IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, 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.
_____/

BRIEF OF PETITIONERS ON THE MERITS

On certified question from the Fourth District Court of Appeal

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PREFACE

The parties will be referred to by their proper names or as they appear in this Court. Petitioners will reference the individual tabs (1–15) as shown in the Appendix to Initial Brief and the documents' individual page number.

The Record-on-Appeal transmitted from the Fourth District Court of Appeal to this Court contains a total of 415 pages. The original record at the Fourth District Court and Petitioners' record contain only 407 pages. Eight additional pages were sent to this Court. The discrepancy appears to be in Volume One, number two, Appendix to Initial Brief.

(TAB) – Appendix to Initial Brief in the Fourth District Record

STATEMENT OF THE CASE AND FACTS

Because this petition is from an Order denying a Motion to Dismiss, the facts below are taken from the allegations of the Third Amended Complaint.

This appeal arises out of a truck/car collision south of Lake Okeechobee on Highway 27. Dale Dickey ("Dickey"), a driver for Airgas Carbonic, Inc. ("Airgas"), was driving south on Highway 27, which had been closed to traffic by the Palm Beach County Sheriff's Office ("Sheriff") because of thick fog in the area (TAB 1:6-7, ¶¶22-25). Instead of respecting the road closed barriers set up by the Sheriff, Dickey found a way around the barricades and drove south on Highway 27 (TAB 1:131, ¶380). Mrs. Castro Lara was stopped on Highway 27 because of the fog. Dickey drove the Airgas truck into Mrs. Castro Lara's vehicle and killed her (TAB 1:7, ¶ 25).

The estate and others filed suit against Airgas and Dickey, but added causes of action against the Airgas employees directly after discovery revealed that the employees who supervised Dickey knew or should have known that Dickey was a careless and dangerous driver.

The Third Amended Complaint alleges that Robert Hurt ("Hurt") personally committed a tort of negligent training, supervision and retention in Florida by allowing Dickey to continue to drive an Airgas truck after receiving information that Dickey was unfit to drive because of his penchant for speeding and, especially, driving too fast

for conditions (TAB 1:8-18). Plaintiff also alleged that Hurt knew Dickey was involved in collisions in 2003 and 2004, received citations for driving too fast in 2005, for avoiding a traffic control device in 2004, and was witnessed driving too fast in poor visibility conditions (TAB 1:79, ¶253). It is also alleged that Hurt reviewed performance evaluations stating that Dickey was observed driving at excessive speeds (TAB 1:79, ¶253, 1:80, ¶254). Hurt is alleged to have direct supervision of Dickey in Florida at the Airgas Bartow plant, and that he signed Dickey's 2005 Performance Review (TAB 1:9, ¶¶31, 33). These acts were all alleged to have been performed at the Bartow plant (TAB 1:9, ¶33). Hurt is not alleged to have been involved superficially in the training and supervision of Dickey from his office far away. He is alleged to have committed a tort in Florida.

The allegations as to Randy Moore ("Moore") and Perry Brock ("Brock") are similar. They are alleged to have been personally active in the tort of negligent training and supervision of Dickey at the Bartow terminal (TAB 1:23-24, ¶¶82, 84, 1:28-29, ¶¶97, 99). Moore is alleged to have direct control and responsibility over Dickey at the Bartow plant (TAB 1:33, ¶115).

Michael Weis ("Weis") is alleged to have directly negligently trained and supervised Dickey as he personally signed the 2001 Performance Review which acknowledged Dickey's unsuitability as a truck driver (TAB1:38, ¶130, 1:39, ¶132,

1:41, ¶137). Weis is alleged to be the manager of the Bartow terminal facility (TAB 1:44, ¶148), not a distant employee who simply issued orders for others to carry out. The same allegations are made as to Kenneth Beck (TAB 1:49-50, ¶¶163, 165, 1:54-55, ¶¶181, 183).

The Airgas employees all filed Motions to Dismiss and affidavits in support of the motions (TAB 2-11). The affidavits all disavowed any contacts with the State of Florida through the residency, ownership of property or by holding a Florida professional license (TAB 7-11). The affidavits did not factually dispute the allegations of the Third Amended Complaint that the Airgas employees performed the negligent acts alleged in the Third Amended Complaint while in Florida (TAB 7-11). The Motions to Dismiss raised only a legal argument, that pursuant to the corporate shield doctrine, the Airgas employees were not subject to personal jurisdiction in Florida because they committed the tortious acts while on corporate business for Airgas (TAB 2-6).

The trial court denied the Motions to Dismiss (TAB 14), and the Airgas employees appealed (TAB 15). The Fourth District Court of Appeal held that the corporate shield doctrine prevented a Florida court from having personal jurisdiction over the non-resident Airgas employees because they committed torts while on business for Airgas. In a concurring opinion, Judge Gross agreed with the dissent

(Judge Farmer) that this Court's decision which recognized the corporate shield doctrine, Doe v. Thompson, 620 So.2d 1004 (Fla. 1993), did not deal with the fact pattern in this case. Although he agreed with the majority (Judge Stevenson) that the decision in Doe required reversal, he wrote that other courts around the country have "departed" from the version of the corporate shield doctrine adopted by this Court in Doe. The majority certified the question to this Court.

