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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

KARL ELLER, ROBERT DEARTH
and RICHARD YARNELL,

Appellants,

vs. CASE NO.: 80,776

RANDY SHOVA, individually, and
as Personal Representative of
the estate of Felicia Shova,

Appellee.

_____/

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

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STATEMENT OF FACTS AND THE CASE

The following are facts not specifically included in the Appellant's Statement of Facts.

Felicia Shova 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 (1) of a number of Circle K Stores located in the Tampa Bay area. Circle K at the time of Felicia Shova's death, owned and operated over thirty-five hundred (3500) stores in the United States.

The geographic area in which the Store is located has for the past five (5) 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 (2) years at the time of the incident that caused Felicia Shova's death. During that time, six (6) to eight (8) robberies had occurred at the Store, five (5) of them being armed robberies. Felicia Shova had been a victim of one (1) 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 (24) hours per day. Felicia Shova was a Supervisor at the Store. Immediately prior to January 26, 1990, Felicia had a problem with low sales and decreasing inventory on the eleven (11) o'clock p.m. to seven (7) o'clock 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 the Circle K Corporation at that time that only one (1) person worked the eleven (11) o'clock to seven (7) o'clock shift.

On January 26, 1990, the Store was not equipped by Circle K with adequate security equipment such as additional personnel, bullet proof enclosures, and automatic door locks even though Circle K and these individual defendants were well aware of the existence of these devices and of the effectiveness of these devices in preventing crime and protecting the employee. These individual defendants made a conscious decision not to provide these safeguards at the Store.

On the night of January 26, 1990, Felicia Shova was working the eleven (11) o'clock p.m. to seven (7) o'clock 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 any provocation, Hill shot and killed Felicia Shova.

The original Complaint in this case was a two (2) count Complaint alleging gross negligence on the part of the defendants, as fellow employees, and alleging simple negligence against the same defendants, as employees working in unrelated employment. (R-1-9) The basis of both counts of the Complaint was that the defendants 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 great majority of armed robberies

and injuries due to armed robberies occur between the hours of eleven (11) o'clock p.m. and seven (7) o'clock a.m.;
and that the Store in this location, operating twenty-four (24) hours a day, with little or no effective security devices, presented an unreasonably dangerous situation for employees working the over-night shift.

The original Complaint was dismissed on November 20, 1990 (R-20) and an Amended Complaint was filed on December 13, 1990 (R-21-30). The Amended Complaint was essentially the same as the original Complaint except additional allegations were made in paragraph twenty-six (26) to the effect that the defendants were aware of the dangers of keeping the Store open without adequate safe guards between the hours of eleven (11) o'clock p.m. and seven (7) o'clock a.m., and knowing the dangers, they made a conscious decision to keep the Store open knowing 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, (R-40-41) and a Second Amended Complaint was filed on March 20, 1991 (R-42-48). This Second Amended Complaint was a one (1) Count Complaint essentially the same as the previous two (2) Complaints except the Plaintiff added the allegation that the Defendants' knowledge of the likelihood of serious bodily harm increased to a certainty where the Store was located in a high crime area and when previous armed robberies had occurred in that Store (paragraph twenty-one (21)). The Second Amended Complaint also alleged that the failure to provide adequate safety devises

and the conscious decision to keep the Store open under all the facts and circumstances amounted to an infliction by the Defendants of actual personal injury on the deceased, Felicia Shova (paragraph twenty-four (24)). The Second Amended Complaint was also dismissed by Order dated June 13, 1991 (R-144-145). This Final Order dismissed the case with prejudice, the Court finding that based on the prior Complaints and representation of counsel, no further allegations and material facts would be forthcoming. Therefore, as a matter of law, the case should be dismissed with prejudice.

