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IN THE SUPREME COURT OF FLORIDA

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SCOTT RANDALL STANLICK, et al.,
Petitioners,
v.
DONALD KAPLAN, et al.,
Respondents.

CASE NO. 69,559

CORRECTED COVER SHEET

RESPONDENTS' ANSWER BRIEF ON THE MERITS

REVIEW OF A DECISION BY
THE SECOND DISTRICT COURT OF APPEAL

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I. STATEMENT OF THE CASE AND FACTS

This action is consolidated with Streeter v. Sullivan, Case No. 86,697. The issue before the Court in these consolidated actions is this: Does the 1978 amendment to Section 440.11(1), Florida Statutes, expand the liability of an employee acting as the alter ego of the employer if the employee is charged with gross negligence in failing to discharge the employer's non-delegable duty to provide a safe place to work--a liability from which the employer is undisputably immune?

As set forth by the district court, the issue before this Court is "whether the amendment, by its language, ... took 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." Kaplan v. Circuit Court of the Tenth Judicial Circuit for Polk County, 495 So.2d 231 at 233 (Fla. 2d DCA 1986).[1] Although the Stanlicks garnish their initial brief with repetition of terms such as "reckless," "willful," and "wanton," the complaint alleges only a few pertinent facts--(1) the Kaplans--on behalf of and in the economic interests of

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[1]The Stanlicks incorrectly present the question as whether the 1978 amendment deprived the trial court of jurisdiction to entertain this action. From the perspective of the amendment's impact on the trial court's jurisdiction, the question is properly whether the 1978 amendment granted the trial court jurisdiction that the court previously lacked.

their employer, Kaplan Industries--overworked Stanlick in violation of unspecified state and federal laws regulating trucking, (2) Stanlick became fatigued while driving, and (3) a serious accident ensued.

II. SUMMARY OF THE ARGUMENT

The Stanlicks' argument is threefold: (1) the 1978 amendment unambiguously provides the Stanlicks with a cause of action, (2) pre-existing case law provides the Stanlicks with a cause of action, and (3) the purpose of the 1978 amendment is to provide the Stanlicks with a cause of action. In all aspects of their argument, the Stanlicks overlook a fundamental distinction of workers' compensation law, upon which the district court based its opinion in this case and on which this and other courts have based earlier decisions.

The distinction is this--simple and direct. When an employee acts as the instrument of the employer and is thereby clothed with the employer's duty to provide a safe place to work and if that employee qua employer breaches that duty, the employee qua employer is immune--because the employer is immune.[2] That is what workers' compensation is all about. This immunized negligence occurs, e.g., when a supervisory employee fails to properly train and supervise a forklift

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[2]This brief utilizes the term "qua" several times as a convenient, shorthand expression for "in the role of" or "acting as."

driver, who then hurts a fellow employee. This is an example of a violation of the employer's duty to assure safety. The instrument of the breach is an employee. Both are immune. However, the same employee may act as a "fellow employee," in which relation the employee has a personal duty of care. For example, if the employee happily--but grossly negligently--joyrides a forklift through the warehouse, speeds around a corner, and smashes into a fellow employee, the employee is not immune. In his role as a fellow employee, the forklift driver was grossly negligent.

In this case, the complaint alleges only that an employee qua employer overworked his truck driver, the driver became fatigued, and an accident ensued. The employee qua employer is immune, as is the employer. Again, that is what workers' compensation is all about.

With reference to pre-amendment case law, the amendment, and post-amendment case law, the answer is the same. Before enactment of the 1978 amendment, case law was uniform that an employee--whether a craftsman, supervisor, officer, or director--acting as the alter ego of the employer enjoys the employer's immunity from liability resulting from a negligent or grossly negligent failure to discharge the employer's nondelegable duty to provide a safe place to work. Pre-amendment case law was also uniform that an employee--acting as a fellow employee (or "co-employee")--was liable as a third party tortfeasor for injuries resulting from negligence, regardless of the degree of negligence. These two

principles of immunity and liability are independent, fundamental, and undoubted precepts of workers' compensation law.

The 1978 amendment extends the employer's immunity to a fellow employee acting within the scope of his employment unless the employee acts, "with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence . . . ." Section 440.11(1), Florida Statutes. The amendment explicitly distinguishes between the "immunities from liability enjoyed by an employer" and "fellow-employee immunities"--the two independent principles of workers' compensation law previously established by statutory and case law.

Cases construing the amendment confirm that the amendment restricts the previous, common law liability of a fellow employee acting as a fellow employee. Nothing in the amendment or case law construing the amendment [with the exception of Sullivan v. Streeter, 485 So.2d 893 (Fla. 4th DCA 1986)] states or suggests that the amendment, which by its explicit terms restricts common law liability of a fellow employee, also expands liability of an employee acting as the alter ego of the employer.

Aside from the extreme improbability that the legislature would implicitly expand the liability of an employee acting as the employer's alter ego, the Stanlicks' interpretation results in an inequitable, irreconcilable inconsistency: Unquestionably, the amendment does not affect the employer's

liability. Regardless of the impact of the amendment, the employer remains immune for negligence or gross negligence in failing to discharge its nondelegable duty to make the workplace safe. If the amendment creates a uniform standard, as proposed by the Stanlicks, an employee can be held liable for the very act for which the employer is immune. Did the legislature really intend to hold a shift supervisor liable for enforcing unsafe, corporate work practices, while concurrently providing the employer impenetrable immunity? Of course not. Fundamental notions of fairness and the Workers' Compensation Law reject that anomalous result. Immunity extends to both.

