IN THE SUPREME COURT OF FLORIDA

LOUIS GERENTINE, ET AL,

Petitioners,

vs. CASE NO: 70,200

COASTAL SECURITY SYSTEMS, ET AL,

Respondents.
_____/

APPEAL FROM DISTRICT COURT OF APPEAL
FIFTH DISTRICT - NO. 86-817

AMENDED
ANSWER BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Respondents, Robert McComb, Phillip Goodwin, Louis Huntley and William Huntley submit this statement of the case and facts to specify areas of disagreement and to include citations to the record on appeal, which were omitted from Petitioner's Initial Brief. Respondents disagree with some of Petitioner's allegations, as specified, pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure. Respondents generally disagree with the conclusory nature of many of Petitioner's allegations.

This is a wrongful death case. Shirley Ann Gerentine was abducted and murdered on September 14, 1983, while she worked as a clerk at a Huntley's Jiffy convenience store, Store Number 137, in Orlando, Florida. After receiving Workers' Compensation benefits, Mrs. Gerentine's estate filed suit against Robert McComb, Phillip Goodwin, Louis Huntley and William Huntley individually for damages under the Florida Wrongful Death Act. Mr. McComb was the division manager for Huntley's Jiffy Food Stores, Inc., and was Shirley Ann Gerentine's immediate supervisor. Phillip Goodwin was the district manager for Huntley's Jiffy Stores, Inc. Louis Huntley and William Huntley were the president and secretary of Huntley's Jiffy Stores, Inc., the corporation which owns convenience stores throughout Florida and Georgia. Both Louis Huntley and

William Huntley retained an active role in the supervision and management of operations at all the stores in the convenience store chain, including Store Number 137, where Shirley Ann Gerentine worked. Because Shirley Ann Gerentine was an employee of Huntley Jiffy Food Stores, Inc. and her survivors received workers' compensation benefit from its account, it was not a defendant in the action (R-27-28).

This case comes to the Florida Supreme Court from the Fifth District Court of Appeal's per curiam decision affirming the trial court's order which dismissed the Second Amended Complaint with prejudice as to these defendants. Since the Second Amended Complaint did not contain sufficient facts to show gross negligence, the trial court dismissed the action. The trial court rejected plaintiffs' argument that Shirley Ann Gerentine and these individual defendants were employed in "unrelated works" so that the immunity provisions of Section 440.11(1) would not apply and allowing Plaintiffs to plead only "ordinary negligence". The trial court also rejected plaintiffs' argument that Section 440.11(1) violates Article 1, Sections 2 and 9 of the Florida Constitution which guarantee equal protection and due process. Finally, the trial court held that the Second Amended Complaint did not allege sufficient facts to state a claim for punitive damages. (R-396-397).

The Fifth District Court of Appeal's decision (Gerentine v. Coastal Security Systems, 502 So.2d 1356 (Fla. 5th DCA 1987), cited Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA), rev. den. 399 So.2d 340 (Fla. 1981) and Kaplan v. Circuit Court of Tenth Judicial Circuit, 495 So.2d 231 (Fla. 2nd DCA 1986). Both of these cases were recently disapproved by this court in Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). Respondents contend that this action should be distinguished from Streeter, supra and that the Fifth District's decision should be affirmed.

Respondents disagree with Petitioner's statements regarding the nature of the facts in the Second Amended Complaint. Respondents assert that, since this case was decided upon a Motion to Dismiss, the depositions, answers to interrogatories and responses to requests to produce are irrelevant to this case. Respondents disagree with Petitioner's statements that the facts asserted in the Second Amended Complaint were established statements of fact rather than mere allegations. (Petitioner's Initial Brief at Page 3).

The Second Amended Complaint alleged that Store Number 137 was a frequent target for robberies prior to the subject incident. Prior to that time, four (4) robberies had been reported at this store. (R-82). The Second Amended Complaint alleged that on the night of her

death, Shirley Ann Gerentine had been required to work alone at the store. The Second Amended Complaint alleged that she had, on previous occasions, told Robert McComb that she did not want to work alone during the night and that Mr. Phillip Goodwin also knew this. The Complaint alleged that Louis Gerentine, husband of Shirley Ann Gerentine, was a former security guard at a prison in New York. The Second Amended Complaint also alleged that the defendants specifically prohibited him from being present at Store Number 137 when Shirley Ann Gerentine was working.

On September 14, 1983 at approximately 9:26 P.M., Store Number 137 was robbed by two individuals later identified as J. Vernon Moss and Joe Hayden. In the course of the robbery, they abducted Shirley Ann Gerentine, murdered her and left her body in a nearby field. (R-83). The Second Amended Complaint contained extensive allegations regarding the staffing policies at Huntley Jiffy Food Stores and the bonus systems for managers. It also contained numerous conclusions regarding the staffing policy and bonus systems. Petitioners concluded in the Second Amended Complaint that the policies and systems were designed based on purely economic considerations, ignoring employee or customer safety. Respondents do not agree with these conclusory

allegations regarding the staffing policy and bonus systems. (Petitioners Brief at Page 4).

The Second Amended Complaint alleged that, as President of Huntley's Jiffy Food Stores, Inc., Louis Huntley possessed supervisory duties, control and authority over Store Number 137, and that he was responsible for the formulation and implementation of security policies for such stores. (R-82). Louis Huntley had direct monthly contacts with district managers for all his stores, including Mr. Goodwin, and had visited Store Number 137 several times prior to Shirley Ann Gerentine's death. He knew of the four robberies which had been reported at Store Number 137. (R-83). The Second Amended Complaint also contains numerous characterizations and conclusions about Louis Huntley's decision making process and actions. These conclusory allegations misrepresent the nature of the systems and the motivations behind the policies for which Louis Huntley was responsible. Respondents do not agree with these conclusory allegations. (Petitioner's Brief at Page 5).

The Second Amended Complaint alleged that, as Secretary of Huntley's Jiffy Stores, Inc., William Huntley possessed supervisory duties, control and authority over Store Number 137 and that he was responsible for the formulation and implementation of security policies for such stores. William Huntley also

had direct monthly contacts with district managers for all his stores, including Mr. Goodwin, and had visited Store Number 137 several times prior to Shirley Ann Gerentine's death. (R-89). The Second Amended Complaint made the same conclusory allegations against William Huntley as it did against Louis Huntley, regarding manpower allocation, bonus systems and security. (Petitioner's Brief at Page 6). Respondents object to these conclusory allegations as well.

