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IN THE SUPREME COURT
STATE OF FLORIDA

KARL ELLER, ROBERT DEARTH and RICHARD YARNELL,

Appellants,

v.

RANDY SHOVA, Individually and as Personal Representative of the Estate of Felicia Shova,

Appellee.

CASE NO. 80,776

AMICUS CURIAE BRIEF OF THE FLORIDA FOOD AND FUEL RETAILERS ON BEHALF OF APPELLANTS

On Appeal from the Second District Court of Appeal from a Declaration of Unconstitutionality of a State Statute

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Charles M. Auslander, Esq.
Florida Bar No. 349747
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

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Interest of the Amicus

The Florida Food & Fuel Retailers ("Retailers") is a state-wide coalition of business enterprises engaged in the distribution and sale of food and fuel products at retail. Its members include proprietors who sell their products in the "convenience store" context, often providing necessaries and convenience items around the clock, 24 hours a day. Its membership ranges from family owned stores to nationwide chains with stores in Florida. The National Association of Convenience Stores ("NACS"), representing approximately 65,000 stores across the country, is a member of Retailers' coalition. Among other responsibilities NACS has studied convenience store security, with planning for the 1990's and beyond. Other constituent members of Retailers include The Florida Petroleum Marketers Association, The Retail Grocers Association of Florida and The Florida Petroleum Council.

Retailers' membership is significantly affected by the decision in *Shova v. Eller*, 17 F.L.W. D2095 (Fla. 2d DCA Sept. 4, 1992), *rev. pending*, Case No. 80,776. (App. 1) (to be reported at 606 So.2d 400). That decision's declaration of the unconstitutionality of section 440.11(1), Florida Statutes (Supp. 1988), throws into serious question the continued economic viability of some convenience stores, and the willingness of individuals to serve as officers, directors and supervisory employees in the convenience store industry in Florida.

Section 440.11 serves the ameliorative effect of protecting supervisory employees and remote individuals such as officers or directors, from fault-based tort liability for management and policy-making decisions made in the course of their duties on behalf of the corporation, absent proof of conduct intended and designed to cause harm to an employee.

The removal of this protection from management has especially painful effects for the convenience store industry.

Convenience stores serve a laudatory purpose for Florida's populous. Unlike most supermarkets, drug stores and department stores, convenience stores are typically open 24 hours a day. These stores offer goods that people are likely to need at anytime, day or night, such as medical supplies, infant formula, diapers, food and paper products. By their operational nature, all late night businesses (not just convenience stores) are subjected to random violence and lawlessness in the dark hours, creating danger not only to customers but to persons employed at these businesses and to property. Commercial establishments which keep more standard business hours may also be prone to nighttime property damage, but are not as likely to experience personal injuries to or the deaths of employees.

Industry studies performed by NACS show that crime which effects convenience stores -- particularly violent crime -- is typically random in nature.[1/] These studies reflect that violent crimes, such as serious batteries, rapes and murders, are generally spontaneous acts of aggression as to which safety efforts undertaken by convenience stores are not likely to reduce with dramatic significance the statistical incidence of crime.

The legislature has recognized the unique dangers to which convenience stores are exposed, and in conjunction with the industry has prescribed measures to alleviate the dangers and risks. The industry polices itself out of self-interest, and the legislature has codified many of the industry's recommendations in the "Convenience Business Security Act" -- sections 812.1701 - 812.175, Florida Statutes (Supp. 1992). This Act established uniform

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1/ NACS research report, "Convenience Store Security, Report and Recommendations," November 1991, National Association of Convenience Stores. (App. 2).

requirements for security devices, and other standards to promote convenience store business security. *See* § 812.173, Fla. Stat. (Supp. 1992). Some municipalities have also enacted "two-employee" ordinances, requiring the presence of two convenience store clerks on night shifts. These ordinances are grandfathered by the statute until the end of 1994. *See* § 812.1725, Fla. Stat. (Supp. 1992).

The legislature and various political subdivisions of the state have been alert to and concerned about the safety issues which underlay the *Shova* decision. The legislature has balanced important issues relative to those safety concerns with the Convenience Business Security Act and supervisory employees' immunity (section 440.11(1)). These legislative enactments recognize the important purpose served by convenience stores and other businesses at night, yet acknowledge the enhanced crime incidence that attends their necessary manner of operation to serve the citizens of this State.

Section 440.11(1), now declared unconstitutional by the Second District, constituted a legislative determination that the spate of lawsuits by injured convenience store employees against supervisory personnel and other management figures was an inappropriate burden to place on these individuals and convenience store corporations. *See, for e.g., Beckler v. Hoffman*, 550 So.2d 68 (Fla. 5th DCA 1989); *Gerentine v. Coastal Security Systems*, 529 So.2d 1191 (Fla. 5th DCA 1988). If this declaration of unconstitutionality is allowed to stand, it will have the negative effect of importing fault-based liability, under the tort system at common law, back into a situation which is properly served by the no-fault principals of the workers' compensation law. It will generate serious financial consequences for the convenience store industry, in particular. It certainly will not serve to reduce random crime.

The lower court's declaration of unconstitutionality can have one of the two following effects, or both: it will make it less likely that competent and qualified persons will be willing to serve as corporate officers, directors, or management and policy-making employees of convenience stores; or it will force convenience stores to pay greater insurance premiums (if policies are available) to indemnify officers, directors, and supervisory employees who make it possible for this industry to operate at a profit. Despite the remedies employed by the industry to enhance nighttime security, random incidents of violent crime will constitute a continuing problem. That kind of crime is usually based on irrational behavior. Introduction of tort-based liability for this impulsive conduct of third parties not employed by late night businesses will not secure a safer environment for employees. The prophylactic use of the tort law to improve safety is of no value whatsoever in this context.

The district court's decision that section 440.11(1) denies access to the courts is wrong as a matter of law. It is also an abstract and detached decision which fails to take account of its practical consequences or to perceive and defer to the wisdom of the legislature. Because of the deep interest which the members of Retailers have in the constitutionality of this statute, Retailers lends its voice to the Court as an amicus curiae in support of the appellants.

Statement of the Case and Facts

Retailers will adopt the statements of the case and facts presented by the parties in their briefs. It is not the object of this amicus curiae brief to resolve conflicts, if any, as to the factual matters of this proceeding. Nor is it the object of Retailers to duplicate the

likely arguments to be presented by appellants in support of the constitutionality of section 440.11(1), as demonstrated by their intensive analysis of Florida law.

Retailers' brief endeavors to provide an additional perspective on the constitutionality of the statute, by discussing the manner in which other states with a consistent common law heritage have treated similar statutory provisions passed by their legislatures and approved by their courts. This additional context for the Florida legislature's judgment in this field of employer/employee relations will demonstrate that the Florida legislature is not out of step with the practical approach that other states have taken to this problem.

Summary of Argument

Section 440.11(1), Florida Statutes (Supp. 1988), does not constitute an unconstitutional denial of access to the courts, a right of Florida citizens embodied in Article I, section 21. That statute's limited immunity from suit for co-employees, engaged in the performance of their employment duties, is a constitutional and practical resolution of a critical problem facing Florida employers. Suits may still be brought against co-employees, including corporate officers, directors and supervisory employees, for conduct which constitutes an intentional tort or culpable negligence not in furtherance of employment-related objectives.

The Courts' prior decisions in *Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981) and *Kluger v. White*, 281 So.2d 1 (Fla. 1973), demonstrate that the change in degree of negligence necessary to bring suit against a managerial employee does not implicate the access to courts provision. The Court's decision in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987), does not alter this result. *Streeter* was centered on statutory construction, not on an exhaustive

examination of the status of common law prior to 1968 in Florida. The legislature was authorized to return the status of workers' compensation law in Florida to that in existence prior to *Streeter*, where actions of corporate officers, directors, and supervisors in the furtherance of their employment responsibilities were not prone to common law suits, other than for intentional torts. Section 440.11(1) merely reflected a legitimate legislative response to *Streeter*.

The greater weight of authority in other jurisdictions has upheld co-employee immunity provisions challenged under their constitutions' access to courts provisions. These attacks have been routinely denied when an opportunity remains for suits against co-employees for their intentional torts. Those states which still treat co-employee immunity under the common law, most often conclude that non-delegable duties of the employer performed by officers, directors and supervisors in the furtherance of their employment duties, do not create a basis for suit unless the co-employee has acted in a willfully tortious manner. This statutory and common law position of the majority of other states reflects the moderate approach of the Florida legislature raising the level for co-employee suits to those based on culpable negligence.