III. ARGUMENT

In Kaplan v. Circuit Court of the Tenth Judicial Circuit for Polk County, 495 So.2d 231 (Fla. 2d DCA 1986), the court held that the Kaplans enjoyed their employers' immunity. In a cogent opinion embracing the distinction between an employee qua employer and an employee qua employee, the court explained previous case law as follows:

> It is undisputed that prior to the 1978 amendment of Section 440.11(1), while an employee who was injured on the job could not sue his employer, he did have a right to sue a coemployee for negligence in causing his injuries. Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955). The question then arose as to whether a corporate officer or supervisor was immune (like the employer) or could be sued (like a co-employee). In West v. Jessop, 339 So. 2d 1136 (Fla. 2d DCA 1976), this court 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 which goes beyond the scope of providing employees with a safe place to work. This rule is based on the theory that since a corporate employer must necessarily conduct its business through its corporate officers, to permit in every case a suit against these officers would reduce the employer's workers' compensation suit immunity to a mere theoretical protection. (emphasis supplied)

495 So.2d at 232. The Kaplan court recognized that a corporate officer at times acts as the employer and, accordingly, is entitled to the employer's immunity. On the other hand, if the corporate officer acts as a fellow employee, the officer is entitled only to the qualified immunity provided by the amendment. The court elaborated the distinction as follows:

> The basis for the decisions granting workers' compensation immunity to corporate officers under certain circumstances before the amendment is that the corporate officers under those circumstances do not occupy the position of a coemployee. (emphasis supplied)

495 So.2d at 233. Noting that the amendment does not affect the reasons for treating a corporate officer as an employer if the officer acts as the employer's alter ego, the court rejected Streeter and granted the Kaplans' petition for a writ of prohibition. In their initial brief, the Stanlicks conspicuously avoid discussion of the Kaplan opinion and the reasons behind the Second District's disagreement with Streeter. The Stanlicks are unable in their argument to confront the lower court's opinion because the opinion explicitly relies on a distinction that the Stanlicks intractably overlook--the distinction between an employee qua

employer and an employee qua employee, a distinction recognized in pre-amendment case law, the amendment, and post-amendment case law (in fact, recognized everywhere, except in the Stanlicks' brief).

A. Pre-Amendment Case Law

Before passage of the 1978 amendment to Section 440.11(1), Florida Statutes, two pertinent lines of cases interpreting Florida's Workers' Compensation Act had developed. First, in Frantz v. McBee, 77 So.2d 796 (Fla. 1955), this Court held that "a co-employee or fellow servant is a 'third party tort-feasor' within the meaning of our Workmen's Compensation Act." 77 So.2d at 800. The defendant employee was charged with negligence in the operation of an automobile. Because the employee breached a personal duty--the duty to operate an automobile safely--the employee did not enjoy the employer's immunity. Frantz established the principle of fellow employee liability.

Second, in West v. Jessop, 399 So.2d 1136 (Fla. 2d DCA 1976); Zurich Insurance Company v. Scofi, 366 So.2d 1193 (Fla. 2d DCA), cert. denied, 378 So.2d 348 (Fla. 1979); Dessert v. Electric Mutual Liability Insurance Company, 392 So.2d 340 (Fla. 5th DCA), review denied, 399 So.2d 1141 (Fla. 1981); Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1982); and Clark v. Better Construction Company, Inc., 420 So.2d 929 (Fla. 3d DCA 1982), Florida's Second, Third, and Fifth District Courts of Appeal held that an employee enjoys the

employer's immunity if the employee is charged with negligence in failing to discharge the employer's nondelegable duty to provide a safe place to work.

In West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976), the court considered as a question of first impression whether an employer's officers are entitled to workers' compensation immunity or are liable as co-employees. In West, the plaintiff developed a headache. Trying to relieve the pain, the president of the employer twisted the plaintiff's neck, inadvertently causing permanent injuries. After recovering worker's compensation benefits, the plaintiff filed a negligence action against the president. The court adopted the reasoning of Kruse v. Schieve, 61 Wis.2d 421, 213 N.W.2d 64 (1973), which held that a corporate officer is liable only for acts committed in his capacity as a co-employee and is entitled to immunity for acts committed in his capacity as a corporate officer. The court explained the holding of Kruse as follows:

> [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.
>
> This principle makes sense. To blindly hold that a corporate officer always occupies the position of co-employee because he is a separate "entity" from the corporate employer would jeopardize the concept of workmen's compensation which is designed to impose a certain but exclusive obligation upon employers whenever their employees suffer on-the-job injuries. A corporate employer must necessarily conduct its business through its corporate officers, and to permit in every case a third party action against these officers, particularly when they also own the corporate stock, would often reduce the

> protection of "exclusiveness" to only a theoretical refuge ....
>
> On the other hand, there is no reason why a stockholding corporate officer should come under the umbrella of exclusive protection when he negligently injuries another employee through an affirmative act. In these circumstances, he should be held personally responsible for his actions in the same manner as any other employee.

339 So.2d at 1137. Finding that the president's act was "an affirmative act of negligence ... beyond the scope of the nondelegable duty ... to provide a safe place to work," the court reversed a summary judgment for the defendant. 339 So.2d at 1137.

