IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-25

MITCHELL I. KITROSER, as Personal Representative of the Estate of RHINA M. CASTRO LARA, BENIGNO RODRIGUEZ, Individually, GLORIA RODRIGUEZ, Individually and FELICITA LARA, Individually,

Petitioners,

vs.

ROBERT HURT, MICHAEL WEIS, KENNETH BECK, PERRY BROCK and RANDY MOORE,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
CASE NO. 4D09-4685

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This answer brief is filed on behalf of Respondents, Robert Hurt, Michael Weis, Perry Brock, Randy Moore, and Kenneth Brock (hereinafter "Defendants" or "individual defendants"). The Respondents are non-resident current and former managers of a corporation who are alleged to have negligently trained, supervised and retained a company truck driver who was later involved in an accident in Florida. The Fourth District Court of Appeal applied the longstanding law of this Court below and held that such individuals cannot be forced to defend themselves in Florida for alleged torts that were committed solely in their capacity as corporate employees.

STATEMENT OF THE FACTS

Petitioners/Plaintiffs brought this wrongful death action arising out of a collision between a truck driven by Dale Dickey and a vehicle driven by Rhina M. Castro Lara, which occurred in South Bay, Florida, and resulted in Lara's death. (R.27-193). Plaintiffs originally sued Dickey and his employer, Airgas Carbonic, Inc., a company incorporated in Delaware and headquartered in Georgia, alleging that Dickey was acting in the course and scope of his employment at the time of the accident, as well as other defendants alleged to be directly involved in the accident. (*Id.*). Airgas Carbonic was conducting business in Florida at the time of

the accident, and thus Plaintiff properly asserted that the court had personal jurisdiction over Airgas Carbonic. (R.29).

Plaintiffs subsequently amended their complaint to add the individual defendants, who are past and current employees of Airgas Carbonic, asserting allegations of negligent training, supervision and retention of Dickey. (*Id.*). Although none of the individual defendants were in Florida at the time of the accident (R.250-93), Plaintiffs alleged that the individual defendants were present at Airgas Carbonic's facility in Bartow, Florida at unspecified times, and while there negligently trained, supervised and failed to recommend discharge, or failed to discharge, Dickey in regard to his operation of Airgas Carbonic vehicles. (R.27-193).

The individual defendants live outside of Florida, and at the times of the alleged torts were employed by Airgas Carbonic in various middle-management positions. Hurt lives in Gainesville, Georgia and was Vice President of Distribution and Logistics. (R.225). Weis lives in Waynesboro, Georgia and was a manager at Airgas Carbonic. (R.291). Brock lives in Texas and at the pertinent times was Director of Safety and Compliance for Airgas Carbonic. (R.273). Moore lives in Augusta, Georgia and served as a safety manager. (R.282). Beck lives in Winston, Georgia and served as Airgas Carbonic's Director of Distribution Rail and Director of Distribution. (R.264). Hurt works, and Beck worked, at

Airgas Carbonic's place of business in Duluth, Georgia. (R.255, 264). Weis and Moore work at Airgas Carbonic's place of business in Augusta, Georgia. (R.282, 291). Brock no longer works for Airgas Carbonic. (*e.g.*, R.272-74).

The individual defendants moved to quash service and dismiss the Third Amended Complaint. (R.195-248). In support of their motions, the individual defendants submitted affidavits establishing that none of them have systemic and prevalent contacts with Florida such that would be sufficient to establish general jurisdiction over them. (R.250-93). Specifically, the individual defendants do not live or work in Florida, own or manage property in Florida, maintain telephone listings or receive mail in Florida, pay Florida taxes, have their finances in Florida, have Florida driver licenses, have vehicles registered in Florida, have professional licenses in Florida, or are registered to vote in Florida. (*Id.*).

As to specific jurisdiction, the individual defendants contended that Florida's "corporate shield doctrine" as set forth by this Court's decision in *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993), prevented Plaintiffs from suing them in a Florida court, as they are not residents of Florida, and the acts alleged were performed solely on behalf of their employer. (R.195-248).