Argument

Section 440.11(1), Florida Statutes (Supp. 1988), Does Not Constitute an Unconstitutional Denial of Access to the Courts.

(1) Introduction

Retailers concurs in the analysis of Florida law set forth by appellants in support of the constitutionality of section 440.11(1), Florida Statutes (Supp. 1988). The crux of that argument is simply that a change in the degree of negligence necessary to maintain a

civil tort action against a co-employee in a supervisory or managerial position does not constitute a denial of a right of access to the courts for redress of injury under Article I, section 21, of the Florida Constitution. *See, Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981); *Kluger v. White*, 281 So.2d 1 (Fla. 1973). In summary form, the supporting elements for this conclusion under Florida law are these:

(1) prior to 1968, the common law and statutory law of Florida did not provide a viable right of action on behalf of a co-employee for the negligent conduct of a managerial employee;

(2) section 440.11(1) constitutes no more than a legislative reversal of the rule of statutory law established in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987), which had determined that an employee could sue an officer or director for gross negligence just as any other co-employee could be sued;

(3) that the legislative override of *Streeter* merely returned the status of workers' compensation law to that in existence prior to *Streeter*, where non-delegable duties of the employer carried out by its vice-principals such as corporate officers, directors, or supervisory managers, in the course and scope of their duties, were not actionable in tort where the workers' compensation system was operative for the employer;

(4) that the workers' compensation system has always been considered to provide a reasonable alternative manner of protecting the rights of employees to redress for injuries which was consistent with the exclusion of rights of action other than for intentional torts by supervisory vice-principals; and

(5) that the exclusive remedy of the workers' compensation system was consistent with and supported by the public policy of providing immediate and prompt payments for injuries or deaths to employees and their survivors, as balanced with the maintenance of a more stable environment for business operations and an absence of the chaotic and random features of the tort-based system of recovery for personal injuries in the workplace.

Retailers believes that this rather abbreviated, five step synopsis captures the essence of appellants' arguments, and the main features of Judge Altenbernd's dissenting opinion in the *Shova* decision. *Shova v. Eller*, 17 F.L.W. 2095, 2097 (Altenbernd, J., dissenting). Under that reasoning, the tests for continued access to the courts identified in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), were readily met by section 440.11(1) when it provided immunity from suit by co-employees for officers, directors and other individuals providing managerial and policy-making decisions in the course and scope of their employment duties.

A few additional remarks are warranted here regarding a lack of cogency in the panel majority's opinion in *Shova*. Without identifiable legal support, the majority has drawn its own public policy line in the sand, and has denied the legislature any ability to limit tort suits against managerial personnel for intentional conduct. The district court's majority seemed comfortable enough with this Court's finding constitutional a 1978 amendment to section 440.11(1) which had raised the level of culpability supporting a lawsuit to a minimum of gross negligence by a managerial employee. *See Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981).

The majority seemed more viscerally than analytically disturbed by the 1988 amendment which had the "effect" of immunizing managerial personnel from tort suits based on gross negligence. 17 F.L.W. at D2096. This led the majority to conclude that the legislature had abolished any civil cause of action in negligence, and in so doing had effectively immunized managerial personnel from any civil lawsuits. This reasoning is difficult to understand because it was paralleled by the correct conclusion that intentional tortious conduct (at the very least) was still very actionable under the culpable negligence standard identified by the legislature in the 1988 amendment to section 440.11(1).

It seems quite illogical to conclude, as the majority did, that the right to pursue an action based on intentional tort and culpable negligence (which are by no means synonymous) does not constitute a constitutionally meaningful right of redress, but instead "is really an illusory right to redress and amounts to virtually no access to the courts . . . ." 17 F.L.W. at D2097. Unsurprisingly absent from this doctrinaire pronouncement is any supporting recitation of precedent. As the dissent notes, there was no pre-*Streeter* right of redress in tort for assertions of gross negligence against a managerial employee based on a failure to provide a safe workplace, as the panoply of rights at common law available to an employee in 1968 did not include a right of action for non-delegable duties of the employer against a vice-principal (managerial) employee carrying out those tasks, including the employer's obligation to provide a safe workplace to its employees. 17 F.L.W. at D2097-98.

Consequently, when the Court in *Streeter* held that the term "employee" in the workers' compensation act includes officers and directors, thereby permitting a suit in gross negligence to be brought against them, it was performing a construction of statutory law and not relying on antecedent, common law principals. *Streeter v. Sullivan*, 509 So.2d at 270-272.

As a result, the 1988 legislature unquestionably possessed the prerogative to undo what the Court had done in *Streeter*. This was strictly a matter of post-1968 statutory construction and amendment; it was not a circumstance where preexisting common law rights of redress were being abrogated. *See* Judge Altenbernd's explanation, in dissent, 17 F.L.W. at D2098. The process of legislative interpretation and revisitation simply did not implicate the access provision of the Florida Constitution.

Two additional points concerning the reasoning of the majority are worth mentioning. First, the majority's conclusion that the "culpable negligence" standard for immunity from tort denies any cause of action in negligence is a debatable one. The level of behavior attributable to culpable negligence is similar to but distinguishable from that of conduct warranting the label of intentional tort. *See State v. Greene*, 348 So.2d 3 (Fla. 1977); *Glaab v. Caudill*, 236 So.2d 180 (Fla. 2d DCA 1970); § 784.05, Fla. Stat. (1991).

In *Greene*, for example, the Court reiterated that culpable negligence constitutes negligence of a gross and flagrant character evincing a reckless disregard for the safety of others. It is this wanton lack of care which raises a presumption of indifference to consequences. 348 So.2d at 4; *see also*, *Killingsworth v. State*, 584 So.2d 647 (Fla. 1st DCA 1991). Plainly, whereas an intentional tort conveys an element of willfulness, design and artifice, culpable negligence does not necessarily import these requirements.

Another useful example can be seen in *Heston v. State*, 484 So.2d 84 (Fla. 2d DCA 1986). In that case, a defendant was convicted under the culpable negligence statute when her behavior included aiming a crossbow without a targeted arrow, with the consequence that a driver of an adjacent car flinched, dodged and was involved in an automobile accident with injuries to a passenger. While there may well have been no intentional design to cause

harm in that particular manner, nonetheless, the evidence sufficed to establish culpable negligence.

As these decisions reflect, there is a zone between gross negligence and intentional tort which can be readily denominated as culpable negligence. The line drawn conclusion by the Second District -- that a cause of action in negligence has been utterly abolished in this context -- is dubious and, in any event, line drawing is the province of the legislature, not the courts. *McMillan v. Nelson*, 149 Fla. 334, 5 So.2d 867 (1942) ("guest statute" modification in degree of negligence did not abolish a right to sue under access to court provision).

Second, the district court's conclusion (without supporting documentation) that the workers' compensation system does not provide a reasonable alternative to tort suits for purposes of access to the courts in the limited circumstance of co-employee tort actions against other employees is a questionable one. Certainly implicit in several past decisions of the Second District itself (which were overruled on statutory grounds by *Streeter*) is the conclusion that the workers' compensation system does provide a reasonable alternative form of redress, to substitute for tort suits against vice-principals performing non-delegable duties of the employer. *See West v. Jessop*, 339 So.2d 1136 (Fla. 2d DCA 1976); *Zurich Insurance Co. v. Scofi*, 366 So.2d 1193 (Fla. 2d DCA), *cert. denied*, 378 So.2d 348 (Fla. 1979); *Kaplan v. Circuit Court of the Tenth Judicial Circuit for Polk County*, 495 So.2d 231 (Fla. 2d DCA 1986). The dissent makes this point from the perspective of a sitting member of that court.[2/]

[2/] In Florida, the employer is immunized from common law tort liability outside the workers' compensation system unless it commits an intentional tort. *See Fisher v. Shenandoah Gen. Constr.*

(continued...)

The Court need not rest wholly on Florida law. Numerous cases from other jurisdictions articulate the precise conclusion that the workers' compensation system is very much the logical alternative and the approved and appropriate substitute for tort suits against supervisory and managing employees, officers and directors. This subject will be taken up at length in the course of this brief.

A reasoned interpretation of Florida law, as bolstered by other state court analysis, leads to a conclusion diametrically opposite to that formed by the Second District panel majority. The 1988 legislature's change in the immunity-authorizing level of conduct does not violate the access to courts provision of the Florida Constitution.

(2) Florida's immunity provision amendment is in step with the multitude of other jurisdictions and constitutionally sound.