Notice of Appeal was filed July 2, 1991. On September 4, 1992, the 2nd District Court of Appeal issued its opinion finding Florida Statute 440.11 (1) as amended on October 1, 1988, unconstitutional because it violated the access to courts provisions of the Florida Constitution, Article I, Section 21. See Shova v. Eller 17 FLW 2095, (2d DCA, Sept. 4, 1992). This appeal ensued.

SUMMARY OF THE ARGUMENT

In Kluger v. White 281 So 2d 1 (Fla 1973), the Supreme Court established the principle that the legislature could not abolish a cause of action existing on the date of the Florida Constitution as amended in 1988 without providing a reasonable alternative remedy except where there was an overpowering public necessity and no other method to alleviate that necessity.

The issue in this case is whether the legislature in enacting the 1988 amendment to Florida Statute 440.11 (1) abolished a pre-existing cause of action. There is no question that a reasonable alternative remedy was not provided by the legislature and that this statute was not enacted to alleviate an overpowering public necessity.

A cause of action by one employee against another existed on the date of the Constitution: Frantz v. McBee 77 So 2d 796 (Fla 1965). As to the specific question whether a cause of action existed in 1968 where a criminal act of a third party was the cause of injury. the case law is clear that if the act was foreseeable, then a cause of action for negligence existed. See Nicholas v. Miami Burglar Alarm Co. 339 So 2d 175 (Fla 1976).

The cause of action for negligence was abolished by the 1988 amendment to 440.11 (1) because the statute, as amended, only allows liability to attach against corporate officers acting in a managerial or policy making capacity when they perform intentional acts. Culpable negligence of the first degree is an intentional

act as defined by this court in Fisher v. Shenandoah General Construction Co. 498 So 2d 882 (Fla 1986).

Therefore, because this legislation abolishes a pre-existing cause of action for negligence, it is unconstitutional under Article I, Section 21 of the Florida Constitution.

This conclusion does not make the employer's immunity an illusion or open the floodgates of litigation. The legislature can formulate legislation to provide limited immunity to corporate officers when acting in a policy making capacity. However, like the limited immunity in the sovereign immunity cases, corporate officers have an operational duty or a duty as co-employees to remedy a known dangerous condition. To the extent that this legislation eliminates liability for the breach of that duty, it is unconstitutional.

ARGUMENT

THE 1988 AMENDMENT TO FLORIDA STATUTE 440.11 (1) IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION BECAUSE IT ABOLISHES A CAUSE OF ACTION WITHOUT PROVIDING A REASONABLE ALTERNATIVE REMEDY.

Randy Shova's claim in this case and the opinion of the 2nd District Court of Appeal are based on several distinct conclusions:

a) The landmark Supreme Court case of Kluger v. White 281 So 2d 1 (Fla 1973) held that the legislature could not abolish a statutory or common law cause of action that existed on the date of enactment of the most recent Constitution of the State of Florida (the Constitution), November 5, 1968 without providing a reasonable alternative remedy except in those cases where there was an overwhelming public necessity and no other reasonable alternative for meeting that necessity was available.

b) The Worker's Compensation Act in the state of Florida as of November 5, 1968 and previously did not preclude suits by one employee against another. Corporate officers are employees under the Worker's Compensation Act and there existed a common law cause of action in 1968 by an employee against a corporate officer: Frantz v. McBee 77 So 2d 796 (Fla 1955), Streeter v. Sullivan 509 So 2d 598 (Fla 1987).

c) The 1988 amendment to Florida Statute 440.11 (1), effective October 1, 1988, which granted immunity to all employees acting in a managerial or policy making capacity unless said employees were guilty of culpable negligence of the first degree, has effectively eliminated the employee's cause of action against certain co-employees. Therefore, it was unconstitutional.

Access to the Courts

Judge Ryder quoted the pertinent language from Kluger v. White in the majority opinion in Shova but it is worth repeating in this brief;

> "...where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution

> of the State of Florida, or where such right has become a part of the common law of the State pursuant to Florida Statute 2.01 F.S.A., the legislature is without power to abolish such a right without providing a reasonable alternative to protect the right 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" (ibid at p. 4).

