluded that the provisions of §440.11(1) before the 1978 amendment did not permit an action against a corporate officer or supervisor even for wanton recklessness or gross negligence, and that the 1978 amendment did not change this pre-existing state of the law. But the district court acknowledged that this conclusion conflicts with the fourth district's decision in *Sullivan v. Streeter*, 485 So.2d 893 (Fla. 4th DCA), *review granted* (Fla. 1986), and thus certified the conflict to this Court (A. 12).

As we have noted, the briefs in *Sullivan*, including an *amicus* brief, have all been filed, and in that light we will attempt in the following pages to avoid a mere repetition

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[2/] *See generally Carraway v. Revell*, 116 So.2d 16 (Fla. 1959); *Bridges v. Speer*, 79 So.2d 679, 682 (Fla. 1955); *Sullivan v. Streeter*, 485 So.2d 893, 895 (Fla. 4th DCA 1986); *Brown v. Winn-Dixie Montgomery, Inc.*, 469 So.2d 155, 159 n.4 (Fla. 1st DCA 1985) (per curiam); *Glaab v. Caudill*, 236 So.2d 180, 185 (Fla. 2nd DCA 1970). *Compare Weller v. Reitz*, 419 So.2d 739, 741 (Fla. 5th DCA 1982).

of arguments. Where appropriate, we will reference passages from the *Streeter* briefs, and will primarily devote our efforts to developing positions which were not raised in those briefs.

II
ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STANLICKS' CLAIM AGAINST THE KAPLANS IS BARRED BY §440.11(1), FLA. STAT. (1981).

III
SUMMARY OF THE ARGUMENT

First, we will demonstrate that the district court ignored the plain meaning of the statute. That statute affords immunity to all employees--whether supervisory or not--who act in furtherance of the employer's business, unless such an employee--whether supervisory or not--has acted with gross negligence or recklessness. There is no ambiguity in this language. It draws no distinction between classes of employees, and thus clearly subjected the Kaplans to liability for their gross negligence without the need for resort to any principles of statutory construction.

Moreover, even assuming *arguendo* that the statute is ambiguous, it is clear that any such ambiguity must be resolved in favor of the Stanlicks' cause of action. We say this first because any ambiguity in the statute should be resolved against the infringement of pre-existing common-law rights, and there can be no question that at common law, a worker was entitled to sue a co-worker even for an act of simple negligence, and certainly for gross negligence, whether or not the defendant was a supervisory employee performing his employer's obligation to make the workplace safe, and whether or not the employer was also vicariously liable. The statute should not be construed to infringe upon that pre-existing common-law right.

Second, our interpretation of the 1978 amendment is consistent even with pre-1978 versions of the statute, as interpreted by the Florida courts. Under those interpreta-

tions, even a supervisory co-employee was liable for committing an act of gross negligence or recklessness, because such an act, by definition, was outside the scope of the employer's make-safe obligation. Thus, even if the 1978 amendment did not change the prior statute in this respect, the Stanlicks have stated a cause of action.

Third and finally, we will establish that regardless of any pre-existing versions of the statute, it is clear that the 1978 amendment permits the Stanlicks' action. The obvious purpose of that amendment was to create a uniform set of standards governing all co-employees---supervisory or not. It protects all employees whenever they are acting in furtherance of the employer's business--whether within or without make-safe rubric--but denying that protection when such employees--all such employees--act with gross negligence or recklessness. That is the manifest purpose of the new legislation, under which the Stanlicks clearly have stated a cause of action. The district court's conclusion to the contrary is wrong.

IV
ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STANLICKS' CLAIM AGAINST THE KAPLANS IS BARRED BY §440.11(1), FLA. STAT. (1981).

We believe, and will demonstrate, that the language of the 1978 amendment clearly and unambiguously permits the Kaplans' action against the Stanlicks, without resorting to any of the rules of statutory construction. It is therefore unnecessary to consider the legislative history of the statute, the judicial interpretations of prior incarnations of the statute, or the extent to which the statute should be construed in light of its underlying purpose or its asserted abrogation of pre-existing common-law rights.

The 1978 amendment provided in relevant part as follows:

> [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 and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunity 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 . . . .

Regardless of any pre-existing interpretation of §440.11(1), the 1978 amendment, by its plain language, provides that an employee is vicariously entitled to his employer's statutory immunity when he is "acting in furtherance of the employer's business," ***unless*** the defendant/employee has acted "with willful and wanton disregard or unprovoked physical aggression or with gross negligence . . . ." As the statute plainly says, "[***s***]***uch*** fellow-employee immunity" (our emphasis)--that is, the very vicarious immunity which the statute has just provided--"shall not be applicable" in the case of "willful and wanton" conduct, or "gross negligence . . . ."

