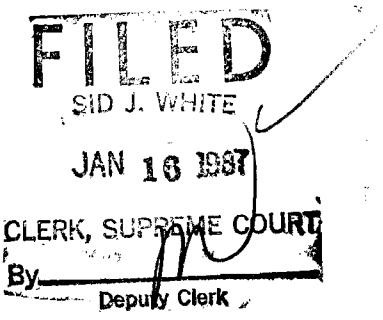
DA 3-4-87

19

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,559




SCOTT RANDALL STANLICK, et al.,

Petitioners,

vs.

DONALD KAPLAN, et al.,

Respondents.

_____/

**PETITIONERS' REPLY BRIEF ON THE MERITS**

WAGNER, CUNNINGHAM, VAUGHAN &
McLAUGHLIN
708 Jackson Street
Tampa, Florida 33602
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: JOEL S. PERWIN

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

## TABLE OF CASES

PAGE



## AUTHORITIES





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

# I
# ARGUMENT

In a brief which is insufferable in its tone of superiority, the Kaplans invent a concept of employee immunity which has never existed in Florida; invoke a series of cases for this concept which do not remotely support it--and in fact contradict it in the very passages quoted by the Kaplans; assert that their invented theory is "recognized everywhere, except in the Stanlicks' brief" (answer brief at 7)--which ignores the obvious conflict of decisions which induced this Court's review; and conclude by asserting that the Stanlicks' legal theory will benefit the "lucky plaintiff [who] might find numerous officers and directors who grossly negligently failed to administer their employees' nondelegable duties," and thus might state a cause of action (answer brief at 33-34). "Lucky" Scott Stanlick was permanently and totally disabled by the Kaplans' unconscionable requirement that he violate federal law, and cover up the violation by falsifying records, so that the Kaplans could increase their profits by driving their employees into virtual exhaustion. If the district court's opinion in this case is upheld, it is the Kaplans, and all supervisory corporate employees like them, who will be the lucky ones. They will have the message, from the highest court of this state, that they can with impunity sacrifice their employees' safety for monetary gain, affirmatively and recklessly creating an unsafe working environment, knowingly violating federal law, and suffer no civil retribution. It should be obvious to no one that Florida law would sanction such an outcome.

It would be impossible in the space permitted to point out each of the misstatements and misleading statements in the Kaplans' brief. We will confine ourselves to a discussion of the major themes in that brief, in the context of our original organization.

At the outset (brief at 5-7), we pointed out that no inquiry into the history or purpose of the 1978 amendment is appropriate, because the plain language of that amendment unambiguously permits the Stanlicks' action against the Kaplans. Making no distinctions among classes of employees, or among ***functions*** of employees, the statute

gives all employees, performing all functions, the immunity of the employer, but then makes clear that "[s]uch" immunity--the very immunity just provided by the statute--does not apply in the case of physical aggression or gross negligence. Ignoring the key word "[s]uch," the Kaplans choose to analyze the statute as if the two sentences were totally unrelated, and "contemplate[] two, discrete types of immunity" (answer brief at 21; *see id.* at 4, 21-22). The first sentence, they argue, clothes all employees with the employer's traditional immunity--that is, immunity from all actions except those alleging intentional torts--while the second sentence merely refers to "fellow-employee" immunity, subjecting them to liability for both intentional torts and torts committed with gross negligence, but ***only*** when such employees are acting as employees, and not when they are acting in the place of their corporate employers relative to the safety of the workplace.

That construction fails not only by omission--because the statute says absolutely nothing to suggest that corporate employees are protected from suits even for gross negligence when they are performing certain functions--but also fails because it is flatly inconsistent with the statutory language itself. The statute creates co-employee immunity in the first sentence, and then provides that "[s]uch" immunity does not apply in the case of gross negligence. The word "[s]uch" is an explicit link between the two sentences of the statute, and the Kaplans have simply ignored that word rather than addressing it. To borrow Justice Frankfurter's language, the Kaplans' "problems are not rendered non-existent by disregard of them." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 462, 77 S. Ct. 912, 1 L. Ed.2d 972, 984 (1957) (Frankfurter, J., dissenting). We are discussing here the plain meaning of the statute. It hardly advances that discussion to ignore the words of the statute.