In the dissent, Judge Farmer argued that the plain wording of the long-arm statute, § 48.193(1)(b), Fla. Stat., giving the court personal jurisdiction over any person who commits a tort in Florida, shows that the corporate shield doctrine does not apply to the claims against the Airgas employees. Like Judge Gross, Judge Farmer recognized that the facts in Doe were very different from the facts in this case. But unlike Judge Gross, Judge Farmer believed the factual difference prevented the application of Doe and that application of Doe to the facts of this case was, in essence, an extension of the corporate shield doctrine beyond the holding in Doe.

SUMMARY OF ARGUMENT

The Fourth District's decision incorrectly applied the corporate shield doctrine, and this Court's decision in Doe v. Thompson, to conflict with the plain wording of § 48.193(1)(b), Fla. Stat. The corporate shield doctrine only prevents Florida long-arm jurisdiction over a non-resident who performs acts on behalf of an employer outside of Florida which cause damage to someone inside Florida. An employee acting in his employment capacity outside the state cannot be fairly said to have committed a tort "personally" in the state.

By contrast, the Airgas employees in this case came to Florida on behalf of their employer and personally committed a tort while in the state. Because the employees were in the state when they personally committed the tort, they are no different than any other person who commits a tort in Florida. To hold otherwise would prevent Florida courts from adjudicating the claims of Florida citizens who are injured in Florida by a person who has undoubtedly committed a tort in Florida. The corporate shield doctrine does not apply.

This Court should answer the certified question in the negative.

ARGUMENT

CERTIFIED QUESTION

> WHERE AN INDIVIDUAL, NON-RESIDENT DEFENDANT COMMITS NEGLIGENT ACTS IN FLORIDA ON BEHALF OF HIS CORPORATE EMPLOYER, DOES THE CORPORATE SHIELD DOCTRINE OPERATE AS A BAR TO PERSONAL JURISDICTION IN FLORIDA OVER THE INDIVIDUAL DEFENDANT?

In this Petition, this Court must consider the corporate shield doctrine in a factual setting outside that found in Doe v. Thompson, 620 So.2d 1004, 1005-06 (Fla. 1993). Stated briefly, the Airgas employees argued that they were not subject to personal jurisdiction, even though they committed a tort in Florida, because they were acting in the course and scope of their employment with Airgas when they committed the tort.[1] The cause of action alleged against the Defendants is not for vicarious liability, however, nor do Plaintiffs allege the Airgas employees made a decision or performed an act out-of-state which was carried out by some other employee in Florida

[1] There is no dispute that Florida law recognizes a cause of action against both the agent and the principal even if the negligence is within the course and scope of the employee's employment. White v. Wal-Mart Stores, Inc., 918 So.2d 357, 358 (Fla. 1st DCA 2005); Petrik v. New Hampshire Ins. Co., 379 So.2d 1287, 1291 (Fla. 1st DCA 1979), citing Greenberg v. Post, 155 Fla. 135, 19 So.2d 714 (1944); McElveen v. Peeler, 544 So.2d 270, 271-72 (Fla. 1st DCA 1989); White-Wilson Med. Ctr. v. Dayta Consultants, Inc., 486 So.2d 659, 661 (Fla. 1st DCA 1986). The right to bring the claim becomes illusory, however, if the corporate shield doctrine is used to protect the employee who commits the tort from suit in Florida.

which caused Mrs. Castro Lara's death. The Third Amended Complaint alleges that Defendants personally came to Florida and committed a tort which caused Mrs. Castro Lara's death.

By contrast, in Doe v. Thompson, 620 So.2d 1004, 1005-06 (Fla. 1993), no tortious act was alleged to have been performed by Thompson in Florida. Thompson was the president and CEO of Southland Corporation (7-11 convenience stores) who was sued by an employee because she was sexually assaulted while working alone in one of the company stores. She alleged that Thompson was grossly negligent for having inadequate security at the store. The claim was not based on any tort committed by Thompson in Florida.

Thompson filed an affidavit which stated that he did not personally do anything in Florida. His affidavit stated that he did not own a business in Florida and did not commit a tortious act in Florida.[2] This Court reviewed the allegations of the claim to determine whether it stated a basis for long-arm jurisdiction over Thompson pursuant

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[2] Although the Airgas employees' affidavits in this case stated generally that they did not commit a tort in Florida, that statement was insufficient to refute the specific factual allegations contained in the Third Amended Complaint. Acquadro v. Bergeron, 851 So.2d 665, 672 (Fla. 2003). As was explained by this Court in Acquadro, a general statement that the affiant did not commit a tort does not refute the allegation that the employees performed certain tortious acts as required by the decision in Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989). As a result, for purposes of this Petition the Airgas employees committed torts in Florida.

to § 48.193, Fla. Stat., which provides in pertinent part (emphasis added):

> (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 and, if he is a natural person, his personal representative 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.