Of course, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931).[3/] The present statute says absolutely nothing to insulate fellow employees who happen to occupy supervisory jobs. To the contrary, it explicitly says that the employer's immunity will apply to "***each***" employee (our emphasis)--not to ***some*** but to ***each*** employee--but that "[***s***]***uch*** fellow-employee immunity" (our emphasis)--that is, the immunity afforded "each" employee--does not apply in the case of wanton and willful conduct. A supervisory employee of a corporation is still an employee, and the 1978 amendment applies to "each employee." That language is clear and unambiguous. It requires no statutory construction. The district court therefore erred as a matter of law, and its

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[3/] *Accord, State v. Egan*, 287 So.2d 1 (Fla. 1973) (and cases cited at footnote 4); *Fidelity & Casualty Co. of New York v. Bedingfield*, 60 So.2d 489, 495 (Fla. 1952) ("plain and unambiguous" amendment to workers' compensation immunity must be "construed within its four corners").

order should be reversed.

If the Court agrees with us about that, it need proceed no further. The entire remainder of this brief assumes *arguendo* that the statute is somehow ambiguous, and must be construed according to the principles of statutory construction. On that assumption, we must consider Florida law at three different points in time--at the time of the common-law rule; at the time of §440.11(1), as interpreted by the courts, before the 1978 amendment; and at the purpose of the 1978 amendment in light of the pre-existing state of the Florida law.

A. The Common-Law Rule.

There can be no question that at common law, a fellow employee--whether high-level or low level--was liable to a co-employee for even his simple negligence, and certainly of gross negligence, whether or not the employer was also vicariously liable.[4/] As the Supreme Court said explicitly in *Frantz v. McBee Co.*, 77 So.2d 796, 798 (Fla. 1955)--in which the plaintiff's action was brought against "the agency manager in charge of [the defendant's] Jacksonville office," *id.* at 797: "There can be no doubt, that, at common law, servants mutually owed to each other the duty of exercising ordinary care in the performance of their service and were liable for a failure in that respect which resulted in injury to a fellow servant." Thus, the Supreme Court continued, only in those states which have abrogated the common law by adoption of workers' compensation statutes is it held "that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation and whose acts are such as to render the corporation liable, is entitled to the immunity given by the Act . . . ." *Id.*

But as *Frantz* holds explicitly (because *Frantz* itself concerned a supervisory employee), there was no common-law immunity for ***any*** employees, whether supervisory

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4/ We refer the Court to the Respondent's answer brief in *Streeter*, at pages 26-30 and 41-43.

or not. And as the U.S. Supreme Court held in *Northern Pacific R. Co. v. Herbert*, 116 U.S. 642, 6 S. Ct. 590, 29 L. Ed.2d 755, 759 (1886), the co-employee/defendant was individually liable even if his conduct had also subjected the employer to vicarious liability, because the co-employee/defendant, "in exercising the master's authority has violated the duty he owes as well to the [plaintiff] servant as to the corporation."[5/] This common-law rule was consistent with the general principle that a corporate officer was individually liable for a tortious act injuring any third party, even if the corporation was also liable: "If . . . a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort."[6/]

Thus in *Wright v. McCord*, 8 Div. 188, 88 So. 150, 151-53 (Ala. 1920), the employer's superintendent was liable to a co-employee for ordinary negligence in failing to provide a safe workplace even though the plaintiff already had settled with the employer, because of "the independent duty of the servant to so use such properties or agencies under his control as not to injure third parties, and irrespective of his relation to his principals."

5/ As the Supreme Court noted in *Northern Pacific*, the employer's vicarious responsibility was significantly limited under the "fellow-servant rule," under which, as a general proposition, the plaintiff's salary from his employer was said to be consideration from the employer for any risk of injury by a fellow employee, thus immunizing the employer from any additional vicarious liability in such circumstances, remanding the plaintiff solely to his action against the offending co-employee. 29 L. Ed. at 758. But at common law, one of the exceptions to the fellow-servant rule was that the employer was vicariously responsible if the co-employee had caused injury while performing the employer's non-delegable duty of providing a safe place to work, because that is a "duty [which] he [the employer] cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission." *Id.* Thus, the common-law rule was that both the employer and the co-employee were liable if the co-employee's conduct constituted a breach of the employer's make-safe obligation.

6/ *Orlovsky v. Solid Surf, Inc.*, 405 So.2d 1363, 1364 (Fla. 4th DCA 1981). *Accord, In Re Firestone*, 26 Bankr. 706, 714 (S.D. Fla. 1982); *Adams v. Brickell Townhouse, Inc.*, 388 So.2d 1279, 1280 (Fla. 3rd DCA 1980). *See* Respondent's Answer Brief in *Streeter* at pp. 41-43 & nn.15, 16.

And in *Givens v. Savona Manufacturing Co.*, 196 N.C. 377, 145 S.E. 681, 682 (1928), both the employer and his superintendent and foreman were liable for ordinary negligence in failing to provide a safe place to work, because the superintendent and foreman "owed [the plaintiff] the duty, while he was at work at a place which would become unsafe, under certain conditions, to exercise due care to prevent the happening of these conditions . . . ." There can be no question, therefore, that at common law, even a supervisory or other high-level employee was individually liable to a co-employee even for acts of ordinary negligence. *A fortiori*, the co-employee was individually liable for acts of gross negligence or recklessness.

