IN THE SUPREME COURT OF FLORIDA

LOUIS GERENTINE, ET AL.,	**	CASE NO. 70,200
Appellants,	**	
vs.	**	
COASTAL SECURITY SYSTEMS, ET AL.	**	
Appellees.	**	

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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

This is a wrongful death case. Shirley Ann Gerentine was brutally abducted and murdered on September 14, 1983, while she worked alone as a clerk at a Huntley's Jiffy convenience store, Store #137, in Orlando, Florida. Her survivors filed suit against Robert McComb, Phillip Goodwin, Louis Huntley and William Huntley. Mr. McComb and Mr. Goodwin were Shirley Ann Gerentine's immediate supervisors. Louis Huntley and William Huntley were the President and Secretary of Huntley's Jiffy Food Stores, Inc., the corporation which owns hundreds of such 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 their chain, including Store #137. Shirley Ann Gerentine was an employee of Huntley's Jiffy Food Stores, Inc. and her survivors obtained worker's compensation benefits from its account, so it was not a defendant in the action.

This case comes to the Florida Supreme Court following a per curiam affirmance of the Trial Court's dismissal of the Second Amended Complaint for failure to state a claim. The Fifth District Court of Appeals decision was based upon Dessert v. Electric Mutual Liability Insurance Company, 392 So.2d 340 (Fla. 5th DCA) review denied 399 So.2d 340 (Fla. 1981) and Kaplan v. Circuit Court of Tenth Judicial Circuit, 495 So.2d 231 (Fla. 2d DCA 1986). Both of these cases have recently been explicitly overturned by this Court in Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). Appellants contend

that Streeter, *supra*, controls and that this action should be remanded to the Trial Court for completion of discovery and trial.

The Trial Court dismissed the Second Amended Complaint for failure to state a cause of action with respect to the defendants McComb, Goodwin, William Huntley, and Louis Huntley. All of these men were fellow employees of Shirley Ann Gerentine. The Fifth District Court of Appeals, in its reliance on Dessert, *supra*, and Kaplan, *supra*, effectively ruled that there was no cause of action against such fellow employees. Streeter v. Sullivan, *supra*, concluded differently.

The Trial Court had ruled that since these individual defendants were co-employees of Shirley Ann Gerentine, it was necessary to allege gross negligence against them pursuant to the provisions of Section 440.11(1), Florida Statutes (1983). The Trial Court had ruled that the Second Amended Complaint did not state facts sufficient to constitute gross negligence and dismissed the action. The Trial Court had rejected plaintiffs' arguments 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. The Trial Court had rejected the arguments of the plaintiffs that Section 440.11(1) violates Article I, Sections 2 and 9 of the Florida Constitution which guarantee equal protection and due process. Finally, the Trial Court had held that the Second Amended Complaint did not allege facts sufficient to state a claim for punitive damages.

Since the issues were before the trial court upon a motion to dismiss by the defendants, the facts stated in the Second Amended Complaint were the only factual information before the court. And although the Trial Court characterized some of the information in the Second Amended Complaint as "conclusory," all assertions of fact in the Second Amended Complaint were based on extensive discovery (including several depositions, answers to interrogatories, and responses to requests for production) and were supported elsewhere in the record. Therefore, the facts asserted in the Second Amended Complaint were statements of fact already established, as distinguished from mere allegations which may or may not have been provable later.

Because the Second Amended Complaint was based on facts established in discovery in the case, it is somewhat lengthy. It is also difficult to summarize because all assertions of fact in it are important. Appellants urge this Court to examine the Second Amended Complaint in its entirety in order to assess its sufficiency at stating claims against the defendants.

The Second Amended Complaint alleged that Store #137 was a frequent target for robberies prior to the time Shirley Ann Gerentine was robbed, abducted, and murdered. Prior to her death, at least four (4) robberies had been reported at this store. On the night of her death, Shirley Ann Gerentine had been required to work alone at the store. She had, on previous occasions, told Robert McComb that she did not want to work alone during the night. Mr. Phillip Goodwin

also knew this. Louis Gerentine, husband of Shirley Ann Gerentine, was a former security guard at a prison in New York. The defendants specifically prohibited him from being present at Store #137 when Shirley Ann Gerentine was forced to work alone at night. At approximately 9:26 p.m., Store #137 was robbed by two individuals later identified as Jay Vernon Moss and Joe Hayden. In the course of the robbery, they abducted Shirley Ann Gerentine, brutally murdered her, and left her body in a field nearby.

According to the Second Amended Complaint, the time of day during which there is the highest risk of robbery at such convenience stores is between 7:00 p.m. and 9:30 p.m. Louis Huntley and William Huntley knew this based on experience at other Huntley's Jiffy Stores and based on other statistical information. In spite of this knowledge, staffing policies for Huntley's Jiffy Food Stores were not formulated to deter robberies. In the words of Louis Huntley, "We don't staff our stores to prevent robberies." The Second Amended Complaint explained, in detail, the staffing policies for Huntley's Jiffy Food Stores which affirmatively discouraged staffing in the evening hours during the highest risk of robbery. It also explained, in detail, the bonus systems in effect which had a similar effect to deter adequate staffing during the highest risk times. In summary, the staffing policies and bonus systems were designed to maximize sales volume and efficiency at Huntley's Jiffy Food Stores and were not geared toward enhancing employee or customer safety.

