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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

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KARL ELLER, ROBERT DEARTH and **RICHARD YARNELL,**

Appellants,

VS.

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

Appellee.

_____/

CASE NO. 80,776

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

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INITIAL BRIEF OF APPELLANTS

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I. DESIGNATION OF THE PARTIES

The Appellants, Karl Eller, Robert Dearth and Richard Yarnell, were originally the defendants in this civil tort action for gross negligence filed in the Circuit Court for the Thirteenth Judicial Circuit on September 1990. (R. 1-147). Thereafter, the defendants became the appellees in the Second District Court of Appeal proceedings, pursuant to the Plaintiff's direct appeal from a final order of dismissal rendered by the circuit court. (R. 147). Throughout the "Case and Facts" portion of this brief, the Appellants will be referred to collectively as "the Defendants," unless additional specificity is required for the sake of clarity. Thereafter, they will be referred to as "Appellants."

The Appellee, Randy Shova, individually and as Personal Representative of the Estate of Felicia Shova, was originally the plaintiff below, and thereafter became the appellant on appeal to the Second District Court of Appeal. (R. 1-147). Throughout this brief, the Appellee will be referred to as "the Plaintiff," unless additional specificity is required.

II. STATEMENT OF THE CASE

This is a direct appeal from an order of the Second District Court of Appeal, dated September 4, 1992, in which the district court expressly declared unconstitutional a 1988 amendment to the Workers' Compensation Act, specifically, Section 440.11(1) of the Florida Statutes, which extended the employer's tort immunity for

work related injuries to the following persons:

> 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). See Shova v. Eller, 17 Fla. L. Weekly 2095 (Fla. 2d DCA Sept. 4, 1992) (Appendix/DCA Final Order). In holding the foregoing amendment unconstitutional, the district court reversed the circuit court's June 13, 1991 order which had dismissed with prejudice the Plaintiff's second amended complaint alleging gross negligence on the part of the Defendants. Thereafter, the Defendants filed a timely motion for rehearing, which motion was denied on October 20, 1992, prompting this direct appeal. (Appendix/DCA Rehearing Motion and Denial).

The appellate jurisdiction of the Supreme Court of Florida is invoked pursuant to Article V, Section 3(b)(1) of the Florida Constitution, and Rule 9.030(a)(1)(A)(ii) of the Florida Rules of Appellate Procedure, as the district court expressly held unconstitutional a provision of the Florida Statutes. (Appendix/DCA Final Order).

III. STATEMENT OF THE FACTS

On September 19, 1990, the Plaintiff, Randy Shova, individually and as personal representative of the estate of Felicia Shova, deceased, filed a complaint against three "fellow

employees" of Felicia Shova, alleging simple negligence and gross negligence resulting in her death. (R. 1-9). In his original complaint, the Plaintiff alleged that his wife, Felicia Shova, had been employed continuously by the Circle K Corporation as an Assistant Manager and Store Manager of one of Circle K's convenience stores in Tampa, Florida from July 1987 until January 26, 1990. (R. 1-9).

On January 26, 1990, while she was working the 11:00 p.m. to 7:00 a.m. shift as supervisor of the Store, Felicia Shova was killed when an individual (later identified as Anthony Hill) entered the Store at approximately 11:30 p.m. and thereafter shot her with a gun during the course of committing an armed robbery. (R. 1-9).

The Defendant, Karl Eller, was identified in the Plaintiff's original complaint as the Chairman of the Board of Circle K Corporation and a "fellow employee" allegedly responsible for formulating the corporation's policies at the time of Felicia Shova's death. (R. 1-9). The Defendant, Robert Dearth, was identified as the President of Circle K Corporation and a "fellow employee" allegedly responsible for implementing the corporation's policies at the time of Felicia Shova's death. (R. 1-9). The Defendant, Richard Yarnell, was identified as the Regional Manager of Circle K Corporation and a "fellow employee" allegedly responsible at the time of Felicia Shova's death for the implementation of policies, supervision, staffing, and security for the corporation's stores in West Central Florida, including the

subject Store. (R. 1-9).

The Plaintiff's original complaint alleged that the Defendants, in their respective corporate capacities as directors, officers or managers of the Circle K Corporation, were liable for gross and simple negligence in failing to increase the safety and security of the subject Store through the provision of additional security devices and measures. (R. 1-9). Initially, the Plaintiff's complaint consisted of two separate counts-- the first one alleged gross negligence on the part of the Defendants in their capacity as "fellow employees," while the second count alleged simple negligence in their capacity as "employees working in unrelated employment." (R. 1-9).

On November 20, 1990, the circuit court dismissed the Plaintiff's original complaint (R. 20) upon the Defendants' motion to dismiss, in which they had argued, inter alia, that Section 440.11(1) of the Florida Statutes provides the individual managerial and policymaking defendants with immunity under situations involving allegations of simple or gross negligence. (R. 12-13). The Plaintiff thereafter filed an amended complaint containing additional allegations of gross negligence (R. 21-30); however, this amended complaint was similarly dismissed on the basis that Section 440.11 provides the individual managerial and policymaking Defendants with immunity against liability in tort for conduct amounting to simple or gross negligence. (R. 32-33,40-41).

The Plaintiff thereafter filed a second amended complaint, which now contained only one count alleging essentially the same

thing as the previously dismissed two count complaint, with certain additional allegations relative to the level of "knowledge" on the part of the Defendants. (R. 42-48). This complaint, like the two previous versions before it, contained no allegations that the Defendants had violated any law "for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in § 775.082," or that the Defendants were guilty of criminal "culpable negligence inflicting actual personal injury on another," as specified in § 784.05(2) of the Florida Statutes. (Appendix/Complaints).

The Defendants moved to dismiss this second amended complaint (R. 49-54), and on June 13, 1991, Circuit Judge Roland Gonzalez entered an order dismissing the Plaintiff's second amended complaint with prejudice. (R. 144-145). The dismissal was "final," as Plaintiff's counsel had represented to Judge Gonzalez that no additional allegations of material fact could be asserted which would satisfy the standard of tort liability set forth in Section 440.11(1) of the Florida Statutes. (R. 144-145). In his order of dismissal, Judge Gonzalez found that Section 440.11, as amended, requires:

> ...allegations of ultimate fact that the alleged injury was a result of a violation of law for which the maximum penalty which may be imposed exceeds sixty (60) days imprisonment, as set forth in Section 775.082 Florida Statutes.

(R. 144-145). Judge Gonzalez also expressly ruled that Section 440.11 of the Florida Statutes is constitutional. (R. 144-145).

On appeal to the Second District Court of Appeal, the

Plaintiff argued that the 1988 amendment to Section 440.11, which now provides heightened tort immunity to the employer's principals, officers and policymaking employees when they are acting in such capacity, and when such actions do not rise to the level of culpable negligence inflicting actual personal injury on another [1] is unconstitutional as a denial of the right of access to the courts guaranteed by Article I, Section 21 of the Florida Constitution. (Appellant Brief/DCA). The Plaintiff contended that, pursuant to Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987), the Supreme Court of Florida rejected the "affirmative act" doctrine previously applied by the various district courts of appeal to partially immunize vice-principals and supervisory level employees, thereby permitting corporate officers to be subject to civil liability for gross negligence as other "employees" under the provisions of the Workers' Compensation Act. (Appellant Brief/DCA).