It is analytically appropriate to assess the means by which other states have addressed the question of co-employee immunity as a feature of workers' compensation laws. Other states share a "common" common law heritage with Florida and the Court has previously compared the status of the law in other jurisdictions when making pronouncements of constitutional import in the field of workers' compensation law. *Iglesia*, 394 So.2d at 995, n. 2. On the topic of workers' compensation law, there has been

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[2/](...continued)

Co., 498 So.2d 882 (Fla. 1986). Consistency would seem to be the appropriate rule in this context. Why should the employer be immunized from independent tort liability for gross negligence when its supervisory employees carrying out its policy and management decisions would be liable for conduct evincing gross negligence? Indirectly, the employer would lose what it has obtained directly. Collateral actions against officers, directors and management would most likely be defended by the corporation, insured against and indemnified if gross negligence took place in furtherance of employment responsibilities. The legislature could not have intended this nullification of an employer's protections under the workers' compensation system. The courts should not contrarily abrogate the logic of the system structured by the legislature, absent a constitutional necessity which is not present here.

significant sharing of creative solutions and analyses by legislatures and judiciary alike. *See, e.g., Reed v. Brunson*, 527 So.2d 102 (Ala. 1988); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (Neb. 1989); *Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (Md. 1984).

The 1988 amendment to section 440.11(1) was not out of step with the majority of other jurisdictions. To the contrary, it parallels the prevailing and contemporary view that only intentional torts constitute a basis for departing from co-employee immunity. (See, *infra*, at subsection b.)

(a) Constitutional challenges.

Courts of other states have several times taken up whether constitutional "access" provisions were violated by limitations on actions for personal injuries by co-employees against officers, directors and other supervisory persons. Almost uniformly, the conclusion reached was that access had not been denied. *Reed v. Brunson*, 527 So.2d 102 (Ala. 1988); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (Neb. 1989); *Mier v. Staley*, 28 Ill. App. 3d 373, 329 N.E.2d 1 (Ill. App. Ct. 1975); *Jadosh v. Goeringer*, 442 Pa. 451, 275 A.2d 58 (Pa. 1971); *Meyer v. Kendig*, 641 P.2d 1235 (Wyo. 1982)[3/]; *Oliver v. Travelers Ins. Co.*, 103 Wis. 2d 644, 309 N.W.2d 383 (Wis. App. 1981).

Alabama limited an employee covered under that state's compensation provisions to tort recovery for "willful conduct that results in or proximately causes injury or

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3/ A fractured Wyoming Supreme Court recently issued a plurality decision determining that a 1986 amendment to the Wyoming workers' compensation law -- barring all suits against co-employees including those for intentional torts -- violated that state's access to courts provision. *Mills v. Reynolds*, 837 P.2d 48 (Wyo. 1992). The decisive opinion expressly confirmed the propriety of the earlier *Meyer* decision, which had upheld the constitutionality of an earlier version of the compensation law (against access attacks) which immunized co-employees against suits based on any degree of negligence less than culpable negligence. *Mills*, 837 P.2d at 54. The end result in Wyoming correctly indicates the constitutionality of Florida's limited immunity provision.

death" in actions against officers, directors and others. *Reed*, 527 So.2d at 105. Alabama's Constitution also possesses an access provision.[4/] In *Reed*, the Alabama Supreme Court evaluated the willfulness-based limitation on tort suits under its access provision in two ways, a "vested rights approach" and the "common-law rights approach." 527 So.2d at 114-115. The germane analysis of the Alabama Supreme Court involved its common law rights approach which is substantially similar to Florida's *Kluger*-based analysis.

Under that approach, Alabama legislation which abolishes or alters a common law cause of action is suspect under the access to court provision of the constitution, and survives scrutiny only if one of two conditions are satisfied: (1) the previously existing right must be voluntarily relinquished by its possessor in exchange for like benefits; or (2) the legislation must ameliorate a perceived social evil and hence, consist of a valid police power exercise. 527 So.2d at 115. The Court found both tests were easily met. The first was resolved in favor of immunity because

> The remedy of proceeding against the tortious co-employee for personal injuries caused by negligence and wantonness and against the employer under the common law or an employer's liability act, or other statute, with its attendant uncertainties of amount and time, can be relinquished and exchanged for the certainty of the remedy provided by the Workmen's Compensation Act for such personal injuries. For an injury done to him, the employee is choosing one means by which a violation of a right is prevented, redressed, or compensated for another means by which a violation of this right is prevented, redressed, or compensated. (Footnote omitted). There is a quid pro quo: remedy for remedy.
>
> There is a mutuality of immunity. An employee relinquishes his right to sue his co-employee for negligence or wantonness in

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4/ Article I, Section 13 of the Alabama Constitution provides in pertinent part that "every person, for any injury done him, in his lands, goods, person or reputation shall have a remedy ...."

> exchange for assurance that he will not be sued by his co-employee for negligence or wantonness. (Citations omitted).

527 So.2d at 115. Ever more simply put, the court found that the certainty of the workers' compensation law remedy for an injury done to an employee was a reasonable and logical substitute for an uncertain cause of action against co-employees.

The second factor was just as readily met. The Alabama legislature was well within its police power prerogative to determine that co-employee suits were producing a debilitating effect on efforts to retain existing industry and attract new employers to the State, placing it at a serious competitive disadvantage with other states. The legislature possessed "the police power to eliminate such co-employee suits in an attempt to eradicate or ameliorate what it perceives to be a social evil." 527 So.2d at 116.

In a lengthy opinion, the Nebraska Supreme Court followed suit in *Peterson*. After reviewing many decisions on the precise subject, that Court concluded that an open court provision of Nebraska's state constitution was not violated by the provision of that state's workers' compensation law which extended exemption from tort liability to employees, officers and directors. 436 N.W.2d at 537. The Courts of California, Colorado, Iowa, Louisiana, New Hampshire and Wisconsin have reached analytically similar results denying challenges based on access to court provisions. *Lowman v. Stafford*, 226 Cal. App. 2d 31, 37 Cal. Rptr. 681 (Cal. App. 3d Dist. 1964); *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982); *Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1984); *Perez v. Continental Cas. Co.*, 367 So.2d 1284 (La. App. 3d 1979), *writ denied*, 369 So.2d 157 (La. 1979); *Thompson v. Forest*, ___N.H. ____, 614 A.2d 1064 (N.H. 1992); *Young v. Prevue Products, Inc.*, 130 N.H. 84, 534

A.2d 714 (1987); *Oliver v. Travelers Insurance Co.*, 103 Wis.2d 644, 309 N.W.2d 383 (Wis. App. 1981).

So, too, on constitutional due process grounds, courts have upheld worker's compensation immunity for officers, directors and other supervisory persons against attacks that the grant of immunity provided no quid pro quo for the injured employee. *Mier, supra*; *Jadosh, supra*; *Thompson, supra.*

In *Mier*, the court reasoned that corporate officers were within the categories of persons granted immunity from suit for work-related injuries under Illinois' compensation statute, and that this immunity was not constitutionally lacking under the federal and state constitutions' due process clauses. This assessment rested on the historical legacy of workers' compensation laws which provide a sure manner of recovery from the employer and its loss of certain common law defenses, in exchange for the employee's being bound to this exclusive remedy and also losing certain elements of damages otherwise available in a common law negligence action. 329 N.E. 2d at 7.

In *Jadosh*, the Pennsylvania Supreme Court evaluated the abrogation of common law liability of one employee to another for negligence under a workmen's compensation law which barred all such suits "except for intentional wrong." 275 A. 2d at 60. The precise challenge to the immunity provision by the employee in that case was the concern (voiced by the Second District panel majority) that the immunity provision insulated a co-worker from liability "without any corresponding financial responsibility being placed on him." 275 A. 2d at 60. The Pennsylvania high court disagreed, however. It explained that

> The employee receives economic insurance that his employment-related injuries will be compensated. He surrenders the right to sue employers or fellow employees for negligence, but he no

> longer need prove negligence, his own contributory negligence is no longer a bar, and he, too, can no longer be sued for negligence by a fellow employee. Such a comprehensive program is not unconstitutional.

275 A. 2d at 60-61. Again, the immunity provision readily passed due process considerations as an effective and legitimate piece of police power legislation.