The trial court denied the motions to dismiss, holding that Florida's corporate shield doctrine did not apply to the individual defendants because they were physically present in Florida when they engaged in the alleged negligent

training, supervision and retention. (R.359-66). Defendants appealed this ruling and the Fourth District reversed, holding that Plaintiffs could not exercise personal jurisdiction over the individual defendants. The Fourth District explained:

> In the instant case, it was undisputed that appellants were carrying out their duties on behalf of their corporate employer while they were present in Florida. "The corporate shield doctrine protects corporate agents from being subjected to Florida jurisdiction for acts performed while conducting business in Florida on behalf of a corporation." *Oesterle v. Farish*, 887 So.2d 412, 415 (Fla. 4th DCA 2004) (refusing to apply corporate shield doctrine because non-resident defendant was alleged to have committed an *intentional* tort when negotiating a contract on behalf of his corporate employer while present in Florida). The rationale for the rule, i.e., that "it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his benefit but for the benefit of his employer," is no less applicable because the individual performs those acts that solely benefit his employer while physically present in Florida. *Doe*, 620 So.2d at 1006. Consistent with the reasoning in *Doe*, appellants did not "personally" do any of the acts which would subject them to personal jurisdiction under Florida's long-arm statute. Consequently, the statutory requirement, the first step of the *Venetian Salami* inquiry, was not met.

Hurt v. Kitroser, 50 So. 3d 62, 65-66 (Fla. 4th DCA 2010) (footnote omitted). In a special concurrence, Judge Gross agreed that the majority decision "is truest to the version of the corporate shield doctrine adopted by the Florida Supreme Court in *Doe*…," but certified to this Court the question of whether the doctrine applies where the alleged corporate tort was committed in Florida. *Id.* at 66-67 (Gross, J., specially concurring). Judge Farmer dissented, holding that *Doe* was inapplicable to the facts of this case. *Id.* at 67-68. This Court thereafter granted review.

SUMMARY OF ARGUMENT

The Fourth District properly applied the long-standing law of this State, embodied in *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993), holding that corporate employees should be protected from the unfairness of being subjected to Florida jurisdiction based on alleged negligent acts performed on behalf of their employers. Florida's long-arm statute only confers jurisdiction for acts "personally" committed in Florida, and a negligent act that is committed solely in one's capacity as a corporate employee is not committed "personally."

This Court should reject, as the Fourth District did below, Petitioners' contention that the corporate shield doctrine does not apply to the individual defendants because they were physically present in Florida during the commission of their alleged negligent training, supervision and retention of a company truck driver. *Doe* did not make such a distinction, and the district courts accordingly have applied the corporate shield doctrine in other instances when the tort was alleged to have occurred in Florida.

The corporate shield doctrine is especially pertinent where, like here, the forum is wholly incidental to the injury. Unlike the hypothetical car driver that Petitioners conjure up, the alleged torts of negligent training, supervision and retention could have been committed anywhere, including over the phone, or on the Internet. The fact that the individual defendants' alleged torts, which are

wholly dependent on the driver's negligence, happened to occur in Florida should not confer personal jurisdiction over them.

Moreover, the torts alleged in this case are purely corporate torts that could not have been committed in the absence of an employer/employee relationship. In contrast, a driver's duty to the public is identical regardless of whether he or she is driving on behalf of an employer or "personally."

In any event, where application of the doctrine would be unfair, this Court and other jurisdictions have recognized exceptions that do not apply here, such as for intentional torts and corporate employees motivated by purely personal interests, or where the corporation was merely a shell for its owner. In contrast, here the torts alleged are unintentional, the individual defendants are mid-level managers who were simply doing their jobs and are not alleged to have been motivated by personal interests, and the Petitioners have asserted personal jurisdiction over the corporation – the so-called deep pocket.

Respondents should not be required to come to Florida to defend themselves against claims of negligent training, supervision and retention where the alleged torts were committed solely in their capacity as Airgas Carbonic employees. This Court should approve and affirm the decision of the Fourth District Court of Appeal.

STANDARD OF REVIEW

The standard of review for a trial court's denial of a motion to dismiss for lack of personal jurisdiction is de novo. *See Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368, 371 (Fla. 4th DCA 2007).

ARGUMENT

I. THE CORPORATE SHIELD DOCTRINE PROHIBITS THE EXERCISE OF PERSONAL JURISDICTION OVER RESPONDENTS.

The Fourth District majority properly applied the long-standing law of this Court in holding that the corporate shield doctrine[1] protects individuals whose purported jurisdictional contacts with the forum state arose solely at the behest of their employers. As this Court held in *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993), and should continue to hold, the corporate shield doctrine protects corporate agents from the unfairness of being subjected to Florida jurisdiction solely for acts performed while conducting business on behalf of their employers.

A. Florida Law Has Long Recognized the Corporate Shield Doctrine.

This Court, in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989), established a two-step inquiry for determining long-arm jurisdiction over a nonresident defendant. A court must first establish whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long-

[1] Also known as the "fiduciary shield doctrine."

arm statute, section 48.193, Fla. Stat. *Id.* at 502. A court then must determine whether sufficient minimum contacts exist between Florida and the defendant to satisfy the Fourteenth Amendment's due process requirements. *Id.* at 500.