The Second Amended Complaint asserted that, as President of Huntley's Jiffy Food Stores, Inc., Louis Huntley possessed supervisory duties, control, and authority over Store #137 and that he was responsible for the formulation and implementation of security policies for such stores. Louis Huntley had direct monthly contacts with district managers for all his stores, including Mr. Goodwin and had visited Store #137 several times prior to Shirley Ann Gerentine's death. He knew of the four robberies which had been reported at Store #137. The Second Amended Complaint stated that Louis Huntley made a conscious, deliberate decision not to have more than one clerk on duty during the time of day of greatest risk of robbery. He created and was ultimately responsible for the implementation of manpower allocation policies at his stores. The manpower allocation and bonus systems he created and enforced actively discouraged the allocation of additional manpower at the stores during the times of highest risk of robbery. He also formulated and implemented a policy which prohibited family members of employees from being present at Huntley's Jiffy Food Stores. He allowed no exceptions to this rule. Although he had ordered the addition of security personnel at other stores within his system, he chose not to do so for Store #137.

The Second Amended Complaint asserted that, as Secretary of Huntley's Jiffy Food Stores, Inc., William Huntley possessed supervisory duties, control, and authority over Store #137 and that he was responsible for the formulation and implementation of

security policies for such stores. William Huntley had direct monthly contacts with district managers for all his stores, including Mr. Goodwin and had visited Store #137 several times prior to Shirley Ann Gerentine's death. The Second Amended Complaint made the same allegations against William Huntley as it did against Louis Huntley, described above, with respect to manpower allocation, bonus systems, and security.

According to the Second Amended Complaint, Phillip Goodwin was the District Manager for the area of Huntley's Jiffy Food Stores which included Store #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 in their attempts to make profits. He knew about the prior robberies at Store #137 and knew there was a risk of further robberies. He had the authority to hire additional staff or special security personnel for Store #137 but did not do so. 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 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, based on complaints from Mr. McComb that Mr. Gerentine was at Store #137 "excessively," Mr. Goodwin affirmatively enforced and tacitly

approved of the enforcement of the policy which prohibited Mr. Gerentine from being present at the store.

The Second Amended Complaint stated that Robert McComb was the Division Manager for Huntley's Jiffy Food Stores, Inc. and had his offices located in Store #137. He also lived across the street from Store #137. He was Shirley Ann Gerentine's immediate supervisor. His duties as a division manager were to visit each store under his control at least two or three times per week, to control hazards and provide for the safety of both employees and customers, to prevent robberies, to enforce company safety rules, to inspect the stores under his control, to make appropriate deposits of receipts from the stores, and generally to oversee the overall operations of stores within his control. Mr. McComb was familiar with the location of Store #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 #137 and knew there was a risk of further robberies at the store. In spite of this, he affirmatively pursued the policies which left clerks like Shirley Ann Gerentine alone during the hours of highest risk. He had the authority to assign additional personnel to the store or to hire additional security personnel, but affirmatively chose to follow established store policy and not do so. He knew that Shirley Ann Gerentine did not want to work at the store during the night but actively participated in personnel assignment processes which

required her to be there during high risk hours. He did so in spite of requests from the store manager that Shirley Ann Gerentine not be required to work at such times. He also knew of Mr. Louis Gerentine's background as a prison guard and other security experience and knew that Mr. Gerentine desired to be present at the store when his wife worked at night. Despite this knowledge, Mr. McComb actively enforced the policy which prohibited the presence of family members at the store.

The Second Amended Complaint also stated that the security systems and devices in place at Store #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 procedures. The deficiencies in security at Store #137 outlined in the Second Amended Complaint included the following: that the security system decals displayed at the store did not convey sufficient information to deter robberies; that the siting of Store #137 and its gas pumps was such that the store was not clearly visible from the street and therefore more likely to be robbed; that there was an affirmative policy against warning would-be robbers that a hidden camera system was in effect, thereby eliminating any potential deterrent effect of the hidden camera; that the floor plan of Store #137 placed clerks like Shirley Ann Gerentine in a hazardous position and that safer, alternative floor plans were known to and had been used by other such Jiffy stores; that

inadequate policies were in effect with regard to blocking the front windows of the store; that only one clerk was on duty during hours of highest risk for robbery; that the electronic alarm system in place was inadequate because it was designed to send an electronic signal from Orlando to Jacksonville and then relied on a long-distance phone call back to the Orlando authorities and thereby allowed time for the robbers to abduct Shirley Ann Gerentine; and that the alarm system was not properly coordinated with the hidden camera system.

The Second Amended Complaint alleged that, as between Shirley Ann Gerentine and each of the individual defendants, they were assigned primarily to "unrelated works." It alleged that, based on the foregoing state of 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 wanton manner, and that they committed intentional misconduct. The Second Amended Complaint asserted 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. The acts of each of these defendants were alleged to be conscious and voluntary acts and omissions which were likely to result in grave injury in the face of the clear and present danger of robbery at Store #137.