This observation is critical to the question at hand, because if there is any ambiguity in the present statute (incorporating the 1978 amendment), it must be resolved against any abrogation of the pre-existing common-law rule, because "[t]he presumption is that no change in the common law is intended unless the statute explicitly so states. Inference and implication cannot be substituted for clear expression."[7/] Since the common-law rule clearly permitted an action by one employee against another for negligence or worse, whether that employee was supervisory or not, any ambiguity in the new statute must be resolved against any limitation of that common-law right.

This is true, we submit, even if under some pre-existing version of the ***statute***, an action against a supervisory co-employee might, in some circumstances, have been barred. In the next sub-section, we will look at the cases interpreting the prior incarnation of §440.11(1), establishing that even under the prior statute, the Stanlicks' action against the Kaplans would not have been barred. But even assuming *arguendo* that the prior statute barred the action, it does not follow that any ambiguity in the present

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7/ *Sand Key Associates v. Board of Trustees*, 458 So.2d 369 (Fla. 2nd DCA 1984). *Accord, Ellis v. Brown*, 77 So.2d 845, 847 (Fla. 1955); *City of Hialeah v. State*, 183 So. 745 (Fla. 1938); *Jones Varnum & Co. v. Townsend*, 23 Fla. 355, 2 So. 612, 613 (1887); *City of Pensacola v. Capital Realty Holding Co.*, 417 So.2d 687 (Fla. 1st DCA 1982).

statute should be construed in a manner consistent with the prior statute.

In the *Streeter* case presently before this Court, both the defendants (*see* Petitioners' Brief on the Merits at 21) and the *amicus* (*see* Brief of Amicus Curiae, Florida Defense Lawyers Association at 21) have invoked the rule discussed above--the rule prohibiting constriction of a pre-existing common-law right unless the legislature says so explicitly--as a vehicle for arguing that the 1978 amendment to the statute should be construed in a manner consistent with prior versions ***of the statute--not*** of the common law. But these parties in *Streeter* are cleverly mixing apples and oranges, in an attempt to confuse the issue. There is no rule of statutory construction that an amendment to a statute should be construed in a manner consistent with previous incarnations of the same statute. To the contrary, there is every reason to believe that when the legislature amends a statute, it intends to do something ***different*** from what the earlier statute provided.[8/] The only relevant rule in this context is that a pre-existing ***common-law*** right should not be abrogated unless the legislature does so explicitly, and in this case the pre-existing ***common-law*** right was that an employee was permitted to sue ***any*** co-employee even for negligence, whether the defendant was in a supervisory position or not. ***That*** is the pre-existing state of the common law which the legislature may not abrogate without saying so explicitly, and ***that*** pre-existing state of the common law is what must inform the Court's interpretation of the 1978 amendment.

Since the 1978 amendment did not clearly and unambiguously abrogate the prior common-law right, the district court's opinion should be reversed with instructions that the Stanlicks' action be permitted to proceed. If the Court accepts this argument, it should proceed no further. But if the Court concludes that the legislature's intention

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[8/] *See Blount v. State*, 102 Fla. 1100, 138 So. 2 (1931); *Sunshine State News Co. v. State*, 121 So.2d 705, 707 (Fla. 3rd DCA 1960).

must be divined by a broader compass, we consider next the state of statutory law which preceded the 1978 amendment.

B. The Kaplans Were Not Entitled to Immunity under Those Decisions Interpreting Earlier Versisions of §440.11(1), Fla. Stat.

In the district court, the Kaplans contended that the pre-1978 version of the statute protected a corporate officer or supervisor from liability to a co-employee unless the defendant was alleged to have committed an affirmative act of negligence ***totally unrelated*** to the employer's responsibility to provide a safe place to work. On that assumption, the Kaplans further contended that because "the complaint in this action is predicated solely on the Kaplans alleged failure to enforce safety regulations, the complaint fails to allege any affirmative act of negligence that is unrelated to the duty to provide a safe place to work."

The district court apparently accepted this contention, noting that in its earlier decision in *West v. Jessop*, 339 So.2d 1136 (Fla. 2nd DCA 1976), the same court had "adopted the principle that corporate officers are immune from suit when they carry out the employer's nondelegable duty to provide employees with a safe place to work but are amenable to suit as coemployees when they commit an affirmative act of negligence when it goes beyond the scope of providing employees with a safe place to work" (A. 8). The district court rejected the claim "that some of the acts of the Kaplans alleged in the complaint were affirmative acts, and that the focus in the cases cited above was upon the affirmative nature of the alleged misconduct and not whether the conduct was related to the duty to provide a safe work place" (A. 9-10). To the contrary, the district court concluded, "a fair reading of the language and factual holdings of those cases demonstrate[s] that before recovery is permitted, there must be both an affirmative act of negligence and one which is outside the scope of the employer's duty to provide a safe place to work" (A. 10). Implicitly, the district court thus concluded that the Stanlicks'

complaint had not alleged any affirmative acts of negligence "outside" of the corporate employer's duty to provide a safe workplace.