Florida's long-arm statute provides in pertinent part:

> (1) Any person, whether or not a citizen or resident of this state, who **personally** or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself … to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
>
> (b) Committing a tortious act within this state.
>
> . . .
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or
>
> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

§ 48.193, Fla. Stat. (emphasis added).

In *Doe v. Thompson*, *supra*, this Court was called upon to determine the breadth of the long-arm statute in a situation where a nonresident defendant is sued

for an act that was committed in the scope of the defendant's employment.[2] In *Doe*, the defendant, a Texas resident, was the president and CEO of a corporation that owned and operated a Florida convenience store in which the plaintiff was sexually assaulted while working. The plaintiff alleged that the defendant was grossly negligent for failing to take adequate security measures to make the store reasonably safe, and contended that Florida's long-arm statute conferred personal jurisdiction over the individual defendant.

This Court rejected the argument that the CEO could be subject to personal jurisdiction in Florida "by virtue of his position" with the company. *Id.* at 1006. In so holding, this Court recognized that Florida's long-arm statute ***requires*** that an individual "personally" commit any of the acts enumerated in the statute, and held that an employee acting on behalf of his corporation is not acting "personally." This Court explained:

> "Personally" means: "In person; without the intervention of another." The American Heritage Dictionary 926 (2d college ed. 1985).
>
> * * *

[2] Prior to *Doe*, some of Florida's district courts had already established the corporate shield doctrine as the prevailing law. *See, e.g., Excell Handbag Co., Inc. v. Edison Bros. Stores, Inc.*, 428 So. 2d 348, 350 (Fla. 3d DCA 1983) ("While a corporation itself may be subject to jurisdiction when it transacts business through its agents operating in the forum state, unless those agents transact business on their own account in the state, as opposed to engaging in business as representatives of the corporation, they are not engaged in business so as to be individually subject to the state's long-arm statute.").

> Thompson's allegedly negligent actions are not alleged to have been taken outside his duties as Southland's president and chief executive officer; rather, Doe alleges that he was acting within the scope of his employment. The distinction between a corporate officer acting on one's own and a corporate officer acting on behalf of one's corporation is set out clearly in *Bloom v. A.H. Pond Co.*, 519 F.Supp. 1162, 1170-71 (S.D. Fla. 1981) (cited with approval in *Kennedy v. Reed*, 533 So. 2d 1200, 1202 (Fla. 2d DCA 1988)). This distinction is recognized in many other jurisdictions; it is referred to as the "corporate shield" or "fiduciary shield" doctrine. *See Estabrook v. Wetmore*, 129 N.H. 520, 529 A.2d 956 (1987) and cases cited there (acts of corporate employee performed in corporate capacity do not form the basis for jurisdiction over corporate employee in individual capacity). "The rationale of the doctrine is 'the notion that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer. *Id.* at 959 (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981)). We approve this distinction.

Id. at 1005-06 (emphasis added, footnote omitted).

In the two decades since *Doe*, Florida's district courts have consistently and repeatedly applied the corporate shield doctrine to instances where an employee was acting solely on behalf of the corporation in the commission of an alleged tort. *See, e.g., Eller v. Allen*, 623 So. 2d 545 (Fla. 5th DCA 1993) (corporate shield doctrine prevented exercise of personal jurisdiction over nonresident chairman of board and president of corporation, where there were no allegations that defendants acted in their personal capacity in Florida); *Carter v. Estate of Rambo*, 925 So. 2d 353 (Fla. 5th DCA 2006) (corporate shield doctrine prevented exercise of personal jurisdiction over nonresident managing member of LLC that operated nursing

home where there was no evidence that defendant personally managed home); *Clement v. Lipson*, 999 So. 2d 1072 (Fla. 5th DCA 2008) (corporate shield doctrine prevented exercise of personal jurisdiction over nonresident managers of LLC where evidence indicated that defendants were acting as managers and not personally); *Frohnhoefer v. Pontin*, 958 So. 2d 420, 422 (Fla. 3d DCA 2007) (applying corporate shield doctrine: "All of the acts alleged against the Frohnhoefers and Stein in the third amended complaint were acts committed by them in their corporate capacities on behalf of the Sea Tow company.").[3]

B. The Instant Case Does Not Fit Under Any Exception to the Corporate Shield Doctrine, and the Equities of the Case do not Compel a Different Result.