The Second Amended Complaint also sought punitive damages and alleged 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 alleged that the acts and omissions of these defendants were gross and flagrant, evinced a reckless disregard for the life and safety of persons exposed to known dangers of robbery and abduction, were of such a nature as 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 an intentional violation of the rights of Shirley Ann Gerentine.

SUMMARY OF ARGUMENTS

ARGUMENT ONE

This case is controlled by this Court's recent decision in Streeter v. Sullivan. All of the defendants were fellow employees of Shirley Ann Gerentine and are liable to her heirs for their gross negligence that led to her abduction and murder.

ARGUMENT TWO

The Complaint stated facts sufficient to allege gross negligence against each defendant. The allegations of the complaint were sufficient, when viewed in a light most favorable to the plaintiffs, to satisfy the legal tests for gross negligence.

ARGUMENT THREE

On remand, proof of ordinary negligence should be sufficient to establish liability of the defendants if it is determined that Shirley Ann Gerentine and the defendants were fellow employees engaged in "unrelated works." The Complaint alleged that, as between the decedent and each of the defendants, they were engaged in "unrelated works." Section 440.11(1), Fla. Stat. (1983) grants no immunity to co-employees engaged in "unrelated works." In the absence of such statutory immunity, the common law controls. The common law in Florida allows suits against negligent fellow employees. Therefore, all that the Complaint needed to allege was simple negligence. The Complaint did allege simple negligence, was sufficient on its face, and should not have been dismissed.

ARGUMENT FOUR

Insofar as it requires the proof of gross negligence or willful and wanton disregard, Section 440.11, Fla. Stats. (1983), is unconstitutional under the Florida Constitution and violates Art. I, Sections 2 and 9. Although the statute has been held not to violate an individual's right to access to the courts, the statute unconstitutionally violates an injured worker's rights to due process and equal protection under the Florida Constitution.

ARGUMENT FIVE

The Complaint adequately pled a cause of action for punitive damages. Construing the allegations in a light most favorable to

plaintiffs, ample facts were pled to satisfy the test for punitive damages.

ARGUMENT ONE

THIS CASE IS CONTROLLED BY THE RECENT FLORIDA SUPREME COURT DECISION IN STREETER V. SULLIVAN. ALL OF THE DEFENDANTS WERE FELLOW EMPLOYEES OF SHIRLEY ANN GERENTINE AND ARE SUBJECT TO LIABILITY TO HER HEIRS FOR THEIR GROSS NEGLIGENCE

From its citations of authority in its per curiam opinion affirming the Trial Court's dismissal of this case, it is apparent that the Fifth Court of Appeals felt that fellow employees could not be sued in Florida. In both Dessert v. Electric Mutual Liability Insurance Co., *supra*, and Kaplan v. Circuit Court of the Tenth Judicial Circuit, *supra*, the rulings had been to this effect. However, both of these cases are no longer valid law in Florida pursuant to the recent decision of this Court in Streeter v. Sullivan, *supra*.

In Streeter v. Sullivan, *supra*, this Court held that fellow employees may be sued for gross negligence, pursuant to Florida Statutes, 1981, section 440.11(1). In that case, which is remarkably similar factually to the Gerentine situation, Suzanne Sullivan had been killed during a bank robbery. The bank had been robbed twice before, and despite this knowledge the bank supervisory personnel, defendants in the action, refused to add security at the bank to prevent further robberies. In the next robbery, Suzanne Sullivan was killed.

The factual similarity of the Streeter v. Sullivan case to Shirley Ann Gerentine's murder is stark. As pled in the Second Amended Complaint, there had been prior robberies at the store. No attempts were made to staff the store with an eye toward employee safety. The store was staffed for maximum profit, rather than security. The security systems employed were inadequate and known to be ineffective for preventing robberies. As in Streeter, *supra*, the defendants in this action ignored the known risk of robbery and did nothing to protect Shirley Ann Gerentine.

Streeter v. Sullivan, *supra*, held that all fellow employees are liable to persons like Shirley Ann Gerentine, regardless of their status. Corporate officers and supervisors alike are liable. This is an confirmation of the liability of all four fellow employees of Shirley Ann Gerentine named as defendants in this case.

Appellants assert that this case is almost "on all fours" with the Streeter decision. It should be remanded for trial.

ARGUMENT TWO

THE SECOND AMENDED COMPLAINT ADEQUATELY STATED A CAUSE OF ACTION FOR GROSS NEGLIGENCE AGAINST ALL DEFENDANTS. APPLYING THE RULE THAT A COMPLAINT IS TO BE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THE SECOND AMENDED COMPLAINT CONTAINED AMPLE FACTUAL ALLEGATIONS TO SUPPORT A CONCLUSION THAT IT STATED A CLAIM FOR GROSS NEGLIGENCE.

The factual charges against the defendants in this case have been outlined in detail in the "Statement of the Case and Facts"

section of this brief. Assuming that such facts were proven to a jury, they would be sufficient to uphold a finding of gross negligence.

