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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.

_____/

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

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REPLY BRIEF OF APPELLANTS

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ARGUMENT

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 FOR REDRESS EXIST, AND RELEVANT LEGAL PRECEDENTS FROM THIS COURT WHICH GOVERN THE RESOLUTION OF THIS PARTICULAR CONSTITUTIONAL ISSUE WERE MISAPPLIED BY THE DISTRICT COURT.

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

The Appellants had argued in their Initial Brief that the common law distinctions between "fellow servants" and "vice principals" previously recognized by the Florida Supreme Court in Stearns & Culver Lumber Co. v. Fowler, 58 Fla. 362, 50 So. 680 (1909), had not been abrogated or altered by the Court in its 1955 decision in Franz v. McBee Company, 77 So. 2d 796 (Fla. 1955). The Appellee has not directly responded to this particular argument.

In Stearns, the Supreme Court discussed the common law principle that it was the master who owed a nondelegable duty to his employees to provide them with a reasonably safe place to work, with reasonably safe tools and implements, and with competent fellow workers. Any employees empowered by the master to perform such nondelegable duties on his behalf were considered, not "fellow employees," but "vice principals" of the master. Stearns, 50 So. at 682-683. Franz did not express an intent to change these established principles, nor should it be interpreted as doing so.

As previously recognized by this Court, it is not the province of the courts to modify or abrogate the rules of common law-- that

function is clearly the province of the legislature. See State v. Egan, 287 So. 2d 1, 6 (Fla. 1973). In State v. Egan, the Supreme Court noted the judiciary's limited power to change the common law:

> The court has no more right to abrogate the common law than it has to repeal the statutory law. In other words, courts may properly extend old principles to new conditions, determine new or novel questions by analogy, and even develop and announce new principles made necessary by changes wrought by time and circumstance. Under our constitutional system of government, however, courts cannot legislate. They cannot abrogate, modify, repeal, or amend rules long established and recognized as parts of the law of the land.

287 So. 2d at 7. Although the Supreme Court may change the common law where "great social upheaval dictates," [1] no such situation was facing the Court in 1955 when it decided Franz, and hence, Franz can, and must, be harmonized with existing common law principles.

Accordingly, this Court's decision in Franz should not be viewed as abandoning the firmly entrenched common law distinctions between fellow servants, and vice principals-- i.e., those employees who stand in the shoes of the employer. The Supreme Court merely observed in Franz that at common law, "servants" owed to each other a duty to exercise ordinary care in the performance of their duties, and that a failure to exercise ordinary care which results in injury to a "fellow servant" subjects the negligent employee to liability. Given the clear constraint upon the courts to amend or abrogate existing rules of common law, this observation should not be construed as abolishing or altering the common law

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[1] See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973, wherein the Supreme Court abandoned the common law rule of contributory negligence because great social upheaval dictated the adoption of the rule of comparative negligence.

distinctions between "fellow servants" and "vice principals." Nor should it be construed as imposing a duty upon vice principals to secure the safety of the work place, in contravention of the common law which imposed that duty upon the master.

It is important to mention that nowhere in its Franz opinion did the Court even obliquely discuss the common law differences between "vice principals" and "fellow servants." Instead, the Court continued to use the common law terms "fellow servant" and "co-employee" throughout its opinion. If the Court had intended to judicially abrogate the common law distinctions between "fellow servants" and "vice principals," it surely would have at least acknowledged these distinctions somewhere in the body of its opinion in Franz. Similarly, it would have identified some important societal need or social movement warranting a judicial abrogation of the common law.

If Franz, therefore, did not alter the common law, and if, under such common law, it was the master who owed a nondelegable duty to his employees to secure the safety of the work place, how, then, can it be said that in 1968, an injured employee had a cause of action to sue vice principals in tort for breach of a duty they did not even owe to the employee? Certainly the statutory law in existence in 1968 did not impose such a duty on vice principals in contravention of the common law.

As of 1968, the Legislature, pursuant to the Worker's Compensation Act, had not statutorily abrogated historical common law distinctions existing between "fellow servants" and "vice

principals," nor should the Act be construed as doing so. As the Supreme Court observed in State v. Egan, supra, "no statute is to be construed as altering the common law farther than its words and circumstances import." 287 So. 2d at 6. In the absence of a clear intent to do so, Chapter 440 should thus not be construed as legislatively abrogating the common law distinctions which existed between "fellow servants" and "vice principals."