The Second District addressed a similar issue in Zurich Insurance Company v. Scofi, 366 So.2d 1193 (Fla. 2d DCA), cert. denied, 378 So.2d 348 (Fla. 1979). The facts in Zurich closely resemble the allegations in this action: In Zurich, an employee died from injuries sustained in a trench during a "cave-in." After receiving workers' compensation benefits, plaintiffs sued the decedent's supervisor, alleging that the supervisor negligently violated state safety rules. The supervisor appealed a jury verdict, alleging immunity arising from the Workers' Compensation Act. Noting that the supervisor was neither an officer, shareholder, nor director of the employer, the court applied the rule of West v. Jessop, supra, and reversed the verdict, holding as follows:

> If a state safety rule 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, a supervisor should be entitled to the immunity of the employer.
>
> . . .
>
> Our holding is that the immunity of the corporate employer extends to its supervisor where that supervisor has committed no affirmative act of negligence going beyond the scope of his employer's non-delegable duty. We would point out that this holding would apply to any employee, regardless of rank or title, so long as that employee was the agency for carrying out the employer's duties. The umbrella of immunity applies to those who fill the role of the corporation's alter ego. In our estimation, this is the only possible common sense application of the immunity rule. (emphasis supplied)

366 So.2d at 1195. The court approvingly quoted the following passage from Kruse v. Schieve, 213 N.W.2d 64 (Wis. 1973) (adopted in West v. Jessop, supra):

> Under what circumstances can 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? Clearly something extra is needed over and beyond the duty owed the employer. (court's emphasis)

366 So.2d at 1194. The court found that the "something extra" required by Kruse was lacking. Id. at 1194.

The rule of West and Zurich was next considered in Dessert v. Electric Mutual Liability Insurance Company, 392 So.2d 340 (Fla. 5th DCA), review denied, 399 So. 2d 1141 (Fla. 1981). In Dessert, the plaintiff suffered injury in the scope of her employment when she stepped into an opening in a platform. After receiving workers' compensation benefits, the plaintiff sued the supervisory employee

responsible for administering the employer's industrial safety program. 392 So. 2d at 341. Applying Zurich and West, the Fifth District affirmed a jury verdict for the defendant. The court quoted with approval the following passage from Lupovici v. Hunzinger Construction Co., 79 Wis.2d 491, 255 N.W.2d 590 (1977):

> The duty of the officer to supervise an employee is the duty owed to the employer, not to a fellow employee. ... If 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. This duty is over and beyond the duty of proper supervision owed to the employer. It is the duty one employee owes another. ... If an officer or supervisor breaches a personal duty, it does not offend the policy of the Workers' Compensation Act to permit recovery from the officer or supervisor.

392 So.2d at 343. The court explained and adopted the Lupovici opinion as follows:

> The rationale of the decision is that the supervisor is personally liable if, as a co-employee, he increases the risk of injury to the employee, that is, he breaches his duty of exercising ordinary care which he owes to the injured party.
>
> Thus, we hold that the "affirmative act of negligence" referred to in Zurich and West means an independent act of negligence committed by the supervisor in breach of a duty to exercise ordinary care which he owes to the injured employee. (court's emphasis)

392 So.2d at 343. Because the evidence established that the supervisor's negligence, if any, related to the employer's nondelegable duty to provide the employer with a safe place

to work, the court held that the supervisor was entitled to the employer's immunity. 392 So.2d at 343.

Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1982), presents a clear example of "an affirmative act of negligence." The injured employee, Chorak, was a salesman for John Naughton Ford. Naughton initiated a contest entitled "John Naughton Ford Managers Will Bust Their Ass For You." According to the rules of the contest, a salesman who met his sales quota earned the opportunity to paddle a company manager with a board two feet long and one and a half inches thick. However, if a salesman failed to meet his quota, the managers were allowed to paddle the salesman. Pursuant to the contest, John Naughton received the opportunity to paddle Chorak. Despite the fact that recent paddlings had been administered lightly and without incident, Naughton hit Chorak so hard that the impact broke the paddle in half and caused permanent injuries to Chorak's head, neck, and back. 409 So.2d at 37.

After receiving workers' compensation benefits, Chorak sued in Circuit Court seeking compensation from John Naughton Ford, Inc., and John Naughton, individually. Applying workers' compensation immunity, the court affirmed the trial court's summary judgment for the employer. However, applying Zurich and West, the court reversed the summary judgment entered for John Naughton. The court explained its holding as follows:

> We think the evidence clearly demonstrates that Naughton's action, i.e., administering a blow

> hard enough to cause severe injuries, was unrelated to his duty to maintain a safe workplace. Moreover, the willful, affirmative nature of his actions placed him sufficiently beyond his corporate capacity and subjected him to liability as a co-employee for his negligence.

409 So.2d at 39.

In Clark v. Better Construction Company, Inc., 420 So.2d 929 (Fla. 3rd DCA 1982), the Third District applied Zurich and West to affirm a directed verdict in favor of a supervisor. Clark, the employee, was electrocuted when a cable used to hoist beams contacted an electrical wire while Clark and his supervisor, Downey, were lifting and placing the beams. After receiving workers' compensation benefits, Clark sued Downey (among others). Finding that Downey committed no affirmative act of negligence unrelated to the employer's duty to provide a safe place to work, the court affirmed a directed verdict for Downey. 420 So.2d at 932.

The distinction between Frantz v. McBee, supra, and West v. Jessop, supra, is critical: Frantz governs liability of a fellow employee acting as a fellow employee. On the other hand, West v. Jessop provides immunity to an employee acting as the employer's alter ego. This distinction, which is crucial to the determination of this action, is overlooked by the Stanlicks.

Professor Larson explains the distinction as follows:

> Most courts have held that status as a corporate officer, director, or stockholder is not of itself a bar to liability as a coemployee, since the corporate entity is the employer.