In the face of a motion to dismiss, the allegations in a complaint must be viewed in a light most favorable to the plaintiff. 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. See, e.g. Abrams v. General Insurance Company, 460 So.2d 562 (Fla. 3d DCA 1984), Truesdell v. Proctor, 443 So.2d 107 (Fla. 1st DCA 1984).

A. SULLIVAN V. STREETER - THE DISTRICT COURT OF APPEALS DECISION - GROSS NEGLIGENCE

Shortly before the Trial Court made its decision in this case, (April 11, 1986) but unknown to either counsel or the Court, the Fourth District Court of Appeals released its opinion (on April 2, 1986) in Sullivan v. Streeter and Melcher, 485 So.2d 893 (Fla. 4th DCA 1986). The Fourth District Court of Appeals decision, in addition to the recent Supreme Court decision, is instructive on the issue of gross negligence. As noted above, that case had remarkably similar facts and legal issues as Shirley Ann Gerentine's case. In Sullivan, Suzanne Sullivan had been a branch manager at Atlantic Federal Savings in Davie, Florida. The bank had originally had a security guard, but he was removed from service. Two robberies occurred at the bank before Suzanne Sullivan's mishap. On July 23, 1982, Mrs. Sullivan was killed during the course of a third robbery. Her husband sued Streeter and Melcher, who were the President and

Senior Vice President of the bank. Since the defendants were co-employees of Mrs. Sullivan, the Fourth District Court of Appeals was faced with interpreting the scope of Section 440.11(1), Fla. Stats. (1978). The Court acknowledged that prior to the 1978 enactment of Section 440.11(1), the district courts of appeal had required a showing of some affirmative act of beyond the scope of the employer's duty to provide a safe place to work in order for an injured employee to prevail against a co-employee. However, the Court reasoned that the Legislative enactment of Section 440.11(1) demonstrated an intention to withhold immunity for acts of gross negligence or willful and wanton misconduct. And the Sullivan Court (District Court of Appeals) held that 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 their own security procedures were more than sufficient to satisfy the requirements for gross negligence.

B. WHAT IS GROSS NEGLIGENCE?

"Gross negligence ... is that kind or degree of negligence which lies in the area between ordinary negligence and willful and wanton misconduct . . . ." White Construction Co., Inc., v. DuPont, 455 So.2d 1026 (Fla. Sup. Ct. 1984), citing Carraway v. Revell, 116 So.2d 16,22 (Fla. Sup. Ct. 1959).

"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." Weller v. Reitz, 419 So.2d 739 (Fla.

5th DCA 1982). Gross negligence is "a conscious and voluntary act or omission which is likely to result in grave injury when in the face of a clear and present danger of which the alleged tortfeasor is aware." Weller, *supra*, citing Glaab v. Caudill, 236 So.2d 180 (Fla. 2d DCA 1970).

C. THE DETERMINATION OF GROSS NEGLIGENCE IS GENERALLY A JURY QUESTION.

Many cases on gross negligence naturally involve discussions of the automobile guest statute. Such cases uniformly held that the determination of the existence of gross negligence is a question for the jury, subject to an initial review by the court to see if there was any evidence, however slight, of such gross negligence. See, e.g., Tuz v. Burmeister, 254 So.2d 569 (Fla. 1st DCA, 1971) and Hodges v. Helm, 222 So.2d 418 (Fla. 1969).

In Otey v. Florida Power & Light Company, 400 So.2d 1289 (Fla. 5 DCA 1981) the court held that both the determination of (1) the existence of gross negligence and (2) the right to punitive damages were jury questions. The court first reasoned that plaintiffs were entitled to punitive damages if the defendant acted with "such gross negligence as to indicate a wanton disregard of the rights of others." "Whether the plaintiffs are entitled to punitive damages must be left to the jury to decide once there is any evidence to show an entitlement to such an award. Even if the court is of the opinion that the preponderance of the evidence is against the plaintiffs, it should be left to the jury to decide." Otey, emphasis added, citing Doral

Country Club, Inc., v. Lindgren Plumbing Company, 175 So.2d 570 (Fla. 3d DCA 1965).

D. PLAINTIFFS' SECOND AMENDED COMPLAINT SATISFIED THE TESTS FOR GROSS NEGLIGENCE.

It is difficult to argue for the sufficiency of the Second Amended Complaint without restating much of it. It has been summarized in detail in the "Statement of the Case and Facts" section of this brief. Plaintiffs urge the court to apply the well known rule that the facts in the complaint should be construed in a light most favorable to the plaintiffs. Doing so demonstrates that if these facts are proven to the jury, the jury could well determine the existence of gross negligence.

What does the Second Amended Complaint say that supports a conclusion of the existence of gross negligence? Prior to the death of Shirley Ann Gerentine, at least four other robberies had occurred at Store #137. The defendants knew this but the defendant Louis Huntley brazenly said, "We don't staff our stores to prevent robberies." The defendants made conscious, deliberate, affirmative decisions not to add any security measures or change security procedures at Store #137 even after the prior robberies. This is not an allegation of an omission. It is an allegation (already proven) that in spite of knowledge of robberies at the store, the defendants deliberately chose not to do anything to make the store safer.