Plainly and unequivocally, making no distinction regarding classes of employees or functions performed by employees, this statute subjects a co-employee to liability for gross negligence. That plain language precludes any scrutiny of the history or purposes of this statute. It says what it says, and it subjects the Kaplans to liability for their



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

gross negligence in this case.[1/]

*A. The Common-Law Rule.* If the Court decides to look beyond the plain language of the statute, its scrutiny must be informed by the rule that pre-existing common-law rights may not be abridged by the legislature unless it says so explicitly, and if the legislature is not explicit, the Court must adopt the narrowest possible construction of such a statute. At common law, as we noted (brief at 7), all co-employees were liable even for ordinary negligence, no matter what functions they were performing. The leading Florida case is *Frantz v. McBee Co.*, 77 So.2d 796 (Fla. 1955), and the Kaplans attempt to limit *Frantz* to the holding that even at common law, a co-employee was liable for negligence only for his personal torts, but not when the conduct in question constituted nothing more than the employee's failure to perform the employer's non-delegable duty to make the workplace safe. After all, the Kaplans argue (brief at 7), the employee in *Frantz*, even though a supervisory employee, was charged with negligence for driving a car, not for some job which the employer could not delegate.

But the Kaplans offer no authority whatsoever for this proposition, which in fact is precisely the opposite of the true common-law rule. At common law, as we noted (brief at 8 n.5), ***both*** the employer ***and*** the employee were liable--not immune--when the employee was negligent in performing a non-delegable duty. Both were liable except insofar as the employer's liability was limited by the "fellow-servant rule." But one important exception to that rule occurred precisely in the circumstances which the Kaplans describe--the circumstance in which the plaintiff's injury was caused by the employer's direct or vicarious failure to make the workplace safe. If a co-employee

---

[1/] If there were any doubt about this interpretation of the statute, it is resolved by §440.02(11)(a), which defines "employee" as "every person engaged in any employment under any appointment or contract of hire or apprenticeship . . . ." And §440.02(11)(b) expressly provides that "employee" includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation . . . ." The statute flatly defines co-employees to include corporate officers, and it makes absolutely no distinction based upon the functions which that officer happens to be performing. The Kaplans' interpretation of §440.11 would be flatly inconsistent with the definitions in §440.02.

caused injury within the scope of the employer's nondelegable duty of providing a safe place to work, ***both*** the co-employee ***and*** the employer were responsible at common law, because the make-safe duty was one which the employer "cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission." *Northern Pacific R. Co. v. Herbert*, 116 U.S. 642, 6 S. Ct. 590, 29 L. Ed.2d 755, 758 (1886). Thus in both *Wright v. McCord*, 8 Div. 188, 88 So. 150, 151-53 (Ala. 1920), and *Givens v. Savona Manufacturing Co.*, 196 N.C. 377, 145 S.E. 681, 682 (1928), the co-employee in question was a supervisory employee charged with ordinary negligence in failing to provide a safe workplace, and in both cases the plaintiff had stated a cause of action against the co-employee. Both cases, along with the Supreme Court's decision in *Northern Pacific*, were cited in our initial brief, and all of them are totally ignored by the Kaplans. There can simply be no question that at common law, a co-employee was potentially liable even for ordinary negligence, regardless of his rank in the corporation, and regardless of the particular function which he was performing at the time. This is undeniable, notwithstanding the Kaplans' attempt to distort the meaning of *Frantz v. McBee*.

This observation is vital, because it demonstrates the propriety of our interpretation of the 1978 amendment. That amendment should not be interpreted to constrict the pre-existing common-law rule unless it says so directly. At the least, the statute says no such thing, and thus the district court's interpretation must be rejected.