In State Department of Corrections v. Koch 582 So 2d 5 (Fla 1st DCA 1991), the First District Court of Appeals in addressing this particular issue stated:

> "...the right of an employee to sue a coemployee for injury caused by that coemployee's negligence was in existence as part of the law of Florida in 1968, and was one of the rights of access and remedy encompassed by Article 1 Section 21 of the Florida Constitution. See Kluger v. White 281 So 2d 1 (Fla 1973), Smith v. Dept. of Ins. 507 So 2d 1080, 1087-1089 (Fla 1987) (The legislature is without power to abolish common law rights predating Article 1, Section 21, without providing a reasonable alternative to protect the rights of the people of the state for redress of injuries)."

Although appellants argue to the contrary, these cases clearly establish that the elimination of a cause of action by the legislature violates Article I Section 21 of the Constitution.

Appellants also argue that even if a cause of action was abolished by the legislature a reasonable alternative was provided and alternatively, that there was an overwhelming public necessity for this amendment and no other reasonable alternative for meeting that necessity. Neither of these arguments has merit. On the date of the Constitution, employees had a cause of action against their managers and supervisors for negligence and a right to receive worker's compensation benefits from their employers. After the 1988 amendment to 440.11, the cause of action for negligence no

longer existed and the employee received nothing in return. Furthermore, there is nothing in the title to this legislation or the legislative history indicating that this legislation was enacted on the basis of an overpowering public necessity.[*]

The Vested Cause of Action

Prior to the enactment of the Constitution, corporate officers were employees by definition (Streeter) and employees had a cause of action against co-employees (Frantz v. McBee). Therefore, there was a vested cause of action.

However, Judge Altenbernd and the Appellants in their initial brief have argued that Randy Shova would not have had a cause of action in 1968 because at that time, there was no cause of action for negligence when the injury was caused by the intervening criminal act of a third party; Lingefelt v. Hammer 125 So 2d 325 (Fla 2d DCA 1988).

With all due respect, this is supply an incorrect analysis of the law. The consistent rule of law was stated by Judge Overton in Nicholas v. Miami Burglar Alarm 339 So 2d 175, 177 (Fla 1976):

> "...though a person's negligence is a cause in fact of another's loss, he will not be liable if an act unforeseeable to him and independent of his negligence intervenes to also cause the loss. See, e.g. "Benedict Pineapple Co v. Atlantic Coast Line R. Co. 55 Fla 514, 46 So 732 (1908)"

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[*] Judge Altenbernd makes this same conclusion in his dissenting opinion in Shova: "Chapter 88-289 however, was not enacted upon a finding of overpowering public necessity." (footnote 1 at 2099)

Lingefelt stated the same rule:

> "The majority view...holds that a willful, malicious or criminal act as a general rule breaks the chain of causation. Lack of foreseeability appears to be the basis for this conclusion".

The question in 1908 and the question today is the same: Was the intervening criminal act foreseeable? If it was, liability attaches. Each case turns on its own facts: For instance, in Nicholas, the defendant installed a burglar alarm system and thieves snapped the wires. The court felt this was sufficiently foreseeable to withstand a motion to dismiss. In Cooper v. IBI Security Service of Florida Inc. 281 So 2d 524 (Fla 3rd DCA 1973), the plaintiff had to make cash premium collections from insureds. Some of the neighborhoods were known to be dangerous so his employer hired a security guard in those neighborhoods. The guard didn't show up on one occasion and the employee was robbed. The court found that this intervening criminal act of a third party was foreseeable. In Florida East Coast Railway Co. v. Booth 148 So 2d 536 (Fla 3rd DCA 1963), a pre-1968 case, the plaintiff as an employee of the railroad was required to ride on the train in a particular car called the "dead head coach". The dead head coach only had 1/8" plate glass while the other passenger cars had two pane laminated safety glass. In recent years prior to the incident in question, there had been a number of rock throwing incidents in the area involved. On the occasion in question, rocks were thrown, and the plaintiff was struck. Liability was found because the criminal act was reasonably foreseeable.