The thrust of Plaintiffs' argument in the instant proceeding is that *Doe* does not apply because, in contrast to the CEO in *Doe* and all other decisions in Florida, the individual defendants physically came to Florida to commit their alleged torts of negligent training, supervision and retention. (IB pp. 6-9). They contend that

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[3] *See also, e.g., Snibbe v. Napoleonic Soc. of Am., Inc.*, 682 So. 2d 568 (Fla. 2d DCA 1996); *Radcliff v. Gyves*, 902 So. 2d 968 (Fla. 4th DCA 2005); *Tramel v. D'Angel Bedding Corp.*, 917 So. 2d 982 (Fla. 3d DCA 2005); *McDougal v. Mizrahi*, 636 So. 2d 138 (Fla. 3d DCA 1994); *Two Worlds United v. Zylstra*, 46 So. 3d 1175 (Fla. 2d DCA 2010); *Rensin v. Office of Atty. Gen.*, 18 So. 3d 572 (Fla. 1st DCA 2009); *Clement v. Lipson*, 999 So. 2d 1072 (Fla. 5th DCA 2008); *Sims v. O'Leary*, 933 So. 2d 1214 (Fla. 4th DCA 2006); *Office of Atty. Gen. v. Wyndham Int'l, Inc.*, 869 So. 2d 592 (Fla. 1st DCA 2004); *Stomar, Inc. v. Lucky Seven Riverboat Co.*, L.L.C., 821 So. 2d 1183 (Fla. 4th DCA 2002); *Berne v. Beznos*, 819 So. 2d 235 (Fla. 3d DCA 2002); *Schnetzler v. Cross*, 688 So. 2d 445 (Fla. 1st DCA 1997).

the Fourth District below "incorrectly interpreted the decision in Doe v. Thompson to apply to the facts of this case where the Airgas Carbonic employees are alleged to have committed torts while they were physically present in Florida." (IB p. 9).

Plaintiffs misconstrue *Doe*. Nowhere in *Doe* did this Court hold or suggest that the corporate shield doctrine rests on the lack of a defendant's physical presence in Florida. Rather, the Court specifically described the corporate shield doctrine as being based on "[t]he distinction between a corporate officer acting on one's own and a corporate officer acting on behalf of one's corporation." It held that the CEO did not "personally" – "without the intervention of another" – commit a tort in Florida. It set forth as its rationale that "it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer."

Thus, *Doe* makes no distinction between the physical presence of a corporate agent within or outside of Florida. The language of *Doe* instructs that even if the *Doe* CEO had made a corporate security decision while physically present in Florida, he still would not have been deemed to have acted "personally" under the long-arm statute.

Plaintiffs similarly miss the point when they contend that "the corporate shield doctrine merely recognizes that the long-arm statute cannot be used to gain

personal jurisdiction over someone who does not personally commit a tort in this state or take some action to cause injury in this state." (IB pp. 10-11). If that were the case, the concept of a corporate shield doctrine would be completely illusory, as it would simply parrot the requirements of the long-arm statute.

Moreover, and contrary to Plaintiffs' contentions, the district courts have expressly recognized that the existing decisional law holds that a corporate agent's physical presence in Florida is **not** relevant to the analysis set forth in *Doe*. In *Oesterle v. Farish*, 887 So. 2d 412 (Fla. 4th DCA 2004), the Fourth District held that the sole inquiry as to whether to apply the corporate shield doctrine was whether the evidence sufficiently supported the allegation that corporate agent had committed an intentional tort in Florida. The Fourth District subsequently stated in *Sims v. O'Leary*, 933 So. 2d 1214 (Fla. 4th DCA 2006), that "[t]his case is distinguishable from *Oesterle v. Farish*, 887 So. 2d 412 (Fla. 4th DCA 2004), because in *Oesterle* the complaint alleged that the managing agent of a Delaware limited liability company had, at plaintiff's request, come to Florida and 'personally guaranteed' that certain conditions pertinent to plaintiff's contract with the company would be carried out." *Id.* at 1215 (emphasis added).

The Second District has similarly held that a defendant's physical presence in Florida is not relevant to the *Doe* analysis. *See Snibbe v. Napoleonic Soc. of Am., Inc.*, 682 So. 2d 568 (Fla. 2d DCA 1996). In *Snibbe*, board members of an

organization were sued in Florida for injunctive relief. The trial court ruled that it could exercise personal jurisdiction over four nonresident defendants "because the nonresidents were personally in Florida and they were conducting business for a Florida corporation." *Id.* at 569. The Second District rejected the trial court's finding that those defendants were "personally" in Florida under the long-arm statute, holding: "Because the nonresidents were acting in their corporate capacity, section 48.193 is not applicable and the court did not have personal jurisdiction over them. *See Doe*, 620 So. 2d at 1006 (nonresident president of corporation not subject to personal jurisdiction under section 48.193 when president's actions were within scope of his employment)." *Id.* at 569-70.