*B. The Kaplans Were Not Entitled to Immunity Under Those Decisions Interpreting Earlier Versions of §440.11(1), Fla. Stat.* We discussed the cases concerning pre-1978 versions of the statute at pages 11-17 of our initial brief, establishing that the courts construed that statute to immunize a corporate employee--in most cases an officer or supervisor--only when that employee was charged with the failure to perform the employer's make-safe duty--but not when the employee had committed an affirmative act of negligence constituting a breach of the defendant's personal duty to the plaintiff. The Kaplans discuss all of the same cases, attributing to them a far broader holding--that

any employee was clothed with his employer's statutory immunity whenever he was acting "qua employer"--that is, as an alter-ego of the employer--performing some function which the employer had no power to delegate. Of course, not a single one of these cases--until the district court's decision in this case--employed the fiction that in performing certain functions, co-employees are not "employees" at all. But that does not stop the Kaplans from attributing to these cases the rule that so long as the co-employee's conduct was somehow related to the safety of the workplace, it was insulated from liability even if it constituted gross negligence, because clothed with the employer's immunity for all acts except intentional wrongs.

As we demonstrated, and will demonstrate again, none of the cases on this question say any such thing. But before returning to those cases, we would pose two questions regarding the Kaplans' assertedly-self-evident theory. First, if the Kaplans are right that these cases provided immunity to any employee acting "qua employer," then why do these cases apply only to ***corporate*** employees? Why do they not also apply to any employee of any business--even an unincorporated business--so long as that employee is performing the employer's non-delegable duties? The Kaplans' rationale--that any employee was entitled to protection if he was acting "qua employer"--would apply just as much to the employee of an unincorporated enterprise who was acting "qua employer." And yet the construction adopted by the courts before the 1978 amendment was only addressed to corporations, while holding ***any*** employee of an unincorporated business, regardless of his rank ***or the function performed,*** for his negligence. The Kaplans' construction of the pre-1978 rule--a construction allegedly "recognized everywhere except in the Stanlicks' brief" (answer brief at 7)--is flatly inconsistent with this well-settled distinction between incorporated and unincorporated businesses.

The second question is similar: in light of the Kaplans' suggestion, why did the pre-1978 rule only relate to the employer's make-safe duty--but not to the full range of responsibilities which an employee performs for an employer? After all, it is the Kaplans' position that a co-employee was entitled to immunity whenever he acted as the

"instrument of the employer . . ." (answer brief at 2). An employee acts as a "instrument of the employer" in all sorts of ways unrelated to the make-safe obligation, and yet was not entitled to the employer's immunity in all of these contexts. The answer cannot be that only the employer's make-safe duty was non-delegable, because the delegability of the function in question is totally irrelevant to the construction advanced by the Kaplans. Their position is an alter-ego theory--that the co-employee was entitled to the employer's liability whenever he stood in the employer's shoes. Employees stand in the employer's shoes in all sorts of areas outside of the make-safe rubric. And yet, they were not entitled to immunity.

It is clear that the Kaplans' suggested formulation of the pre-amendment rule cannot be reconciled with its limited reach. To the contrary, the rule evolved as a far more-restricted accommodation of the realities of corporate operation. It evolved in recognition that corporations have to function through individuals, and that in certain circumstances, those individuals have committed no independent, or personal act of negligence violating a common-law duty to those who might foreseeably be injured by it, but instead have simply ***failed*** to do something which the corporation was required to do. And at common law, the main thing that the employer was required to do--that is, could not delegate--was to make the workplace safe. If the employee did nothing more than to omit to perform that corporate duty, he was held to have violated no personal duty to his fellow workers. But if the employee had personally committed an affirmative act of negligence--even in fulfillment of some duty owed by the employer--then the defendant was personally responsible, because he had a personal duty to act with care.

We reviewed the pre-amendment cases for this proposition at length in our initial brief (pp. 13-17). As we noted, in *West v. Jessop*, 339 So.2d 1136, 1137 (Fla. 2nd DCA 1976)--which speaks repeatedly only about "corporate officers," or "a stockholding corporate officer"--and not about all employees--the court stated directly 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 affirma-



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

tive act." That formulation is positively inconsistent with the Kaplans' position.