Nothing in the language of Section 440.11(1), as it existed in 1968, changes the common law rule that the employer himself owed a nondelegable duty to his employees to secure the safety of the work place. In order to abrogate this common law rule, the language of Section 440.11(1) would have to have expressed a clear intent to shift the master's nondelegable duty to another. The 1968 version of Section 440.11(1), however, is totally silent on this particular point, and does not reflect an intent to statutorily shift the master's duty to secure the safety of the work place to his vice principals, in contravention of the common law.

In addition, nothing in the wording of Section 440.11(1) suggests that the common law meanings historically given to the terms fellow servant and fellow employee had changed, or that such terms now included "vice principals" of the employer for purposes of imposing tort liability for policy-making decisions. Since, as previously discussed, a statute should not be construed as modifying the common law farther than its words and circumstances import, it is evident that the legal distinctions between "fellow servants" and "vice principals" which existed at common law

remained intact after the passage of Section 440.11(1) and were not intended to be affected by the statute in any substantive respect.

It would be an anomaly to suggest that, by originally enacting Section 440.11(1), the Legislature intended that while employers themselves could not be sued in tort by injured employees for alleged failures concerning the proper discharge of their common law duties to secure the safety of the work place, that their vice principals could be sued personally for those very same failures. The Second District Court of Appeal implicitly recognized this anomaly when it articulated the "affirmative act" doctrine back in 1976-- a doctrine which recognized that an officer or supervisor enjoys the employer's tort immunities unless he has engaged in an affirmative act of negligence which goes beyond the scope of his employer's nondelegable duty to provide a safe work place. [2]

The Legislature itself recognized this incongruity, when it later amended Section 440.11(1) in direct and immediate response to this Court's decision in Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987). By quickly amending Section 440.11(1) in response to Streeter, wherein the Court interpreted the term "fellow employee" used in the 1978 version of the statute to include corporate officers, the Legislature obviously intended to clarify what had been its original intent all along with respect to "vice principals." Specifically, that officers and managers were never intended to be subject to tort liability as third party tortfeasors when they are acting in a policy-making, or "vice principal" type

[2] See West v. Jessop, 339 So. 2d 1136 (Fla. 1987).

of capacity on behalf of the employer.

The Appellee has simply not responded to this particular argument, but instead continues to point to Franz v. McBee Company as authority for the proposition that a third party action against officers and managers premised on negligent security existed back in 1968. Appellants maintain that while an employee could then sue a "fellow servant" in tort for negligence resulting in injury, such employee had no recognized right back in 1968 to sue his employer's vice principals in tort for their alleged failure to secure the safety of the work place-- a duty owed to the employee, not by the vice principals, but by the master himself. In the absence of a recognized legal duty at that time, there can be no liability in tort, and thus, no cause of action against such vice principals.

As previously discussed by the Appellant in their Initial Brief, even if such a right of access existed back in 1968, the Legislature, by amending Section 440.11(1) to partially immunize policy-making employees when they act in such capacity on behalf of the employer, has not "abolished" this right. To fully appreciate this argument, one needs simply to note the types of legislative enactments which have been upheld as not abolishing the right of access-- the second prong of the "access" test formulated by the Court in Kluger v. White, 281 So. 2d 1 (Fla. 1973).

Judicial precedent on the concept of "abolishment" establishes that a right of access is not "abolished" by any of the following legislative actions:

* Adding additional restrictive elements to an

existing cause of action.

For example, in Feldman v. Glucrof, 522 So. 2d 798 (Fla. 1988), the Supreme Court determined that Section 768.40(4) of the Florida Statutes (1983), which added a restrictive element to a plaintiff's defamation action against members of a medical review committee did not totally abolish such action, even though the statute essentially precluded such defamation actions in the absence of extrinsic proof of malice or fraud. See Feldman, 522 So. 2d at 799-780. [3]

* Adding conditions precedent to a cause of action.

In Ross v. Gore, 48 So. 2d 412 (Fla. 1950), the Supreme Court upheld against an access to courts challenge Section 770.01 of the Florida Statutes, which imposed a "notice" condition precedent to libel actions against newspapers and periodicals. 48 So. 2d at 414-416. Specifically, Section 770.01, Fla. Stat., provided that at least five days before instituting a libel suit against a newspaper or periodical, the plaintiff must serve notice on the defendant specifying the article and the statements alleged to be false and defamatory. In the absence of such notice, no suit could be maintained by the plaintiff. This statutory condition precedent to

[3] By way of a footnote to its opinion, the Feldman court observed that Section 768.40(4) had again been amended by the Legislature in 1985. Feldman, 522 So. 2d at 800. The 1985 version of the same statute essentially precludes a defamation action against a member of a medical review committee who acts without intentional fraud-- an even higher standard of liability than the previous 1983 standard involving extrinsic proof of malice or fraud. § 768.40(4), Fla. Stat. (1985).

suit was held constitutional.