According to the Second Amended Complaint, Phillip Goodwin was the district manager for the area of Huntley's Jiffy Food Stores which included Store Number 137. His duties as district manager were to insure proper staffing of stores within his district, to visit stores regularly, to supervise the work of division managers such as Mr. Robert McComb, to train division managers, to train employees and to assist division managers. According to the Second Amended Complaint, Mr. Goodwin knew about the prior robberies at Store Number 137 and knew there was a risk of further robberies. He had the authority to hire additional staff or special security personnel for Store Number 137 but did not do so. The Second Amended Complaint alleged that he knew personally that Shirley Ann Gerentine did not desire to work at night and had the authority to assign her to different shifts, but chose not to do so. He also allegedly knew about Mr. Gerentine's

prior experience as a prison guard and that Mr. Gerentine desired to be present at the store when his wife worked at night. However, allegedly based upon complaints from Mr. McComb that Mr. Gerentine was at Store Number 137 "excessively", Mr. Goodwin enforced the company policy which prohibited Mr. Gerentine from being present at the store. (R-96-100).

The Second Amended Complaint stated that Robert McComb was the division manager for Huntley's Jiffy Stores, Inc. and had his offices located in Store Number 137. He also lived across the street from Store Number 137. He was Shirley Ann Gerentine's immediate supervisor. His duties as division manager were to visit each store under his control at least two or three times per week, to control hazards and to provide for the safety of both employees and customers, to discourage robberies, to enforce company safety rules, to inspect the stores under his control, to make appropriate deposits from the stores, and generally to oversee the overall operations of stores within his control. Mr. McComb was familiar with the location of Store Number 137, visited it frequently, was personally aware of its business volume and knew of its operational history prior to the time Shirley Ann Gerentine was abducted and murdered. Robert McComb knew about the prior reports of robberies at Store Number 137 and knew there was a risk of future robberies at the

store. In spite of this, he allegedly pursued the policies which left clerks like Shirley Ann Gerentine alone during the hours of alleged highest risk. He had the authority to assign additional personnel to the store or to hire additional security personnel, but followed established store policy instead. (R-96-100). Robert McComb allegedly knew that Shirley Ann Gerentine did not want to work at the store during the night, but allegedly actively participated in personnel processes which required her to be there during alleged "high risk" hours. He did so in spite of alleged requests from an unnamed store manager that Shirley Ann Gerentine not be required to work at such times. Allegedly, he also knew of Mr. Louis Gerentine's background as a prison guard and other security experience and knew that Mr. Gerentine wished to be present at the store when his wife worked at night. Despite this knowledge, Mr. McComb allegedly enforced the company policy which prohibited the presence of family members at the store. The underlying tone of the allegations is that Mrs. Gerentine was singled out and specifically or uniquely assigned to an allegedly high risk shift. Respondents object to such conclusory allegations.

The Second Amended Complaint also alleged that the security systems and devices in place at Store Number 137 were inadequate and insufficient to deter robberies and

abductions. It alleged that all four of the individual defendants, McComb, Goodwin, William Huntley and Louis Huntley, were responsible for the deficiencies in the security equipment and procedure.

Numerous alleged "deficiencies" in the security system are listed in the Second Amended Complaint. The Second Amended Complaint does not allege that there was no security system, but acknowledges that there was a silent alarm, a hidden camera and decals on the door regarding the security system. The essence of the allegations regarding security "deficiencies" is that, despite the fact that Store Number 137 contained a sophisticated electronic security system, and had decals displayed at the store regarding the system, this robbery and tragic murder occurred. Plaintiffs conclude, therefore, that the systems were deficient. (Petitioners Brief at Pages 8-9). Respondents object to such conclusions since they are based on the assumption that a security system alone would prevent crimes from occurring.

The Second Amended Complaint alleged that, Shirley Ann Gerentine and these defendants were assigned primarily to "unrelated works". (R-88). The Second Amended Complaint concluded that, based on the foregoing facts, McComb, Goodwin, William Huntley and Louis Huntley each violated duties of care to Shirley Ann Gerentine and that they were negligent, grossly negligent, that they acted in

a willful and wanton manner, and they committed intentional misconduct. The Second Amended Complaint concluded that the acts of each of these defendants were active in nature, affirmative and were actions which went beyond the general duty of the employer to provide a safe place to work. (R-88, 95, 99, 104). The conclusory allegations in the Second Amended Complaint further state that the acts of each of these defendants were conscious and voluntary acts and omissions which were likely to result in grave injury and that there was a clear and present danger of robbery at Store Number 137.

The Second Amended Complaint also sought punitive damages and concluded that the acts and omissions of the defendants McComb, Goodwin, William Huntley and Louis Huntley amounted to willful and wanton misconduct and were with total disregard to the rights and safety of Shirley Ann Gerentine. The Second Amended Complaint concluded that the acts and omissions of these defendants were gross and flagrant, evidenced a reckless disregard for the life and safety of persons exposed to known dangers of robbery and abduction, were of such a nature to evince a conscious indifference to consequences, or wantonness or recklessness, or a grossly careless disregard of the safety of Shirley Ann Gerentine and were tantamount to a reckless indifference or a intentional violation of the

rights of Shirley Ann Gerentine. (R-109-110). Respondents disagree and object to these conclusions.

POINTS ON APPEAL
(Restated by Respondents)

I. WHETHER THIS CASE IS DISTINGUISHED FROM STREETER V. SULLIVAN BECAUSE PETITIONERS FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS TO STATE A CLAIM FOR GROSS NEGLIGENCE AGAINST THE DEFENDANTS.

II. WHETHER THE SECOND AMENDED COMPLAINT FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS, RATHER THAN CONCLUSIONS, TO STATE A CLAIM FOR GROSS NEGLIGENCE.

III. WHETHER THE TRIAL COURT WAS CORRECT IN RULING THAT THE DEFENDANTS AND SHIRLEY ANN GERENTINE WERE NOT ENGAGED IN UNRELATED WORKS; AND, THEREFORE, PETITIONERS MUST PROPERLY PLEAD AND PROVE SUFFICIENT ULTIMATE FACTS TO SUPPORT A FINDING OF GROSS NEGLIGENCE TO HOLD DEFENDANTS LIABLE.

IV. WHETHER FLORIDA STATUTE 440.11(1) (1983) IS CONSTITUTIONAL AND DOES NOT VIOLATE AN INJURED WORKER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OR ACCESS TO COURTS BECAUSE IT IS NOT ARBITRARY OR CAPRICIOUS AND DOES NOT COMPLETELY EXTINGUISH THE RIGHT TO SUE CO-EMPLOYEES.

V. WHETHER THE TRIAL COURT WAS CORRECT IN RULING THAT THE SECOND AMENDED COMPLAINT FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS TO STATE A CLAIM FOR PUNITIVE DAMAGES.

SUMMARY OF ARGUMENT

ARGUMENT ONE

This case is distinguished factually from this court's recent decision in Streeter v. Sullivan. Unlike the Streeter case, here the Second Amended Complaint contains no allegations on which to support a finding of gross negligence. Therefore, the trial court correctly ruled that defendants are not liable to Shirley Ann Gerentine's estate.