Similarly 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 quoted with approval the pronouncement of the Wisconsin Supreme Court 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." *Lupovici v. Hunzinger Construction Co.*, 79 Wis.2d 491, 255 N.W.2d 590 (1977). As the *Dessert* court put it, a "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." 392 So.2d at 343 (emphasis in original). The Kaplans quote these very passages in their brief (p. 11), without recognizing that they are positively inconsistent with the broad formulation which they advance. These passages clearly indicate that even if the co-employee is performing some obligation which the employer cannot delegate, he is personally liable if he personally has increased the risk to the plaintiff through an affirmative act, because everyone owes a personal duty of reasonable care in the commission of an affirmative act. *See* note 2, *infra*.

Similarly in *Zurich Ins. Co. v. Scofi*, 366 So.2d 1193, 1194 (Fla. 2nd DCA), *cert. denied*, 378 So.2d 348 (Fla. 1979), the court quoted with approval the pronouncement in *Ortman v. Jensen & Johnson, Inc.*, 66 Wis.2d 508, 225 N.W.2d 635 (1975), that the plaintiff has stated a cause of action by the "allegation of any affirmative act of negligence by the respondent [defendant] which increased the risk of injury." Again, it is the affirmative nature of the defendant's personal conduct, increasing the risk of injury above that which may have been caused by the mere failure to perform the employer's non-delegable duty, which controls. This formulation is positively inconsistent with the Kaplans' position.

Finally, in *Chorak v. Naughton*, 409 So.2d 35, 39 (Fla. 2nd DCA 1981), in a passage



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

also quoted by the Kaplans (brief at 13) without recognizing its meaning, the court rejected the argument that the defendant's conduct in paddling the plaintiff as part of a corporate contest was related to the employer's make-safe duty, but added that such a question was really irrelevant, because of the willful nature of the defendant's alleged conduct (our emphasis): "***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." The Kaplans ignore this explicit statement that the willful nature of the employee's conduct was alone sufficient to state a cause of action.

As we have noted, however, and as these cases make abundantly clear, the "affirmative-act" exception to the rule of vicarious co-employee immunity did not require the allegation of an intentional act. As the Kaplans demonstrate (brief at 17-18), such an allegation was required in order to subject the employer to liability, but a co-employee--whether supervisory or not, and whether standing in the corporate employer's shoes or not--was amenable to suit even for ordinary negligence, whenever his conduct satisfied the "affirmative-act" exception. Under that exception, before the 1978 amendment, the co-employee's liability focused upon the nature of his conduct, not upon the quality of his wrongdoing. If the employee did nothing more than fail to do what the corporate employer was required to do, then his conduct was protected, because corporate employers must act through individuals. But if the individual had done "something extra," *Zurich Ins. Co. v. Scofi*, 366 So.2d at 1194, something of an affirmative nature which not only constituted the employer's failure, but also an act of personal negligence by the employee, then the employee was personally liable for injuries caused by his own conduct.

At the very least, that is one reasonable interpretation of the pre-1978 statute, and because that statute was passed in derogation of the common law, the courts were ***required*** to adopt that interpretation in favor of one which was more restrictive of the pre-existing common-law rule. *See* our initial brief at p. 13 n.9. That observation alone requires adoption of the interpretation offered here, in preference to the onerous



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

constriction of pre-existing common-law rights which the Kaplans insist was "recognized everywhere, except in the Stanlicks' brief."