Plaintiffs' contention that *Snibbe* is distinguishable because the defendants were not alleged to have committed a tort in Florida (IB p. 11) is misplaced. The board members were not alleged to have committed a tort at all, but were alleged to have engaged in the conduct subject to injunctive relief in Florida. As the Second District held, because their Florida conduct was on behalf of the corporation, it was not "personal" under the long-arm statute and *Doe*.

Other decisions, including others that Plaintiffs try to distinguish, similarly hold that a defendant's physical presence in Florida is not dispositive of the corporate shield analysis. *See Radcliff v. Gyves*, 902 So. 2d 968, 972 n.4 (Fla. 4th DCA 2005) ("Any activity in one's capacity as a corporate officer or director is

exempted [from personal jurisdiction]."); *Tramel v. D'Angel Bedding Corp.*, 917 So. 2d 982, 984 (Fla. 3d DCA 2005) ("Tramel's two business trips to the State and communication with Florida businesses were conducted in his corporate capacity. Therefore, personal jurisdiction cannot be asserted against him."); *McDougal v. Mizrahi*, 636 So. 2d 138, 138 (Fla. 3d DCA 1994) ("In the absence of sufficient allegations in the complaint that the non-resident appellants did business or committed a tort in Florida as individuals, as opposed to their conduct as officers of a corporation, there is no basis for asserting Florida jurisdiction over them pursuant to any applicable statute.") (emphasis added).

In fact, Plaintiffs fail to identify a single Florida decision that expressly holds that *Doe* does not apply where the corporate employee was compelled by his employment to be physically present in Florida. In *Silver v. Levinson*, 648 So. 2d 240 (Fla. 4th DCA 1995), cited by Plaintiffs, the sole inquiry was "whether defendant committed an intentional tort in Florida." *Id.* at 241. Because *Doe* expressly recognized an "intentional tort" exception to the corporate shield doctrine, the additional discussion of *Doe* in *Silver* was *dicta*.

Plaintiffs overstate the effect of *Doe* by invoking the image of a car accident involving a corporate agent and the alleged inability to effect process over the agent. (IB pp. 9-10). Assuming the hypothetical agent was even in the course and scope of his employment while driving to the airport, a car accident is not in the

nature of a "corporate" tort for *which the place of the forum is incidental to the injury*. For instance, the individual defendants in this case are only indirectly connected to the accident. They did not have to be physically present in Florida to commit the alleged torts of negligent training, supervision or retention. The same alleged torts could have been committed in Georgia or Texas, or over the phone, or on the Internet, and Dickey would have allegedly been involved in the same accident. In contrast, Plaintiffs' hypothetical driver *had to drive his car in Florida* in order to strike and kill the pedestrian.

Plaintiffs' hypothetical also highlights an important distinction between this case and those involving non-"corporate" torts such as driving. Even if a corporate agent is in the course and scope of his employment while driving a car on company business, the tort of getting into an accident is not one encompassing his or her employment duties. A driver's duty to the public is identical regardless of whether he or she is driving on behalf of an employer or "personally." In contrast, the torts of negligent training, supervision and retention cannot be separated from an individual's employment, or committed "individually." Take away the employer, and there is no tort.

Thus, although the question of whether the agent in Plaintiffs' hypothetical can be haled into a Florida court can be answered on another day, it certainly has no application to the instant case, where the alleged acts and omissions of the

individual defendants cannot be separated from their employment with Airgas Carbonic.

Moreover, Plaintiffs' example ignores the inequities that can arise in the absence of the corporate shield doctrine. The individual defendants in this case are or were middle managers who work, or worked, for a national corporation. They did not choose where Airgas Carbonic built its plants, solicited customers, employed truck drivers, entered into contracts, and otherwise physically established its presence in various jurisdictions. Rather, the individual defendants were compelled by Airgas Carbonic to visit locations of the corporation's choosing.

As analogy, if an employer instructs an agent to visit its offices for training seminars in twenty-five different states, under Plaintiffs' analysis this individual would be subject to personal jurisdiction for alleged corporate acts of negligence in all twenty-five states, as well as his home state. If he is no longer employed by the corporation, or if the corporation no longer exists, he could end up having to incur his own defense and travel costs. Although it is certainly fair and proper to subject the corporation to personal jurisdiction in all of those states, it is not fair to subject individuals who were compelled to visit those jurisdictions for non-personal reasons to personal jurisdiction.