As we have noted, the Stanlicks' complaint is not based simply upon the Kaplans' alleged failure to enforce safety rules, or to make sure that the company's drivers worked in a safe environment. To the contrary, the complaint charges not that the Kaplans failed to make the workplace safe, but that the Kaplans acted affirmatively and intentionally to make the workplace ***far more unsafe.*** It alleges that the Kaplans affirmatively created an unsafe working environment by demanding that their drivers violate federal law at the threat of loss of their livelihoods; by requiring their drivers "to falsify their driving time . . .[;] to drive when they were tired and ill[;] and . . . to drive heavy over-the-road trucks under extremely dangerous circumstances" (A. 2). In addition, the complaint charges that in this particular case, the Kaplans "had been notified and were well aware that the Plaintiff had operated the truck far in excess of the amount of time allowed by law" and "knew that Plaintiff had driven through extremely bad weather on the return trip to Florida but insisted that Plaintiff drive the load directly to Miami," and that the Kaplans "expected Plaintiff to do so within a time frame that made it impossible to accomplish without driving in excess of the amount of time allowed by law" (A. 2). In these many ways, the complaint charged the Kaplans with affirmative acts of intentional misconduct in the creation and knowing enforcement of an inherently (indeed, illegally) dangerous policy. It charged them not merely with negligently failing to make the workplace safe--that is, to correct some danger--but with the affirmative and intentional ***creation*** of a danger, in violation of federal law. And of course, it rightly charged that this conduct was willful, wanton and reckless.

We submit that the district court was clearly wrong to conclude that even such reprehensible affirmative and intentional misconduct is protected from liability under pre-1978 versions of §440.11(1). We do not disagree with the district court's statement

of the rule--but only with its application. As first formulated by the same court in *West v. Jessop*, 339 So.2d at 1137, the rule was that "a corporate officer becomes amenable to suit as a co-employee when he has committed 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." The court's reasoning was that "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." Thus, the plaintiff's complaint was sufficient in *West* because the court found that "the act of negligence charged against Jessup [wrenching an employee's neck while attempting to assist her] was clearly one of affirmative action upon his part." It was the affirmative nature of the defendant's misconduct--the act of making things worse for the employee--which placed his conduct beyond the scope of the employer's non-delegable duty to make the workplace safe. After all, even in *West*, the defendant employee's conduct was not ***totally unrelated*** to the safety of the workplace, because the defendant's conduct clearly ***did*** make the workplace less safe. Nevertheless, the conduct was actionable because of the defendant's active ***creation*** of an unsafe condition--as opposed to the mere omission of either a direct or perhaps supervisory make-safe obligation delegated by the employer.

A number of subsequent cases are consistent with this definition of the restricted scope of co-employee immunity prescribed by the pre-1978 version of the statute.[9/] In *Dessert v. Electric Mutual Liability Ins. Co.*, 392 So.2d 340 (Fla. 5th DCA), *review denied*, 399 So.2d 1141 (Fla. 1981), the court forbid an action grounded solely in the

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[9/] Of course, under the authorities cited earlier, *see* text at n. 7, *supra*, the district courts were required to adopt the narrowest possible reading of the pre-1978 statute consistent with pre-existing common-law rights. Thus, to the extent that the district court in the instant case attributed to these decisions a broader incursion upon pre-existing common law rights than that of other reasonable interpretations of the statute, its holding clearly conflicts with this important principle of statutory construction.

plaintiff's supervisor's failure to report or correct an opening in the floor of a platform upon which the plaintiff's machine was placed, because the defendant had merely failed to perform an obligation owed by the employer. In the process, however, the court cited with approval the pronouncement of the Wisconsin Supreme Court in *Lupovici v. Hunzinger Construction Co.*, 79 Wis.2d 491, 255 N.W.2d 599 (1977)--that "[i]f the officer or supervisor is to be personally liable it is because of some affirmative act of the officer or supervisor which increased the risk of injury to the employee. If a corporate officer or supervisor engages in this affirmative act, he owes the involved employee a duty to exercise ordinary care under the circumstances." Thus, the plaintiff's problem in *Dessert* was not that she could show no conduct by the defendant ***unrelated*** to the employer's make-safe duties, but that she could show no conduct ***independent*** of the supervisor's mere failure to perform the employer's delegated job. The *Dessert* court's approval of the cited passage from *Lupovici* admits of no other conclusion.

Similarly in *Zurich Ins. Co. v. Scofi*, 366 So.2d 1193, 1194 (Fla. 2nd DCA), *cert. denied*, 378 So.2d 348 (Fla. 1979), the plaintiff charged only that the supervisor had failed to prevent a cave-in of the trench in which her decedent was working. As it had done earlier in *West*, 339 So.2d at 1137, the court in *Zurich* quoted with approval the formulation of the Wisconsin Supreme Court in *Kruse v. Schieve*, 61 Wis. 421, 213 N.W.2d 64, 67 (1973), that in order that "a duty be owed to a fellow employee additional to and different from the duty of proper supervision that is owed to the employer by a corporate officer or supervisory employee . . . [c]learly *something extra* is needed over and beyond the duty owed the employer." In *Zurich*, "the 'something extra' as required by *Kruse* was missing . . . ." 366 So.2d at 1194. That "something else," the *Zurich* court noted, quoting another Wisconsin case, was the "'allegation of any affirmative act of negligence by the respondent [defendant] which increased the risk of injury.'" *Zurich*, 366 So.2d at 1194 n.2, *quoting Ortman v. Jensen & Johnson, Inc*, 66 Wis.2d 508, 225 N.W.2d 635 (1975).