Because the complaint in this case alleges several prior criminal acts of third parties at the Store, these acts were foreseeable, and therefore, a cause of action would have existed prior to the enactment of the Constitution.

Elimination of a Cause of Action

Judge Ryder in his majority opinion in Shova stated:

> "...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" (ibid a p.8).

The case law supports his conclusion. In Dominique v. State 435 So 2d 974 (Fla 3rd DCA 1983), the Third District defined manslaughter by culpable negligence (which is the cause of action this plaintiff has to prove under the present statute) as follows:

> "...Manslaughter is defined by section 782.07, Florida Statutes (1981) as "the killing of a human being by the act, procurement or culpable negligence of another without lawful justification...". Culpable negligence, which replaces the element of criminal intent (citation omitted) means action of such a gross and flagrant character that it evidences a reckless disregard for human life or safety equivalent to an intentional violation" (emphasis supplied).

In Dominique, there was an altercation at a party during which an individual named Placid threatened to kill Dominique. Placid was escorted from the party. Dominique went to his car and pulled out a loaded gun. Someone grabbed his arm, the gun discharged and killed an innocent bystander. The court held that these facts did not constitute culpable negligence. In Getsic v. State 193 So 2d 679 (Fla 2d DCA 1966) the wife bought her husband a new gun. The

husband was playing with the gun, pulling the hammer back and forth, pointing it at her as he was doing it. She told him to stop. The gun went off and she was killed. The court found no culpable negligence noting that there was no friction, ill will or argument at the time (intent). In Sharp v. State 120 So 2d 206 (Fla 2d DCA 1960), the defendant owned a bar. A crowd was causing a fracas outside the bar. The defendant warned the group to quiet down or leave. When they didn't he went outside with a shotgun. He stumbled and the gun went off killing someone in the crowd. The court found no culpable negligence because there was no indication that the defendant had any reason or cause to shoot this particular victim (intent).

The above cases all establish that there must be some intentional act on the part of the defendant before culpable negligence will be found. There need not be an intent to inflict harm on the person injured but there at least must be an intent to fire the gun. It is extremely important to understand that the above cases are all examples of culpable negligence where there is an "actual" infliction of personal injury which is required by 440.11 (1).[2] On the other hand, where someone by culpable negligence merely "exposes" another to personal injury, there is

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[2] Florida Statute 440.11 (1) requires the criminally negligent act to carry a penalty exceeding 60 days imprisonment. Florida Statute 775.082 (4) (a) and (b) establish that a misdemeanor of the first degree carries a penalty which exceeds sixty days. Florida Statute 784.05 (1) and (2) establish that culpable negligence which "exposes" a person to personal injury is a misdemeanor of the second degree while culpable negligence which "actually inflicts" personal injury is a misdemeanor of the first degree.

absolutely no liability.

In Fisher v. Shenandoah General Construction Co 418 So 2d 882 (Fla 1986) and Spivey v. Battaglia 258 So 2d 815 (Fla 1972), this court adopted the "substantial certainly" test to determine whether an action was intentional. In Spivey, this court stated:

> "...thus, the distinction between intent and negligence boils down to a matter of degree. 'Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man could avoid (negligence) and becomes a substantial certainty'. In the latter case, the intent is legally implied and becomes an assault rather than unintentional negligence" (ibid at 817).

The definition of culpable negligence contained in Dominique which requires proof of an act which is equivalent to an intentional violation above and to the exclusion of every reasonable doubt, and the cases cited herein interpreting that definition, clearly establish that culpable negligence of the first degree is an intentional act as defined in Fisher and Spivey.