Other jurisdictions have expressly recognized that the corporate shield doctrine should be applied to corporate employees who do not have the discretion

to determine the jurisdictions to which they should direct their conduct. *See Schiller-Pfeiffer, Inc. v. Country Home Prods., Inc.*, 2004 WL 2755585, *5-6 (E.D.Pa. Dec. 1, 2004) (explaining that courts in that district analyze "the officer's role in the corporate structure" in determining whether to apply corporate shield doctrine, and will decline to apply doctrine where individual defendants "play major roles" in the corporation); *In re Vitamins Antitrust Litig.*, 120 F.Supp.2d 58, 70-71 (D.C. 2000) (limitations to corporate shield doctrine include situations "where the defendant was a director or officer who had discretion regarding whether the contacts occurred."). *See also* 3A FLETCHER CYC. CORP. § 1296.20 ("Additional limitations to the protection of the fiduciary shield doctrine include … where the defendant is a director or officer who has discretion regarding whether the contacts occur.").

Plaintiffs' attempts to show the purported unfairness of the corporate shield doctrine fall flat for additional reasons. Regardless of whether an agent of the corporation could be haled into a Florida court, jurisdiction will always attach to the corporation for activity conducted in Florida. Thus, just as in the instant case, Plaintiff is always permitted to sue the "deep pocket" in Florida.

Where the corporation is <u>not</u> a deep pocket because it is simply a mere shell for its owner, other jurisdictions have held that the corporate shield doctrine will not be applied to protect the owner from personal jurisdiction. *See Marine*

Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2d Cir. 1981) ("If the corporation is a mere shell for its owner, the employee-owner's actions may be viewed as having been taken simply in his own interest. In such circumstances it will not advance notions of fairness to allow the owner of the corporation to invoke the protections of the fiduciary shield."). *See also* FLETCHER, *supra* (citing cases: "The fiduciary shield doctrine will not prevent jurisdiction over an individual defendant where the corporation is the individual's alter ego.").

Other recognized exceptions to the doctrine similarly ensure the fairness of its application. For instance, the *Doe* Court and Florida district courts have consistently held that a corporate officer will be subject to Florida's long-arm statute when he or she has engaged in an intentional tort such as fraud. *Doe*, 620 So. 2d at 1006 n.1 ("A corporate officer committing fraud or other intentional misconduct can be subject to personal jurisdiction…"). *See also Oesterle*, 887 So. 2d at 415 (Fla. 4th DCA 2004); *Office of Atty. Gen. v. Wyndham Int'l, Inc.*, 869 So. 2d 592 (Fla. 1st DCA 2004).

In fact, many of the cases cited by Plaintiff on pages 13 through 15 as examples of courts not applying the corporate shield doctrine involved intentional torts and are thus inapplicable. *See, e.g., Delong Equip. Co. v. Wash. Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988) (involving claims for conspiracy to restrain trade and other antitrust allegations); *Columbia Briargate Co. v. First*

National Bank in Dallas, 713 F.2d 1052 (4th Cir. 1983) (involving claims of fraudulent misrepresentation); *Schiller-Pfeiffer*, 2004 WL 2755585 at *3 (involving claims of fraudulent misrepresentation and fraudulent concealment).

Furthermore, there is nothing in the holding of *Doe* to support Judge Farmer's fear, as stated in the dissent below, that the majority's decision would "pardon corporate agents who exceed authority or act in some way the corporation could disown." *Hurt v. Kitroser*, 50 So. 3d 62, 68 (Fla. 4th DCA 2010) (Farmer, J., dissenting). A defendant generally will not be protected by the corporate shield doctrine where he has purposely avails himself of the forum or was motivated by personal interests. *See, e.g.*, *Marine Midland*, 664 F.2d at 903 ("[W]hen a corporate employee acts in his own personal interest rather than in the best interest of his corporation, he is not protected by the fiduciary shield since it is equitable that his self-interested actions be considered his own and be treated as a predicate for the exercise of jurisdiction over him personally."); *Bloom v. A.H. Pond Co., Inc.*, 519 F.Supp. 1162, 1171 (S.D.Fla. 1981) ("Nowhere does the plaintiff allege that the individual defendants were engaged in a business venture on their own behalf, as opposed to engaging in business on behalf of their corporate employer. Accordingly, the Court concludes that it has no jurisdiction over the individual defendants…pursuant to the Florida long-arm statute."). *See also* FLETCHER, *supra* ("Additional limitations to the protection of the fiduciary shield doctrine include

where the defendant is motivated solely or in part by personal interests, as opposed to interests of the corporation….").

A corporate employee's act of simply doing his job to please his employer is not the type of "personal interest" that would invoke an exception to the corporate shield doctrine. *See Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc.*, 1995 WL 109322, *1 (N.D.Ill. 1995) ("Orix suggests that because Metts was primarily responsible for the Gallo account at Taylor, he had a personal interest in facilitating the Orix loan to Gallo. The court doubts that this would constitute the kind of personal benefit that Orix has to show in order to overcome the fiduciary shield defense. Every employee who acts in his employer's interest could be said to derive a personal benefit from satisfying the employer, if only in terms of job security. That should not deprive the employee of the fiduciary shield defense."). *Compare In re Vitamins Anitrust Litig.*, 120 F.Supp.2d at 70 n.6 (corporate shield doctrine did not apply in Sherman Act proceeding where employee was president of division of company that made "considerable sums" selling vitamins at inflated prices, and as a company "superior" personally benefited from the misconduct).