According to the Plaintiff, the Legislature's amendment of Section 440.11(1) in 1988 in direct response to the Supreme Court's Streeter decision unconstitutionally abolished an injured employee's right to sue managerial or policy-making employees for gross negligence. (Appellant Brief/DCA).

In support of the trial court's order of dismissal, the Defendants conversely argued on appeal that the 1988 amendment to Section 440.11(1) of the Florida Statutes had not abolished any

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[1] This particular standard of liability equates with the minimum level of conduct necessary to constitute a first degree misdemeanor, for which the maximum criminal penalty which may be imposed exceeds 60 days, pursuant to Sections 775.082(4)(a) and 784.05(2) of the Florida Statutes (1989).

pre-existing statutory or common law right of an employee to sue officers, directors or supervisors for the intentional or criminal acts of unrelated third-party tortfeasors, such as the robber who intentionally killed the deceased, Felicia Shova. (Appellee Brief/DCA). The Defendants additionally argued that the Legislature simply "increased" the standard of liability necessary to support a civil action in tort against managerial and policy making employees acting in such capacity, and that as such, the Legislature had not "abolished" any existing remedy or right by its enactment the 1988 amendment. (Appellee Brief/DCA).

In support of this contention, the Defendants argued that a previous 1978 amendment to Section 440.11(1), in which the standard of liability in tort for fellow employees had been increased from "simple" negligence to "gross" negligence, had already passed constitutional muster under a similar "access to courts" challenge asserted in Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981). (Appellee Brief/DCA). The Defendants additionally argued that viable, alternative remedies for the redress of work-related injuries and deaths already exist under the present workers' compensation framework, and that as such, the 1988 amendment to Section 440.11(1) does not deny employees access to the courts to seek redress for work-related injuries. (Appellee Brief/DCA).

The Second District Court of Appeal, in a majority opinion authored by Acting Chief Judge Ryder, expressly held that Section 440.11(1) of the Florida Statutes, as amended, violates the access to courts provision of Florida's Constitution, specifically Article

I, Section 21. Shova v. Eller, 17 Fla. L. Weekly 2095 (Fla. 2d DCA September 4, 1992)(Appendix/DCA Final Order). According to the majority, prior to the 1988 amendment, an officer or director could be sued by a fellow employee for gross negligence, just as any other employee, pursuant to the Supreme Court's 1987 decision in Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987). (Appendix/DCA Final Order). The district court further reasoned that by raising the standard of liability for managerial and policymaking employees from gross negligence, to culpable negligence, the Legislature abolished any civil cause of action in negligence. (Appendix/DCA Final Order).

The district court additionally concluded that the workers' compensation system does not provide a reasonable alternative to a cause of action in gross negligence against a fellow employee. (Appendix/DCA Final Order). According to the majority, the workers' compensation system only provides a reasonable alternative to suit against the employer itself, and an employee's ability to bring a civil cause of action against officers, directors, and supervisory employees predicated on culpable negligence is now "illusory" under the statute, as amended. (Appendix/DCA Final Order).

Judge Altenbernd dissented from the majority opinion, writing a lengthy separate opinion expressing his opposing views. (Appendix/DCA Final Order). In his dissenting opinion, Judge Altenbernd concluded that the 1988 amendment to Section 440.11(1) did not violate the access to courts guarantee of Article I,

Section 21, in that injured workers had no pre-existing statutory or common law right to sue managerial or policymaking employees, either for injuries sustained as a result of the intentional tortious or criminal conduct of third parties, or for injuries resulting from negligent decisions made by such "vice principals" relative to carrying out the employer's nondelegable duty to provide a safe work place. (Appendix/DCA Final Order).

Judge Altenbernd additionally reasoned that, as long as substantial benefits are still available to injured workers under the existing workers' compensation system, it continues to provide an acceptable, reasonable alternative to tort liability for both employers and coworkers alike. (Appendix/DCA Final Order). He further noted that the 1988 amendment to Section 440.11(1) actually creates more causes of action than it eliminates. (Appendix/DCA Final Order). Specifically, while sole proprietors and partners used to enjoy tort immunity as the "statutory employer" under the provisions of the Workers' Compensation Act, now, under the 1988 amendment, they no longer have complete immunity for work-related injuries or deaths directly occasioned by their culpable negligence. (Appendix/DCA Final Order).

The Defendants' Motion for Rehearing of this matter was denied by the Second District Court of Appeal, without comment, and this appeal ensued. (Appendix/DCA Motion for Rehearing and Denial).

SUMMARY OF THE ARGUMENT

The 1988 amendment to Section 440.1(1) of Florida's Workers' Compensation Act, which extended the employer's tort immunities to policymaking and managerial employees when they act in such capacity, and when their conduct does not constitute a violation of the law for which the maximum penalty exceeds 60 days imprisonment, is a valid enactment in complete harmony with the constitutional "right of access" to the courts set forth in Article I, Section 21 of the Florida Constitution. The subject amendment to Section 440.11(1) represents a clarification of Section 440.11(1), and establishes that the employer's officers, directors, and policymaking employees were never intended by the Legislature to be considered "fellow employees" subject to tort liability when they are acting in their policymaking capacities on behalf of the "employer."

Legislative enactments challenged under Article I, Section 21 of the Florida Constitution are evaluated under an application of the Kluger test previously formulated by the Supreme Court, which test requires this Court to determine whether a "pre-existing" right of access existed; whether such right has been "abolished" by the Legislature; whether "reasonable alternatives" to protect the right of access have been provided; and finally, whether the Legislature has shown an "overpowering need" for abolishment of the right which cannot be met by any "alternative means." The subject amendment to Section 440.11(1) passes constitutional muster under each and every prong of the Kluger test.

In 1968, when the Florida Constitution was reenacted, there was no common law or statutory right of action available to an injured employee which would have enabled such employee to sue his employer's vice principals (i.e., officers, directors, and policymaking employees) for acts of omission relative to the employer's nondelegable duty to provide a safe work place. This was particularly true under the particular facts of this case, since, in 1968, an injured employee had no preexisting right to sue his employer's officers and managers for omissions amounting to negligent security, or for injuries occasioned by the intentional criminal acts of third-party tortfeasors who are unrelated to the employer.

Moreover, even if there was such a pre-existing right of access, the 1988 amendment to Section 440.11(1) did not "abolish" such right, it simply raised the standard of liability in tort applicable to policymaking and managerial employees to conduct which constitutes a violation of the law for which the maximum penalty which may be imposed exceeds 60 days imprisonment, as set forth in Section 775.082 of the Florida Statutes. If the injurious conduct fits within this liability rubric, an injured employee can still maintain a tort action against the responsible officers or managers. In addition, the employee can still sue his supervisors for acts of gross negligence if the injurious conduct which caused his injuries was NOT conduct within the course and scope of his supervisor's policymaking or managerial duties.

Furthermore, in addition to pursuing workers' compensation

benefits available under Chapter 440, an injured employee can still pursue tort remedies against the unrelated third-party tortfeasor who was directly responsible for his or her injuries. Such actions remain wholly viable after the 1988 amendment and were unaffected by the partial immunities extended to officers, directors, and managers. In addition, reasonable alternatives to protect the injured employee's right of access still exist, even after the 1988 amendment. Under the provisions of Chapter 440, including Section 440.11(1), an injured worker can still pursue valuable and substantial benefits under the current workers' compensation system-- a system which has repeatedly withstood "access to courts" challenges over the years and has been viewed as a reasonable alternative to unwieldy tort litigation for work-related injuries.