The Kaplans argue, however (brief at 18-21), that this distinction between acts of commission and omission is "utterly irrelevant to workers' compensation law," because the legislature could not have intended a distinction which the Kaplans find to be nonsensical. They ask the Court to consider the example of a corporate employee who simply fails to instruct the workers about the safe operation of industrial equipment on the one hand, and on the other a safety instructor who improperly instructs an employee about the use of equipment, resulting in his injury. It makes no sense, the Kaplans insist, to distinguish the co-employee's personal liability on that basis. But with all respect, such a distinction makes a great deal of sense. In the former case, the co-employee has done nothing to ***increase the risk*** to the plaintiff beyond the risk which is created by the corporate ***employer***'s failure to provide such instruction--the failure of a non-delegable duty. Since a corporation can act only through an employee, the employee's omission is nothing more than the corporation's omission. But in the latter case, the defendant has committed an act of ***personal*** negligence to those whom he owed a ***personal*** obligation. *See* note 2, *infra*. He has not simply failed to make the workplace safe by omitting to instruct the employees about how to use equipment; he has affirmatively and personally made the workplace ***less safe***, by committing a ***personal*** act of negligence--by ***personally*** telling co-employees to do the wrong thing. That careless act constitutes not merely a failure to perform the employer's non-delegable duty; in addition, it constitutes an act of personal negligence, and thus is actionable. At the very least, that is one reasonable interpretation of the pre-1978 statute, and because it is least restrictive of the pre-existing common-law right, it ***must*** be adopted.

In the instant case, the Kaplans did not simply fail to perform the corporate employer's duty of keeping the workplace safe. They did not simply fail to service the trucks and make sure that the garage was free of hazards. They also acted affirmatively to make the workplace less safe. They gave affirmative instructions to their drivers, not

merely to drive to the point of exhaustion, but to violate federal law by falsifying records, to cover up the unconscionable working conditions which they knew to be unlawful. When they acted affirmatively in that way, they stepped outside of the corporate employer's duty to keep the workplace safe. They acted not just as the personal embodiment of the corporation, but as individuals. They issued directives to individuals to whom they had a personal duty of reasonable care. By thus acting affirmatively, they shed the mantle of their corporate employer's immunity.[2/]

Under the old statute, all of the foregoing arguments would be appropriate even if the Kaplans had merely acted in a negligent way, in light of their affirmative conduct. But even if those arguments were to be rejected by the Court, it cannot be stressed too strongly that the Stanlicks in this case have alleged not mere negligence, but gross negligence and recklessness. There can simply be no question that a co-employee loses the employer's mantle of immunity when his conduct is not merely careless, but reckless. Indeed, as we noted (brief at 17 n.10), both the plaintiffs ***and the defendants*** in the *Streeter* case (*Streeter v. Sullivan*, Case No. 86,897) agree with this formulation, leaving the Kaplans alone on a thin and shaky limb. As even the defendants in *Streeter* note (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."

---

[2/] The Kaplans argue (brief at 33) that they had no personal duty to Scott Stanlick at all--that only the corporation had such a duty. After all, they point out, it was the corporation--not they--which was required to obey the federal truck-driving regulations. Of course, this "duty" argument has nothing to do with the immunity issue, was not raised in the trial court, was not raised in the district court, and is not properly before this Court. Beyond that, the point is plainly wrong. The Kaplans may be right that in the abstract, they had no personal duty to protect Scott Stanlick's safety. *See McDaniel v. Sheffield*, 431 So.2d 230, 231 (Fla. 1st DCA), *review denied*, 440 So.2d 352 (Fla. 1983) (corporate officers had no personal duty to protect employee from armed robbers of business). But the Kaplans did not simply fail to protect Scott Stanlick. They acted affirmatively in a manner which foreseeably injured him. And in Florida, when someone acts affirmatively, he has a duty to those who may foreseeably be injured by his conduct. *Vining v. Avis Rent-A-Car Systems, Inc.*, 354 So.2d 54 (Fla. 1977); *Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981). In any event, this question of duty is not properly before the Court.

Even the *Streeter* defendants acknowledge that gross negligence or recklessness cannot be protected vicariously by the employer's immunity. And again, at the very least, this interpretation is certainly arguable, and therefore ***must*** be adopted in preference to an interpretation which constitutes a greater incursion upon the pre-existing common-law right. There can be no question that under prior versions of the statute, the Stanlicks have stated a cause of action against the Kaplans.