The federal and out-of-state cases cited by Plaintiffs in support of their arguments are inapplicable for an additional reason. Many courts have recognized that the corporate shield doctrine is not a constitutional principle, "but is rather a doctrine based on judicial inference as to the intended scope of the long-arm

statute." *Marine Midland*, 664 F.2d at 902 n.3. Thus, in jurisdictions that have long-arm statutes that are coextensive with the Fourteenth Amendment, application of the corporate shield doctrine is more limited. For instance, in *Columbia Briargate*, 713 F.2d 1052, cited by Plaintiffs (IB p. 14), the Fourth Circuit explained that it would not broadly apply the corporate shield doctrine "under the forum long-arm statute which is as broad as due process itself solely on constitutional due process grounds." *Id.* at 1060.

In distinguishing the New York cases upon which the corporate shield doctrine originated, the *Columbia Briargate* court recognized that if the concept was one solely of statutory construction as opposed to due process, the New York courts' reasoning "is without application in this case where service was had under the South Carolina long-arm statute, which, unlike the New York long-arm statute, extends the amenability of a non-resident to jurisdiction 'to the outer perimeter allowed by due process'." *Id.* at 1057.

The *Columbia Briargate* court rejected the notion that the corporate shield doctrine was constitutional in nature, and concluded that "when a non-resident corporate agent is sued for a tort committed by him in his corporate capacity in the forum state in which service is made upon him" outside of the forum state, "he is properly subject to the jurisdiction of the forum court, *provided the long-arm statute of the forum state is co-extensive with the full reach of due process*." *Id.* at

1064 (emphasis in original). The same reasoning applied in the other decisions cited by Plaintiffs. *See Delong Equip.*, 840 F.2d at 849 n.7 (applying Georgia law and stating: "It is well established in the Eleventh Circuit and among the Georgia state courts that the Georgia long-arm statute is to be interpreted to the maximum limits of due process."); *Schiller-Pfeiffer*, 2004 WL 2755585 at *3 ("Under Pennsylvania's long-arm statute, Pennsylvania courts may exercise jurisdiction 'the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States. … The reach of Pennsylvania's long-arm statute is therefore coextensive with the Due Process Clause of the Fourteenth Amendment.").

In contrast to *Columbia Briargate*, *Delong*, and *Schiller-Pfeiffer*, the Florida long-arm statute is not coextensive with Fourteenth Amendment due process. In *Bloom v. A.H. Pond Co., Inc.*, 519 F.Supp. 1162 (S.D.Fla. 1981), a decision cited in *Doe*, the Southern District of Florida explained that "it has been recognized by state and federal courts that the current Florida long-arm statutes require more activities or contacts with Florida than are required by constitutional due process considerations." *Id.* at 1167. *See also Youngblood v. Citrus Assocs. of N.Y. Cotton Exchange, Inc.*, 276 So. 2d 505, 508 (Fla. 4th DCA 1973) ("The Florida long-arm statutes are, generally speaking, of the first type; i.e., they require more activities

or contacts to sustain service of process than are currently required by the decisions of the United States Supreme Court."); *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 241 (5th Cir. 1981) ("Florida state courts have repeatedly held that the Florida statute requires more activities or contacts to sustain personal jurisdiction than demanded by the Constitution."); *Dublin Co. v. Peninsular Supply Co.*, 309 So. 2d 207, 210 (Fla. 4th DCA 1975) ("[Section 48.181 and 48.193] are drawn so that compliance with the requirements thereunder will more than satisfy the due process requirement of minimum contacts enunciated in International Shoe Co. v. State of Washington….").

Plaintiffs also misplace reliance on an unpublished 2009 decision from the United States Eleventh Circuit, *Lane v. XYZ Venture Partners, L.L.C.*, 322 Fed.Appx. 675 (11th Cir. 2009). In *Lane*, the plaintiff relied on the Eleventh Circuit's decision in *Delong* for the proposition that personal jurisdiction should be extended to the same extent as liability. *Id.* at 678-79. The Eleventh Circuit rejected this argument based on language in *Delong* limiting its holding to situations where the defendant was physically present in the forum when he participated in the tort. *Id.* at 679.