Finally, an overpowering necessity exists for extending the employer's tort immunities to policymaking and managerial employees under the circumstances set forth in the statute, as the employer's immunity from tort would become nothing more than mere illusion if the employees who formulate the employer's policies remain exposed to tort litigation for policymaking decisions made on behalf of the employer. Such immunity is at the heart and soul of the workers' compensation system and must and can be preserved without running afoul of Article I, Section 21 of Florida's Constitution. Section 440.11(1), as amended, is constitutionally sound.

ARGUMENT

Point I.

THE DISTRICT COURT ERRED IN HOLDING THAT SECTION 440.11(1), AS AMENDED IN 1988, VIOLATES ARTICLE I, SECTION 21 OF FLORIDA'S CONSTITUTION, AS THE LEGISLATURE DID NOT ABOLISH ANY PRE-EXISTING RIGHT OF ACCESS, REASONABLE ALTERNATIVES TO SUIT ALREADY EXIST, AND RELEVANT LEGAL PRECEDENTS FROM THIS COURT WHICH GOVERN THE RESOLUTION OF THIS PARTICULAR CONSTITUTIONAL ISSUE WERE MISAPPLIED BY THE DISTRICT COURT.

This case centers around a constitutional "access to courts" challenge asserted against Section 440.11(1) of the Florida Statutes, as amended by the Legislature in 1988. The 1988 amendment to Section 440.11(1) of the Workers' Compensation Act extended employer tort immunity to managerial and policymaking employees under certain limited circumstances, as specified in the statute. See Ch. 88-284, §1, Laws of Fla. The Defendants (Appellants herein) contend that the Second District Court of Appeal, in holding Section 440.11(1) unconstitutional under Article I, Section 21 of the Florida Constitution, not only misinterpreted the amendment's intended scope and effect, but also misapplied prevailing precedents from this Court which govern the resolution of this particular constitutional issue.

Before evaluating the constitutional merits of the challenged amendment, however, it is first necessary to discern the proper judicial focus of this particular case, and to specify what this case is NOT about. This case solely concerns the constitutional validity under Article I, Section 21 of a 1988 amendment to the tort immunity provisions of the Workers' Compensation Act-- an

amendment which affects the tort liability of policymaking and managerial employees of both public and private employers who engage in almost every conceivable type of employment within the State of Florida.

From department stores to delicatessens, commercial banks to the local book store, the Workers' Compensation Act (with limited exception) applies equally to all "employers" across the board, without regard to the particular type of business activity engaged in by any given employer, or to the relative safety risks posed by any given line of employment. Hence, this case is NOT the proper judicial crucible for testing, either the need for, or the constitutional validity of, legislation passed specifically to address perceived safety issues pertaining to a particular type of employer, such as those who operate convenience stores-- a small subset of all employers operating throughout the State of Florida. The Legislature has already separately addressed such safety concerns by its passage of the "Convenience Store Security Act" in 1990, and by its recent amendments to that Act, effective December 31, 1992. See Ch. 90-346, Laws of Fla.; and Ch. 92-103, Laws of Fla. [2]

Appellants believe, that in evaluating the constitutional validity of the 1988 amendment to the tort immunity provisions of

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[2] The 1992 amendments to the "Convenience Store Security Act," now renamed the "Convenience Business Security Act," serve to impose additional and more stringent safety requirements on the owners or operators of convenience businesses and to make the provisions of the Act uniform throughout the State. See Ch. 92-103, Laws of Fla. (Appendix/"Convenience Business Security Act).

the Workers' Compensation Act, the district court perhaps became unduly influenced by the bare allegations of the Appellee's complaint, and by its own perceptions concerning the relative safety of convenience stores and similar business establishments. The case sub judice, however, is simply not the proper vehicle for addressing any such safety concerns, whether real or imagined. The resolution of these issues is clearly the province of the Legislature, which has already chosen to act in that regard by passing specific legislation aimed at increasing the safety of these types of businesses. Such legislation is NOT currently before this Court for review and any policy considerations germane to such legislative enactments should not influence, or otherwise divert the Court's proper focus on the limited issue before it: Whether Section 440.11(1) of the Workers' Compensation Act, as amended in 1988, is an unconstitutional denial of access to the courts.

As will be discussed later in greater detail, the Workers' Compensation Act, through its many and varied incarnations, has withstood numerous constitutional challenges raised over the years on "denial of access" grounds. See, e.g., Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991); Newton v. McCotter Motors, Inc., 475 So. 2d 230 (Fla. 1985); Sasso v. Ram Property Management, 452 So. 2d 932 (Fla. 1984); Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981); Seaboard Coast Line R. Co. v. Smith, 359 So. 2d 427 (Fla. 1978); These cases, and others like them, cogently reveal that the workers' compensation system has, and continues to provide a

reasonable alternative to tort litigation by creating substantial benefits and advantages to employers, employees, and the citizens of the State of Florida, who, both directly, and indirectly, benefit from the continued operation of the system. It is against this historical backdrop that the current constitutional challenge to Section 440.11(1) must be carefully analyzed.

THE CONSTITUTIONAL "RIGHT OF ACCESS"

. . . AN HISTORICAL OVERVIEW

The Plaintiff's constitutional challenge to Section 440.11(1) was predicated on the "right of access to the courts" provision set forth in Article I, Section 21 of the Florida Constitution. That particular provision of the State constitution, as adopted in 1968, provides in its entirety, as follows:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Art. I, § 21, Fla. Const. (1968). The foregoing provision has been held to apply to acts of the Legislature, as well as to rules and decisions promulgated by the various courts of this State. However, up until 1973, the precise contours of this constitutional right of access had not been fully defined for purposes of determining the validity of Legislative acts which seek to modify, or even abolish pre-existing remedies or rights.

In 1973, the Supreme Court of Florida, in Kluger v. White, 281 So. 2d 1 (Fla. 1973), developed a judicial litmus test for use in determining whether an act of the Legislature violates Article I,

Section 21 of the Florida Constitution. The continuing validity of the Kluger test, as applied to substantive laws enacted by the Legislature in the area of tort, is the subject of considerable discussion by the Florida Defense Lawyers Association in its amicus curiae brief filed in this action. To avoid redundancy, the Appellants will not detail such arguments here. However, they are in substantial agreement that the Kluger test, as currently formulated, unnecessarily hobbles the Legislature and represents an unduly broad interpretation of the constitutional right of access, requiring revisitation by this Court.

The Kluger case involved various constitutional challenges to Section 627.738 of the Florida Automobile Reparations Act raised by the plaintiff-- a motor vehicle owner affected by a specific provision in the Act. The version of Section 627.738 then in effect essentially provided that a motor vehicle owner's right of action to sue in tort for property damage resulting from an automobile accident was barred, and that the owner must look instead to his own insurer for relief, unless he had previously chosen not to purchase property damage insurance, AND he has suffered property damage in excess of $550.00, in which case he could still sue the responsible party in tort. See Kluger, 281 So. 2d at 2-3.

The plaintiff in Kluger had not purchased any insurance coverage for accidental property damage, and her property damages were not in excess of the threshold statutory amount of $550.00 necessary to enable her to bring a tort action against the

responsible party. Id. at 3. Hence, she fell into that particular statutory class of accident victims under the Act who had no recourse against any person or insurer for the loss occasioned by the fault of another. Id.

In analyzing the constitutional validity of Section 727.738, the Supreme Court articulated the following test for use in evaluating legislative enactments challenged on the basis of an alleged violation of the constitutional right of access:

> [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 meting such public necessity can be shown.