ARGUMENT TWO

The Second Amended Complaint does not state sufficient ultimate facts to support an allegation of gross negligence against the defendants. The allegations were conclusory and inadequate to satisfy the legal tests for gross negligence.

ARGUMENT THREE

The trial court correctly ruled that the defendants were not engaged in "unrelated works". Therefore, defendants cannot be held liable for ordinary negligence. Absent a statutory definition, this court should utilize the "same line of business" definition to determine whether co-employees are engaged in "unrelated works". Utilizing this definition it is clear that the defendants and Shirley Ann Gerentine were involved in the same line of business or "related works". Therefore, the Plaintiffs

were required to state a cause of action for gross negligence. The Second Amended Complaint did not state a cause of action for gross negligence and was properly dismissed by the trial court.

ARGUMENT FOUR

Section 440.11(1), Florida Statute (1983) does not completely extinguish Petitioners' right to sue a co-employee. It merely raised the degree of negligence necessary to support a claim against a co-employee. It is neither arbitrary nor capricious. Therefore, Section 440.11(1), Florida Statutes, (1983) is constitutional and does not deny an individual's access to the courts or his rights to due process or equal protection under the Florida Constitution.

ARGUMENT FIVE

The Second Amended Complaint did not state a claim for punitive damages. Considering only the well pleaded allegations of fact, rather than conclusions, Petitioners complaint failed to satisfy the test for punitive damages

ARGUMENT

I. THIS CASE IS DISTINGUISHED FROM STREETER V. SULLIVAN BECAUSE PETITIONERS FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS TO STATE A CLAIM FOR GROSS NEGLIGENCE AGAINST THE DEFENDANTS.

While Petitioners assert that this court's recent decision in Streeter v. Sullivan, supra, requires reversal of the lower court's order, this case is distinguishable factually from Streeter. The complaint here fails to allege sufficient facts to state a cause of action for gross negligence against any of the four defendants.

In Streeter v. Sullivan, supra, this court held that the term "fellow employee" as used in Section 440.11(1), Florida Statutes, (1981), includes all employees regardless of corporate status. This court concluded that the trial court had erred in granting summary judgment in favor of the individual defendants on the grounds that Workers' Compensation immunity barred the claim.

In Streeter, the victim, Suzanne Sullivan, was killed during a bank robbery. The bank had been robbed twice prior to the robbery in which Suzanne Sullivan was killed. Unlike the situation here, Ms. Sullivan was individually threatened in one of the prior bank robberies. Additionally, the man who killed Ms. Sullivan was the same man who had committed the prior armed

robbery and had threatened to return to kill her. Despite knowledge of these facts, the Streeter defendants refused to add security at the bank.

There is no "stark" factual similarity between the Streeter v. Sullivan case and this one. In fact, close examination of the Second Amended Complaint shows the lack of similarity between the two cases. While the Second Amended Complaint alleges that there had been prior robberies at Store Number 137, there are no allegations that any of the prior robberies involved weapons or violence of any kind. There is no allegation that Shirley Ann Gerentine was present at any prior robbery or that any prior robbery occurred during her shift. There is no allegation that anyone was abducted, murdered, threatened or harmed in any of the prior robberies.

Another fact distinguishing Sullivan v. Streeter from this case is that here Store Number 137 had a sophisticated security system in place at all times, which included a hidden camera, a silent alarm, and decals with the name of the security company displayed on the door. In the Streeter case not only was the deceased personally threatened with death, but the defendants withdrew the armed security guard after the prior robbery and murder threat occurred. Petitioners here assert that, because an unprecedented armed robbery-abduction-murder occurred in Store Number 137, the security system was inadequate.

Petitioners imply that an "adequate" security system would consist of armed security patrols for all employees and customers. While convenience store owners such as the defendants here are concerned about security, it is unrealistic to require them to turn their establishments into armed camps to meet the standard of care.

Petitioners assert that under this court's decision in Sullivan v. Streeter all fellow employees are liable to their co-employees regardless of their corporate status. (Petitioners' initial brief at Page 13). Respondents respectfully assert that this is an incorrect characterization of the holding in Streeter. Streeter held that all fellow employees may be liable to co-employees for gross negligence, willful and wanton misconduct or unprovoked physical aggression regardless of corporate status. While Streeter expanded the liability of supervisors or corporate officers, it did not alter the standard for imposing such liability. Plaintiffs must still plead and prove that the corporate officer or supervisor acted with more than simple negligence. Consequently, Sullivan v. Streeter does not require that defendants be held liable in this case.

This case is factually distinguished from the Streeter case. The trial court's order of dismissal and the Fifth District's affirmance should be affirmed.

II. THE SECOND AMENDED COMPLAINT FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS RATHER THAN CONCLUSIONS TO STATE A CLAIM FOR GROSS NEGLIGENCE.

The allegations against the Defendants contained in the Second Amended Complaint were outlined in the "Statement of the Case and Facts" section of this brief. An examination of those facts shows them insufficient to uphold a finding of gross negligence against the defendants in this case.

It is true that in considering a motion to dismiss, the allegations in the complaint must be viewed in the light most favorable to the plaintiff. However, Petitioners state that "only if there is no conceivable way, under any conceivable set of fair inferences from the allegations, for the plaintiff to win should the complaint be dismissed". (emphasis supplied). In support of that statement, Petitioners cite Abrams v. General Insurance Company, 460 So.2d 572 (Fla. 3d DCA 1984), and Truesdell v. Proctor, 443 So.2d 107 (Fla. 1st DCA 1984). An examination of those two cases finds the language much less broad than Petitioners represent.

In Abrams v. General Insurance Company, supra, the accurate statement of the court's language is, "that when considering a motion to dismiss for failure to state a cause of action, the court must confine itself strictly to the allegations within the four corners of the

complaint, and must accept all well pleaded allegations as true". Id. (emphasis added). Examining Truesdell v. Proctor, supra, the accurate statement of the standard applied is:

> whether the complaint, construed in the light most favorable to the plaintiff, is sufficient to constitute a valid claim, and the motion to dismiss should not be granted 'unless the allegations in the pleading under attack show with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim.'

Truesdell v. Proctor, 443 So.2d 107, 108 (Fla. 1st DCA 1983), citing Mid Florida Schools Federal Credit Union v. Fansler, 404 So.2d 1178 (Fla. 2d DCA 1981). Neither case cited by Petitioner states that a complaint should be dismissed "only if there is no conceivable way" or "under any conceivable set of fair inferences" that plaintiff can win.