Rather than staff the store with an eye to safety, the defendants staffed Store #137 according to a manpower allotment

formula that depended on sales. As sales increased, more man-hours per week were allowed. But even this did not allow for more staff during dangerous hours at night. The defendants required that extra man hours "earned" by a store by extra sales be used during the busiest times of day. For Store #137, this meant that two people worked during the safest hours of the day, 11:00 a.m. to 7:00 p.m. During the time of day most prone to robbery, between 7:00 p.m. to 9:30 p.m., there was not enough manpower allotted to have two persons at the store and thereby deter robberies. The defendants enforced the manpower rules in spite of their explicit knowledge that they were not providing for the added security of two persons on the premises during the most dangerous times. The policies enforced by the defendants actually prohibited store managers from allotting an additional person to be at the store during the most dangerous time.

Additionally, the defendants committed other affirmative acts which greatly increased the risk of robbery. They consciously and deliberately chose not to display the fact that the store had a hidden camera. The conscious choice not to inform robbers of this fact took away any possible deterrent effect of the camera. Apparently the defendants were content to settle for the possibility of catching a robber rather than deterring him from robbing and abducting in the first place.

The defendants also implemented and enforced, specifically with regard to the Gerentines, a policy that prohibited family members from staying at the stores. Louis Gerentine was a former

prison guard and when his wife worked the dangerous night hours, he liked to be at the store. His mere presence was a deterrent to robberies. Nonetheless, Shirley Ann Gerentine was told by the defendants that Louis could not be at the store. The defendants actively, affirmatively, and deliberately eliminated this additional deterrent to robbery.

In addition to the above, the Second Amended Complaint makes several other allegations of acts and omissions by the defendants. Most of them have to do with the inadequacy of the existing security system and procedures to prevent robberies or abductions.

From the foregoing, it is clear that a jury could conclude that the defendants acted in ways which would "probably result in injury to person or property." They knew of the dangers of robbery but didn't take proper steps to deter robbery. A finding of gross negligence would not only be possible, it would be probably and entirely appropriate. The dismissal of the Second Amended Complaint was clearly premature and inappropriate.

ARGUMENT THREE

EVEN THOUGH THE SECOND AMENDED COMPLAINT ADEQUATELY STATED A CLAIM FOR GROSS NEGLIGENCE, IT SHOULD HAVE BEEN SUFFICIENT TO PLEAD ONLY ORDINARY NEGLIGENCE. THIS IS BECAUSE SHIRLEY ANN GERENTINE AND THE DEFENDANTS WERE FELLOW EMPLOYEES ENGAGED IN UNRELATED WORKS. PURSUANT TO STATUTE, THEREFORE, ORDINARY NEGLIGENCE WAS SUFFICIENT TO CREATE LIABILITY IN THE DEFENDANTS. ON REMAND, THE TRIAL COURT SHOULD BE INSTRUCTED TO ALLOW RECOVERY IN THE EVENT OF PROOF OF ORDINARY NEGLIGENCE

A. STATUTORY REQUIREMENTS

Shirley Ann Gerentine, as a clerk for Huntley's Jiffy Food Stores, Inc., at Store #137 in Orlando, was a fellow employee of the defendants Robert McComb, Phillip Goodwin, William Huntley, and Louis Huntley. Streeter v. Sullivan, *supra*. The Second Amended Complaint stated facts adequate for a finding that they were fellow employees. In an Order concerning previous motions, the Trial Court had held that all were co-employees. "The Court finds that Robert McComb, Phillip Goodwin, Louis Huntley and William Huntley were co-employees of Shirley Ann Gerentine . . ." ("Order Granting Defendants' Motion to Dismiss," January 21, 1986.)

Pertinent portions of Section 440.11(1), Fla. Stats. (1983) provide as follows:

> The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liability of such employer . . . . The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment. (Emphasis added.)

Pursuant to the above statute, then, an employee injured by his fellow employee's acts or omissions may sue the fellow employee for the following:

1. Gross negligence, or
2. Willful and wanton misconduct, or
3. Unprovoked physical aggression.

Additionally, if, the injured employee and the co-employee(s) are assigned to "unrelated works," then the immunity from liability granted by the statute does not apply. In this instance, the liability of the co-employee(s) must be assessed according to the common law because the immunity granted by Section 440.11(1), Fla. Stats., (1983) does not come into play.

B. THE COMMON LAW - RECOVERY FOR ORDINARY NEGLIGENCE OF A FELLOW EMPLOYEE WAS ALLOWED.

Under the common law, an injured employee could sue his "ordinarily negligent" co-employee. This was the law of Florida and it was expressly recognized by the Florida Supreme Court in Frantz v. McBee Company, 77 So.2d 796 (Fla. 1955). In that decision, the Court held that a negligent co-employee was a "third party" within the meaning of that term as used in the then effective version of Section 440.11, Fla. Stats. As such a "third party," the Court ruled that a co-employee could be sued for ordinary negligence. Hence, prior to the enactment of Section 440.11(1), Fla. Stats. (1978), "there was no statutory right of action by an employee against a co-employee. There was only the common law right to sue any third-party

tortfeasor, including co-workers." Sullivan v. Streeter & Melcher, 485 So.2d 893 (Fla. 4th DCA 1986), citing Frantz v. McBee.