In *Thompson*, the New Hampshire Supreme Court concluded that an amendment to the workers' compensation statute barring actions for non-intentional torts by co-employees, including corporate officers, directors and supervisory personnel, passed constitutional muster. 614 A. 2d at 1066-1067. That court, in fact, overruled one of its own precedents, to conclude that a quid pro quo was not necessary when the legislature created a statutory bar to actions for non-intentional torts against co-employees. *Id.*

While the constitutional questions explored in these various decisions have minor variance from Florida constitutional law because they are distilled through the filter of other state constitutional provisions, the factors evaluated in these decisions are akin to the tests required under Florida's *Kluger* decision. Each culminated in a conclusion of constitutionality for supervisory, co-employee immunity provisions. These decisions buttress the analysis of Florida law in the dissent, and they undermine the district court panel majority's counterintuitive conception that workers' compensation provides a reasonable alternative to tort suits only for the employer. Respectfully, the panel majority seems not to have understood the underlying policies for the workers' compensation law.

(b) The non-delegable duty to provide a safe place to work

The significant majority of jurisdictions across the nation which have faced the question of whether supervisory employees or corporate officers may be held liable for negligently performing a duty which the employer owes to the employee, when the employer conforms to the applicable workers' compensation law, have reasoned that co-employee immunity is the appropriate result. *See Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (Md. 1984), and numerous cases cited therein at pages 717-718. That conclusion of law has been identified as the "Wisconsin approach," based on its origination in that state. The general principal can be stated simply: there is no constitutional impropriety in a legislative bar to co-employee suits against officers, directors or supervisory employees in the absence of some intentionally tortious conduct, when the main allegation of the suit is the failure to provide a safe place to work. *Athas*, 476 A.2d at 714-718.

The trend against imposing liability, and in favor of extending immunity for these co-employees, has been growing since the 1970's. *Larson*'s treatise explains that

> most courts will hold the defendant immune if the act with which he is charged is an act done in his official capacity as an agent or representative of the corporation. (Footnote omitted). Suit is also barred if the duty allegedly violated was a non-delegable duty of the corporation, (footnote omitted) such as the duty to provide a safe place to work - as distinguished from the duty of care owed by one employee to another . . . . Most states have held . . . that a supervisor, like a corporate officer, cannot be held liable by a co-employee for breach of a corporate duty, such as that to provide a safe place to work, (footnote omitted) but can be held only for breach of a personal duty.

2A. Larson, *The Law of Workmen's Compensation*, § 72.13-72.14, 14-81 through 14-84, 14-86 through 14-89 (1987). As noted in an earlier version of the treatise:

> A strong tide toward co-employee immunity has been running. As recently as 1974, a majority of States permitted suits against co-employees.

2A. Larson, *The Law of Workmen's Compensation*, §72.11, 14-54 to 14-55 & n. 131 (1983). The 1983 roll call of states reflected that only 11 of them permitted suits against co-employees for negligence, *Athas*, 476 A.2d at 714, dropping to 10 by 1987. Larson, *supra*, § 72.11 at 14-68 (1987). Many states have retained or adopted co-employee liability for intentional torts (sometimes described as culpable negligence, as expressed in section 440.11(1), Florida Statutes (1988)). Larson, § 72.11 at 14-68, 69 (1987).

A number of states have approved immunity for non-delegable duties based on the notion that the typical exclusive remedy provisions in workers' compensation laws constitute an acceptable statutory trade-off, in which the employee gives up his right to sue in tort and the employer waives common law defenses. *See Athas*, and numerous cases identified therein at 476 A.2d at pages 714-715. The conception attributable to this theory generally runs that the supervisory employee, officer or director is performing a function which must be performed by the corporation, and hence the employee acts for and is entitled to the cloak of immunity granted to the corporation itself. No direct duty runs between the supervisory employee and the injured employee on which a tort suit can be based for breaching the obligation of the employer to provide a safe place to work.

This legal analysis has often been buttressed by the practical realization that immunity from tort suit, given to the employer corporations in exchange for election into the compensation system, will be defeated if tort causes of action for negligence are authorized against supervisory co-employees. In all likelihood, those high ranking employees, officers or directors will be financially protected by the corporation itself through contractual

indemnity or insurance policies, which will expose the corporate employer to a double dose of financial obligation when that cost is added to the statutory obligation to pay compensation benefits to the injured employee.

It is important to note that prior to the Court's *Streeter* decision in 1987, the other appellate courts of Florida had interpreted Florida to be a "Wisconsin approach" state. *See Athas*, 476 A.2d at 717 citing to the *Zurich* and *West* decisions of the Second District. The Florida legislature's enactment of section 440.11(1) was, as appellants have argued, no more than a return to the pre-*Streeter* status of the workers' compensation law, vis-a-vis immunity for all but intentional torts for corporate officers, directors and supervisory employees making managerial and policy decisions in the course and scope of their employment.

The common law and statutory trends in other jurisdictions underscore the legitimacy of this approach, and the common law heritage underlying it. This nationwide perspective indicts as unreasonable any interpretation of pre-1968 Florida law which would suggest that a common law duty in negligence against managerial employees for their actions in providing an unsafe place to work, and providing a tort cause of action for redress, existed parallel to the workers' compensation statute.

(c) The degree of negligence required to avoid immunity.

Two members of the Second District panel held section 440.11(1) unconstitutional, apparently, on the visceral impression that raising the threshold of liability to culpable negligence constituted an illusory right of court access. 17 F.L.W. at D2097. That view has not been shared by other courts throughout the country which have routinely found a separation between negligent conduct, on the one hand, and intentional conduct on the

other, as supportive of extended versus no extension of immunity. Again referring to Larson, that treatise provides:

> In twenty states, the immunity of a co-employee is subject to an exception for intentional wrongs, or the equivalent . . . Most of the decisional law here consists of repeated affirmations that 'intentional' means 'intentional.' It does not mean merely gross or wanton negligence. (Footnote omitted). The defendant must have entertained a desire to bring about the injurious result and must have believed that the result was substantially certain to follow. (Footnote omitted).

Larson, § 72.26 at 14-145, 146 (1987 and Supp. 1992).

Other jurisdictions have rejected co-employee tort liability resting on allegations only of reckless behavior or wanton conduct which might constitute a highly foreseeable risk but not an intent or design to injure. *Reed v. Brunson*, 527 So.2d 102 (Ala. 1988); *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980) (applying Louisiana law). Still other courts have rejected co-employee liability on account of the exclusive remedy clause of the compensation law, even when willful or intentional misconduct or grossly negligent conduct was said to have occurred. *Bryant v. Wal-Mart Stores, Inc.*, 203 Ga. App. 770, 417 S.E.2d 688 (Ga. Ct. App. 1992), *cert. denied*, ___ S.E.2d ___ (Ga. 1992); *Jett v. Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979); *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W.2d 789 (Mich. 1962).

With all the various and sundry standards of conduct for immunity identified in other states, research discloses only one state court which has found co-employee immunity unconstitutional without regard to access for suits based on intentional tort. *See Kilpatrick v. Superior Court*, 105 Ariz. 413, 466 P.2d 18 (1970); *Halenar v. Superior Court*, 109

Ariz. 27, 504 P.2d 928 (1972).[5/] The present status of the law throughout the United States overwhelming finds no constitutional impropriety attends the adoption of employee tort immunity provisions of workers' compensation laws, particularly where those laws permit actions for intentional torts. The legislature's 1988 amendment puts Florida in the mainstream.

(d) The Sovereign Immunity Analogy.

The law waiving sovereign immunity in part for acts of state officials is a useful counterpoint to this discussion of constitutionality. Judge Altenbernd noted in his dissenting opinion that section 768.28, Florida Statutes (1991)[6/], grants total immunity for policy-making decisions by managerial government employees even though the state has not waived its immunity for these decisions. 17 F.L.W. at D2099; *see also, Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). The State has exchanged its limited liability in tort actions (capped at $200,000 per incident and $100,000 per claim) for total immunity for acts of simple negligence by government employees. *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).

It would be difficult indeed to reconcile the purported unconstitutionality of the co-employee partial immunity provision of section 440.11(1) with the constitutionality of the unlimited immunity provision of section 768.28. The workers' compensation law was

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5/ The courts of Arizona were governed by a constitutional provision which expressly stated that "the right of action to recover damages for injuries shall never be abrogated." Art. 18, §16, Arizona Constitution.

6/ With unrelated modifications, the waiver section is presently codified at section 768.28, Florida Statutes (Supp. 1992)

created in the first place out of overpowering public necessity. So, too, it is apparent that the workers' compensation laws carry with them as much public importance as the law waiving sovereign immunity. In practical application, the latter, in fact, impacts far fewer residents of this state.