Rather, both Abrams and Truesdell stress the importance of examining the facts alleged in the complaint. Examining the facts, as opposed to the conclusions, alleged in the Second Amended Complaint shows that the trial court's dismissal for failure to state a cause of action was correct. This decision should be affirmed.

A. SULLIVAN V. STREETER

Petitioners repeatedly refer to the "remarkable similarity" between the facts and legal issues presented in Sullivan v. Streeter and in this case. As noted above, the Sullivan v. Streeter case and the situation here are factually dissimilar.

In Sullivan, the deceased, Suzanne Sullivan, was a branch manager at Atlantic Federal Savings in Davie, Florida. Originally the branch had a security guard, but he was removed for purely economic reasons. In Sullivan, two robberies occurred at the bank before the robbery resulting in Suzanne Sullivan's death. In the second robbery the perpetrator specifically threatened to return to kill Suzanne Sullivan. During the third robbery, he carried out his threat and murdered Suzanne Sullivan. Her estate sued Streeter and Melcher, the President and Senior Vice President of the bank. Plaintiff alleged that defendants were co-employees of Mrs. Sullivan; thus, the trial court and the Fourth District considered whether they were entitled to immunity under the Workers' Compensation statute, Section 440.11(1), Florida Statutes (1981).

The Fourth District acknowledged that, prior to the 1978 amendment to Section 440.11(1), Florida Statutes, the courts did not allow an injured worker to sue a supervisory employee without a showing that the

supervisory employee committed some affirmative act of negligence beyond the scope of the employer's duty to provide a safe place to work. However, the Fourth District reasoned that the legislative amendment to Section 440.11(1) demonstrated an intent to withhold immunity for all co-employees for acts of gross negligence, willful and wanton misconduct or physical aggression. Petitioners state that the Fourth District Court of Appeal in Sullivan held that mere allegations of prior knowledge of the risk of robbery, the removal of the security guard solely for economic reasons, and the failure of the bank to seek security advice or follow its own security procedures were more than sufficient to satisfy the requirements for gross negligence.

What Petitioners fail to include in their list of the factual allegations considered by the Fourth District in Streeter is that: (1) not only did the branch originally have an armed security guard in place, but the guard was later withdrawn by the defendants despite employee protest; (2) the deceased was individually threatened with death by the robber, who was still at large; (3) the defendants annually certified that the bank's security program equalled or exceeded the standards of the bank protection act of 1968; (4) the defendants certified that they had provided appropriate security devices after being advised by law enforcement officers when, in fact, they

never sought such advice; (5) the defendants did not comply with the requirements of the security manual they themselves had written. In summary, there were considerably more facts alleged in Sullivan v. Streeter to support a finding of gross negligence than the conclusions alleged here.

To state a cause of action for even simple negligence, plaintiffs would have to plead and prove that defendants had actual or constructive knowledge of prior similar criminal attacks. Relyea v. State, 385 So.2d 1378 (Fla. 4th DCA 1980). In Relyea the trial court granted motions for judgment on the pleadings and motions for directed verdict in favor of the defendants, the State of Florida, the Board of Regents, the Chancellor of the State University System and their insurer. The estates of two students sued defendants under the wrongful death statute. The decedents were students at Florida Atlantic University who were assaulted, abducted in the university parking lot, taken to a secluded area and murdered. The Fourth District Court of Appeal, affirming the judgment for defendants, stated:

> In order to impose a duty upon a landowner to protect an invitee from criminal acts of a third person a plaintiff, invitee, must allege and prove that the landowner had actual or constructive knowledge of prior, similar criminal acts committed upon invitees. The landowner is not bound to anticipate criminal activities of

> third persons, where, as here, the wrongdoers were complete strangers to the landowner and where the incident occurred precipitously. 385 So.2d at 1383.

The court further stated, ". . . there being no duty to protect from the type of conduct which occurred here, the trial court correctly entered judgment for the insurance company". Id. See also, Admiral's Point Condominium Association, Inc. v. Feldman, 426 So.2d 1054 (Fla. 4th DCA 1983). rev. den. 434 So.2d 887 (Fla. 1983); Lucks v. Publix Supermarkets, Inc., 399 So.2d 451 (Fla. 4th DCA 1981); Highlands Ins. Co. v. Gilday, 398 So.2d 831 (Fla. 4th DCA 1981). rev. den., 411 So.2d 382 (Fla. 1982).

In Doe v. United States, 718 F.2d 1029 (11th Cir. 1983) the plaintiff, a patron in a Miami post office, sued for damages arising from her rape in the post office lobby. The trial court awarded judgment for the plaintiff. The Eleventh Circuit reversed, holding that the trial court's finding that "the type of criminal acts to which plaintiff fell prey were foreseeable" was "clearly erroneous" since there was no evidence that a crime against the person had been committed in the post office or its vicinity for two years prior to the rape.

Here, also, there are no allegations of prior crimes against the person at Store Number 137 prior to this tragic incident. Thus, there is no basis to hold defendants liable for even simple negligence.

B. WHAT IS GROSS NEGLIGENCE?

Florida courts have created three classifications for conduct that violates an owed duty of care: 1) ordinary negligence, 2) gross negligence and 3) conduct justifying punitive damages. In Carraway v. Revell, 116 So.2d 16 (Fla. 1959), the Florida Supreme Court defined simple negligence and gross negligence:

> [S]imple negligence is that course of conduct which a reasonable and prudent man would know might possibly result in injury to person or property whereas gross negligence is that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property. To put it another way, if the course of conduct is such that the likelihood of injury to other persons or property is known by the actor to be imminent or clear and present, that negligence is gross, whereas other negligence would be simple negligence.

116 So.2d at 22, 23 (quoting Bridges v. Speer, 79 So.2d 679 (Fla. 1955)) (emphasis supplied).

Florida's Second District Court of Appeal seized the opportunity to explain the definition of gross negligence in Glaab v. Caudill, 236 So.2d 180 (Fla. 2d DCA 1970). In this case involving an automobile accident and the Florida Guest Statute, the Second District pointed out that, "gross negligence presupposes the existence of a 'composite' of circumstances which, together, constitute a 'imminent' or 'clear and present' danger amounting to more than normal and usual highway peril". 236 So.2d 180, 183.

The Glaab court further stated that, "gross negligence must be predicated on a showing of chargeable knowledge or awareness of the imminent danger spoken of". Id.

The third point made by the Glaab court in its discussion of gross negligence was that, "the act or omission complained of must occur in a manner which evinces a 'conscious disregard of consequences', as distinguished from a 'careless' disregard thereof (as in simple negligence) or from the more extreme 'willful or wanton' disregard thereof (as in culpable or criminal negligence)". 236 So.2d 180, 183-184.