Therefore, the cause of action for negligence against certain co-employees has been abolished by the 1988 amendment to Florida Statute 440.11.

Public Policy

Even though this legislation was not enacted on the basis of an overpowering public necessity, this court in its prior opinions dealing with similar issues has been concerned with the public policy effects of its decisions. As in Streeter, there are conflicting issues of public policy in this case.

On the one hand, the legislature has a legislative interest in

insuring that the employees immunity in worker's compensation does not become a illusion. On the other hand, certain decisions by corporate officers expose employees to personal injury, rape and murder. The legislature recognized this fact in the 1992 amendment to the Convenience Business Security Act. As appellant pointed out the problem is not cured by this Act because 440.11 (1) applies to all businesses. Even though employees in the convenience store industry are now arguably protected, corporate officers by their decisions are still knowingly exposing employees to danger in banks (Streeter), trucking (Kaplan), construction (Fisher) and numerous other industries without any personal liability for their actions.

The public policy of this state should be concerned with protecting the lives of these employees. Personal injury and products liability lawsuits have historically performed a useful function in this regard because they not only serve to compensate injured victims and their families but they also serve the interest of society as a whole by making corporations, ever interested in the bottom line, make safer products and, as in this case, by making corporate officers, concerned with their own personal liability, provide better safeguards for their fellow employees.

The legislation in this case is unconstitutional because it destroys the vested rights of employees. But the fact that a cause of action must exist for negligence against all fellow employees does not necessarily destroy the immunity of the Worker's Compensation Act and open the floodgates of litigation.

The legislature has a legitimate interest in protecting the corporate employee for performing the employer's non delegable duty of providing a safe work place. However, as this court noted in Frantz v. McBee, there is a difference between the immunity of the owner who secures compensation and the employee. When a corporate officer has knowledge of a danger to employees and makes a conscious decision not to adequately protect those employees, then that officer has gone beyond the boundaries of the employer's duty to provide a safe work place and has breached a duty he owes directly to that employee. His knowledge of the danger and his or her decision not to act creates that duty. Perhaps this is what Justice Grimes had in mind when he introduced the affirmative act doctrine in West v. Jessup 339 So 2d 1136 (Fla 2d DCA 1976). Unfortunately, the parameters of that doctrine have not been clearly defined in this state.

A good example by way of analogy is the court's treatment of liability under the sovereign immunity doctrine. Although the state and its political subdivisions are immune from suit for discretionary or policy making decisions, where the governmental entity has knowledge of a danger and knowledge of the presence of people who are likely to be injured by that danger, a duty arises at the operational level to take steps to avert the danger or to warn persons who may be injured. See City of St. Petersburg v. Collom 419 So 2d 1082 (Fla 1982), Department of Transportation v. Neilson 419 So 2d 1071 (Fla 1982), Duval County School Bd v. Dutko

483 So 2d 492 (Fla 1st DCA 1986), and Bailey Drainage District v. Stark 526 So 2d 678 (Fla 1988).

The legislature can enact appropriate legislation granting limited immunity to corporate officers acting in a policy making capacity and at the same time protect the vested interests of employees. In fact, if this court were to construe the 1988 amendment to Florida Statute 440.11 (1) as this court has decided the sovereign immunity cases, then it may find the statute constitutional.

CONCLUSION

For the reasons expressed herein, the undersigned requests this honorable court to affirm the decision of the 2nd District Court of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to WILLIAM M. SCHNEIKART, ESQUIRE, Post Office Box 11329, St. Petersburg, Florida 33733. DAVID W. HENRY, ESQUIRE, FLORIDA DEFENSE LAWYERS ASSOC., Post Office Drawer 1991, 19 East Central Boulevard, Orlando, Fla. 32802, and LIPOFF, ROSEN & QUENTEL, P.A. 1221 Brickell Avenue, Miami, Fla. 33131, this 8 day of February, 1993.

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