Conclusion

The Second District panel majority's declaration that section 440.11(1) is unconstitutional finds no support in Florida law. No right of access to the courts has been abrogated without a reasonable alternative and without an overpowering public necessity. The law in a vast majority of other jurisdictions supports the conclusion that the Florida legislature's override of the Court's *Streeter* decision, insofar as it governs the conduct of supervisory employees, officers and directors, is wholly consistent with the prior common law heritage of Florida.

The declaration of unconstitutionality of this particular law is particularly invasive and fraught with serious implications for corporate employers and other businesses in this State. Those enterprises represented by the Florida Food and Fuel Retailers believe that the constitutional legitimacy, and the public policy value of section 440.11(1), are consistent with the continued public welfare of Floridians, as well as the business interests of this state and others who visit the state and express the need for the products offered by Retailers' member stores.

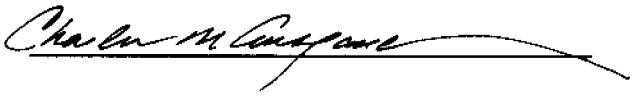
The decision of the district court should be reversed, with directions to reinstate the judgment of the circuit court dismissing the second amended complaint with prejudice.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Charles M. Auslander, Esq.
Florida Bar No. 349747
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
Attorneys for Amicus Curiae,
Florida Food and Fuel Retailers
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Certificate of Service

I hereby certify that a true and correct copy of this amicus brief was mailed on December 23, 1992, to William M. Schneikart, Esquire and Randee K. Carson, Esquire, Hampp, Schneikart & James, P.A., P. O. Box 11329, St. Petersburg, Florida, 33733; to James A. Sheehan, Esquire, 341 Third Street South, St. Petersburg, Florida, 33701; and to David W. Henry, Esquire, McDonough, O'Neal & O'Dell, Attorneys for Amicus Curiae Florida Defense Lawyers' Association, PO Drawer 1991, Orlando, Florida, 32802.



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IN THE SUPREME COURT
STATE OF FLORIDA

KARL ELLER, ROBERT DEARTH and RICHARD YARNELL,

Appellants,

v.

RANDY SHOVA, Individually and as Personal Representative of the Estate of Felicia Shova,

Appellee.

CASE NO. 80,776

APPENDIX TO
AMICUS CURIAE BRIEF OF THE FLORIDA
FOOD AND FUEL RETAILERS
ON BEHALF OF APPELLANTS

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1. *Shova v. Eller*, 17 F.L.W. D2095 (Fla. 2d DCA 1992)

2. NACS, "Convenience Store Security, Reports and Recommendations," November 1991.

#2 Stricken from Amicus Appendix

* * *

Torts—Negligence—Convenience store manager shot and killed during robbery of store—Gross negligence action by decedent's husband against chairman of the board, president and regional manager of convenience store corporation alleging that defendants knew store was located in high crime area, that previous armed robberies had occurred at store, that majority of armed robberies occurred during shift decedent was working, and that operation of store 24-hours a day with little or no security devices presented unreasonably dangerous situation for employees—Amended statute raising degree of negligence necessary to maintain civil tort action against coemployee in supervisory/managerial position from gross negligence to culpable negligence constituting first degree misdemeanor unconstitutionally abolishes civil cause of action in negligence for an unintentional act by a fellow employee in a managerial/policymaking capacity, in violation of access to courts provision of Florida Constitution—Workers' compensation system fails to provide reasonable alternative to cause of action in gross negligence against fellow employee—Error to find that workers' compensation system provided exclusive remedy for plaintiff's injury

RANDY SHOVA, Individually, and as Personal Representative of the Estate of Felicia Shova, Appellant, v. KARL ELLER, ROBERT DEARTH and RICHARD YARNELL, Appellees. 2nd District. Case No. 91-02087. Opinion filed September 4, 1992. Appeal from the Circuit Court for Hillsborough County; Roland Gonzalez, Judge. James A. Sheehan, St. Petersburg, for Appellant. A. Wade James of Hampp, Schneikart & James, P.A., St. Petersburg, for Appellees.

(RYDER, Acting Chief Judge.) We have for review an issue concerning the trial court's dismissal of Randy Shova's second amended complaint in this action for gross negligence. We reverse.

The complaint was filed against fellow employees of the deceased, Felicia Shova, for simple negligence and for gross negligence which was alleged to have caused Felicia's death. Randy Shova was Felicia's husband and is the personal representative of her estate.

Mr. Shova's complaint alleged that appellee, Karl Eller was the chairman of the board of Circle K Corporation where Felicia worked and was responsible for formulating the policies of Circle K at the time of the incident which caused Felicia's death. Appellee, Robert Dearth, was the president of Circle K and was responsible for implementing the policies of Circle K at the time of the incident that caused Felicia's death. Appellee, Richard Yarnell, was the regional manager of Circle K and was responsible for implementation of policies, supervision, staffing and security at Circle K stores in west central Florida and in particular, the store where Felicia worked at the time of her death, which was located at the corner of Armenia and Waters Avenues in Tampa (the store).

Mr. Shova's complaint alleged that Felicia was employed continuously as an assistant manager and store manager by Circle K from July 1987 until January 26, 1990 at the store. The store is only one of a number of Circle K stores located in the Tampa Bay area. The complaint alleged that the geographic area in which the store is located has, for the past five years, experienced a significantly high crime rate in Hillsborough County which has increased each year. Most of the incidents of crime in the area where the store is located have occurred at the store. The store had been opened for two years at the time of the incident that caused Felicia's death. During that time, six to eight robberies had occurred at the store, five of them being armed robberies. Felicia had been a victim of one of these armed robberies in December of 1988. Theft was routine.

For most of the period that the store had been in operation prior to January 26, 1990, it had operated twenty-four hours a day. Felicia was a supervisor at the store. Immediately prior to January 26, 1990, Felicia had a problem with low sales and decreasing inventory on the 11:00 p.m. to 7:00 a.m. shift. In order to determine what was causing the problems on the late shift, Felicia had to work the shift herself. It was the policy of Circle K at that time that only one person worked the late shift.

Mr. Shova's complaint further alleged that on January 26, 1990, the store was not equipped, by Circle K, with adequate security equipment such as additional personnel, bulletproof enclosures and automatic door locks even though Circle K and appellees were well aware of the existence of these devices and of the effectiveness of these devices in preventing crime and protecting the employee. On the night of January 26, 1990, Felicia was working the 11:00 p.m. to 7:00 a.m. shift at the store alone. At approximately 11:30 p.m., the store was robbed by an individual later identified as Anthony Hill. In the course of the robbery and without provocation, Hill shot and killed Felicia.

The original complaint was a two-count complaint alleging gross negligence on the part of appellees as fellow employees,

and alleging simple negligence against appellees as employees working in unrelated employment. The basis of both counts was that appellees knew that the store was located in a high crime area; that previous incidents of armed robbery involving guns and knives occurred at the store; that the majority of armed robberies and injuries due to armed robberies occur between the hours of 11:00 p.m. and 7:00 a.m.; and that the store in this location, operating twenty-four hours a day, with little or no effective security devices, presented an unreasonably dangerous situation for employees working the overnight shift.

The original complaint was dismissed on November 20, 1990 and an amended complaint was filed on December 13, 1990. The amended complaint was essentially the same as the original complaint except additional allegations were made in paragraph 26 to the effect that appellees were aware of the dangers of keeping the store open without adequate safeguards between the hours of 11:00 p.m. and 7:00 a.m., and knowing the dangers, they made a conscious decision to keep the store open with the knowledge that this decision was going to result, at some time, in great bodily injury to their employees.

This amended complaint was also dismissed on February 27, 1991, and a second amended complaint was filed on March 20, 1991. The second amended complaint was a one-count complaint essentially the same as the previous two complaints except Mr. Shova added the allegation that appellees' knowledge of the likelihood of serious bodily harm increased to a certainty because the store was located in a high crime area and previous armed robberies had occurred in that store. The second amended complaint also alleged that the failure to provide adequate safety devices and a conscious decision to keep the store open under all the facts and circumstances amounted to an infliction, by appellees, of actual personal injury on Felicia. The negligence claim asserting appellees were coemployees engaged in unrelated works did not appear in appellant's final complaint. The second amended complaint was also dismissed by order dated June 13, 1991. The trial court found the Florida workers' compensation system provided the exclusive remedy for appellant's injury. The court held section 440.11(1), Florida Statutes (1989), was constitutional. The final order dismissed the case with prejudice. This timely appeal followed.