C. "UNRELATED WORKS"

The Legislature has not defined the concept of "unrelated works." The legislature has mandated that if co-employees are engaged in "unrelated works," then the immunities granted would not apply. And absent a legislative definition, there have been no Florida court decisions which define the phrase. The positions of welder for a subcontractor and laborer for general contractor were not considered as primarily "unrelated works" in Johnson v. Comet Steel Erection, Inc., 435 So.2d 908 (Fla. 1st DCA 1983). However, no decision has been rendered which defines "unrelated works" satisfactorily. In fact, counsel for Appellants have conducted a computerized search of all American Court decisions and have found no definition in any court for such a phrase.

In the absence of statutory or court definition, a court must give the words of a statute their plain and ordinary meaning. "One well established rule of construction is that when a statute does not specifically define words of common usage, such words are to be construed in accordance with their plain and ordinary meaning." Simmons v. Schimell, 476 So.2d 1342 (Fla. 3d DCA 1985) citing State v. Cormier, 375 So.2d 852 (Fla.1979); State v. Stewart, 374 So.2d 1381 (Fla.1979); Graham v. State, 362 So.2d 924 (Fla.1978). Also see Maryland Casualty Co. v. Reliance Insurance Co., 478 So. 2d 1068 (Fla. 1985). Also see Streeter v. Sullivan, *supra*.

Appellants believe that the most appropriate definition to be given to the phrase "unrelated works" as used in Section 440.11(1), Fla. Stats. (1983) would be to recognize the generally accepted dichotomy between labor and management. "Unrelated" would generally mean not connected in any way. However, all employees of the same employer are obviously connected by their common employment. By defining "unrelated works" in terms of management and labor, the commonly recognized dichotomy in the workplace would be a convenient point of reference for statutory interpretation. Such a definition would also serve the interests of not interfering with workplace harmony - which is a common argument made against co-employee suits. If this definition were adopted, then as between laborers proof of gross negligence or willful and wanton misconduct would be necessary for a lawsuit. As between management personnel, the same would be required. Within their respective groups, workplace harmony would not be upset by the prospect of suits for negligence. However, across the dividing line between labor and management, suits for ordinary negligence would be permitted. This approach would have the additional benefit of enhancing workplace safety, because it is commonly management which makes the decisions as to the procedures and equipment which may be used by the workers. Knowledge that a suit for ordinary negligence might exist for negligence in the selection of procedures or equipment would be added incentive for the management to provide a safe working environment.

D. PLEADING ORDINARY NEGLIGENCE WAS SUFFICIENT

If Shirley Ann Gerentine and the defendants are held to have been engaged in "unrelated works," then the immunity from lawsuit and the special protection of requiring proof of gross negligence in Section 440.11(1) are not available to the defendants. This discussion has been aimed, primarily, toward a later stage in this case. Appellants assert that they should be able to prevail in the case, once it has been remanded for trial, upon a showing of ordinary negligence.

However, there is one compelling reason for this Court to hold at this time that the Second Amended Complaint was sufficient if it pled ordinary negligence. There can be no doubt that the Second Amended Complaint alleged that Shirley Ann Gerentine and the defendants were engaged in "unrelated works." These allegations must be taken as true, no matter what meaning is ascribed to the phrase "unrelated works." It is an elementary proposition of law that, in the context of a motion to dismiss, all allegations in the complaint must be accepted as true. Federal Insurance Company v. Western Waterproofing Company of America, No. BF-158 (Fla. 1st DCA June 12, 1986), Dyson v. Dyson, No BE-300 (Fla. 1st DCA Feb. 21, 1986), Harris v. Lewis State Bank, 482 So.2d 1378 (Fla. 1st DCA 1986), Cutler v. Board of Regents of the State of Florida, 459 So.2d 413 (Fla. 1st DCA 1984).

Accepting the allegation that Shirley Ann Gerentine and the defendants were engaged in "unrelated works" as true, then the

statutory immunities granted to co-employees for ordinary negligence do not apply. The liabilities of Robert McComb, Phillip Goodwin, William Huntley, and Louis Huntley are left to be determined according to the common law and without statutory protection from suit. In accordance with Frantz v. McBee, supra, allegations of ordinary negligence were sufficient. The Second Amended Complaint should not have been dismissed.

ARGUMENT FOUR

IF IT IS APPLIED IN SUCH A MANNER AS TO REQUIRE THE SHOWING OF GROSS NEGLIGENCE OR WILLFUL AND WANTON MISCONDUCT IN ORDER TO RECOVER AGAINST A CO-EMPLOYEE, SECTION 440.11(1) VIOLATES ART. I, SECTIONS 2 AND 9 OF THE FLORIDA CONSTITUTION. WHEN APPLIED IN SUCH A MANNER, THE STATUTE VIOLATES THE INJURED WORKER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION. ALTHOUGH THE STATUTE HAS BEEN HELD NOT TO VIOLATE THE RIGHT OF ACCESS TO COURTS, IT DOES VIOLATE EQUAL PROTECTION AND DUE PROCESS.