* Changing the standard of liability or degree of proof required to maintain an action.

The Supreme Court has previously observed that increasing the standard of liability or degree of care required in a tort action does not equate with a denial of access. See Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981). See also McMillan v. Nelson, 5 So. 2d 867 (Fla. 1942). In Iglesia, a previous 1978 amendment to Section 440.11(1) which raised the standard of liability for co-employees from simple negligence to gross negligence, was deemed constitutionally valid under a similar "access to courts" challenge, even though no additional alternatives to a simple negligence suit were provided by the Legislature at that time.

* Limiting the liability of one vicariously liable.

In Abdala v. World Omni Leasing, Inc., 583 So. 2d 330 (Fla. 1991), the Supreme Court upheld Section 324.021(9)(b) of the Florida Statutes (1987), which essentially provided that the lessor of an automobile under a lease for a period in excess of one year is not liable under the dangerous instrumentality doctrine for damages occasioned by the lessee's operation of the leased vehicle, provided the lessee maintains the requisite minimum insurance coverage. According to the Abdala Court, legislatively limiting the tort liability of a person vicariously liable does not equate to a denial of access to the courts. Abdala, 583 So. 2d at 333.

* Restricting the classes of potential defendants liable to a plaintiff in tort.

In Campbell v. City of Coral Springs, 538 So. 2d 1373 (Fla. 4th DCA 1989), the Fourth District Court of Appeal observed that a statute, such as the waiver of sovereign immunity statute, which "reasonably arranges and restricts the classes of potential defendants based on the nature of the claims as part of an overall statutory scheme," does not unconstitutionally "abolish" causes of action. 538 So. 2d at 1374. Accordingly, under this "access" analysis, Section 440.11(1) should be upheld, as it simply restricts the classes of potential defendants liable to an injured employee as part of the overall workers' compensation scheme.

Based on the foregoing authorities, it is clear that Section 440.11(1), as amended in 1988, does not "abolish" an employee's right of redress for work-related injuries. The very analysis applied by the Court in Feldman, supra, to uphold the medical committee member defamation statute should be applied to uphold Section 440.11(1) as well. Clearly, for purposes of determining whether a right of access has been abolished, no logical distinction exists between a statute which grants qualified immunity to certain defamation defendants in the absence of intentional fraud, and a statute which grants partial tort immunity for work place injuries to officers and managerial employees. Both statutes have the effect of raising the standard of liability--Section 768.40(4), as amended in 1985, grants defamation immunity to certain defendants in the absence of extrinsic evidence of

intentional fraud, while Section 440.11(1) grants tort immunity to managerial employees in the absence of conduct punishable as a first degree misdemeanor, i.e., conduct constituting criminal culpable negligence.

If this Court upheld Section 768.40(4) against a constitutional challenge under Article I, Section 21, Fla. Const. (1968), then it should likewise uphold Section 440.11(1) applying the same "access" analysis-- particularly when one considers that even after the 1988 amendment to Section 440.11(1), an employee can still obtain workers' compensation benefits for work-related injuries, regardless of fault. Hence, an employee injured through a supervisor's policy-making negligence still has a viable forum in which to redress his work-related injury. Nowhere in her Answer Brief does the Appellee suggest that such worker's compensation benefits are either inadequate or unavailable to injured employees under the circumstances of this case.

Appellee simply cites several cases involving the criminal "culpable negligence" standard of liability in support of her contention that Section 440.11(1), as amended, totally abolishes a negligence cause of action against officers and supervisors. It must be pointed out, however, that each of the cases cited by Appellee on this particular point involved defendants who carelessly or recklessly discharged firearms, resulting in another person's death. Appellants submit that an officer or supervisor who similarly discharges a firearm at work in a grossly negligent or reckless fashion resulting in an employee's injury or death

would be subject to tort liability for gross negligence just as any other employee would be under Section 440.11(1).

As previously discussed in the Initial Brief, under most, if not all circumstances, a supervisor's discharge of a firearm at work would not be conduct within the course and scope of his policy-making functions, and as such, would not be policy-making conduct immunizing the supervisor from tort liability under Section 440.11(1). The same would hold true for other types of grossly negligent conduct engaged in by an officer or supervisor outside the course and scope of his policy-making or managerial functions. An injured employee's "gross negligence" action arising out of such collateral conduct has not been precluded by the 1988 amendment to Section 440.11(1).

Moreover, as far as actions specifically predicated on a "negligent security" theory of liability are concerned, an injured employee can still bring a tort action against the responsible non-employee tortfeasor who was directly and primarily responsible for his injuries. Such causes of action have also not been abolished by the 1988 amendment.