Thus, *Zurich* clearly endorses the notion that a supervisory employee may be liable because his conduct "goes beyond" a failure to fulfill the employer's delegated make-safe duty, if the supervisor has done something of an affirmative nature to increase the risk of injury to the plaintiff, even if that "something" happens to make the workplace less safe. The defendant's conduct must not be totally ***unrelated*** to the make-safe duty before the action is permitted; it must simply (to borrow the district court's formulation in this case, A. 9) "go beyond" that duty, because it is something more than the mere non-performance of the employer's obligation, but instead is an affirmative act which makes things ***more*** dangerous for the plaintiff.

Finally, this conclusion is supported by *Chorak v. Naughton*, 409 So.2d 35 (Fla. 2nd DCA 1981), in which the corporate officer and majority shareholder was amenable to suit for paddling the plaintiff too hard in the conduct of a contest among employees. The defendant argued "that he should be cloaked with the employer's immunity because the injury occurred during a corporate contest, and this directly related to the corporate president's duty to maintain a safe work place." *Id.* at 39. The district court rejected the factual premise that the defendant's conduct was related to the make-safe duty. But it added that the answer to that question was really irrelevant, because the defendant had also been charged with willful conduct: "Moreover, the willful affirmative nature of his actions placed him sufficiently beyond his corporate capacity and subjected him to liability as a coemployee for his negligence." *Id.* In other words, even if the corporate officer's conduct had been related to the make-safe duty, the willful affirmative nature of that conduct "placed him sufficiently beyond his corporate capacity" to subject him to liability.

It is one thing for the employer--either personally or through a supervisory agent--to do little more than fail to assure the safety of the workplace. In such a case, the delegated supervisor's failure may be nothing more than the employer's failure, and the

employer's sole obligation is prescribed by the workers' compensation laws. But it is quite another thing for the supervisory employee not simply to fail in some delegated responsibility to make the workplace safe, but to commit an affirmative act of personal negligence (or worse) by actually creating a danger to a co-worker. The rationale of *West* was that when a business person chooses to operate through a corporation, he should enjoy the corporate employer's immunity when he is standing in the shoes of the corporate employer. As the court noted, to hold otherwise would deprive the business person "of the reasonable protection against suits by his employees which is afforded to his competitor who is operating as a proprietorship, or even a partnership." 339 So.2d 1137. But the court added this caution: "On the other hand, 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." *Id.*

In the instant case, the Kaplans did more than simply fail to perform the corporate employer's obligation of maintaining a safe workplace. They stepped outside of that role. They acted in an affirmative way. They created a policy which was not only reckless and dangerous, but unlawful. And they enforced that policy despite knowing that it presented a significant danger to their drivers, by threatening them with the loss of their jobs if they chose to obey the law. It is inconceivable that their affirmative instruction that employees falsify records and violate federal law--that they drive until they were incapable of driving safely--should be afforded immunity on the ground that such reprehensible conduct is inherent in the employer's duty to make the workplace safe. Any such holding would stand the principle of *West* on its head, because in this case the Kaplans did exactly the opposite--they violated the law and made the workplace less safe. No statutory objective would be served by maintaining the fiction that the Kaplans were merely standing in the shoes of their corporate employer at the time they allegedly committed such reprehensible acts. Even under the pre-1978 versions of §440.11(1), the

Stanlicks have stated a cause of action. Thus, even if the 1978 amendment preserved this aspect of the statute, the district court erred in prohibiting the action. If the Court agrees with us about that, it need proceed no further.[10/]

C. The Kaplans Were Not Entitled to Immunity Under §440.11(1), Fla. Stat. (1981).

The district court acknowledged that "the 1978 amendment changes the law by extending the employer's immunity from liability to coemployees unless such employees act with gross negligence or a higher degree of misconduct" (A. 10). From our perspective, as we have argued, that acknowledgement should have ended the inquiry. Because the statute does not distinguish between classes of co-employees, but instead provides plainly that a co-employee is not immune from liability for gross negligence or recklessness, and since everybody in this action agrees that the Kaplans' complaint states a cause of action for gross negligence, the district court should have affirmed the trial court on the basis of the plain language of the statute alone.

Instead, the district court, without directly discovering an ambiguity in the statute, posed the additional question of "whether the amendment, by its language, also took

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10/ It is vital to note that ***both sides*** in the *Streeter* case agree with our characterization of the pre-existing status of Florida law. As even the defendants note in *Streeter* (Petitioners' Brief on the Merits at 18), conduct which is "willful, wanton, grossly negligent or physically aggressive" was "traditionally viewed as outside the course and scope of employment--the very antithesis of conduct in the furtherance of business." Of course, we agree entirely with this statement by the ***defendants*** in *Streeter*.