A. PRECEDENT IN OTHER STATES.

Recently, the New Hampshire Supreme Court ruled that a statute which deprived workers of the right to sue their co-employees for negligence violated the injured worker's rights to due process and equal protection. In Estabrook v. American Hoist & Derrick, 498 A.2d 741 (N.H. 1985), four cases were considered which raised the issue of the constitutionality of a New Hampshire statute that granted immunity from suit to co-employees. The statute granted immunity to co-employees except for intentional torts. Reasoning that the right to recover for injuries to one's person is "an

important substantive right," the New Hampshire court held that the statute was unconstitutional, because it failed to provide for an "adequate substitute" for the right of the injured worker which it purported to take away. Since the statute did nothing to replace the common law right of an injured employee against his negligent co-employee which it took away, it violated due process and equal protection concepts.

Central to the court's decision in Estabrook, supra, was the recognition that there was no quid pro quo between the injured worker and the immune co-employee. The workers' compensation system involved a give and take between the employer and the injured employee -- the employer gave up common law defenses and paid money and the injured employee gave up his common law right to sue the employer. But the negligent co-employee gave up nothing. He paid no premiums to the fund. But the statute gave him immunity from suit. This, the court reasoned, did not satisfy considerations of due process and equal protection.

Arizona and Alabama have reached similar conclusions. In Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970) and Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972) the Arizona Supreme Court twice held that a statute which gave immunity to suit to negligent co-employees violated Arizona constitutional provisions against limiting the right to sue. And in Grantham v. Denke, 359 So.2d 785 (Ala. 1978) the court held that the Alabama due process constitutional provision was violated by a

statute that gave co-employees immunity from lawsuit. The Alabama court recognized that there was an absence of any quid pro quo between the injured employee and his co-employees. It also recognized that a rule of co-employee immunity negated the deterrent to unsafe practices which exposure to suit brings about.

B. SOMETHING FOR NOTHING.

The most basic view of Florida's statute which grants immunity to co-employees except in cases of gross negligence, willful and wanton misconduct, or intentional misconduct is that it gives something for nothing. Quite simply, the negligent co-employee is given immunity from suit. But he gave up nothing for this benefit. And the injured worker gets no benefit from it, either. The employer pays the premiums for the workers' compensation insurance. The employer gives up something. In return, the employer gets immunity from suit. There is a quid pro quo between the employer and the injured employee. The injured employee gives up his right to sue the employer and gets immediate benefits from workers' compensation.

In this case, the defendants Robert McComb, Phillip Goodwin, William Huntley, and Louis Huntley want "something for nothing." They didn't pay any workers' compensation premiums. They have given up nothing. But they want the court to say that the survivors of Shirley Ann Gerentine have no rights against them, because Huntley's Jiffy Food Stores, Inc., a corporation which the Gerentines could not sue, paid into the fund. Giving these defendants such a

benefit, while giving no benefit to the Gerentines and taking away their common law and statutory rights to sue for the death of Shirley Ann Gerentine, is offensive to the principles of due process and equal protection.

C. THE FLORIDA SITUATION.

Pertinent portions of the Florida Constitution provide as follows:

Article I, 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

Article I, Section 9. Due Process. No person shall be deprived of life, liberty, or property without due process of law ...

In Florida, the right to maintain an action for personal injuries has been held to be a personal property right entitled to protection from arbitrary laws. Sunspan Engineering and Construction v. Spring Lock Scaffolding Company, 310 So.2d 4 (Fla. 1975), citing Pritchard v. Norton, 106 U.S. 124, 1 S.Ct. 102, 27 L.Ed 104 (1882), Ross v. Gore, 48 So.2d 412 (Fla. 1950) and State ex rel. Vars v. Knott, 135 Fla. 206, 184 So. 752 (1938). Thus, the right of the survivors of Shirley Ann Gerentine to sue for her death, once conferred by the wrongful death statutes, cannot and should not be taken away without due process of law. The survivors of Shirley Ann Gerentine are also entitled to equal protection and equal application of the laws.

There is a strong analogy in prior decisions of the Florida courts with regard to the effect of the workers' compensation statute and the right to sue for indemnity, either common law or contractual. In Sunspan, supra, and in City of Clearwater v. Duncan, 466 So.2d 1116 (Fla. 2d DCA 1985), aff'd. Duncan v. City of Clearwater, 478 So.2d 816 (Fla. 1985), the question analyzed was the effect of the workers' compensation immunity statutes on the right of a third party to sue the employer for common law or contractual indemnity. In all these cases, an employee had been injured. The employee sued a third party, but naturally could not sue the employer. The third party then attempted to sue the employer for indemnity. The employer raised the workers' compensation exclusive remedy provisions as a defense to the indemnity action, claiming that the payment of workers' compensation benefits gave the employer total immunity from such indemnity actions. The courts disagreed. They said that the workers' compensation laws could not have the effect of taking away the rights of the third party to indemnity. Explaining Sunspan, supra, the court in City of Clearwater v. Duncan, supra, said, "The Supreme Court's rationale was that a statute cannot abolish a common law right of action without providing a reasonable alternative to protect the people's rights to access to the courts and to equal protection under the law." (Emphasis added.) All three of the above-cited decisions concluded that to apply the workers' compensation statutes in such a fashion as to deprive the third party of its indemnity rights was unconstitutional. They reasoned that the

failure of the legislature to provide a "reasonable alternative" to the right of indemnity which the statute purportedly took away violated equal protection.