Kluger, 281 So.2d at 4. As observed by this Court in its recent decision in Psychiatric Associates, etc. v. Siegel, 17 Fla. .L. Weekly 726 (Fla. December 3, 1992), once the Court has determined that the Legislature has in fact "abolished" a "preexisting right of access," the Court must additionally consider the following two prong inquiry: 1) Whether the Legislature has provided a reasonable alternative remedy or benefit, or 2) Whether the Legislature has shown an overpowering public necessity for the abolishment of the right, and that no alternative method of meeting the necessity exists. Psychiatric Associates, 17 Fla. L. Weekly at 728.

Appellants contend that under the circumstances of this case,

where the Court has not yet made a threshold determination that the Legislature has indeed "abolished" a "pre-existing right of access," the Kluger test is more appropriately subdivided into four individual prongs, each of which must be separately analyzed before an act of the Legislature can be invalidated as an unconstitutional violation of Article I, Section 21:

1. Prong I- Was there a Pre-existing Right of Access?

In applying the Kluger test to a challenged statute, the Court must first determine, as a threshold inquiry, whether a pre-existing right of access actually existed relative to the particular injury sustained. As indicated by the Court in Kluger, this determination must be made by looking to both the statutory law, and the common law, predating the Declaration of Rights of the Constitution of the State of Florida. [3] See Kluger, 281 So. 2d at 4. If it is properly determined under this first prong that a pre-existing right of access to the courts to redress a particular injury did NOT exist prior to 1968, then the passage of a legislative enactment subsequently affecting or even precluding this previously "unrecognized" right is not an unconstitutional denial of the right of access. Obviously, if no pre-existing right

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[3] Apparently, one must look to the statutory law as it existed prior to the reenactment of the Florida Constitution on November 5, 1968. It is unclear from Kluger, supra, whether one must look to the common law as it existed on July 4, 1976, pursuant to Section 2.01 of the Florida Statutes. Other decisions, however, seem to suggest that November 5, 1968 is the controlling date for determining the people's rights at common law as well. See, e.g., Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979).

of redress exists, then there is simply no need to additionally consider the remaining three prongs of the Kluger test in order to conclude that there has not been an improper denial of access.

2. Prong II- Has the Legislature Actually Abolished the Pre-existing Right of Access?

If the Court determines under the first prong of the Kluger test that a pre-existing right of access to redress a particular type of injury existed as of 1968, then it must still determine under the second prong whether this pre-existing right of access has actually been "abolished" by the Legislature. If the Court determines that a pre-existing right of access has NOT been abolished (i.e., to completely do away with; to put an end to; to render null and void), then it is obviously unnecessary for the Court to proceed further to additionally determine whether the Legislature has provided a "reasonable alternative" to protect the people's right of redress.

3. Prong III- Have Reasonable Alternatives to Protect the Right of Access Been Provided?

If the Court determines under prongs I and II of the Kluger test that the Legislature has indeed abolished a pre-existing right of access, before it can properly invalidate the statute on "denial of access" grounds, it must also consider whether the Legislature has provided a "reasonable alternative" to protect the abolished right of redress. Factors relevant to this particular prong of the test would be considerations such as whether the aggrieved party

can still sue some other person, entity or insurer to recover for his injury, or whether he can seek remedy, relief or benefits in some alternative forum, or by other suitable means.

Although, as judicially interpreted, the constitutional right of access guarantees a forum in which to be heard, it does not guarantee the availability of a particular type of remedy, a particular type of defendant, a particular element in a cause of action, or a particular type of forum in which to redress a given injury. See Psychiatric Associates, 17 Fla. L. Weekly at 728 (right of access guarantees a forum, but not a particular remedy). See also Abdala v. World Omni Leasing, Inc., 583 So. 2d 330 (Fla. 1991)(statutorily limiting vicarious liability does not deny access to courts); Feldman v. Glucrof, 522 So. 2d 798 (Fla. 1988)(adding additional element to libel action did not deny access to courts) Campbell v. City of Coral Springs, 538 So. 2d 1373 (Fla. 4th DCA 1989)(Statute which restricted classes of potential defendants based on nature of claims did not deny access to courts).

4. Prong IV- Does an Overwhelming Public Necessity Exist Which Cannot be Satisfied by any Alternative Methods Other than Abolishment of the Right?

Assuming the Court has first determined under an application of the first three prongs of the Kluger test that a "pre-existing right of redress" existed; that the Legislature has "abolished" this pre-existing right; AND that it has failed to provide a "reasonable alternative" method to protect the abolished right of redress, the Court's judicial labor still does not end here. To

the contrary, before the Court can properly invalidate a legislative enactment on "denial of access" grounds, it must additionally consider whether the Legislature has shown an overpowering public necessity for the elimination of such right, and that no alternative method of satisfying the public necessity exists. As this Court observed in Kluger, where the Legislature can show that public necessity justifies the total abolishment of a pre-existing right to sue and that no alternative method of satisfying the public necessity exists, it does not run afoul of the constitutional right of access by enacting legislation that totally abolishes the right. [4]

In Kluger, the Supreme Court ultimately concluded that the challenged statute in that particular case (Section 727.738) violated the constitutional right of access for redress of injuries guaranteed by Article I, Section 21 of Florida's Constitution. 281 So. 2d at 4-5. Applying the foregoing principals to the statute before it, the Kluger Court observed that, prior to the adoption of the 1968 Florida Constitution, motor vehicle owner's had a pre-existing statutory and common law right to sue in tort for negligent causation of property damage to their automobiles caused by collision. Id. at 4. By enacting Section 727.728, however, the Legislature totally abolished this right to sue for the particular class of victims into which the plaintiff fell without providing

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[4] Obviously, a particular legislative enactment may be susceptible to legal challenges premised on other constitutional grounds; however, such challenges, if raised, must be evaluated separately and in accordance with the controlling principles of constitutional law which may apply.

any reasonable alternatives to protect such victims. Importantly, and as observed by the Supreme Court in Kluger, the plaintiff in that case had absolutely no recourse against any person, entity or insurer for the property damage caused to her vehicle. Id. at 3.

If the Legislature had mandated motor vehicle owners to obtain insurance protecting them against property damage, then, in the Court's view, a "reasonable alternative" to a suit in tort would have been provided, and the issue before the Court would instead have been whether the requirement to obtain insurance was reasonable-- an inquiry premised on entirely different constitutional grounds. Id. at 5. The Court additionally observed that the Legislature had not demonstrated the existence of a public necessity requiring the abolition of an automobile owner's right to sue the responsible tortfeasor for property damage inflicted on his or her automobile. Id. at 4-5. Consequently, the challenged statute in Kluger was deemed an unconstitutional denial of the right of access guaranteed by Article I, Section 21 of the Florida Constitution. Id. at 5.

Appellants contend, that in the case sub judice, the Second District Court of Appeal misapplied the Kluger test (and other relevant "access" precedents issued by this Court) in holding that Section 440.11(1) of the Florida Statutes, as amended, violates Article I, Section 21 of Florida's Constitution.

A) BY AMENDING SECTION 440.11(1), THE LEGISLATURE DID NOT ABOLISH ANY PRE-EXISTING RIGHT OF ACCESS.

In applying the four prong Kluger test to the case sub judice, the logical starting point in assessing the constitutional validity of Section 440.11(1) is to carefully evaluate the precise scope and intended effect of the 1988 amendment to the Workers' Compensation Act. To do this, however, it is helpful, if not necessary, to first review the language of the statute as it existed prior to the subject amendment, and indeed, prior to the 1978 amendment which similarly extended partial immunity from suit to "co-employees."