> The clearest case for such liability is that in which the corporate officer is acting in his capacity as an employee--even a managerial empoyee--and in which the conduct involved is merely the kind of negligence or other misconduct that would normally make any coemployee liable.
>
> At the other extreme, the clearest case for immunity is that in which the defendant's alleged liability is predicated entirely upon his status as a stockholder, and not upon some active conduct on his part.
>
> Between these two extremes are various shades of closer cases, turning on the extent to which the defendant is in effect the alter ego of the corporation, or is at least acting as an agent or representative of the corporation, or being charged with violation of duties that are not his personal duties, but the nondelegable duties of the corporation.
>
> If the defendant so dominates the corporation, perhaps as stockholder, president, and manager, that he can honestly be said to be the alter ego of the corporation, this in itself may suffice to bar any action against him.
>
> Short of this, most courts will hold the defendant immune if the act with which he is charged is an act done in his official capacity as an agent or representative of the corporation. Suit is also barred if the duty allegedly violated was a nondelegable duty of the corporation, such as the duty to provide a safe place to work--as distinguished from the duty of care owed by one employee to another. (citations omitted, emphasis supplied)

2A A. Larson, The Law of Workman's Compensation § 72.13 (1982) (citing West v. Jessop, supra, and Zurich Insurance Company v. Scofi, supra)

As the Second District explained in Zurich Insurance Company v. Scofi, 366 So.2d 1193 (Fla. 2d DCA), cert. denied, 378 So.2d 348 (Fla. 1979):

> The umbrella of immunity applies to those who fill the role of the corporation's alter ego.

> In our estimation, this is the only possible common sense application of the immunity rule.

366 So.2d at 1195. In Dessert v. Electric Mutual Liability Insurance Company, 392 So.2d 340 (Fla. 5th DCA), review denied, 399 So.2d 1141 (Fla. 1981), the court confirmed the distinction between an employee acting as a fellow employee and an employee acting as the employer's alter ego:

> Although a negligent co-employee may be sued in tort as a third party tortfeasor notwithstanding the common employer's immunity, Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955), the immunity of the corporate employer extends to its supervisory [personnel] where that supervisor has committed "no affirmative act of negligence" going beyond the scope of his employer's non-delegable duty. West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976). The umbrella of immunity applies to all those who fill the role of the corporation's alter ego. Zurich, supra. (emphasis supplied)

392 So.2d at 342. Quoting Lupovici v. Hunzinger Construction Co., 79 Wis.2d 491, 255 N.W.2d 590 (1977), the court elaborated on the distinction:

> It is when the officer or supervisor doffs the cap of officer or supervisory and dons the cap of a coemployee that he may be personally liable for injuries caused. If 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. This duty is over and beyond the duty of proper supervision owed to the employer. It is the duty one employee owes another .... If an officer or supervisor breaches a personal duty, it does not offend the policy of the Worker's Compensation Act to permit recovery from the officer or supervisor. (emphasis supplied)

392 So.2d at 343. Case law confirms the distinction between a personal duty owed as a fellow employee and a corporate duty owed on behalf of the employer.[3]

Unquestionably, pursuant to West v. Jessop, the Kaplans are entitled to their employers' immunity. The Stanlicks attempt to avoid the rule of employers' immunity (regardless of the amendment) by advancing a perceived distinction between a failure to make the work place safe and acting "affirmatively and intentionally to make the work place far more unsafe," "the affirmative and intentional creation of a danger," and "reprehensible, affirmative, and intentional misconduct." (Petitioners' Brief on the Merits at p. 12). The Stanlicks' argument is premised upon a meaningless distinction and a misunderstanding of the "affirmative act of negligence" rule.

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[3]The Academy of Florida Trial Lawyers admonishes the Court that:

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

(Amicus Curiae Brief of the Academy of Florida Trial Lawyers at p. 4) The Academy can rest easy. Neither West v. Jessop nor the opinion on review in this proceeding hold that officers or supervisors enjoy employers' immunity because of their status as an officer or supervisor. The clear, unequivocal, and unavoidable holding of the cases is that any employee enjoys employers' immunity when the employee acts as the employer.

First, the Stanlicks suggest the arcane distinction between failing to make the work place safe and affirmatively making the work place "far more unsafe." The Stanlicks explain the proposed distinction as follows:

> [The complaint] charged [the Kaplans] 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. (emphasis in original)

(Petitioners' Brief on the Merits at p. 12.) Unless the Stanlicks allege an intentional tort, their proposed distinction is meaningless. Clearly, no distinction exists between a grossly negligent failure to ensure safety and a grossly negligent creation of danger.

In Fisher v. Shenandoah General Construction Co., 11 F.L.W. 602 (Fla. November 26, 1986), this Court set forth the elements of a cause of action for an employer's intentional tort. The Stanlicks' complaint falls short of meeting those criteria. Additionally, the Stanlicks fail to allege an intentional tort against the Kaplans. Professor Larson confirms the distinction between a co-employee's intentional tort and gross negligence:

> In eleven states the immunity of a co-employee is subject to an exception for intentional wrongs or the equivalent. Wyoming has an exception for gross negligence.
>
> Most of the decisional law here consists of repeated affirmations that "intentional" means "intentional." It does not mean merely gross or wanton negligence. The defendant must have entertained a desire to bring about the injurious result and must have believed that the result was substantially certain to follow. Thus, failure to equip a police officer's

> motorcycle with a siren, although a siren might have helped prevent the accident, was not such an intentional act. Moreover, it is not enough merely to include the word "intentional" in the complaint, if the alleged facts clearly do not add up to intention. (emphasis supplied, citations omitted)

2A A. Larson, The Law of Workmen's Compensation § 72.26 (1982). The Stanlicks allege that the Kaplans negligently overworked an employee to maximize Kaplan Industries' economic gain. The Stanlicks neither allege nor imply that the Kaplans specifically intended to injure Scott Stanlick, i.e., implemented a plan to slavishly work Scott Stanlick until he injured himself.