The debate in *Streeter* is about the extent to which an act of omission might subject a corporate officer to liability. The plaintiffs have made an excellent argument that the "affirmative act" requirement of *West v. Jessup* and other cases merely required that the defendant be personally, rather than vicariously, responsible for the condition which injured the plaintiff (*see* Respondent's Answer Brief at 33-43). The defendants contend that liability depended upon some act of commission outside of the make-safe rubric, but concede that gross negligence or recklessness is actionable because it is outside the scope of the make-safe rubric (Petitioner's Brief on the merits at 18). Although we agree with the plaintiffs in *Streeter*, the outcome of that dispute is totally irrelevant to the Stanlicks' position in the instant case. ***Both*** sides in *Streeter* agree with the Stanlicks' position.

away the immunity of corporate officers or supervisors for gross negligence or willful and wanton misconduct in providing a reasonably safe place for employees to work" (A. 11). Acknowledging that only *Sullivan v. Streeter* had directly addressed that question, the district court rejected *Sullivan*'s reliance upon the plain language of the statute, on the ground that under those cases interpreting prior versions of the statute, corporate officers performing functions for their employer "do not occupy the position of a coemployee" (A. 11). The 1978 amendment, the district court concluded, "merely gives coemployees some immunity in workers' compensation situations. It did not affect the prior case law defining which persons would be treated as coemployees" (*id.*). And, the court concluded, "the amendment does not change the definition of a coemployee. The reasons for not treating corporate officers and supervisors as coemployees discussed in the cases cited above other than Sullivan are still valid and we see no reason to depart from those cases" (A. 12).

The question, then, is whether *Sullivan* is right in holding that a statute which subjects co-employees to liability for gross negligence, making no distinction between classes of co-employees, should be enforced according to its plain language; or whether the district court in this case is right in maintaining the fiction (which, by the way, is not specifically found in any other Florida case) that "corporate officers," when performing certain functions, are not co-employees at all. The short answer to this question is the one we have already given--that the statute must be enforced according to its plain language, and the statute says absolutely nothing to suggest that certain co-employees, in certain circumstances, should not be treated as co-employees. To the contrary, the statute says what it says, making no distinction whatsoever between various categories of co-employees.

Even if the Court should reject this invocation of the plain language of the statute, it is clear that the construction adopted in *Sullivan* is the right one, consistent with the

Florida Legislature's apparent purpose in promulgating the 1978 amendment to §440.11(1). This question of legislative purpose is heavily emphasized in the defendant's briefs in *Streeter v. Sullivan* (*see* Petitioners' Brief on the Merits at 15-20; Petitioners' Reply Brief at 14). In these passages, coupled with an appendix containing various House and Senate versions of the amendment before it was passed in final form, the petitioners in *Streeter* effectively demonstrate that these prior versions of the amendment clearly evidence a legislative intention to increase the scope of statutory immunity and restrict the scope of potential liability, by affording ***all*** employees--not just supervisory employees--the same immunity enjoyed by the employer, so long as those employees are acting in furtherance of the employer's business. Thus, as the petitioners in *Streeter* themselves acknowledge, even the most restrictive versions of the bill--versions which did not pass--intended a result which would treat ***all employees*** the same--by protecting ***all*** of them from liability when acting in furtherance of the employer's business. Clearly the object was uniform treatment of all employees.

As the petitioners in *Streeter* also point out (*see* Petitioners' Brief on the Merits at 20), the final version of the amendment--unlike the prior versions--contained this additional sentence: "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 . . . ." And the petitioners in *Streeter* acknowledge (Petitioner's Brief on the Merits at 20) that "[t]here are no staff analyses or other materials which amplify on the origin and purpose of this eleventh-hour addition." In light of the purpose of the earlier versions of the statute, however, the petitioners in *Streeter* suggest that "[i]t would make no sense . . . 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."

But even assuming *arguendo* that the pre-1978 statutes did not subject supervisory employees to liability even for gross negligence or recklessness in conduct related to the safety of the workplace--a contention we already have rebutted--there is in fact every reason to believe that the "eleventh-hour addition" to the statute was intended to do precisely that, consistent with the overriding legislative objective of treating all employees uniformly.

The amendment created an entirely new class of individuals entitled to immunity, with the effect that ***all*** employees--from the highest to the lowest--would be treated uniformly. It expanded the immunity of supervisory employees, by extending their protection beyond the make-safe rubric, to include all functions performed in service of the employer; and it extended the same immunity to all other employees. In the earlier versions of the statute, however, as the petitioners in *Streeter* so clearly demonstrate, the new immunity afforded all employees was very broad. In the House bill, for example (Petitioners' Brief on the Merits in *Streeter*, Appendix at 5), the employee was protected not only against liability for negligence, but also for any "wrongful act . . . ." The legislature obviously thought that to be too broad an immunity, and so the final bill subjected co-employees to potential liability for recklessness or gross negligence.