1. The 1977 Version of Section 440.11(1)

In 1977, Section 440.11(1) of the Florida Statutes provided as follows relative to employer tort liability:

> 440.11 Exclusiveness of liability.-
>
> (1) The liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability of such employer to any third party tort-feasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the legal representative thereof, in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence or comparative negligence of the employee.

§440.11(1), Fla. Stat. (1977). [5] The foregoing statutory provision granting employer tort immunity made no express reference to the tort liability of "fellow employees" vis a vis each other. Moreover, this particular version of the statute did not specifically define the term "third-party tortfeasor," as used in Section 440.11 (and throughout the Act). Consequently, the Court must look elsewhere, i.e., to another statute, or to common law, to determine whether an injured employee had a pre-existing right to sue an officer, director or policymaking employee for injuries occasioned by the negligence of such policymaking employee acting in such capacity.

In 1909, the Supreme Court observed that at common law, legal distinctions existed between "fellow servants" and "vice principals" of the master/employer. See Stearns & Culver Lumber Co. v. Fowler, 58 Fla. 362, 50 So. 680 (1909). According to the Stearns Court, at common law, a master owed a nondelegable duty to his servants to exercise reasonable care and diligence to provide his servants with a reasonably safe place to work, with reasonably safe tools, machinery, implements, materials, and with suitable and competent "fellow servants" to work with. Stearns, 50 So. at 682-683. If the master properly discharged this nondelegable duty to his servants, then he was not liable to his servants for injuries in the work place caused by the negligence of "fellow servants." Id.

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[5] With the exception of a few minor changes not relevant here, this was the version of Section 440.11(1) in effect at the time the Florida Constitution was reenacted on November 5, 1968.

If, however, the master delegated to any officer, agent, servant or employee (regardless of title), his nondelegable duty to provide his employees a safe work place, then such person was considered to be, not a "fellow employee," but a "vice principal" of the master himself. Id. As such, the vice principal's negligence in discharging his master's nondelegable duty to provide his servants a safe place to work subjected the master himself to liability to an injured employee. Id. In other words, at common law, the duty to provide a safe work place was owed to the employee by the master, and while the master may attempt to empower a vice principal or agent to discharge his duty to provide a safe work place, he was still directly liable if an employee was later injured by the negligence of his vice principal in discharging the nondelegable duties the master owed to his employees.

Since the cornerstone of negligence is the existence of a duty owed to the injured party, and since the master at common law was the party who owed a non-delegable duty to his employees to maintain the safety of the workplace, it would thus appear that a vice-principal of that master would not be personally liable in tort to subordinate employees for negligent omissions involved in discharging the master's nondelegable duty to provide his servants with a safe workplace. This common law distinction between "fellow employees" and "vice principals," as previously recognized by the Supreme Court in Stearns, supra, was simply not discussed or distinguished by the Supreme Court in its subsequent 1955 opinion rendered in Franz v. McBee Company, 77 So.2d 796 (Fla. 1955).

In Franz, the Supreme Court noted that at common law, "servants" owed to each other a mutual duty to exercise ordinary care in the performance of their employment duties, and that liability existed for a failure to exercise ordinary care, when such failure results in injury to a "fellow servant." 77 So.2d at 798. The Franz Court additionally held that, in the absence of an express legislative mandate to the contrary, a "fellow servant" or "co-employee" can be considered a third party tortfeasor subject to tort liability under the Workers' Compensation Act. Id. at 800.

In its Franz opinion, however, the Supreme Court did not specifically define the terms "co-employee" or "fellow servant," which the Court had used repeatedly throughout its opinion. Moreover, the Court made no reference whatsoever to the legal distinctions that previously existed at common law between "fellow servants" and "vice principals"-- specifically, those employees who have been charged with carrying out the employer's nondelegable duty to provide a safe workplace, and who have become "vice principals" of the employer by virtue of such functions. Hence, while the Court's decision in Franz clearly stood for the proposition that, as of 1955, a "fellow employee" could be sued in tort under Section 440.39 as a "third-party tortfeasor," such decision did not expressly hold, either that the common law distinction between "fellow servants" and "vice principals" had been abrogated by the provisions of the Worker's Compensation Act, or that "vice principals" could now be similarly sued in tort as "third-party tortfeasors" for failing to properly discharge the

employer's nondelegable duty to secure a safe place to work.

2. The 1978 Amendment to Section 440.11(1)

In 1978, the legislature amended Section 440.11(1) of the Florida Statutes to add the following additional language extending the employer's tort immunity to co-employees who injure fellow-employees through acts constituting simple negligence:

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

Ch 78-300, § 2, Laws of Fla. The constitutional validity of the foregoing enactment was later directly challenged in Iglesia v. Floran, 394 So. 2d 394 (Fla. 1981). In Iglesia, the personal representative of the deceased employee, Iglesia, brought a civil suit against Iglesia's co-employee, Floran, who had been driving a rented delivery vehicle at the time of the accident in which Iglesia, a passenger in the car, was killed. 394 So. 2d at 995. The plaintiff had argued to the trial court that the 1978 amendment to Section 440.11(1), which immunized co-employees from tort liability unless such employees acted with willful and wanton disregard, unprovoked physical aggression, or gross negligence,

violated the constitutional right of access to the courts guaranteed by Article I, Section 21 of the Florida Constitution. Id. The trial court ultimately ruled, however, that the 1978 amendment was constitutional and entered summary judgment in favor of the defendant. Id.

On appeal, the Supreme Court evaluated the 1978 amendment to Section 440.11(1), against the backdrop of its previous decisions in Kluger v. White, supra, and McMillan v. Nelson, 5 So. 2d 867 (Fla. 1942). The Iglesia Court ultimately concluded that the Legislature's act of changing the degree of negligence necessary to sustain a tort action against a fellow employee did not abolish the employee's pre-existing right to sue in tort. According to the Iglesia Court, the statute, as amended, still permitted a cause of action against co-employees for acts constituting gross negligence. Id. In the Court's view, the 1978 amendment, which raised the threshold standard of liability from simple negligence, to gross negligence for co-employees vis a vis each other, did not violate the access to courts provision of the Florida Constitution. Id.

It is important to mention at this point that the 1978 amendment to Section 440.11(1) was held constitutionally valid in Iglesia against an "access to courts" challenge, even though the amendment did not provide any additional alternatives to an action for simple negligence, which, prior to the 1978 amendment, a co-employee could bring against a fellow servant, pursuant to this Court's previous decision in Franz v. McBee Co., 77 So.2d 796 (Fla. 1955). In other words, even though an injured employee could no

longer bring an action against a "fellow employee" for simple negligence after the 1978 amendment, and even though no additional alternatives to such an action grounded in simple negligence were provided by the Legislature at that time, the Iglesia Court still deemed the 1978 amendment to be a valid legislative enactment in harmony with Article I, Section 21 of the Florida Constitution.

3. The Genesis of the Affirmative Act Doctrine

In 1976, just two years prior to the Legislature's enactment of the foregoing 1978 amendment to Section 440.11(1), the Second District Court of Appeal tangentially addressed the common law "vice principal" doctrine in the context of an employee's tort action against a corporate officer. See West v. Jessop, 339 So. 2d 1136 (Fla. 2d DCA 1976). Specifically, in its West opinion, the Second District Court of Appeal made the following observation regarding the tort liability of corporate officers:

> [A] corporate officer becomes amenable to suit as a co-employee when he has committed an affirmative act of negligence which goes beyond the scope of the nondelegable duty of the employer to provide his employees with a safe place to work.