What *Lane* fails to mention, however, is that *Delong* did not involve Florida law or Florida's long-arm statute. As explained above, *Delong* was analyzing Georgia's long-arm statute, which, unlike Florida's, has been interpreted to be

coextensive with Fourteenth Amendment due process. *Delong*, 840 F.2d at 849 n.7. In stating the exception that the defendant "was present in the forum when he participated in the tort," the *Delong* court specifically relied on the United States Fourth Circuit's decision in *Columbia Briargate*, which held that its analysis applied "*provided the long-arm statute of the forum state is coextensive with the full reach of due process*." *Id.* at 852, *citing Columbia Briargate*, 713 F.2d at 1064-65 (emphasis supplied in *Delong*).

Because Florida's long-arm statute is not coextensive with Fourteenth Amendment due process, its long-arm statute is subject to a different analysis. *Doe*, and not Georgia law, applies to the instant case, and holds that the corporate shield doctrine applies to any alleged tortious activity conducted on behalf of the corporation, regardless of where the tortfeasor was physically present.

Accordingly, the cases cited by Plaintiff have no application to Florida's more restrictive long-arm statute.

Finally, Plaintiffs suggest that this Court should recede from the version of the corporate shield doctrine adopted in *Doe*. (IB pp. 15-16). First, regardless of the viability of the cases relied on by the *Doe* Court, the corporate shield doctrine is still alive and well in American jurisprudence as a principle of fundamental fairness. *See, e.g., M-R Logistics, LLC v. Riverside Rail, LLC*, 537 F.Supp.2d 269, 279-80 (D. Mass 2008) (applying corporate shield doctrine under Massachusetts

law: "[I]t is axiomatic that 'jurisdiction over the individual officers of a corporation may not be based on jurisdiction over the corporation'."); *Parker v. Learn the Skills Corp.*, 530 F.Supp.2d 661, 673-74 (D.Del. 2008) (recognizing and applying corporate shield doctrine under Delaware law); *MMK Group, LLC v. Sheshells Co., LLC*, 591 F.Supp.2d 944, 953-54 (N.D. Ohio 2008) (recognizing continued application of corporate shield doctrine under Ohio law); *Femal v. Square D Co.*, 903 N.E.2d 32, 35-38 (Ill. Ct. App. 2009) (holding that Illinois recognizes corporate shield doctrine); *Smith v. Cutler*, 504 F.Supp.2d 1162, 1169-70 (D.N.M. 2007) (explaining that New Mexico recognizes corporate shield doctrine); *Walz v. Martinez*, 307 S.W.3d 374, 382 (Tex. Ct. App. 2009) (Texas recognizes corporate shield doctrine except where corporation is alter ego for individual). *Compare Calder v. Jones*, 465 U.S. 783 (1984) (neither expressly adopting nor rejecting corporate shield doctrine, but holding that whether personal jurisdiction can be imposed over nonresident individual employee involves fact-specific inquiry into the nature of the allegations).[4]

Second, even if this Court were to determine that the version of the corporate shield doctrine adopted in *Doe* is too rigid, this should not change the

[4] *See also Lowry v. Owens*, 621 So. 2d 1262, 1267 (Ala. 1993) (Alabama law); *State v. Internal Energy Mgmt. Corp.*, 324 N.W.2d 707, 711-12 (Iowa 1982) (Iowa law); *Hoag v. Sweetwater Int'l*, 857 F.Supp. 1420, 1426-27 (D.Nev. 1994) (Nevada law).

results of the instant case. The individual defendants are not and were not high-level employees of the corporation who were capable of exercising discretion as to where they would direct their conduct, but rather were middle management employees acting at the direction of their employer. They have not been accused of intentional misconduct, but rather the indirect torts of negligent training, supervision and retention of another employee. They are not alleged to have purposefully directed their conduct at Florida, but are being tied to Florida by incidental visits to a Bartow plant. They are not alleged to have been acting in their own interests in committing the alleged torts, but rather were furthering a purely corporate interest by allegedly training, supervising and retaining Dickey.

Thus, under these facts, it would be entirely equitable to apply either the *Doe* version of the corporate shield doctrine, or a less rigid version adopted by other jurisdictions, and hold that it protects the individual defendants from being haled into court in Florida.

As the Fourth District majority properly held, the corporate shield doctrine embodies a longstanding equitable principle that protects corporate agents from the unfairness that can result if they can be haled into jurisdictions with which their only relevant contact was on behalf of the corporation. The individual defendants submit that this Court continue to apply the corporate shield doctrine, and at the very least to the facts of the instant case.

CONCLUSION

WHEREFORE, Respondents, Robert Hurt, Michael Weis, Perry Brock, Randy Moore, and Kenneth Brock, respectfully request that the Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This brief complies with the font requirements of Rule 9.210. It is typed in Times New Roman 14 point type.

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