In short, statutes which add additional restrictive elements to a cause of action; which raise the standard of liability; which limit potential defendants, etc. are not statutes which "abolish" causes of action. Moreover, where the injured party still can seek redress from some other party, entity, or insurer, his right of access has not been abolished, as implicitly recognized by this Court in Kluger v. White, supra.

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

The Appellee has not addressed the Appellants' argument that reasonable alternatives to protect the employee's right of access already exist. As Appellants previously argued, the narrow class of employees whose circumstances of injury would preclude suit against officers and managers under the heightened standard of liability set forth in Section 440.11(1) can still pursue all the remedies and benefits otherwise available to them under the current workers' compensation system-- a system which has repeatedly been recognized as a viable alternative to tort litigation for the redress of work-related injuries. Consequently, if an employee accidentally injures himself, he can recover compensation and medical benefits under Chapter 440. If he is injured by a co-employee, he can recover. If he is injured by an officer or supervisor, he can recover. If he is injured by a non-employee tortfeasor, he can recover. Finally, if the employee is injured by the employer himself, he can recover compensation and medical benefits under Chapter 440. Clearly, an injured employee has not been deprived by Section 440.11(1) of a forum in which to seek redress for work-related injuries. Under any of the foregoing circumstances, compensation and medical benefits would still be available to the injured employee.

The 1988 amendment to Section 440.11(1) has done nothing to change, either the availability, or the viability of existing alternative remedies. The fact that an injured employee can still

obtain redress for his injuries within the framework of the workers' compensation system sets Section 440.11(1) apart from the statute invalidated by the Court in Kluger, supra. [4]

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

The Appellee argues in her brief that the Legislature has a legitimate interest in protecting the safety of employees and that personal injury and products liability lawsuits have historically benefitted society as a whole. Appellants have no quarrel with these basic observations. They submit, however, that by passing the Workers' Compensation Act, including the many amendments to it, the Legislature initially expressed, and has reaffirmed, society's belief that for the greater good of society, injuries transpiring within the work place as an incident of industry are to be handled differently than those which transpire outside the work place.

Different policy goals and issues are implicated by injuries caused by the hazards of industry. Specifically, the Workers' Compensation Act was enacted to meet two important societal goals:

> 1. To assure that employees are rewarded for their industry by not being deprived of reasonably adequate and certain payments for work place injuries, and

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[4] Recently, the First District Court of Appeal, in a case involving an access to courts challenge to Section 440.11(1), as amended in 1988, noted in dicta that if the facts before it had required the court to choose between the majority's position in Shova v. Eller, 600 So. 2d 400 (Fla. 2d DCA 1992), and that articulated by Judge Altenbernd in his dissenting opinion below, the Court might be inclined to find Judge Altenbernd's dissenting position more persuasive. See Hyster Company v. David, 18 Fla. L. Weekly D363 (Fla. 1st DCA Jan. 21, 1993).

2. to replace and unwieldy tort system that made it virtually impossible for employers to predict or insure for the cost of work-related accidents.

See De Ayala v. Florida Farm Bureau Cas. Ins., 543 So. 2d 204 (Fla. 1989). To permit injured employees to receive compensation benefits under the Act, while at the same time instituting tort litigation against the employer's officers and policymaking employees, would circumvent and seriously undermine the underlying purposes of the Act.

For employees to be able to do indirectly what they cannot do directly (i.e., sue their employers) runs counter to the very reason employers were granted immunity from suit in the first place. The 1988 amendment to Section 440.11(1) simply recognized this fact, and although the Legislature did not expressly identify the overwhelming public necessity motivating its 1988 amendment to Section 440.11(1) in response to Streeter, such necessity is intuitively evident, particularly given this Court's previous recognition that employer immunity is at the very heart and soul of the workers' compensation system. See Seaboard Coast Line R. Co. v. Smith, 359 So. 2d 427 (Fla. 1978). Clearly, where employer immunity is threatened, so is the continuing viability of the entire worker's compensation system.

In overview, Section 440.11(1), as amended in 1988, passes constitutional muster under each and every prong of the Kluger test. The district court's decision holding Section 440.11(1) unconstitutional 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 and other policy-making employees for injuries caused by conduct within the course and scope of such policy-making duties. Moreover, reasonable alternatives already exist to protect the alleged right of redress, and such alternatives remain both viable, and available to injured employees. Finally, an overwhelming public necessity exists for granting heightened tort immunity to officers, directors, and policy-making 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 Reply Brief of Appellants has been furnished, by U.S. Mail, this 26th day of February, 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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