339 So. 2d at 1137. In other words, according to the West Court, a corporate officer's liability in a third-party tort action must be based on an affirmative act done by him which is separate and apart from the acts committed by him in his capacity as a corporate officer charged with the duty of securing the safety of the workplace. Id. The West Court observed that the immunity provisions which protect the corporate employer under Section

440.11 would be reduced to a mere "theoretical refuge" if injured employees are permitted to bring third party actions against corporate officers under all circumstances of negligence, regardless of degree. Id.

This "affirmative act" doctrine adopted by the West Court was later expanded by the various district courts of appeal, even after the previously discussed 1978 amendment to Section 440.11(1). See, e.g., Zurich Ins. Co. v. Scofi, 366 So. 2d 1193 (Fla. 2d DCA 1979)(affirmative act doctrine also applies to supervisors); Dessert v. Electric Mutual Liability Ins. Co., 392 So. 2d 340 (Fla. 5th DCA 1981)(employer immunity extends to those who fill role as corporation's alter ego where no affirmative act is involved); Clark v. Better Const. Co., 420 So. 2d 929 (Fla. 3d DCA 1982)(supervisor enjoys employer immunity unless he commits affirmative act beyond scope of employer's nondelegable duty); and Cliffin v. State, Dept. of Health & Rehab. Serv., 458 So. 2d 29 (Fla. 1st DCA 1984)(complaint must allege affirmative acts beyond scope of nondelegable duty).

Ten years after its West decision, the Second District Court of Appeal, in Kaplan v. Circuit Court of Tenth Judicial Circuit, 495 So. 2d 231 (Fla. 2d DCA 1986), determined that the 1978 amendment to Section 440.11(1) did NOT change or otherwise affect prior case law concerning which types of employees would be considered "co-employees" amenable to suit under the statute. 495 So. 2d at 233. In the district court's view, the 1978 amendment enacted by the Legislature did not take away, or otherwise affect

the pre-existing immunities enjoyed by corporate officers and supervisors under the "affirmative act" doctrine. According to the Kaplan Court, the reasons for treating such persons differently were just as valid after the 1978 amendment as they were before. Id. As discussed below, however, this particular view was later disapproved by the Supreme Court of Florida; however, that disapproval was based on the Court's own interpretation of what it considered to be the clear intent of the Legislature, as expressed in its 1978 amendment to Section 440.11(1), and was not based on the status of common law rights available in 1968 when the current constitution was adopted.

4. **Streeter v. Sullivan**-- The Supreme Court's Rejection of the Affirmative Act Doctrine

In the 1987 case of Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987), the Supreme Court of Florida disapproved of the affirmative act doctrine which had previously been applied and expanded over the years by the various district courts of appeal. In Streeter, the Supreme Court was asked to decide the following question which had been certified by the Fourth District Court of Appeal:

> DOES SECTION 440.11(1), FLORIDA STATUTES (1983) PERMIT SUITS AGAINST CORPORATE EMPLOYER OFFICERS, EXECUTIVES, AND SUPERVISORS AS "EMPLOYEES" FOR ACTS OF GROSS NEGLIGENCE IN FAILING TO PROVIDE A REASONABLY SAFE PLACE IN WHICH OTHER EMPLOYEES MAY WORK?

509 So.2d at 269. In a divided opinion, the Supreme Court answered this certified question in the affirmative, concluding that Section 440.11(1), as amended in 1978, was intended to impose liability on all employees who act in a grossly negligent manner relative to

"fellow employees," regardless of whether the grossly negligent employee was an officer, director or supervisor. Id. at 270.

In ruling that the Legislature had made no statutory distinction between the types of employees intended to be affected by Section 440.11(1), the Streeter Court declined to interpret the statute beyond what the Court perceived was its "plain language." The Court therefore looked primarily to the definitional section of Chapter 440, wherein the term "employee" had been previously defined by the Legislature as follows:

> (2)(b) The term "employee" includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.

§ 440.02, Fla. Stat. (1981). 509 So.2d at 270.

In the majority's view, the "affirmative act" doctrine had its genesis prior to the 1978 amendment to Section 440.11(1); therefore, the district courts which had applied the doctrine did not have the benefit yet of the Legislature's subsequent amendment "expressly imposing liability on grossly negligent employees who injure other employees." 509 So.2d at 271. Justice Overton, however, disagreed with the majority view articulated in Streeter, and wrote a separate dissenting opinion, in which Justice McDonald concurred. Id. at 272.

According to Justice Overton, by including corporate officers, directors and supervisors within the benefits of the Workers' Compensation Act under the definitional section of the Act, it was clearly not the Legislature's intent to subject such persons to tort liability for gross negligence relative to managerial

decisions made pertaining to the safety of the work place. Id. Justice Overton was thus wholly in agreement with the Second District Court of Appeal's earlier decision in Kaplan, supra, in which the district court had concluded that the "affirmative act" doctrine was still viable and had not been abrogated by the Legislature's 1978 amendment to Section 440.11(1).

In what turned out to be a prophetic statement on his part, Justice Overton additionally noted that "the majority decision appears to require immediate legislative review." Id. (emphasis added). The Legislature did in fact quickly review this matter, as urged by Justice Overton. In 1988, it answered the judicial salvo launched by the Court in Streeter with another amendment to Section 440.11(1)-- specifically, the one currently on review which grants partial tort immunity to managerial and policymaking employees when they act in such capacity.

5. The 1988 Amendment to Section 440.11(1)

The Legislature amended Section 440.11(1) to expressly provide heightened tort immunity for officers, directors and supervisory employees who act in such capacity.[6] The statute now clearly

[6] According to a May 31, 1988 Final Staff Analysis issued by the Commerce Committee of the Florida House of Representatives (See Appendix), the 1988 amendment to Section 440.11(1) was proposed in direct response to this Court's Streeter, supra, decision. According to this legislative analysis, the term "fellow employee," as used by the Legislature in its previous 1978 amendment to Section 440.11(1), had not been judicially interpreted for almost ten years until Streeter, when the Supreme Court judicially interpreted the term "fellow employee" to include corporate officers, because the definitional section of Chapter 440 included corporate officers in the term "employee." This Staff Analysis

distinguishes between policymaking employees (i.e., officers, directors, supervisors) and "fellow employees" under the following circumstances:

> The same immunity provisions enjoyed by an employer shall also apply 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

Ch. 88-284, § 1, Laws of Fla. See § 440.11(1), Fla. Stat. (1989).

The foregoing provision essentially represents a codification and refinement of the "affirmative act" doctrine previously recognized and applied by the various district courts of appeal prior to the Supreme Court's express disapproval of the doctrine in Streeter, supra-- a rejection premised on what the Court believed was the intent of the Legislature, as gleaned from the language of its 1978 amendment and the definitional section of Chapter 440. Certainly, by enacting this particular immunity provision in direct response to Streeter, the Legislature was intending to incorporate the judicial interpretations of Section 440.11(1) previously expressed by the various district courts prior to Streeter, supra, and to clarify what had been its original intent all along relative

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additionally notes that the amendment was needed, because there were already several cases pending in the courts which were now citing the Streeter decision as precedent for including "corporate officers" in the term "fellow employee," as used in Section 440.11(1).

to the persons intended to be included within the protective umbrella of the employer's immunity provisions.