Additionally, the Stanlicks misapprehend the "affirmative act of negligence" rule. Apparently, the Stanlicks attempt to draw the line between omissions and affirmative actions--between failing to act in a certain manner, on the one hand, and affirmatively acting in a certain manner, on the other. The distinction, although familiar to the vocabulary of tort law, is utterly irrelevant to workers' compensation law and West v. Jessop. Again, the pertinent distinction depends upon the role of the defendant employee at the time of the accident. In West v. Jessop, the court held:

> [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 non-delegable duty of the employer to provide his employees with a safe place to work. (emphasis supplied)

339 So.2d at 1137. In West, the court held the officer liable because he negligently injured an employee while

attempting to correct a toothache--an act obviously unrelated to the employer's nondelegable duty to provide a safe place to work. The key language in West is the phrase "beyond the scope of the nondelegable duty of the employer. . . ." The relevant distinction rests in the role of the employee at the time of the negligence rather than whether the negligence results from an omission or an affirmative action. Confirming the relevant distinction, the court in West concluded:

> The facts alleged in the complaint unquestionably place him in the category of a co-employee. Therefore, he would not be entitled to the cloak of immunity provided by the statute. (emphasis supplied)

339 So.2d at 1137. In other words, the corporate officer's conduct was as a co-employee--not, pursuant to the duty to provide safety, as the corporation's alter ego.

The fundamental emphasis of the rule is upon the nature of the duty. If the negligence relates to the employer's nondelegable duty to provide a safe place to work, the employee is immune. If the negligence is unrelated to the employer's nondelegable duty, the employee is not immune.

Whether the duty was breached by an omission as opposed to an affirmative action is irrelevant. If an employee negligently fails to administer the employer's duty to make the workplace safe, whether his negligence resulted from a negligent act or a negligent omission is irrelevant to application of workers' compensation immunity. Consider an example: Assume that an employer has a duty to instruct its

employees in the safe operation of industrial equipment. The employer can discharge the nondelegable duty only through a safety instructor. If the safety instructor fails entirely to provide instructions and an employee is injured and collects workers' compensation benefits, the safety instructor is clearly immune pursuant to West v. Jessop. Similarly, if the safety instructor improperly instructs the employee and the employee is injured and collects workers' compensation benefits, the safety instructor is equally immune. The distinction between the omission in the first instance and the affirmative act in the second instance is irrelevant.

The distinction is equally irrelevant in this action. What is the difference between (1) failing to apply a safety law by passively allowing a driver to exceed time limits and (2) failing to apply a safety law by actively requiring a driver to exceed time limits? In either event, Kaplan Industries--not the Kaplans--owes the driver the duty not to allow or require him to drive in excess of applicable, safety laws. Kaplan Industries can discharge the duty only through its officers, agents, or employees. The Kaplans' alleged failure to apply federal safety laws--whether the failure results from a mere passive inapplication of the laws or an active violation of the laws--constitutes negligence directly related to Kaplan Industries' non-delegable duty to enforce the safety laws. The allegations in the complaint clearly establish that the Kaplans acted at all times--whether negligently, grossly negligently, passively, actively, affir-

matively, or otherwise--as the alter ego of Kaplan Industries. The complaint fails to allege or imply that the Kaplans acted at any time as fellow employees.

B. The Amendment

The 1978 amendment of Section 440.11(1), Florida Statutes, reads as follows:

> 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. (emphasis supplied)

The language of the amendment is instructive in two respects. First, the amendment contemplates two, discrete types of immunity. In the first sentence, the amendment refers to the "immunities from liability enjoyed by an employer...." Those immunities are, of course, the fundamental employer's immunities of the Workers' Compensation Act. Next, the amendment limits the "fellow employee immunities" in cases of gross negligence, etc. The amendment contains no similar language limiting the employer's immunity. Thus, the amendment recognizes both (1) the unqualified immunity of the employer,

which is unaffected by the amendment, and (2) the immunity of fellow employees, which is explicitly qualified by the amendment.

The degree of negligence is irrelevant to the employer's immunity. Upholding the constitutionality of the 1975 version of Section 440.11, Florida Statutes, the Court explained the employer's immunity:

> The Workmen's Compensation Act, by its express terms, replaces tort liability of the employer with strict liability for payment of the statutory benefits without regard to fault. An employer under this Act is not liable in tort to employees by virtue of the express language of the Act. Such immunity is the heart and sole of this legislation which has, over the years been of highly significant social and economic benefit to the working man, the employer and to the state. And, whether the injury to the employee is caused by "gross negligence," "wanton negligence," "simple negligence" passive or active, or no negligence at all of the employer, is of no consequence. There is no semblance of suggestion in these statutes that the legislature intended to make any distinction in degrees of negligence so far as the employer's immunity is concerned and we see no reason or logic in any distinction.

Seaboard Coast Line Railroad Company v. Smith, 359 So.2d 427 at 429 (Fla. 1978). Consistent with the previous version, the 1978 amendment does not create classes or categories of negligence with respect to the employer's immunity. As before, the employer is immune whether the injury resulted from simple or egregious neglect. Instead, the 1978 amendment, by its express language, applies only to employees acting in their capacity as fellow employees. The 1978 amendment restricts the right to sue a fellow employee, who

acts in furtherance of the employer's business, only to those incidents in which the fellow employee--acting as a fellow employee, not as the employer--acts with willful and wanton disregard, etc.