Looking at the facts pleaded in this case, it is clear that the four defendants were not grossly negligent in their acts toward Shirley Ann Gerentine. Under the Glaab definition, to state a cause of action for gross negligence Petitioners must plead factual allegations to show a composite of circumstances constituting a degree of danger amounting to more than the normal or usual risk involved in assigning an employee to a work shift in a convenience store. Petitioners did not allege such facts in their Second Amended Complaint.

In Glaab v. Caudill, supra, the driver of the car, driving at 25 to 30 miles per hour, took both hands off the wheel and took both eyes of the road to retrieve a bag containing 6 cups of ice tea which had spilled over. The court found that these facts were sufficient to

uphold the jury's finding of gross negligence on the part of the driver.

The Glaab court gave examples of what constitutes a "clear and present danger", such as operation of a vehicle while under the strong influence of alcohol or drugs, Herring v. Eiland, 81 So.1d 645 (Fla. 1955); driving while subject to black outs or fainting spells, Goodis v. Finkelstein, 174 So.2d 600 (Fla. 3d DCA 1965); driving while extremely fatigued, Johnson v. State, 148 Fla. 510, 4 So.2d 671 (1941). While all of these cases are automobile cases, their holdings illustrate that a "clear and present danger" means a danger which is immediate and observable. The facts alleged in the Second Amended Complaint do not show a "clear and present danger". At best the well pleaded facts show only a possibility of danger.

It was far more likely that Shirley Ann Gerentine would be killed in a traffic accident than that she would be murdered in a convenience store robbery. In 1981 there were eleven homicides committed in conjunction with convenience store robberies in Florida. "Food Store Robberies in Florida, Detailed Crime Statistics", Florida Agricultural Market Research Center, University of Florida, Gainesville, Florida (June, 1983). By comparison, there were 3,076 traffic fatalities in Florida that same year. "Fatal Accident Reporting System 1985",

U.S. Dept. of Transportation, National Highway Traffic Safety Administration. It would be absurd to argue that an employer was "grossly negligent" in allowing an employee to drive in the course of employment. Yet, there is certainly a real possibility that an employee could be seriously injured or killed while driving on the job. The fact that such a possibility exists does not mean that there is a "clear and present danger". Similarly, the possibility that a robbery could occur at some time does not constitute an "imminent danger" that a murder will be committed.

The facts alleged in the Second Amended Complaint do not show "chargeable knowledge or awareness of imminent danger" by defendants. Nor do the facts show a "conscious disregard of consequences" by defendants. Petitioners argue that the determination of gross negligence is generally a jury question. While this is true, under the case law, they must make a showing of a "composite of circumstances constituting danger". Petitioners failed to plead such allegations of fact in the complaint. The trial court was correct in dismissing the action for failure to state a claim as was the Fifth District's affirmance of this order.

C. PLAINTIFFS' SECOND AMENDED COMPLAINT DID NOT SATISFY THE TEST FOR GROSS NEGLIGENCE.

In their initial brief Petitioners urge the court to apply the well known rule that the facts in the complaint should be construed in the light most favorable to the plaintiffs. While acknowledging this rule, Respondents urge the court also to apply the well known rule that only the well pleaded facts alleged in the complaint, rather than conclusions,may be considered.

The Second Amended Complaint alleges at most a claim for simple negligence. It alleges that, prior to the death of Shirley Ann Gerentine, four robberies had occurred at Store Number 137. According to Petitioners, the fact that defendants did not add any security measures or change security procedures at Store Number 137 even after these robberies should constitute gross negligence. (This assumes of course that additional or different security measures could prevent other robberies from occurring). Petitioners also allege that defendants should be found grossly negligent because they required Shirley Ann Gerentine to work a "high risk" shift. Nothing in the Second Amended Complaint supports the conclusion that this was a "high risk" shift. There is no allegation that any of the prior four robberies occurred during the shift that Shirley Ann Gerentine worked.

In a case similar to this one, Lil' Champ Food Stores, Inc. v. Holten, 475 So.2d 726 (Fla. 1st DCA 1985) rev. den., 484 So.2d (Fla. 1986), the First District Court of Appeal reversed a jury verdict awarding punitive damages. In Lil' Champ a convenience store customer was killed in the store parking lot by an armed robber. Her estate sued Lil' Champ for compensatory and punitive damages, alleging that Lil' Champ was "grossly negligent" in failing to institute a formal security program to prevent armed robberies, in failing to hire any security consulting services and in failing to install silent alarms in its stores. The complaint further alleged that no actions regarding security were taken notwithstanding the fact the Lil' Champ's officers knew that armed robberies had occurred in the past and were likely to recur and had resulted in injury to employees and customers.

The First District stated that: "In our view the evidence in this case fails to demonstrate even 'gross negligence' much less willful and wanton misconduct of such egregious nature as to support an award of punitive damages". Id. at 729. The facts alleged here are similar to those in Lil' Champ, and similarly, do not state a cause of action for "gross negligence". In fact, the allegations here show that the defendants in this case

did far more regarding security than did the defendants in Lil' Champ.

The facts in this case show that Store Number 137 had an operative security system, including a silent alarm, a hidden camera, and door decals displayed with the name of the security company. Yet, Petitioners would have this court conclude that because the security system did not prevent a robbery from occurring, defendants should be found grossly negligent. This argument assumes that convenience store owners have the ability to prevent crimes from occurring. Obviously, this is not true. While convenience store owners can try to discourage crimes at their stores or to help capture criminals, there is no security system available to prevent all crimes from occurring. In considering the absurdity of the standard to which Petitioners would hold these defendants, the court should consider the fact that even the President of the United States, who presumably has the most sophisticated security available, was shot. In addition, murders and assaults occur even in maximum security prisons with armed guards and sophisticated electronic security monitors. Obviously, the task of preventing crime is not a simple one, nor is it within the ability of convenience store owners to prevent crime.

In Weller v. Reitz, 419 So.2d 739 (Fla. 5th DCA 1982), the court applied the Carraway and Glaab holdings

to a suit in which an employee was suing a co-employee for injuries he received when a truck struck him. The plaintiff alleged that the co-employees' act constituted "gross negligence", so that Workers' Compensation immunity did not apply. At the time of the accident, the plaintiff was tuning up a truck engine. While standing in front of the truck's raised hood, Weller asked his co-employee, Reitz, to start the engine. "Reitz leaned in through the open window and turned the key. The truck lurched forwarding, striking Weller's legs and pinning him to the wall. Both of Weller's legs were broken". 419 So.2 at 740. Weller asserted that the following facts created a jury issue on the issue of whether Reitz's actions constituted gross negligence:

> 1. Reitz started the vehicle without getting inside it.
> 2. He started the vehicle without knowing what gear it was in.
> 3. He started the vehicle while [Weller] was in front of it.
> 4. He started the vehicle without checking to see if the brake was on.
> 5. He was sorry the accident happened and said in effect, he should have know better, although not in those words.