As the First District Court of Appeal recently noted in Asphalt Pavers, Inc. v. Dept. of Revenue, 584 So. 2d 55 (Fla. 1st DCA 1991):

> [A] mere change in the language of a statute does not necessarily indicate an intent to change the law, because the intent may be to clarify what was doubtful and to safeguard misapprehension as to existing law.

584 So. 2d at 58 (citing State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So. 2d 529 (Fla. 1973). By amending Section 440.11(1) in immediate and direct response to Streeter, the Legislature simply sought to clarify what had been its intent all along, i.e., that the policymaking and managerial employees of the employer who act in such capacity were never intended to be considered "fellow employees" subject to tort litigation as third-party tortfeasors under Sections 440.11 and 440.39 of the Workers' Compensation Act.

Under the clear language of the 1988 amendment, the employer's immunities provided in the statute apply to those persons who, in the course and scope of their duties, act in a managerial or policymaking capacity. To enjoy these heightened immunities, however, the amendment indicates that the conduct which allegedly causes another employee's injury must have actually arisen in the course and scope of those managerial or policymaking duties.

Consequently, if a policymaking employee engages in conduct which is NOT within the course and scope of his policymaking duties and another employee is injured thereby, then that policymaking

employee remains subject to tort liability for gross negligence--just as any other employee would be under Section 440.11(1). When a policymaking employee acts outside the bounds of his policymaking functions, he is not insulated from liability under Section 440.11(1) for acts of gross negligence which result in injury to another employee.

For illustrative purposes, the Appellants offer the following example of conduct which would clearly be beyond the scope of the policymaking functions of an officer, director or supervisor: Assume one day at work, the corporate president of a shoe manufacturing company randomly discharges a gun in the company cafeteria during a busy lunch hour, and as a result of this conduct, another employee is injured by a ricochetting bullet. Under such circumstances, the injured employee can obviously still sue the corporate president in tort for gross negligence under the terms of the amended statute. This is because the president's act of discharging a firearm in a crowded company cafeteria would clearly NOT be conduct within the course and scope of his managerial and policymaking functions, under most, if not all circumstances.

Now, if one applies the first and second prongs of the Kluger test to the above scenario, it is obvious that the 1988 amendment to Section 440.11(1) did not abolish or eliminate an injured employee's right to bring a tort action against a supervisor for gross negligence which transpires outside the course and scope of that supervisor's managerial or policymaking duties. These types

of actions remain totally unaffected by the 1988 amendment to the Workers' Compensation Act.

Similarly, the 1988 amendment has not abolished any pre-existing right of an employee to maintain a tort action against officers and supervisors for injuries sustained by an employee through the intentional criminal conduct of an independent third-party tortfeasor. This is because, in 1968, there was no established right to sue a corporate officer or manager for simple or gross negligence under circumstances, such as the case at bar, where the employee's injury is caused by a third-party's intentional criminal misconduct and the officer or manager has acted within the course and scope of his policymaking duties.

As Judge Altenbernd observed in his dissenting opinion below, an injured employee in 1968 had no pre-existing common law right to sue an officer, director or supervisor for injuries intentionally inflicted by an unrelated third-party tortfeasor who has committed an intentional, malicious criminal act. (See Appendix/DCA Final Order). The prevailing rule at common law, was that the intentional criminal act of a third-party tortfeasor constituted an intervening cause of injury, thereby breaking the causal connection between a defendant's alleged negligence and the victim's subsequent injury. See, e.g., Lingefelt V. Hanner, 125 So. 2d 325 (Fla. 3d DCA 1960)(the court adopted majority view expressed in other jurisdictions that willful, criminal acts of another break chain of causation).

This common law rule was not effectively abrogated by the

Supreme Court until 1976 (after the 1968 reenactment of the State constitution), when it determined that an original actor's negligence could potentially be considered the proximate cause of another's loss, if the intervening criminal act, or the loss therefrom, was reasonably foreseeable. See Nicholas v. Miami Burglar Alarm Co., 339 So. 2d 175 (Fla. 1976). However, back in 1968, neither the decedent, Felicia Shova (nor her survivors or personal representative), could have successfully maintained a tort action against her employer's officers and policymaking employees for injuries or death inflicted by the intentional, malicious criminal acts of a third-party tortfeasor, such as Anthony Hill--the person who committed the intentional crime of murder in the instant case.

In short, the 1988 amendment to Section 440.11(1) simply did not eliminate any pre-existing right of redress that would have been available to the Plaintiff in 1968 under the circumstances of this case. There was no statutory or common law cause of action available at that time against the employer's officers and managers predicated on negligent security, when such officers and directors have acted within the course and scope of their policymaking functions on behalf of the employer. Moreover, even if such a right existed, an employee who has been injured by the intentional criminal conduct of an independent third party can still bring a direct cause of action in tort against the tortfeasor himself. In this case, the Plaintiff Shova can still bring a tort action against Anthony Hill, the party directly responsible for his wife's

death. This type of action has certainly not been eliminated or abolished by the Legislature's amendment of Section 440.11(1). Moreover, workers' compensation benefits still remain available to the injured employee under such circumstances.

In regard to the final category of employees-- i.e., those who have been injured by the conduct of a corporate officer, director, supervisor (or other managerial or policymaking employee), whose injurious conduct WAS within the course and scope of such person's managerial or policymaking duties, such injured employees can still bring an action in tort against the responsible supervisors, providing the applicable standard of liability set forth in the statute has been met. The 1988 amendment did not abolish an employee's "cause of action in tort" against such officers and managers. The amendment simply raised the standard of liability in tort from gross negligence, to conduct which constitutes as violation of the law for which the maximum penalty which may be imposed exceeds 60 days. For purposes of a tort action, this standard would be culpable negligence which directly inflicts actual personal injury on another.[7]

Even if the Court ultimately determines that such a right of redress under the facts of this case actually existed as of 1968, the narrow class of employees whose circumstances of injury would trigger the heightened standard of liability, are the only ones who

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[7] This standard of liability is essentially the minimum level of conduct necessary for which the maximum criminal penalty which can be imposed exceeds 60 days, regardless of whether a violation of the law has actually been charged. See § 775.082(4)(a) and § 784.05(2), Fla. Stat. (1989).

would in any way be affected by the 1988 amendment to Section 440.11(1). As previously discussed, however, the Legislature's act of increasing the degree of negligence required to maintain an action in tort does not abolish any pre-existing right of redress. See Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981)(raising standard of liability of co-employee from simple negligence, to gross negligence did not abolish cause of action for purposes of Article I, Section 21). See also McMillan v. Nelson, 5 So. 2d 867 (Fla. 1942)(Guest statute which raised degree of negligence in passenger's action against driver from simple negligence to gross negligence was constitutionally valid). Hence, the 1988 amendment to Section 440.11(1) passes constitutional scrutiny under an application of both the first, and the second prongs of the Kluger test, as there was no pre-existing right of redress against managerial employees under the facts of this case, and even if there were such a right, it has not been totally abolished or eliminated by the amendment.

In its majority opinion, the district court drew an arbitrary, unworkable line in the sand when it distinguished between the 1978 amendment to Section 440.11(1) previously sustained by this Court in Iglesia, supra, and the 1988 amendment to the same statutory provision. The majority concluded, without support, that the subject amendment abolished any civil cause of action against supervisory employees sounding in negligence, without providing any reasonable alternative to suit. (See Appendix/DCA Final Order). Appellants contend that this particular conclusion not only

represents a misapplication of the controlling Kluger test, but also does not take into account the other viable remedies still available to an injured employee who finds himself unable to meet the threshold standard for tort liability required by Section 440.11(1).