> [W]here 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 the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., 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.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). The *Kluger* court noted that in *McMillan v. Nelson*, 5 So.2d 867 (Fla. 1942), the court approved the automobile guest statute which raised the degree of negligence necessary to maintain a tort action from negligence to gross negligence.

The supreme court approved a similar change when, in 1978, the legislature amended section 440.11(1), Florida Statutes (1977). *See Iglesia v. Floran*, 394 So.2d 994 (Fla. 1981). This amendment grants immunity from tort liability to coemployees who, while in the course of their employment, negligently injure other employees of the same employer, unless the employees act with willful and wanton disregard or unprovoked physical aggression or with gross negligence. *Iglesia*. Relying on what the court in *Kluger* stated about *McMillan*, the supreme court in *Iglesia* approved the 1978 amendment to section 440.11(1) which raised the degree of negligence to gross negligence in cases where an employee sues a fellow employee for injuries received within the scope of employment. *Iglesia* held that the legislative amendment which changed the degree of negligence does not violate the access to courts provision of the Florida Constitution.

In 1987, the Florida Supreme Court held that the term "employee" includes corporate officers and directors, thereby permitting a suit in gross negligence to be brought against officers and directors. *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). The result of the *Streeter* decision was that an officer or director could be sued by a fellow employee just as any other coemployee could be sued for willful and wanton disregard or unprovoked physical aggression or for gross negligence under section 440.11(1).

In 1988, the legislature again amended section 440.11(1). This second amendment grants immunity from tort liability to

> any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his duties acts in a managerial or policymaking capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in s. 775.082.

§ 440.11(1), Fla. Stat. (Supp. 1988). This amendment raises the degree of negligence necessary to maintain a civil tort action against a coemployee in a supervisory/managerial position from gross negligence to culpable negligence constituting a misdemeanor of the first degree. *See* § 775.082(4)(a), (b), Fla. Stat. (1989). Section 784.05(2) provides that a person commits a first degree misdemeanor when that person, "through culpable negligence, inflicts actual personal injury on another."

Appellant argues that when the legislature amended section 440.11(1) in 1988, it essentially abolished a cause of action without providing a reasonable alternative in violation of the access to courts provision of the Florida Constitution. Appellees, on the other hand, argue that the legislature did not abolish a cause of action, because appellant is not prohibited from bringing suit under a higher degree of negligence.

Appellees rely on *Iglesia* in support of their position that the 1988 legislative amendment to section 440.11(1) does not violate the access to courts provision of the Florida Constitution. Appellees contend that under *Iglesia* the legislature may change the degree of negligence necessary to maintain a tort action, as long as the plaintiff can still bring some type of action. Under the 1988 amendment to section 440.11(1), appellees, as managerial/policymaking-type employees, claim they are immune from suit for gross negligence.

By this 1988 amendment to section 440.11(1), the legislature has taken away a cause of action in negligence and in gross negligence and in so doing has abolished any civil cause of action in negligence. The only similarity in negligence, gross negligence and culpable negligence is the word "negligence." Culpable negligence is criminal negligence which is equivalent to an intentional act. *See Barber v. State*, 592 So.2d 330 (Fla. 2d DCA 1992) and cases cited therein. As a consequence, the legislature has abolished a cause of action for unintentional acts by a fellow employee in a managerial/policymaking capacity in the state of Florida.

Appellees argue that the workers' compensation system provides a reasonable alternative to a cause of action in gross negligence against a fellow employee. It is true that through history the Workers' Compensation Act has served as a reasonable alternative to tort law. *See, e.g., Martinez v. Scanlan*, 582 So.2d 1167, 1171-72 (Fla. 1991) (reduction of benefits did not deny access to courts as system remained a reasonable alternative to tort suits), and cases cited therein. However, appellees overlook the fact that the workers' compensation system provides no alternative as far as coemployees are concerned. Workers' compensation provides an alternative only as to an employer. Accordingly, appellees' reliance on the workers compensation system as a reasonable alternative in this case is misplaced.

We feel that the legislature has gone too far with this 1988 amendment to section 440.11(1). Although an injured employee may still be able to bring some type of action, the "reasonable alternative" provided—proof of a first degree misdemeanor—is an insurmountable task in most cases, and amounts to no alternative at all. This alternative which raises the threshold of liability to culpable negligence is really an illusory right to redress and amounts to virtually no access to the courts in situations like the one presented here. If we were to hold that this 1988 amendment were constitutional, we fear that the legislature may next raise the degree of negligence necessary to maintain a tort action by an injured employee, to a third degree felony. Just how far can the legislature go if we hold this criminal standard of liability to be a reasonable alternative to negligence actions between coemployees?

Because the legislature abolished a civil cause of action in negligence, for an unintentional act, we hold that section 440.11(1), as amended, is unconstitutional, as it violates the access to courts provision of the Florida Constitution. Art. I, § 21, Fla. Const.

Reversed and remanded for further proceedings. (THREADGILL, Jr., Concurs. ALTENBERND, J., Dissents with opinion.)

(ALTENBERND, Judge, Dissenting.) Although the amendment to section 440.11 in chapter 88-289, Laws of Florida, addresses a legitimate problem, it provides a misguided solution. Therefore, I truly regret that I cannot join in the majority's opinion. The dispositive issue before this court is whether the balance of power established in 1968 by article I, section 21, of the Florida Constitution gives the judiciary the authority to facially invalidate this questionable legislative enactment. Especially in the context of this case, I do not believe that this court has that power.

Mrs. Shova's personal representative is attempting to sue management-level employees of her corporate employer, Circle K, for their alleged negligence in the making of management decisions relating to the safety of her workplace. Allegedly, as a result of these decisions, Mrs. Shova was killed by the intentional, criminal act of a third party on January 26, 1990. There is no dispute that Circle K is obligated to provide workers' compensation benefits for this death.

The first constitutional question presented is whether chapter 88-289 deprived Mrs. Shova of "a right of access to the courts for redress for a particular injury [that was] provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right ha[d] become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). Only if we answer this question in the affirmative must we decide whether the legislature provided a "reasonable alternative to protect the rights of the people of the State to redress for injuries."[1] *Kluger*, 281 So. 2d at 4. I have not been able to convince myself that the legislation at issue deprived Mrs. Shova's estate of any right of redress established prior to 1968 which would necessitate a reasonable alternative remedy.

I. THIS CASE DOES NOT INVOLVE A PREEXISTING RIGHT OF REDRESS

Mrs. Shova's personal representative maintains that her estate would have had a right of redress against these managerial employees if her death had occurred in 1968 and that the 1988 legislation eliminated this right of redress. I have not found any precedent to convince me that the estate would have had any meaningful right of redress for this tragic circumstance if it had occurred in 1968. Under *Kluger*, we examine both statutory rights and common law rights as of that date.[2]

A. Statutory Rights in 1968

Concerning statutory rights, I can find no statute that would have allowed Mrs. Shova's estate to sue these managerial employees in 1968 for managerial decisions "causing" a death, when that death resulted directly from the intentional criminal act of a third party. Although the job of a convenience store clerk in 1992 is probably a hazardous occupation, it has never been a "hazardous occupation" for purposes of chapter 769. Moreover, even if it were a "hazardous occupation," it is not clear that chapter 769 would create any statutory right against these managerial coworkers.

The wrongful death statute, both in 1968 and now, creates a vehicle for the estate to sue only if Mrs. Shova could have sued as a survivor.[3] It creates a separate cause of action for the estate, but only if the decedent would have had a similar claim. *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968). Suffice it to say that neither this court nor the parties to this appeal have discovered a statutory cause of action for Mrs. Shova in 1968.

B. Common Law Rights in 1968 Concerning the Criminal Conduct of Third Parties

A victim of a crime in 1968 had no common law right of redress against a person whose negligence gave a criminal the opportunity to harm the victim. Even though the law now reaches a contrary conclusion, under the applicable common law of 1968, criminal conduct was not legally foreseeable. *Lingefelt v. Hanner*, 125 So. 2d 325 (Fla. 3d DCA 1960); *see also* 38 Fla. Jur. 2d *Negligence* § 44 (1982). The criminal act operated as an intervening cause of the injury, breaking the causal connection between the defendant's negligent act and the victim's injury. Not until *Nicholas v. Miami Burglar Alarm Co.*, 339 So. 2d 175 (Fla. 1976), did this traditional rule of common law change. Accordingly, section 440.11 did not deprive this plaintiff of any right of redress existing at common law as of 1968. If section 440.11 deprives some other person of a theory that was viable in 1968, this constitutional question should await that person's case. *See Sandstrom v. Leader*, 370 So. 2d 3 (Fla. 1979); *Williston Highlands Dev. Corp. v. Hogue*, 277 So. 2d 260 (Fla. 1973).