419 So.2d at 741. Based on these facts, the Fifth District held, as a matter of law, that there was no indication of circumstances sufficient to constitute gross

negligence on the part of Reitz. Accordingly, the Fifth District held that Weller's action was barred by Section 440.11, Florida Statutes.

The facts in Weller came much closer to showing a "clear and present danger", knowledge or awareness of the danger and a conscious disregard of the consequences than do any of the facts pleaded in this case.

The well pleaded facts in the Second Amended Complaint do not state a cause of action for "gross negligence". The Fifth District Court of Appeal was correct in affirming the trial court's dismissal of the action with prejudice. This court should affirm the Fifth District's decision.

III. THE TRIAL COURT WAS CORRECT IN RULING THAT THE DEFENDANTS AND SHIRLEY ANN GERENTINE WERE NOT ENGAGED IN UNRELATED WORKS; AND, THEREFORE, PETITIONERS MUST PROPERLY PLEAD AND PROVE SUFFICIENT ULTIMATE FACTS TO SUPPORT A FINDING OF GROSS NEGLIGENCE TO HOLD DEFENDANTS LIABLE.

A. STATUTORY REQUIREMENTS.

Respondents do not concede that Shirley Ann Gerentine was a fellow employee of the defendants Robert McComb, Phillip Goodwin, William Huntley and Louis Huntley under the Streeter v. Sullivan decision. The trial court held that the Second Amended Complaint alleged insufficient facts for finding that they were fellow employees.

Petitioners' only support for the claim that the court ruled defendants were co-employees is an interlocutory order. (Petitioners' Initial Brief at Page 20). The order cited granted defendants' motion to dismiss of January 21, 1986, and is not the subject of this appeal. It was not until after the third unsuccessful attempt to state a cause of action that the trial court dismissed the case with prejudice in its amended order dated May 8, 1986. (R-398). The original order specifically disagreed with plaintiff's position that defendants and Shirley Ann Gerentine were co-employees. (R-396).

Florida's Workers' Compensation Statute contains a unique exception to the immunity granted to co-employees in Florida Statute 440.11(1) (1983). The statute provides that

> Such fellow employee immunity shall not be applicable to an employee who acts with respect to a fellow employee, with willful and wanton or unprovoked physical aggression or with gross negligence when such acts result in 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 public or private employment. (emphasis added).

Prior to the 1979 amendment to the Workers' Compensation Statute, co-employees could sue each other for damages in tort. Only employers were granted immunity

by statute. This rule was set forth in Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955).

Unfortunately, the legislature did not define "unrelated works" in the statute. Neither the committee notes nor the testimony before the legislative committee offers any explanation of what the drafters intended.

Petitioners urge that this court adopt a definition of "unrelated works" in terms of management and labor. Obviously, such a definition would benefit Petitioners here, although they offer no realistic suggestion as to where to draw the line between "management" and "labor". They claim that this definition would enhance work place harmony by allowing suits between "labor" and "management" for ordinary negligence, but allowing suits between members of the same class, (i.e. "labor" or "management") only for gross negligence or willful and wanton misconduct.

This dividing line is both unrealistic and impractical. Would the store manager of a Huntley's Jiffy Food Store be considered part of "management"? Would Shirley Ann Gerentine, who had acted as a assistant manager and a training manager be considered part of "management"? Further, would allowing suits between "labor" and "management" for ordinary negligence enhance work place harmony? This seems contrary to the spirit of the Workers' Compensation law.

Respondents assert that the test for determining whether or not employees are assigned to unrelated works should be whether the employees are involved in the same "line of business". In Johnson v. Comet Steel Erection, Inc., 435 So.2d 901 (Fla. 1st DCA 1983), the court held that a laborer for a general contractor and a welder for a subcontractor employed on the same construction project were not involved in "unrelated works". This decision seems to apply the "line of business" test.

Such a test is appropriate in this age of multi-national conglomerate corporations, which operate diverse and unrelated types of businesses. If a company owned and operated both a cement plant and an aerospace engineering factory, and an employee driving a cement truck hit an employee from the aerospace factory, these employees would be involved in "unrelated works" and would not be entitled to Workers' Compensation immunity. There is no logical connection between the two lines of business. This test is much easier to apply than Petitioners' "labor-management" test and is much more likely to promote work place harmony than a test which pits "labor" against "management".

Here, Huntley's Jiffy Stores, Inc.'s sole business was operating convenience stores. It was not and is not a conglomerate with many different types of businesses. Petitioners, in fact, pleaded in the Second Amended

Complaint that all of the defendants were involved in the operation of the convenience stores. (R-80, 81). Therefore, all defendants were in the same "line of business" as the decedent. Assigning the everyday, clear meaning to the word "unrelated", it is plain that Petitioners alleged no facts, as opposed to conclusions to show that defendants were engaged in "unrelated works".

The trial court was correct in ruling that the "unrelated works" exception to the Workers' Compensation exclusive remedy did not apply. Even if this court applies the holding in Sullivan v. Streeter to find that Shirley Ann Gerentine and the four defendants were fellow employees, it must also conclude that they were involved in a related line of work. Consequently, the trial court correctly held that Petitioners were required to plead facts showing more than ordinary negligence to state a cause of action against Respondents. Petitioners failed to plead such facts in the Second Amended Complaint. The trial court's order dismissing the Second Amended Complaint with prejudice and the Fifth District Court's affirmance should be affirmed.

IV FLORIDA STATUTE 440.11(1) 1983 IS CONSTITUTIONAL AND DOES NOT VIOLATE AN INJURED WORKER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OR ACCESS TO COURTS BECAUSE IT IS NOT ARBITRARY OR CAPRICIOUS AND DOES NOT COMPLETELY DISTINGUISH THE RIGHT TO SUE CO-EMPLOYEES.

Petitioners look to the case law of other states for support for their argument that the Florida Workers' Compensation statute violates due process and equal protection. Citing Estabrook v. American Hoist & Derrick, 498 A.2d 741 (New Hampshire 1985), Petitioners claim that this court should overrule its prior decisions on this point and hold the Workers' Compensation statute unconstitutional. The New Hampshire workers' compensation statute in question in the Estabrook case granted absolute immunity to co-employees except for intentional torts. Estabrook considered four cases which questioned the constitutionality of the New Hampshire statute that extinguished an employee's right to sue a fellow employee tortfeasor. The New Hampshire court held the statute was unconstitutional because it failed to provide an "adequate substitute" for the rights extinguished under the statute.