*C. The Kaplans Were Not Entitled to Immunity Under §440.11(1), Fla. Stat. (1981).* As we have noted, the plain language of the 1978 amendment admits of no other conclusion. But even apart from that, it is clear that the purpose of the amendment was to redefine the nature of co-employee immunity in a uniform way, by vastly expanding the immunity of co-employees on the one hand (by removing the make-safe parameters of the co-employee's vicarious protection, and substituting a far-broader vicarious protection based on the agency theory that a co-employee is entitled to the same immunity as the employer whenever acting in furtherance of the employer's business), while at the same time making clear that this newly-created scope of co-employee immunity is limited to acts of simple negligence, as opposed to gross negligence or intentional misconduct.

The net result of this legislative effort to provide uniform treatment for co-employees was to vastly expand their immunity from liability; and it accomplished that result by vastly expanding in one way, but then cutting back to the pre-existing rule in another. Thus, if one were looking for a shorthand description of what the act was seeking to accomplish, it would be that the act extended the exclusiveness of liability to fellow employees, subject to certain exceptions. And that, of course, as the Kaplans themselves observe (brief at 23), is exactly the title of the bill that eventually was passed--a bill "extending the exclusiveness of liability to fellow employees with certain exceptions . . . ." That title is a perfect description of our interpretation of the amendment, and of course, that title reflected the single subject-matter of the amendment--the matter of defining the new concept of co-employee immunity, by vastly

expanding the alter-ego theory of vicarious immunity, while making certain that, as under pre-existing statutes, such immunity would not extend to acts of gross negligence or worse. And as we have noted, if this construction of the amendment is at all reasonable, it ***must*** be adopted in preference to a construction which would more-seriously constrict the pre-existing common-law rule.[3/]

As we noted (brief at 21), the post-amendment cases all support our interpretation. The Supreme Court in *Iglesia v. Floran*, 394 So.2d 994, 995 (Fla. 1981), upheld the statute as a grant of immunity to "coemployees" for acts of negligence but not gross negligence, making no distinction between classes of co-employees, or between the functions performed by co-employees, and creating no fiction that when performing certain functions, co-employees are not really "employees" at all. Incredibly (brief at 28), the Kaplans assert that *Iglesia* "confirms the impact of the amendment . . . by granting immunity to a fellow employee acting as a fellow employee . . . ." We find no such pronouncement, or even the slightest hint of any such pronouncement, in the *Iglesia* opinion. It is simply the Kaplans' invention.

We cited a few other district-court opinions in our initial brief (p. 21), which describe the statute in precisely the same terms, again creating no fiction that when performing certain functions, a co-employee is not an "employee" at all. And in their

---

3/ The Kaplans point out (brief at 26) that nothing in the legislative history discusses the old make-safe rule, or purports to expand the pre-existing liability of a co-employee. Of course, the net effect of the amendment was to greatly reduce such pre-existing liability, and in any event, there was no need for such discussion because the amendment did not change the pre-existing rule concerning a co-employee's liability for gross negligence or worse. Thus, the appropriate question is addressed to the Kaplans: why is it that nothing in the legislative history connotes a legislative intent to adopt the fiction that in performing certain functions, co-employees are not really "employees" at all? One would think that if the legislature had intended to do that--something that no court before the instant decision had ever attempted to do--it would have said so explicitly, especially since the legislature was amending a chapter in which an "employee" is explicitly defined to include "any person who is an officer of a corporation and who performs services for remuneration for such corporation . . . ." §440.02(11)(b). In light of that statutory definition of a co-employee, one would think that if the legislature had intended to adopt the Kaplans' interpretation, in obvious transgression of a pre-existing common-law rule, it would have said so explicitly.