Read in conjunction with the Frantz v. McBee rule of fellow employee immunity, the amendment unambiguously restricts the liability of fellow employees. In fact, restricting the liability of fellow employees was the express purpose of the amendment. The title of House Bill 721 read "exempting employees from liability as third party tortfeasors under certain circumstances ...." (Streeter Appendix to Petitioners' Brief on the Merits at A.5) The title of the Senate version read:

> A bill to be entitled an act relating to workmen's compensation; amending S. 440.11(1), Florida Statutes; providing that the immunities from liablility enjoyed by an employer shall apply to an employee acting in the furtherance of the employer's business; providing an effective date.

(Streeter Appendix to Petitioners' Brief on the Merits at A.7) The title of the bill as passed, Chapter 78-300, Laws of Florida, read "amending s. 440.11(1), Florida Statutes; extending the exclusiveness of liability to fellow employees with certain exceptions ...." None of the titles of the proposed bills or the act itself expresses or implies that, in addition to limiting fellow employee liability, the legislature intended to expand the liability of employees acting as the alter ego of the employer. The Stanlicks' proposed interpretation of the amendment is not only incon-

sistent with the language of the amendment and existing case law, but would violate Article III, Section 6, Florida Constitution, which requires that the subject matter of every law must be expressed in the title.

In Mayo v. National Truck Brokers, Inc. 220 So.2d 11 (Fla. 1969), the Court affirmed a declaratory judgment holding a statute unconstitutional pursuant to Article III, Section 6, Florida Constitution. The Court affirmed the "well-reasoned decision of the chancellor" that the statute was unconstitutional because its title failed to notify interested persons that the statute provided for increasing license fees. 220 So.2d at 12

In State Ex Rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973), a vending machine operator petitioned for a writ of mandamus to compel repayment of taxes paid by vendees before enactment of an amendment, which specifically provided that revenues from vending machines were not entitled to the sales tax exemption provided for food and drink. The taxpayer argued that, by implication, before enactment of the amendment, the general groceries exemption applied to vending machines. After discussing the legislature's apparent purpose in enacting the amendment, the Court held:

> A more important circumstance shedding light on the legislative intent is the title to [the amendment] as the title may be considered in an effort to aid interpretation ... The title to [the amendment] plainly shows that vending machines were not mentioned ....

> Vending machines are not listed under either the elimination of exemptions or the extension of taxation to new subjects. A new tax not mentioned in the title is unconstitutional and invalid. Mayo v. National Truck Brokers, Inc., 220 So.2d 11, 12 (Fla. 1969). (citation omitted, emphasis supplied)

286 So.2d at 531. Accordingly, the Court denied the petition for writ of mandamus. Id. at 532.

In State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977), this Court observed:

> This court is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution. (citations omitted, emphasis supplied)

349 So.2d at 153. The Stanlicks' proposed interpretation of the amendment suggests that the statute is unconstitutional because the title of Chapter 78-300, Laws of Florida, is devoid of any mention of the West v. Jessop rule, much less any express (or even implied) indication that the act abrogates the rule. Accordingly, adoption of the Stanlicks' argument renders the 1978 amendment to Section 440.11(1), Florida Statutes, unconstitutional and invalid.

The Senate staff analyses are equally instructive. The April 14, 1978, Senate staff analysis of Bill 407 states in summary that the bill is to provide "for fellow employee immunity under workmen's compensation." After setting forth the rule that an employee may recover against a fellow employee as a third party tortfeasor, the analysis states the

purpose of Bill 407 as follows:

> This bill grants immunity to a fellow employee who is acting in furtherance of the employer's business. A fellow employee therefore could not be named as a third party tortfeasor and workmen's compensation would be the injured worker's only recourse.

(Streeter Appendix to Petitioners' Brief on the Merits at A.9) The Senate staff analysis of the final version states that the amendment "would change the law to provide for fellow employee tort immunity." None of the staff analyses discusses the rule that an employee acting as the alter ego of the employer enjoys employer's immunity. None of the analyses states that the purpose of the bill is to expand liability in any way. None of the analyses states that the purpose of the bill is, as suggested by the Stanlicks, to create a uniform rule of liablility for all employees, regardless of their role. (See Streeter Appendix to Petitioners' Brief on the Merits at pp. A.9-A.18.)

Remarkably, the Stanlicks assert the following:

> [A]ny 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 .... The statute should not be construed to infringe upon that pre-existing common-law right.

(Petitioners' Brief on the Merits at p. 4) Infringing on that common-law right is the precise, express purpose of the amendment. Even the Stanlicks apparently realize that purpose in advancing their "uniform standard" argument that all employees can be sued for acts of gross negligence, but

not for acts of simple negligence. Moreover, the Stanlicks' assertion directly conflicts with this Court's construction of the amendment in Iglesia v. Floran, 394 So.2d 994 (Fla. 1981). See discussion infra at pp. 27-28.

The 1978 amendment does not apply to this action--and Sullivan v. Streeter is wrong--because of the fundamental distinction between (1) an employee acting as a fellow employee and (2) an employee--whether laborer, supervisor, officer, or director--acting as the employer's alter ego.