Thus, at the same time that the statute created a new across-the-board protection for all co-employees, it also created a new across-the-board exception to that protection--in cases in which ***any*** employee has acted "with willful and wanton disregard or unprovoked physical aggression or with gross negligence . . . ." The "eleventh-hour" addition was perfectly consistent with earlier versions of the amendment, because like those earlier versions, it created a uniform set of standards governing actions by one employee against another--whether or not the defendant/employee was fulfilling his employer's makes-safe duties--so long as the defendant/employee was acting in furtherance of the employer's business. And that is precisely how this Court read the

statute in upholding it against constitutional challenge in *Iglesia v. Floran*, 394 So.2d 994, 995 (Fla. 1981): "This amendment grants immunity from tort liability to co-employees who, while in the course of their employment, negligently injure other employees of the same employer, unless the employees act with willful and wanton disregard or unprovoked physical aggression or with gross negligence." This description of the statute contains no qualifier to the effect that even a wanton or grossly-negligent employee is immune when performing the employer's make-safe duty, because the statute says no such thing. And yet, if the district court's reading of the statute in the instant case were correct, this Court could not have described the statute the way it did in *Iglesia*.

Indeed, the same district court itself provided an identical description in *McCarrol v. Reagan*, 396 So.2d 239, 240 (Fla. 2nd DCA 1981): "That section provides immunity from tort liability for a fellow employee when that employee was acting in furtherance of the employer's business except when the employee was acting with gross negligence or willful and wanton disregard of the interest of the victim or when the victim and his fellow employee were assigned primarily to unrelated work." And the fifth district agreed with this interpretation in *Weller v. Reitz*, 419 So.2d 739, 740-41 (Fla. 5th DCA 1982), holding that the amendment "provides immunity from tort liability to a fellow employee when that employee was acting in furtherance of the employer's business except when the employee was acting with gross negligence or willful and wanton disregard of the interest of the victim or when the victim and fellow employee were assigned primarily to unrelated works within private or public employment." Again, there is no qualifying language that the fellow employee would also be immune--even for gross negligence--if he was performing the employer's make-safe duty at the time of his allegedly-wrongful conduct.

These uniform descriptions of the amendment are perfectly consistent with the fourth district's pronouncement on this question in *Sullivan v. Streeter*, 485 So.2d at 895,

that in the new, uniform legislative scheme governing actions against a co-employee, "[n]o restriction was provided by the legislature that would limit its effect to *non*-officers or *non*-executives." As the court noted: "The legislature, in its wisdom, spoke clearly and plainly of its intention to grant or withhold immunity based upon the actions of the employee." The statute is based on the ***actions***--not the ***status***--of the employee. This Court said precisely the same thing in describing the statute in *Iglesia*. Thus, even if one resorts to consideration of the purpose of the new amendment, it is clear that the overriding purpose was to create a uniform set of standards governing all employees, and thus that the exception for gross negligence or recklessness also clearly applies to all employees.

In the district court, the Kaplans contended that this obvious construction of the statute, consistent with its plain meaning, could not have been the legislature's intention, because it would treat corporations differently from sole proprietorships. Under the trial court's ruling in this case, the Kaplans contended, the owner or officer of a corporation is not immune because he is also an employee, while the owner of an unincorporated business is immune because he is only an employer. Thus, the Kaplans contended, the trial court's interpretation would make no sense.

We respectfully disagree, because the anomaly which the Kaplans point out--between cases brought against bosses of corporations and cases brought against individual bosses--was no less problematic under the legislative scheme which pre-dated the 1978 amendment to the statute, even under the Kaplans' interpretation of that scheme. No less under that interpretation was it possible that a sole proprietor might escape liability for a wrongful act, while a corporate officer or shareholder would not. We ask the Court to compare the decisions in *Revere v. Shell Chemical Inc.*, 376 So.2d 1214, 1215 (Fla. 3rd DCA 1979), with the decision in *Chorak v. Naughton*, 409 So.2d 35 (Fla. 2nd DCA 1982), and *West v. Jessop*, 339 So.2d 1136 (Fla. 2nd DCA 1976).

In *Revere*, the plaintiff was not permitted to pursue his action for negligence against an individual employer not operating through a corporate entity. And the plaintiff would have fared no better by claiming gross negligence or wanton negligence. *See Seaboard Coast Line R. Co. v. Smith*, 359 So.2d 427, 429 (Fla. 1978) (per curiam). In *Chorak*, in contrast, the business was incorporated, and the action was brought not only against the corporation but also against the alleged perpetrator, who was the corporation's 100%-stockholder, president, director, and general manager. 409 So.2d at 37. Thus, if ever an individual was a personal embodiment of a corporation, this defendant was such an individual. Nevertheless, the court permitted even the claim of gross negligence (the other claim was assault), on the ground that the defendant was alleged to have committed an affirmative act outside of the scope of the company's duty to make the workplace safe. There could be little question, however, that the action would not have been permitted if the defendant had not incorporated his business. Indeed, the court in *Chorak* upheld the trial court's dismissal of the action against the corporation itself. Similarly in *West v. Jessop*, it was the corporation's president and sole stockholder who was held to be amenable to suit for committing an affirmative act of negligence outside of the company's make-safe duty, even though "[t]here is no doubt that the statute would preclude a suit against the corporate employer."