C. Common Law Rights in 1968 Arising from the Errors of Vice Principals

Even if *Lingefeldt* had not been the controlling common law in 1968, Mrs. Shova's estate would still confront a complex legal issue which the supreme court did not resolve in *Streeter v. Sullivan*, 509 So. 2d 268 (Fla. 1987). That issue is whether a corporate employee had a right of redress against a management-level employee in 1968 for a negligent decision depriving the employee of a safe place to work. I have found no precedent in Florida in which any employee successfully sued a managerial employee under this theory. If such a right existed, it was a very quiet right of redress.

Prior to the advent of workers' compensation, an employee was liable for negligently injuring a coworker, but an employer could not be held liable to one employee for the negligence of another. *See Frantz v. McBee Co.*, 77 So. 2d 796 (Fla. 1955); *Prairie Pebble Phosphate Co. v. Taylor*, 64 Fla. 403, 60 So. 114 (1912). This "fellow servant" doctrine operated as an exception to the theory of respondeat superior and apparently applied to exempt the employer, even in cases of an employee's willful or malicious conduct or criminal acts. *See* 56 C.J.S. *Master and Servant* § 325 (1948).

An exception to the fellow servant doctrine developed which allowed the employer to be held liable for the negligence of "vice principals," managerial employees charged with carrying out the employer's common law duties. *See Ingram-Dekle Lumber Co. v. Geiger*, 71 Fla. 390, 71 So. 552 (1916); *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 So. 680 (1909). This vice principal exception made nondelegable some, if not all, of the employer's common law duties, including the duty to provide a safe workplace. Employees could sue their employers for breach of such nondelegable duties. The vice principals, who were responsible for carrying out these nondelegable duties, however, owed these duties to the employer—not to the other employees.

Stearns & Culver. Thus, regardless of whether it was the employer or the vice principal who committed the breach, the inured employee's cause of action was against his or her employer and not the vice principal. I have found no Florida case imposing joint and several liability on the employer and the vice-principal for a negligent act concerning such a nondelegable duty.[4]

To the best of my knowledge, these rules of common law have never been completely abrogated. They were first eliminated for a select group of hazardous occupations in chapter 769. Thereafter, by "mutual renunciation," both employees and employers *within* the workers' compensation system gave up common law rights and defenses. § 440.015, Fla. Stat. (1989). Therefore, if an employer who is obligated to pay workers' compensation benefits fails to do so, he may not avail himself of the common law defenses. § 440.06, Fla. Stat. (1989). Mrs. Shova's estate is not attempting to sue her employer for a failure to secure compensation; she is attempting to sue *outside* the workers' compensation system for damages. The legislature has never abrogated these defendants' right to claim that their managerial functions are nondelegable functions of the employer. If the supreme court overruled *Stearns & Culver* by 1968, I have not located that precedent.[5]

It was in the context of this common law that the Second District decided *West v. Jessop*, 339 So. 2d 1136 (Fla. 1976), *Zurich Insurance Co. v. Scofi*, 366 So. 2d 1193 (Fla. 2d DCA), *cert. denied*, 378 So. 2d 348 (Fla. 1979), and *Kaplan v. Circuit Court of the Tenth Judicial Circuit for Polk County*, 495 So. 2d 231 (Fla. 2d DCA 1986).[6] This court essentially concluded that a coworker who was a vice principal performed a nondelegable duty. Thus, such a vice principal had no actionable duty under the common law to a coworker or, alternatively, possessed the same statutory immunity that the employer possessed for that duty.

D. Statutory Rights and Common Law After *Streeter*

In *Streeter*, the supreme court held that section 440.11, Florida Statutes (1981), did not statutorily distinguish between types of corporate employees and that the statute did not provide immunity for managerial employees. *Streeter* did not discuss vice principals or the law as it existed in 1968. Admittedly, that opinion does state that the "affirmative act doctrine" had "no roots in the common law, where a corporate officer was without doubt liable for gross negligence, and perhaps even simple negligence." *Streeter*, 509 So. 2d at 271 n.4. As authority for this proposition, however, *Streeter* relies upon *Frantz v. McBee Co.*, 77 So. 2d 796 (Fla. 1955), which involved a management-level employee who negligently operated a motor vehicle. Because the negligent employee in *Frantz* was not carrying out any of the employer's nondelegable duties, he was not acting as a vice principal.[7] Thus, the supreme court in *Streeter* did not change the common law concerning nondelegable duties or the law of vice-principals.

Although *Scofi*, *West*, and *Kaplan* have been overruled by *Streeter*, I continue to believe that they accurately analyzed the common law liability of a vice principal in 1968. Therefore, I conclude that the legislature had the constitutional power to overrule *Streeter* and to provide an amendment to section 440.11 which strictly limits the right of redress against people who would have been vice principals under the common law of 1968. I do not believe that article I, section 21, gives this court the power to overrule the legislature's judgment on this subject, even if the legislature's judgment is poor.[8]

II. WORKERS' COMPENSATION BENEFITS CAN PROVIDE A REASONABLE ALTERNATIVE TO TORT LIABILITY FOR BOTH EMPLOYERS AND COWORKERS

Even if I could conclude that Mrs. Shova's estate would have had an established cause of action against these Circle K managers under 1968 law, I would still reluctantly find that chapter 88-289 is constitutional.

The constitutionality of the alternative remedy of workers' compensation benefits is already well-established in the case law.[9] The more difficult question, however, concerns the scope or the extent of the rights of redress that may be eliminated or modified in exchange for this alternate remedy. In addition to the employer's immunity, can coworkers, both fellow servants and vice principals, receive broad immunity for acts of negligence in exchange for the remedy of workers' compensation benefits? I conclude that, so long as the benefits are substantial, workers' compensation benefits are an acceptable, reasonable alternative to most tort remedies that were available to an employee in 1968 against both employers and coemployees.[10]

In order to properly evaluate whether the alternative remedy provided in chapter 440 is sufficient under *Kluger*, it is necessary to consider the status of the law in 1968. It is easy to lose sight of the fact that the law was far less generous to plaintiffs at that time. Contributory negligence and assumption of the risk were still the law in 1968. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977). Those doctrines frequently, if not usually, destroyed negligence claims arising in the workplace. *See generally* Arthur Larson, *Workmen's Compensation*, (Desk ed. 1991) § 4.40 (if consequences of employer's breach of common law nondelegable duties were "obvious" to employee, then employee had a duty to "look out for himself").

If Mrs. Shova's estate had sued in 1968 alleging negligence against her managerial coworkers, she would have faced strong arguments that she had assumed the risks of criminal attack because she had equal or superior knowledge of those risks at her store, and because she had agreed to work the night shift, despite her knowledge of the potential dangers.[11] In exchange for this type of difficult, expensive, and time-consuming lawsuit concerning the safety of her workplace, the workers' compensation statute gives her the ability to quickly recover a significant portion of her damages without regard to fault.[12]

I admit that the legislature's solution, immunity for any act that is not so egregious as to amount to a second-degree misdemeanor, is a very high standard which will prevent the prosecution of many claims that might seem merit-worthy under the tort law of 1992. Essentially, the legislature is allowing a claim for acts that "inflict" personal injury through culpable negligence and prohibiting a claim for acts that merely "expose" one to such personal injury.[13] *See* § 784.05, Fla. Stat. (1989). This distinction between "inflicting" and "exposing" will apparently require active involvement on the part of the culpably negligent managerial employee that will, for example, make it easier to pursue a claim against a local manager as compared to someone in a regional office. It will not allow for the claim alleged by Mrs. Shova's estate. Without speculating on the types of claims that can be pursued under this statute, I remain convinced that some claims have not been barred. This statute perhaps represents the extreme limit in the shift of a standard of care permitted under *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981), but I cannot declare it unconstitutional.

It is important to realize that article I, section 21, performs at least two distinct constitutional functions. The first is to prevent the judiciary from creating unreasonable procedural roadblocks that restrict access to courts. The second is to protect the substantive rights of the people through judicial checks on the power of the legislature.

In the context of the first function, I agree that the judiciary should liberally construe article I, section 21, to limit its own power. *See Lehmann v. Cloniger*, 294 So. 2d 344 (Fla. 1st DCA 1974) (access to courts provision liberally construed with respect to rules governing time to file motion for new trial). This case, however, is not such a case.