C. Post-Amendment Case Law

In Iglesia v. Floran, 394 So.2d 994 (Fla. 1981), this Court held the 1978 amendment constitutional. Floran and Iglesia, acting within the scope of their employment, were passengers in an automobile operated by Floran. Floran's negligent operation of the automobile caused Iglesia's death. Applying the 1978 version of Section 440.11(1), Florida Statutes, the trial court granted summary judgment for Floran. Iglesia's personal representative appealed the summary judgment, contending that the amendment violated the constitutional prohibition against abolishing a common law right for which no reasonable alternative is provided. 394 So.2d at 996. Affirming the trial court's summary judgment and the constitutionality of the amendment, the Court explained the amendment as follows:

> Before the 1978 amendment to Section 440.11, an employee had the right to bring a lawsuit against a co-employee for death or injuries

> negligently inflicted. Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955). But in [Kluger v. White, 281 So.2d 1 (Fla. 1973)] we stated:
>
> > In McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942), this Court approved the so-called "Guest Statute" which merely changed the degree of negligence necessary for a passenger in an automobile to maintain a tort action against the driver. It did not abolish the right to sue, and does not come under the rule which we have promulgated.
>
> 281 So.2d at 4. Section 440.11 still provides a cause of action for gross negligence just as the court-sustained "Guest Statute" did. (footnote omitted)

394 So.2d at 996.

Iglesia confirms the impact of the amendment: The amendment restricts the common law, co-employee liability rule of Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955), by granting immunity to a fellow employee acting as a fellow employee within the scope of his employment unless the employee acts with willful and wanton disregard or unprovoked physical aggression or with gross negligence. The purpose of the 1978 amendment is to restrict the Frantz v. McBee common law liability of a fellow employee--not to expand the liability of an employer using an employee as its instrument.

As stated in Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), affirmed, 452 So.2d 932 (Fla.), appeal dismissed, ____ U.S. ____, 83 L.Ed.2d 391 (1984):

> Thus, in Iglesia v. Floran, 394 So.2d 994 (Fla. 1981), the constitutionality of Section 440.11 relating to actions of claimants against negligent co-employees, was upheld because the court found that the statute merely modified the degree of negligence required, rather than

> abolishing the right of action. (emphasis supplied)

431 So.2d at 210. Similarly, in McCotter Motors, Inc. v. Newton, 453 So.2d 117 (Fla. 1st DCA 1984), affirmed, 475 So.2d 230 (Fla. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 1210 (1986), the court described the amendment as follows:

> Section 440.11 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 co-employees act with willful and wanton disregard or unprovoked physical aggression or with gross negligence. (emphasis supplied)

453 So.2d at 119.

In McCarroll v. Reagan, 396 So.2d 239 (Fla. 2d DCA 1981), an injured employee sued a co-employee for injuries sustained in an automobile accident that occurred within the scope of employment. Applying the 1978 amendment, the court affirmed a summary judgment for the defendant co-employee. 396 So.2d at 240. Similarly, Weller v. Reitz, 419 So.2d 739 (Fla. 5th DCA 1982), involved an on-the-job accident between two co-employees. The plaintiff was tuning the engine of a truck--an activity within the scope of his employment. Standing in front of the truck, the plaintiff requested the defendant, a fellow employee, to start the engine--an act within the scope of the defendant's employment. After the defendant started the engine, the truck moved forward and injured the plaintiff's legs. 419 So.2d at 740. Applying the 1978 amendment, the trial court granted summary judgment for the defendant.

Citing McCarroll v. Reagan, supra, and Iglesia v. Floran, supra, the appellate court affirmed the summary judgment. 419 So.2d at 741. In both McCarroll and Weller, the defendant was clearly acting as a fellow employee rather than the alter ego of the employer. Accordingly, the 1978 amendment applied.

The foregoing cases establish that the 1978 amendment governs liability of a fellow employee acting as a fellow employee. On the other hand, the rule of West v. Jessop provides immunity to an employee acting as the employer's alter ego. The Stanlicks simply (and completely) fail to acknowledge the distinction.

In the tragic case of Cliffin v. State, Department of Health and Rehabilitative Services, 458 So.2d 29 (Fla. 1st DCA 1984), the court recognized the distinction and affirmed a summary judgment entered on behalf of the decedent's supervisor in an action governed by the 1978 version of the statute. In Cliffin, the decedent was employed in the mentally disordered sex offender unit of the Florida Department of Health and Rehabilitative Services facility in Gainesville, Florida. While working, the decedent was physically attacked, murdered, and sexually assaulted by a resident of the unit. 458 So. 2d at 30. Finding that the complaint failed to allege any affirmative act of negligence beyond the scope of the employer's nondelegable duty to provide a safe place to work, the court affirmed a summary judgment for the individual defendants, who were decedent's

supervisors. Id. at 30. Additionally, in Albert v. Salemi, 431 So.2d 345 (Fla. 2d DCA 1983), the court affirmed the trial court on the basis of Section 440.11(1), Florida Statutes (1981), and West v. Jessop.

However, in Sullivan v. Streeter, 485 So.2d 493 (Fla. 4th DCA 1986), the Fourth District Court of Appeal held that the 1978 amendment allows an action against an employee acting as the employer's alter ego for gross negligence in failing to provide a safe place to work. The Streeter interpretation of the amendment fails to perceive the distinction between employers' immunity and fellow employees' liability. In an opinion that expressly and emotionally evokes the incidents at Bopal, Three Mile Island, and Love Canal, the Fourth District concluded (correctly) that corporate officers are also employees. However, the court failed to look in the other direction--corporate officers sometimes act as the employer. Obviously, a corporation can act only through its employees. If an employee--whether an officer, director, supervisor, or laborer--steps into the shoes of the employer to fulfill a nondelegable duty of the employer, the employee acts as the employer and is entitled to the employer's immunity. That is the distinction the Streeter court failed to perceive. That is why Streeter is wrong.