Petitioners claim, citing Estabrook, that Florida's Workers' Compensation statute, which requires a plaintiff to show at least gross negligence to sue a co-employee, violates due process and equal protection under Florida's

Constitution. What distinguishes this case from Estabrook is the fact that, unlike Florida's Statute, the New Hampshire statute "completely deprives an individual of his right to a remedy", 498 A.2d 741 at 747. Florida's Statute does not completely deprive an individual of his right to a remedy, it merely changes the degree of negligence necessary for an employee to sue a co-employee. Thus, because no right has been completely abrogated, there is no requirement for a "quid pro quo" as Petitioners claim.

A. THE FLORIDA CONSTITUTION AND THE WORKERS' COMPENSATION STATUTE

The Florida Constitution provides:

> Article 1, Section 2 Basic Rights.
> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.
>
> Article 1, Section 9, Due Process:
> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense or be compelled in any criminal matter to be a witness against himself.

> Article 1, Section 21, Access to Court: The court shall be open to every person for redress of an injury, and justice shall be administered without sale, denial or delay.

Even though Petitioners state that the issue is whether Florida Statute 440.11(1) violates the due process clause and equal protection clause of the Florida Constitution, their argument in this section of their Initial Brief is an "access to courts" argument, not a due process or equal protection argument. In Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), the Florida Supreme Court set forth the test to determine whether a statute violates the due process clause or the equal protection clause. In Lasky, the appellant argued that the Florida no-fault statute was unconstitutional because it violated the access to court, due process, and equal protection clauses.

The due process test enunciated by the Lasky court is:

> The test to be used in determining whether an act is violative of due process is whether the statute bears a reasonable relation to a permissible legislative objective and is discriminatory, arbitrary or oppressive. 296 So.2d at 15. (emphasis added).

Proceeding to the equal protection argument, the court in Lasky stated:

> In order to comply with the requirements of the equal protection

> clause, statutory classifications must be reasonable and non arbitrary, and all persons in the same class must be treated alike. When the difference between those included in a class and those excluded bears a substantial relationship to the legislative purpose, the classification does not deny equal protection. 296 So.2d at 18. (citations omitted).

Additionally, the Florida Supreme Court noted in Lasky that the person asserting that a statute is unconstitutional has the burden of demonstrating clearly that the act is invalid.

The leading case on the "access to courts" clause in Florida is Klugar v. White, 281 So.2d 1 (Fla. 1973). In Klugar, the Florida Supreme Court stated,

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of Florida or where such right has become a part of the common law of the state pursuant to Florida Statute 2.01, Florida Statutes Annotated, the legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. 281 So.2d at 4. (emphasis added).

If Petitioners were arguing that the statute in this case bears no reasonable relation to a permissible legislative objective, but is discriminatory, arbitrary

and oppressive, they would be arguing that it violates the due process clause. If they argued that all persons in the same class are not being treated alike, they would be arguing that the statute violates the equal protection clause. However, Petitioners do not make either of these arguments. Instead, Petitioners argue that the statute is unconstitutional because "there has been no quid pro quo". (Petitioners' Initial Brief at Page 30), and that enforcement of the statute "would create a 'special class' of people, . . ." (Id.). Petitioners allege that the "[t]he legislature has provided no 'reasonable alternative' to the rights the immunity statute purports to take away with regard to co-employees suits". Id.

This is an "access to courts" argument, not a due process or equal protection argument. The Florida Supreme Court in Klugar v. White, supra, held that, in general, the legislature could not abolish a recognized right of action without providing a reasonable alternative. This is the argument presently being made by the appellants, even though they attempt to transform it by throwing in the words "due process" and "equal protection".

Various Florida courts have already rejected the denial of "access to courts" argument as grounds for holding the workers' compensation statute unconstitutional. In Klugar v. White, opinion, the

Florida Supreme Court cited with approval its prior decision in which it upheld the so-called "guest statute". The court stated that this statute did not abolish the right to sue but merely changed the standard of negligence. In Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981) the First District explained this holding and stated,

> The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action. As discussed in Klugar and borne out in later decisions, no substitute remedy need be supplied by legislation that reduces but does not destroy a cause of action. The court pointed out that legislative changes and the standard of care required making recovery for negligence more difficult, impede but do not bar recovery, and so are not constitutionally suspect. 399 So.2d at 398.

The Jetton court's analysis is supported by Iglesia v. Floran, 394 So.2d 994 (Fla. 1981). In Iglesia the Florida Supreme Court addressed the same argument Petitioners make here (in fact citation of Iglesia alone would seem to refute Petitioners' constitutional arguments). Gustavo Floran and Jose Iglesia both worked for Ace Parker, Inc. While in the course of employment, they were in a car rented by the employer. As a result of Floran's operation of the car, Iglesia was thrown from the vehicle and killed. Iglesia's personal

representative sought to recover damages from Floran. On appeal, the personal representative argued that the 1978 amendment to Section 440.11(1), Florida Statutes, was unconstitutional in that it abolished a cause of action without providing a reasonable alternative. This Court rejected that argument and stated,

> In Klugar v. White, 281 So.2d 1 (Fla. 1978), we held that the legislature may not abolish a common law right for which no reasonable alternative is provided, unless an overpowering need to do so exists. Before the 1978 amendment to Section 440.11, an employee had the right to bring a law suit against a co-employee for death or injuries negligently inflicted. Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955). But in Klugar we stated: "In McMullan 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. 394 So.2d at 996.

Thus, in Iglesia, the Florida Supreme Court rejected the very argument presently being made by the Petitioners. In Iglesia v. Floran, 394 So.2d 994 (Fla. 1981), the Florida Supreme Court distinguished Grantham v. Denke, 359 So.2d 785 (Al. 1978) cited in Petitioner's Initial Brief stating,

> The Alabama Statute excluded employees from its definition of third parties against whom actions could be brought. No exception allowing an action for gross negligence was made. 394 So.2d at 995, n.2.

Sunspan Engineering & Construction Co. v. Spring Lock Scaffolding, 310 So.2d 4 (Fla. 1975), cited by Petitioners is also distinguishable from this case. In Sunspan, the Florida Supreme Court reviewed the section of Florida Statute 440.11(1) (Supp. 1972), which made the employer immune from tort suits by third parties. Citing Klugar v. White, supra, the Sunspan court held this section to be unconstitutional because it totally abolished the third party's right to sue the employer without providing an alternative. The present statute is distinguishable because employees are allowed to bring actions against co-employees for gross negligence, willful and wanton conduct and unprovoked physical aggression. Stated another way, Section 440.11(1) merely changes the degree of negligence necessary for one employee to maintain an action in tort against a co-employee. Accordingly, the Petitioner's right of action has not been totally abolished and the access to court clause has not been violated.

Therefore, the trial court was correct in holding that the 1978 amendments to the workers' compensation statute are constitutional. The Fifth District Court of

Appeal's per curiam affirmance of the trial court's holding should be affirmed.