Thus, the anamoly which the Kaplans pointed out in the district court was equally present under pre-1978 versions of the statute. Therefore, the asserted persistence of that anamoly is no argument against the obvious interpretation of the 1978 amendment which we advance here. Indeed, the only way to resolve that anamoly is to hold--by statutory construction or new legislation--that even an unincorporated employer should be responsible for his own acts of recklessness or gross negligence--just as a corporate president or majority shareholder would be. Any other system would create a disincen-

tive to incorporation.[11/]

Until such a construction or amendment is adopted, those who incorporate their businesses will face the anamoly which the Kaplans pointed out in the district court, and which exists even under their own interpretation of the statute. And of course, those who do incorporate their businesses, like the Kaplans, are certainly charged with knowledge of the legal consequences when they make their decision to incorporate. The Kaplans were not required to incorporate their business, but chose the corporate form. That choice gave them substantial legal benefits. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (Fla. 1984). In return, the incorporators must accept the consequences of having created a separate jural entity. *See, e.g., Gulfstream Land & Development Corp. v. Wilkerson*, 420 So.2d 587, 589 (Fla. 1982). In this case, the Kaplans

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[11/] It may be that such a construction of the statute does not require new legislation. The fourth district, at least, has recognized a serious question on this point, and twice has certified to this Court the question of whether the workers' compensation law precludes actions by employees against their corporate employers at least for intentional torts, even though the injuries were incurred during the scope of their employment. *See Lawton v. Alpine Engineered Products, Inc.*, 476 So.2d 233 (Fla. 4th DCA) (per curiam), *review granted*, 10 FLW 2042 (Fla. 1985); *Fisher v. Shenandoah General Construction Co.*, 472 So.2d 871, 873 (Fla. 4th DCA), *review granted*, 10 FLW 1751 (Fla. 1985) (oral argument heard June 9, 1986). At least a colorable argument can be made that the new statute should be construed to permit actions against the employer--that is, against either the corporation or the owner of the business--when the plaintiff has been victimized by the intentional or reckless misconduct of an employee who is sufficiently high-level to bind the business by his conduct.

This interpretation would be consistent with the longstanding principle that an employer individually is not entitled to immunity for his intentional torts, or for commanding or authorizing the intentional tort of an employee. *See Schwartz v. Zippy Mart, Inc.*, 470 So.2d 720 (Fla. 1st DCA 1985) (per curiam) (en banc), *citing* 2A *Larson Workman's Compensation Law* §68.21, at 13-28 (1982). *See generally Barnes v. Chrysler Corp.*, 65 F. Supp. 806 (N.D. Ill. 1946); *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950); *Meyer v. Graphic Arts International Union Local No. 63-A, 63-B*, 88 Cal. App.3d 176, 178-79, 151 Cal. Rptr. 597, 599 (1979); *Smith v. Rich's, Inc.*, 104 Ga. App. 883, 123 S.E.2d 316, 318 (1961); *Estupinan v. Cleanerama Drive-In Cleaners, Inc.*, 38 A.D.2d 353, 329 N.Y.S.2d 448 (1972); *Garcia v. Gusmack Restaurant Corp.*, 150 N.Y.S.2d 232, 233-34 (1954); *Stewart v. McClellan's Stores Co.*, 194 S.C. 50, 9 S.E.2d 34, 35, 37-38 (1940). *But see Fisher v. Shenandoah General Construction Co.*, 472 So.2d 871, 872 (Fla. 4th DCA), *review granted*, 10 FLW 1751 (Fla. 1985); *Brown v. Winn-Dixie Montgomery, Inc.*, 469 So.2d 155, 157 (Fla. 1st DCA 1985) (per curiam) (en banc).

elected the corporate vehicle; they elected to create the corporation as a separate employer. In the process, for their own protection, they necessarily elected to create their own separate identities as employees. They cannot now complain that a non-incorporated employer--who has foregone the benefits of creating a corporate status--should enjoy some slight advantage under another statute. The Kaplans made their choice. They assumed the consequences.

In any event, as we have noted, those consequences cannot be avoided by the statutory construction which the Kaplans are advocating, and which the district court adopted. Regardless of which interpretation of the 1978 amendment this Court accepts, the anamoly pointed out by the Kaplans will persist. Thus, that anamoly is irrelevant to the outcome of this case, which must be reached according to the principles of statutory construction which we have discussed above.

Under those principles, concerning both the plain meaning and the obvious purpose of the statute, and its impact upon prior common-law rights, it must be construed in a manner consistent with the trial court's ruling. It is inconceivable that the Florida Legislature could have intended to protect corporate officers who knowingly and intentionally violate federal regulations, who instruct their employees to falsify records in order to cover up such violations, and who know that such violations are literally threatening the lives of those employees. There is absolutely no legislative purpose to be served by protecting the Kaplans from such reprehensible conduct. The trial court was right to permit the action; the district court was wrong to forbid it.

V
CONCLUSION

It is respectfully submitted that the decision of the district court should be reversed, and the cause remanded with instructions that the Stanlicks' action be permitted to proceed to trial.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of November, 1986, to: STEVEN D. MERRYDAY, ESQ., Glenn, Rasmusen, Fogarty, Merryday & Russo, P.O. Box 3333, Tampa, Florida 33601.

Respectfully submitted,

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