In Kaplan v. Circuit Court of the Tenth Judicial Circuit for Polk County, 495 So.2d 231 (Fla. 2d DCA 1986), the court rejected Streeter and held that the Kaplans enjoyed their employers' immunity. As discussed supra at pp. 5-6, the

Kaplan court recognized that a corporate officer at times acts as the employer and, accordingly, is entitled to the employer's immunity.

The fundamental infirmity in the Stanlicks' argument and the Streeter opinion is the failure to acknowledge that a corporate employee sometimes acts as the employer. That is true because a corporation can act only through its employees. Neither a certificate of incorporation, the corporate minute book, nor a share of stock can hire employees, borrow money, make payrolls, or supervise employees. A corporate employer can discharge its nondelegable duties of care only through its employees. The Stanlicks suggest that the Kaplan opinion contains "the fiction ... that corporate officers, when performing certain functions, are not co-employees at all." (Petitioners' Brief on the Merits at p. 18). That is not a fiction at all--that is a fundamental reality--and necessity--of the corporate existence.

The function--not the identity or title of rank--of an employee determines the immunity to which the employee is entitled. If an employee--whether an officer, director, field foreman, or laborer--acts as the alter ego of the employer and performs (or fails to perform) the employer's nondelegable duty, the employee enjoys the absolute immunity of the employer. On the other hand, if an employee--an officer, director, field foreman, or laborer--acts as a fellow employee, he is entitled only to the amendment's qualified immunity of a fellow employee. This action

presents an excellent example of that distinction: If John Kaplan had grossly negligently driven a Kaplan Industries truck in which Scott Stanlick was a passenger, John Kaplan would be entitled only to the qualified immunity of a fellow employee and would, therefore, be liable to Scott Stanlick. That is true regardless of John Kaplan's status as an officer, director, and major shareholder of Kaplan Industries.

The Stanlicks fail also to realize that the duty allegedly breached was owed by Kaplan Industries--not the Kaplans. The Stanlicks specifically allege:

> The defendant, Kaplan Industries, Inc., plaintiff's employer, is subject to federal and state regulations concerning long haul over the road truck driving as an Interstate Commerce Commission approved carrier.

(Complaint at ¶ 2) The Stanlicks allege no law that requires John or Donald Kaplan to personally enforce driving regulations. Arguably and without reference to the law of workers' compensation immunity, the Stanlicks fail to state a cause of action at all against the Kaplans because the Stanlicks fail to allege a duty owed by the Kaplans. See McDaniel v. Sheffield, 431 So.2d 230 (Fla. 1st DCA), review denied, 440 So.2d 352 (Fla. 1983).

The rule embraced in Streeter and advocated by the Stanlicks effectively abolishes workers' compensation immunity for an employer's failure to make the work place safe and affords a plaintiff a cause of action prohibited by Florida's Workers' Compensation Act. In addition to workers' compensation benefits, a lucky plaintiff might find numerous

officers and directors who grossly negligently failed to administer their employees' nondelegable duties. That result is foreign to the spirit and the letter of the Workers' Compensation Act.

If the legislature had elected to depart perpendicularly from the fundamental principle of employer immunity, the legislature undoubtedly would have elected to promulgate that departure in a more plausible and expressive place than a statute dealing with fellow employee immunity. It is highly unlikely that the legislature would have implemented that departure offhandedly, backhandedly, by indirection or implication, or in the absence of great fanfare (generated, undoubtedly, by newly stricken employers). It is equally unlikely that plaintiffs would have taken eight years to notice the lucrative opportunity.

A corporate employer owes its employees a duty to provide a safe work place. Pursuant to Florida's Workers' Compensation Law, the employer is absolutely immune from liability for any breach of that duty--whether the breach results from negligence, gross negligence, or willful and wanton recklessness. The corporate employer can discharge its nondelegable duty only through its employees. Those employees qua employer must share the employer's immunity or, in fact, the immunity is only illusory. Considering the complete lack of any indication -- express or implied -- that the legislature intended to deprive an employee acting for the employer of

workers' compensation immunity, no persuasive reason exists for this Court to do so.

IV. CONCLUSION

The Kaplans request that the Court affirm the Second District Court of Appeal with instructions that the Stanlicks' action be dismissed with prejudice.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served by United States mail on December 22, 1986, on Joel S. Perwin of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Suite 800, City National Bank Building, 25 W. Flagler Street, Miami, FL, 33130; Bill Wagner of Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, FL, 33602; C. Rufus Pennington, III, of Margol, Fryefield & Pennington, 222 East Forsyth Street, Jacksonville, FL, 32202; Alan McMichael of Stripling & Denson, Post Office Box 1287, Gainesville, FL, 32602; Valerie Shea of Conrad, Scherer & James, Post Office Box 14723, Fort Lauderdale, FL, 33302; Robert M. Curtis of Saunders, Curtis, Gainestra & Gore, Suite 302, 1750 East Sunrise Boulevard, Fort Lauderdale, FL, 33338; Leslie King O'Neal of Market, McDonough & O'Neal, 19 East Central Boulevard, Post Office Drawer 1991, Orlando, FL, 32802; Talbot D'Alemberte, 320 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, FL, 33201; and Judith M. Korchin of Steel, Hector & Davis,

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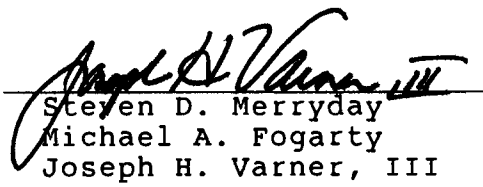

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