V. THE TRIAL COURT WAS CORRECT IN RULING THAT THE SECOND AMENDED COMPLAINT FAILED TO ALLEGE SUFFICIENT ULTIMATE FACTS TO STATE A CLAIM FOR PUNITIVE DAMAGES.

Recent decisions of Florida courts have made it much more difficult to plead and to prove a claim for punitive damages. In White Construction Co. v. Dupont, 455 So.2d 1026 (Fla. 1984) and Como Oil Co. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985) this Court set forth the type of conduct needed to justify the imposition of punitive damages as follows: " . . . the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages". White Construction Co. v. Dupont, supra, at 1028. This court further stated:

> The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous affects or there is that entire want of care which would raise the presumption of a conscious indifference of consequences or which shows wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Id.

In White, the owners of a forty ton loader knew that its brakes had not been working for some time. Nevertheless, they allowed the loader to be driven. The loader backed into a truck, causing the truck to roll over and severely and permanently injure the plaintiff. The Florida Supreme Court held that "under no view of the evidence presented here would it be proper to impose punitive damages on petitioner". White at 1029.

Similarly, in Como Oil v. O'Loughlin, 466 So.2d 1061 (Fla. 1985), the Florida Supreme Court upheld the trial court's ruling denying punitive damages. Despite evidence that the Como Oil Truck involved in causing the fire was in poor repair, leaked, and lacked proper safety devices, the court stated: "We hold that under no view of the evidence does Como Oil's conduct reach the willful and wanton level necessary to support an award of punitive damages". Como Oil, at 1062. The court in Como found that the required misconduct goes beyond gross negligence. Id. Even if Petitioners had pleaded adequate ultimate facts to support a claim for gross negligence, which they did not, they have not pleaded the type of facts necessary to support an award of punitive damages.

In Bradenton Mall Associates v. Hill, 508 So.2d 538 (Fla. 2d DCA 1987), plaintiff, a business invitee in a shopping mall owned and operated by defendants, was abducted and raped by a third party. Plaintiff alleged

that defendants had failed "to provide security even remotely adequate for the reasonable safety of their invitees". Id., at 538. Plaintiff alleged that there were ample factors, including prior, similar criminal acts committed upon other invitees, to put defendants on notice of the need to take security measures "to protect plaintiff from reasonably foreseeable harm". Id. at 539.

Following the well settled rule that only the well pleaded allegations of ultimate fact may be considered, the court stated:

> [I]f the facts as set forth in a complaint are taken as true and still do not properly state a claim for punitive damages, the court can enter a protective order solely upon a review of the pleadings. In the present case, although respondent ends the allegations in her complaint by stating precautions 'exhibited a willful, wanton and reckless disregard for the rights, safety and welfare of plaintiff', such statements are not more than 'conclusory allegations . . . not supported by allegations of acts.' 508 So.2d 538, 539 (Fla. 2d DCA 1986), citing Solodky v. Wilson, 474 So.2d 1231, 1233 (Fla. 5th DCA 1985). (citation omitted) (emphasis added).

Petitioners have not alleged that Store Number 137 did not contain a security system, only that the system was inadequate.

Similarly, Ten Associates v. Brunson, 492 So.1d 1149 (Fla. 3d DCA), pet. rev. den., 501 So.2d 1281 (Fla. 1986), dealt with a factual scenario more extreme than the

factual allegations in this case. The defendants in Ten Associates owned and operated an apartment complex located in a high crime area. During the course of approximately one year there were over sixty reported "incidents", yet the landlords discharged a private security agency. The defendants hired their own security, using persons lacking experience or training. A victim of one attack sued for negligence. The Third District Court of Appeal reversed the award of punitive damages, noting that the defendants had made at least some effort to provide security. 492 So.2d 1149 (Fla. 3d DCA 1986) rev. den., 501 So.2d 1281 (Fla. 1986).

In this case the respondents provided a sophisticated security system for the protection of its employees and customers. There are no well pleaded allegations of ultimate fact regarding any prior armed robberies, there are no allegations of any prior attacks on employees or customers, of any prior abductions or murders, or of any robberies during the shift Shirley Gerentine worked, which was referred to as "high risk". In short, Petitioners have alleged no facts to support an award of punitive damages, only conclusions. Following both Bradenton Mall Associates v. Hill, supra, and Ten Associates v. Brunson, supra, this court should affirm the trial courts dismissal for failure to state a claim for punitive damages.

On facts very similar to those in this case, the First District Court of Appeal reversed a jury verdict awarding punitive damages against Lil' Champ Food Stores, Inc. which allegedly was guilty of "willful and wanton misconduct" by failing to have a security system which would prevent robberies. The First District Court of Appeal stated: "The evidence in this case was only marginally sufficient to support a finding of simple negligence. It was patently insufficient to support an award of punitive damages". Lil' Champ Food Stores, Inc. v. Horton, 475 So.2d 726, 729 (Fla. 1st DCA 1985), rev. den., 484 So.2d 8 (Fla. 1986). The defendant in Lil' Champ had no security alarm system and was held not to be grossly negligent. Store Number 137 not only had an alarm system, but also had a hidden camera.

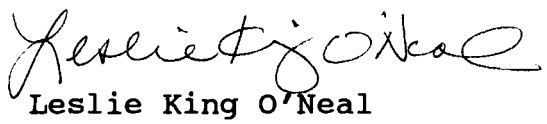
The facts alleged in this case would not sustain a manslaughter conviction against the Respondents. In criminal cases involving "culpable negligence", acts such a firing a loaded gun in a room while another person was walking about (Navarro v. State, 433 So.2d 1011 (Fla. 2d DCA 1983), rev. den. 447 So.2d 887 (Fla. 1984)) and flying an aircraft near the ground in a populated area (Pritchett v. State, 414 So.2d 2 (Fla. 3d DCA 1982) rev. den., 424 So.2d 762 (Fla. 1982)) have been held to constitute "culpable negligence". The facts alleged regarding Respondents conduct do not rise to such a standard.

The Second Amended Complaint did not state a cause of action for punitive damages. The trial court was correct in dismissing this claim with prejudice and the per curiam affirmance of the Fifth District Court of Appeal should be affirmed.

CONCLUSION

The trial court was correct in dismissing the Second Amended Complaint with prejudice. THe Fifth District court was correct in affirming this decision. This Court should affirm these decisions.

Respectfully submitted,



Leslie King O'Neal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to MEL R. MARTINEZ, ESQUIRE, Connor & Martinez, Post Office Box 2447, Orlando, Florida 32802 and GARY L. SHOCKEY, ESQUIRE, Spence, Moriarity & Schuster, Post Office Box 548, Jackson, Wyoming 83001 this 9th day of October, 1987.

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