own brief (pp. 28-29), the Kaplans themselves provide one other case which says the same thing.[4/] According to the Kaplans (brief at 30), these cases "establish that the 1978 amendment governs liability of a fellow employee acting as a fellow employee" (emphasis in original). But these cases say no such thing. They simply say what the statute says--that under the 1978 amendment, co-employees are immune from liability for their negligence when acting in furtherance of the employer's business, but not immune for gross negligence or worse. Only if one adopts the fiction that co-employees are not "employees" at all when performing certain functions could these pronouncements possibly support the Kaplans' position. But so far as we can determine, neither the legislature nor any court except for the district court in this case has ever adopted such a fiction. And to the contrary, as we have noted, the statute explicitly defines corporate officers as "employees." Thus, if the legislature had intended to say something else, in derogation of the pre-existing common-law rule, it certainly would have said so explicitly. And yet the Kaplans' position, which they find so repeatedly and so obnoxiously to be self evident, is a distinction of their own creation, supported neither by the statutory language, nor the case law, nor the principles of statutory construction, nor the policies underlying the statute.

If the Kaplans' interpretation were adopted, it would send a clear signal to those

---

[4/] *McCaroll v. Reagan*, 396 So.2d 239, 240 (Fla. 2nd DCA 1981) (per curiam) ("That section 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 interests of the victim . . ."). Two other cases cited by the Kaplans, however (brief at 28, 30), provide no guidance on the question. In *Sasso v. Ram Property Management*, 431 So.2d 204, 210 (Fla. 1st DCA 1983), the court simply noted that in *Iglesia*, "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." That description of the statute certainly does nothing to support an interpretation that co-employees are not really "employees" in certain circumstances, but it really does not address the question at all. The Kaplans also discuss at length the decision in *Cliffin v. Department of Health and Rehabilitative Services*, 458 So.2d 29 (Fla. 1st DCA 1984), but that opinion clearly discusses the 1977 statute--not the 1978 amendment--and in fact relies upon two decisions which were explicitly based upon pre-1978 versions of the statute. Thus, it has no place in the Kaplans discussion of "Post-Amendment Case Law" (answer brief at 27).

who run incorporated businesses--that they can profit by subjecting their employees to unconscionable working conditions, and by instructing them to falsify records to cover up their misconduct--that they can squeeze their employees beyond the limits of human endurance--with confidence that they will never be subjected to individual liability because of the legislature's handywork. We submit that in the 1978 amendment, when the legislature said that co-employees are responsible for acts of gross negligence, the legislature meant what it said. It could not have intended to tolerate reprehensible conduct like the conduct which the Kaplans are alleged to have committed, and this Court should not approve their attempt to escape the consequences of that conduct.

## II
## 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.

## III
## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of January, 1987, to: STEVEN D. MERRYDAY, ESQ., Glenn, Rasmusen, Fogarty, Merryday & Russo, P.O. Box 3333, Tampa, Florida 33601; C. RUFUS PENNINGTON, III, ESQ., Margol, Fryfield & Pennington, 222 East Forsyth Street, Jacksonville, Florida 32202; ALAN McMICHAEL, ESQ., Stripling & Denson, P.O. Box 1287, Gainesville, Florida 32602; VALERIE SHEA, ESQ., Conrad, Sherer & James, P.O. Box 14723, Ft. Lauderdale, Florida 33302; ROBERT M. CURTIS, ESQ., Saunders, Curtis, Gainestra & Gorr, Suite 302, 1750 East Sunrise Boulevard, Ft. Lauderdale, Florida 33338; LESLIE KING O'NEAL, ESQ., Marked, McDonough & O'Neal, 19 East Central Boulevard, P.O. Drawer 1991, Orlando, Florida 32802; TALBOT D'ALEMBERTE, ESQ., 320 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 33201; and to JUDITH KORCHIN, ESQ., Steel, Hector & Davis, 4000 Southeast Financial Center, 200 South

Biscayne Boulevard, Miami, Florida 33131-2398.

Respectfully submitted,

WAGNER, CUNNINGHAM, VAUGHAN &
McLAUGHLIN
708 Jackson Street
Tampa, Florida 33602
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: _____
JOEL S. PERWIN

STANL-PRBR/amg