This case involves the second function of article I, section 21—its use by the judiciary to protect the substantive rights of the people by checking the power of the legislature. If article I, section 21, is to achieve this intended effect within the balance of

governmental powers, it must give to the judiciary only that power necessary to preserve to the people redress for injuries similar to the redress which existed in 1968 when the people ratified this constitution. *See Jetton v. Jacksonville Elec. Auth.*, 399 So. 2d 396 (Fla. 1st DCA), *review denied*, 411 So. 2d 383 (Fla. 1981) (narrowly construing the right to access to courts in determining whether the sovereign immunity statute was unconstitutional). That power must be exercised with a realization that the courts themselves continue to expand and change the common law. Moreover, our society changes with increases in population and developments in technology. Unless article I, section 21, is interpreted to protect only those rights of redress which were well-established in 1968, it shifts the balance of power, limits the legislature's ability to address new problems that are not honestly "overpowering public necessities," and authorizes the judiciary to impose anachronisms within the law. As much as I am uncomfortable with the solution devised in chapter 88-289, I am convinced that the constitution does not permit the judiciary to override the legislature's decision expanding workers' compensation immunity and precluding most suits against those managerial coworkers who perform the nondelegable functions of vice principals.

I am also influenced by three additional factors. First, the immunity given to these managerial workers is similar to the sovereign immunity given to many governmental workers and to municipalities. Prior to the waiver of sovereign immunity, many of these employees had no immunity, and municipalities had no immunity for proprietary functions. In exchange for the limited liability of the state, we have held that the legislature could create total immunity for acts of simple negligence by government employees and limit the liability of municipalities. *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981); *White v. Hillsborough County Hosp. Auth.*, 448 So. 2d 2 (Fla. 2d DCA 1983), *dismissed*, 443 So. 2d 981 (Fla. 1983); *Jetton*. Moreover, under section 768.28, Florida Statutes (1991), a managerial government employee apparently receives total immunity for policymaking decisions, even though the state has not waived its immunity for these decisions. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979). I cannot hold the amendment to section 440.11 unconstitutional when section 768.28 has passed a similar test.

Second, I am inclined to believe that chapter 88-289 *creates* more causes of action than it destroys. Before chapter 88-289 was enacted, a sole proprietor was unquestionably the statutory "employer" who received workers' compensation immunity. Now, if a sole proprietor commits culpable negligence, the immunity does not exist. Given the number of employees who undoubtedly work for sole proprietors in businesses subject to less regulation than larger corporations, it seems unfortunate that we hold this beneficial limitation of immunity unconstitutional.[14] *See Jetton*, 399 So. 2d at 398 (emphasizing that the sovereign immunity statute, while restricting some causes of action, "enhance[d] overall" liability).

Finally, the limitations on redress in the area of workers' compensation frequently inure to the employee's benefit. Mrs. Shova, for example, was allegedly an assistant manager. Ironically, we are holding unconstitutional an immunity which would have protected her from the risk of suit by the people she supervised. Particularly in light of the fact that most businesses operate with several management levels, there is a legitimate value to discouraging avoidable litigation within the workplace between coworkers. In my mind, the benefit an employee receives from these immunities should provide some weight in determining the reasonableness of the remedy.

I hope the legislature will soon revisit this issue because it merits serious attention, but I cannot declare its last effort unconstitutional.

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[1]If the legislature properly finds "an overpowering public necessity," it can eliminate a right of redress without providing an adequate alternative remedy. *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). Chapter 88-289, however, was not enacted upon a finding of overpowering public necessity.

[2]The constitutions of this state have contained a right of access to the courts since 1838. *See* G.B.B. Invs., Inc. v. Hinterkopf, 343 So. 2d 899 (Fla. 3d DCA 1977). As a result, one could argue that the right to access should be determined under the law as it existed at any one of several dates. *Kluger*, however, makes it clear that we are to examine the statutory causes of action existing at the time of the reenactment of the Florida Constitution in 1968. Because *Kluger* refers to the common law pursuant to section 2.01, Florida Statutes, it is arguable that July 4, 1776, is the correct date upon which to examine the common law. Since *Kluger*, however, I believe the supreme court intended to clarify this issue. *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) (holding a statute unconstitutional because it eliminated a right of redress that was first recognized by the common law in 1959). Nevertheless, the supreme court has used an analysis of the common law effective July 4, 1776, to uphold sovereign immunity for municipalities. Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981). Although my argument would be stronger if I relied on the common law of 1776, I conclude that November 5, 1968, is the relevant point of inquiry for both statutory and common law rights because that is the date that the applicable constitution took effect, following ratification by the voters.

[3]For both this and the following section of this dissent, it is helpful to remember that the Wrongful Death Act was far less generous to survivors in 1968 than it is today. *See* § 768.01, Fla. Stat. (1965). Under the old act, the survivors did not receive pain and suffering for the death of an adult and the remedy frequently was not much more extensive than the present workers' compensation benefits. *See* White v. Clayton, 323 So. 2d 572 (Fla. 1975); Leo M. Alpert, *Death Acts in Florida*, 10 U. Fla. L. Rev. 153 (1957).

[4]Under the common law of 1968, of course, the employer had no right of contribution against a joint tortfeasor, much less against a vice principal. *See* Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975); Kellenberger v. Widener, 159 So. 2d 267 (Fla . 2d DCA 1963); § 768.31, Fla. Stat. (1989).

[5]In fact, in a somewhat confusing decision, the supreme court seems to have reconfirmed and expanded the doctrine of vice principalship. *See* Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353 (1940).

[6]As explained below, these cases were subsequently overruled by the supreme court in *Streeter*.

[7]It is interesting that chapter 88-289, Laws of Florida, does not overrule the basic rule announced in Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955). A management-level employee can still be sued for gross negligence for the operation of a motor vehicle, just like any other employee. The greater immunity applies only when the manager acts "in a managerial or policymaking capacity," i.e., as a vice principal.

[8]The well-publicized debate over the need to protect store clerks at convenience stores and the best ways to address this need is difficult to ignore in this case. With pressure from all sides, the legislative branch of government has done little to mandate greater protection for these employees. *See* Ch. 92-103, Laws of Fla. (requiring special convenience store security only after an employee or patron has already been victimized by a serious, violent felony). The immunities provided in chapter 440 have effectively prevented the judiciary from allowing individual juries to require protection for specific employees under specific circumstances. While I find this result regrettable, I cannot convince myself that the legislature has acted unconstitutionally or that the judicial branch has the authority to override their established public policies, however questionable.

[9]*See* Chamberlain v. Florida Power Corp., 144 Fla. 719, 198 So. 486 (1940); Carter v. Sims Crane Serv., Inc., 198 So. 2d 25 (Fla. 1967); Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981); Mahoney v. Sears, Roebuck & Co., 440 So. 2d 1285 (Fla. 1983).

[10]Although the majority opinion emphasizes that culpable negligence is similar to an intentional tort, it seems obvious that it is still a form of negligence and not an intentional tort. *See* State v. Greene, 348 So. 2d 3 (Fla. 1977); Glaab v. Caudill, 236 So. 2d 180 (Fla. 2d DCA 1970); Fla. Std. Jury Instr. (Crim.) 784.05. I am not suggesting in this dissent that workers' compensation benefits would be an adequate remedy for battery or true intentional torts, many of which do not actually involve an incident within the scope of employment.

[11]*See* note 3.

[12]The full effect of workers' compensation liens will not be discussed in this opinion, but it seems relevant that Mrs. Shova would apparently be required to repay her benefits to her employer if she recovered against these vice principals for their failure to fulfill the nondelegable duty concerning a safe place to work. § 440.39, Fla. Stat. (1989).

[13]Additionally, the language of chapter 88-289 appears to bar a claim for simple assault against an employee under 65 years of age, while permitting a claim for simple battery. *See* §§ 784.011(2), .03(2), Fla. Stat. (1989). Since this case does not involve these intentional torts, I will not address them. It is interesting to note, however, that the victim of a criminal assault is probably entitled to restitution even if this section provides tort immunity. § 775.089, Fla. Stat. (1989).

[14]According to the Bureau of the Census, Department of Economic Census and Surveys, in 1987, 88.5% of all businesses in the nation were sole proprietorships. There were 735,810 total businesses in the state of Florida. Assuming the national percentages are representative of the state percentages, there were 651,192 sole proprietorships in the state of Florida in 1987.

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