The plaintiffs in this action stand similarly. The individual defendants, as co-employees of Shirley Ann Gerentine, have given up nothing. There has been no quid pro quo. The legislature has provided no "reasonable alternative" to the rights the immunity statute purports to take away with regard to co-employee suits. The limited rights of recovery under worker's compensation are not equal to the rights of full recovery for economic loss which would exist againt the negligent co-employee. Enforcement of the literal terms of Section 440.11(1), Fla. Stats. (1983) would amount to violations of Florida's constitutional guarantees of equal protection and due process. Such literal enforcement of the provisions of the statute would create a "special class" of people, i.e., co-employees, who would enjoy special immunity from lawsuit without having given up anything in return for their special status.

Since the right of an injured co-employee to sue a negligent co-employee has been recognized, Frantz v. McBee, supra, it has been recognized that the failure of the co-employee to contribute to the Compensation scheme means that the negligent co-employee should gain no special immunities. "We can perceive nothing in sound reasoning that would entitle a co-employee to gratuitous protection for his own misconduct." Frantz, supra. None of the defendants in

this action should be given special, gratuitous protection for their grave misconduct.

ARGUMENT FIVE
THE SECOND AMENDED COMPLAINT ADEQUATELY PLED A CAUSE OF ACTION FOR PUNITIVE DAMAGES.

"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 effects, or there is that entire want of care which would raise the presumption of a conscious disregard of consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or or that reckless indifference to the rights or others which is equivalent to an intentional violation of them." White Construction Co., Inc., v. DuPont, supra, citing Carraway v. Revell, supra.

"Reckless indifference" is the term used in the punitive damage cases cited above which most accurately describes the conduct of the defendants in this case. They knew of the dangers and, quite indifferent to the consequences of another robbery, did nothing more. They perpetuated a myth that a low amount of cash deters robberies, when, in reality, all it did is to cut the money losses to the company. They gave their employees, like Shirely Ann Gerentine, a false feeling of security, all the time knowing that if a robbery occurred, the alarm system would not summon the police in time to prevent exactly what happened to Shirley Ann Gerentine. One can

easily imagine the different outcome if a second clerk had been on duty to deter the robbery or summon help immediately, or, at the very least, to observe a license plate number to aid in the apprehension of the murderers of Shirley Ann Gerentine before they accomplished their grisly crime. But for the purpose of maximizing profit, by basing their staffing rules and decisions only on money and not on safety, the defendants recklessly and indifferently exposed Shirley Ann Gerentine to the known risk of robbery and its attendant hazards.

The test at this stage in the proceeding should not have been whether the appellants definitely could have convinced a jury that punitive damages were justified, but whether, interpreting the facts in the Second Amended Complaint in a light most favorable to the plaintiffs, a reasonable jury might have made such an award. The motion to dismiss the punitive damage claim was premature and should not have been granted.

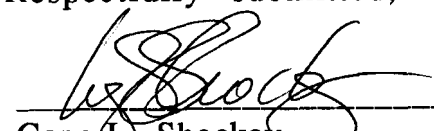
CONCLUSION

Appellants respectfully request that this Court reverse the dismissal of Robert McComb, Phillip Goodwin, William Huntley, and Louis Huntley and to remand for completion of discovery and trial. Appellants request that, pursuant to Streeter v. Sullivan, supra, that this Court hold that the heirs of Shirley Ann Gerentine possess a cause of action against all defendants in this case. Further, Appellants request that this Court hold that the Second Amended

Complaint adequately stated a cause of action against the defendants and adequately stated a claim for gross negligence. Appellants also request a finding that Shirley Ann Gerentine and the defendants were engaged in "unrelated works" and that the remand to the trial court level be with instructions that it was sufficient for appellants to plead ordinary negligence to state claims against these defendants, and that a showing of ordinary negligence against these defendants would support a recovery unless and until a factual finding would be made that Shirley Ann Gerentine and the defendants were not engaged in "unrelated works." Appellants also request that this Court hold that insofar as Section 440.11(1), Fla. Stats. (1983), is interpreted to limit the liability of co-employees to situations of gross negligence, willful and wanton misconduct, and unprovoked physical aggression, it is unconstitutional and violates due process and equal protection. Finally, appellants request that this Court find that the Second Amended Complaint adequately set out a claim for punitive damages. Appellants request that the case be returned to the Trial Court for completion of discovery proceedings and for trial.

DATED this 16th day of September, 1987.

Respectfully submitted,



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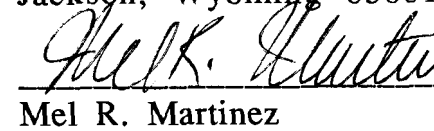

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to LESLIE KING O'NEAL, ESQ., Post Office Drawer 1991, Orlando, Florida, 32802, this 16th day of September, 1987.

MEL R. MARTINEZ