B) REASONABLE ALTERNATIVES TO PROTECT ANY EXISTING RIGHT OF ACCESS ALREADY EXIST.

Under Section 440.11(1), as amended, an injured employee can still seek all of the valuable benefits and remedies otherwise available to him under the provisions of the Workers' Compensation Act, without delay, without regard to fault, and without the need to resort to costly and time-consuming tort litigation. Such benefits have been viewed as adequate and substantial time and time again by the various courts of this State, including this Court.

Moreover, in addition to pursuing the substantial benefits and remedies available to an injured employee under the Act, such employee can still sue any "outside" tortfeasor who was either totally, or partially responsible for his work-related injuries, subject of course to the employer/carrier's statutory right of offset under the Act. See §440.39, Fla. Stat. (1989). The fact that an injured employee can still obtain valuable benefits and seek redress from some other person, entity, or insurer, wholly distinguishes this statute from the one invalidated by the Court in Kluger, supra.

Pivotal to the Court's decision in Kluger, was the fact that

the plaintiff in that case fell into a category of persons under the statute who could not obtain redress or relief from any other person, entity or insurer. Under the subject statute, however, an injured employee can still obtain redress from his employer (and its workers' compensation carrier) within the framework of the existing compensation system. Moreover, the Plaintiff in the instant case can still bring a third-party tort action against the tortfeasor who was directly responsible for murdering his wife. Hence, the existence of viable, alternative remedies for redress of the injury clearly set this statute apart from the one invalidated by the Court in Kluger.

Each time the Legislature amends Chapter 440, it does not need to provide new and additional alternatives to suit with each new amendment or modification as long as the alternatives which already exist under the statutory scheme are still, both available, AND beneficial to the injured worker. Clearly, if the Legislature, by specific reference, had originally included corporate officers, directors and other policymaking employees within the protective umbrella of the employer's tort immunity back when the Workers' Compensation Act was first enacted, it cannot be doubted that such legislation would have survived a similar "access to courts" challenge, if one had been raised at that time. Why is that? Because the Workers' Compensation system was originally devised to meet the following important societal goals:

> 1. to see that workers were in fact rewarded for their industry by not being deprived of reasonably adequate and certain payments for workplace accidents; and

2. to replace and unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.

De Ayala v. Florida Farm Bureau Cas. Ins., 543 So. 2d 204 (Fla. 1989). See also Seaboard Coast Line R. Co. v. Smith, 359 So. 2d 427 (Fla. 1978).

As this Court previously observed in Seaboard, supra, employer tort immunity is at the very heart and soul of the workers' compensation system. 359 So. 2d at 429. Over the years, the Act has proven to be "of highly significant social and economic benefit to the working man, the employer and the State." Id. By providing a somewhat heightened level of tort immunity to those employees who formulate and enforce the employer's policies and goals, but only when an employee is injured by conduct within the course and scope of such policymaking duties, the Legislature continues to advance and protect the very important societal goals previously recognized by this Court. Consequently, the 1988 amendment to Section 440.11(1) passes constitutional scrutiny under the third prong of the Kluger test, as well, since reasonable alternatives to protect the right of redress still exist and have not been eliminated or otherwise restricted by the amendment.

C) AN OVERWHELMING PUBLIC NECESSITY EXISTS FOR INCLUDING POLICYMAKING AND MANAGERIAL EMPLOYEES WITHIN THE TORT IMMUNITIES PROVIDED TO THE EMPLOYER.

As previously discussed, even if it is determined under an application of the first three prongs of the Kluger test that a pre-existing right of redress existed; that the Legislature

abolished such right; and that no reasonable alternatives to protect the right of redress have been provided, a challenged statute still does not violate Article I, Section 21 of the Florida Constitution if the Legislature can show that an overwhelming public necessity exists for abolishing the right and that no other alternative methods exist. See Kluger, supra, See also Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948). While it is true that the subject statute does not contain any express legislative statement identifying an overwhelming public necessity for the Legislature's extension of heightened immunity to officers and policymaking employees, the Appellants contend that an express pronouncement is unnecessary under the circumstances of this particular amendment.

This Court has repeatedly recognized the important societal interests served by the Workers' Compensation Act. It has also recognized that employer immunity from tort is an integral and indispensable aspect of the system-- a system which would fail to work at all were it not for such tort immunities. By enacting the 1988 amendment to Section 440.11(1), the Legislature implicitly recognized that the employer's immunity from tort would cease to have any meaning whatsoever if injured employees can receive compensation benefits and then turn around and sue the employer's officers, directors and policymaking employees for injuries occasioned by the very policies developed by such employees on behalf of the employer. Employers will surely suffer the economic brunt of such suits (in contravention of the clear intent of the Act), if not directly, then certainly indirectly through

indemnification agreements and increased costs associated with liability insurance policies covering officers and managers.

As recognized by the First District Court of Appeal, one of the key purposes of the Workers' Compensation Act was to:

> designate and define for the employer the responsibilities that will come to rest upon its shoulders to thus mark the limit of its liability.

Matthews v. G.S.P. Corp., 354 So. 2d 1243 (Fla. 1st DCA 1978). If employers, by virtue of employee suits against their officers and managers, are once again exposed to tort litigation for corporate policies, with all the attendant economic uncertainties caused by such litigation, then one of the key purposes of the Workers' Compensation Act will be totally destroyed and the entire compensation system will be destined to fail. For the system to have any prospect of working now, and into the future, managerial immunity must work in tandem with employer immunity. The Legislature obviously recognized this indisputable fact when it amended the statute in direct response to this Court's previous decision in Streeter v. Sullivan, supra-- a decision which posed the very real threat of opening the floodgates to employee suits against officers and managers for injuries occasioned by corporate policies, thus thrusting the entire system into economic jeopardy.

In overview, the 1988 amendment to Section 440.11(1) of the Florida Statutes does not represent an unconstitutional denial of the right of access guaranteed by Article I, Section 21 of the Florida Constitution. The decision of the Second District Court of Appeal should be reversed, accordingly.

CONCLUSION

Section 440.11(1) of the Florida Statutes, as amended in 1988, does not violate the right of access to the courts guaranteed by Article I, Section 21 of Florida's Constitution. The Legislature did not abolish any pre-existing right of access held by employees to sue officers, directors and policymaking employees for injuries caused by conduct within the course and scope of such policymaking duties. Moreover, reasonable alternatives already exist to protect any alleged right of redress, and such alternatives remain both viable, and available to employees who are injured in work-related accidents. Finally, an overwhelming public necessity exists for granting heightened tort immunity to officers, directors, and policymaking employees, which necessity cannot be met in any other fashion consistent with the important societal goals of the Act. As such, the order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellants has been furnished, by U.S. Mail, this 22d day of December, 1992, to James A. Sheehan, Esq., Attorney for Appellee, 341 Third Street South, St. Petersburg, FL 33701; to David W. Henry, Esq., Attorney for the Florida Defense Lawyers' Association (Amicus Curiae), 19 East Central Boulevard, Orlando, FL 32802; and to Arthur J. England, Jr., Esq., Attorney for the Florida Food and Fuel Retailers (Amicus Curiae), 1221 Brickell Avenue, Miami, FL 33131.

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