This Court explained that to commit a tort "personally" means that it cannot be a tort committed by someone who is outside the state and can only act through other people who are in the state (Id. at 1005-6):

> "Personally" means: "In person; without the intervention of another." The American Heritage Dictionary 926 (2d College Ed. 1985). Thompson's affidavit states that he did

> not personally do anything in Florida: he did not personally operate a business in Florida, commit a tortious act in Florida, or cause injury in Florida.

This Court concluded that § 48.193, Fla. Stat., did not apply to Thompson because he did not personally commit a tort in Florida.

The Fourth District incorrectly interpreted the decision in Doe v. Thompson to apply to the facts of this case where the Airgas employees are alleged to have committed torts while they were physically present in Florida. Because the facts in Doe did not include the situation in this case, the Fourth District should not have applied the decision in Doe. The error of the Fourth District's holding was explained by Judge Farmer in his dissent, pointing out that the holding of a decision is limited to the facts of the decision, and cannot automatically be applied to a different factual scenario.

Recognizing that the corporate shield doctrine does not apply to the facts of this case comports with common sense. Assume that an employee of a California corporation, who is a California resident, is on corporate business in Florida to attend a convention. While driving back to the airport after his last meeting, he swerves off the road and kills a pedestrian. According to the Fourth District's decision, that non-resident employee cannot be sued in Florida because he is on corporate business only and is immune from suit in Florida. To pursue the claim against the employee, the

Florida resident must retain an attorney in California, file suit in California, and pay to have all the witnesses travel to California and great expense and inconvenience to all involved. Forcing the Florida resident also carries the risk that the witnesses will be unable to travel or refuse to travel and hinder the prosecution of the claim or deny it altogether.

That result would be contrary to the interests of the state to protect its citizens, and would certainly be contrary to the law of personal jurisdiction. The district court's holding would require a Florida resident who is injured by a non-resident corporate employee to file suit in the foreign jurisdiction, while a resident corporate employee who commits a tort would be subject to suit. In essence, the Fourth District's conclusion gives a non-resident defendant an advantage over a resident plaintiff. As applied, the decision of the Fourth District interprets § 48.193, Fla. Stat., to conflict with the access to courts provision of the Florida Constitution. Article I, § 21, Florida Constitution ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay").

In the lower court, the Airgas employees reached their conclusion by relying on the general statements used by the courts in corporate shield decisions, without any understanding of the purpose of the corporate shield and the specifics of the doctrine. As used in Doe, 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.

The cases cited by the Airgas employees below do not recognize the limitation of the corporate shield doctrine. The opinion in McDougal v. Mizrahi, 636 So.2d 138 (Fla. 3d DCA 1994), contains no facts or explanation of the allegations in the complaint in that case. It appears that the corporate officers were simply alleged to be personally liable because the corporation committed a tort because of some act the officers made outside the state. The corporate shield doctrine would properly apply to that situation. In Snibbe v. Napoleonic Society of America, Inc., 682 So.2d 568 (Fla. 2d DCA 1996), the employees were not alleged to have committed a tort in Florida, but rather, were alleged to have conducted business in Florida. The court held that their presence in Florida on corporate business could not be considered personal to them because it was for the corporation. The Castro Plaintiffs in this case did not base their claims against the Airgas employees on the allegation that they were conducting business in Florida.

In Radcliffe v. Gyves, 902 So.2d 968 (Fla. 4th DCA 2005), the employee defendants were members of the board of directors who were not alleged to have committed a tort in Florida. Although they were alleged to have committed an intentional tort, the court found those factual allegations were sufficiently refuted by

defendants, and not supported by evidence from plaintiff. The court found that the board members had insufficient minimum contacts because they only came to Florida for personal reasons sporadically.

The decision in Tramel v. D'Angel Bedding Corp., 917 So.2d 982 (Fla. 3d DCA 2005), also fails to support the Airgas employees' argument. In that case, there is no indication that the Oklahoma employees were physically present in Florida and committed a tort. Moreover, the court in Tramel held that the plaintiff failed to allege a basis for jurisdiction under § 48.193, Fla. Stat., which is another clear indication that the allegations of the case were not that the employees committed a tort in Florida. In Oesterle v. Farish, 887 So.2d 412 (Fla. 4th DCA 2004), the allegations were that the employee committed an intentional tort in Florida. Although the court held that the corporate shield doctrine does not apply to intentional torts, it did not say that an allegation of an intentional tort was the only way to avoid the corporate shield doctrine. Finally, in Sims v. O'Leary, 933 So.2d 1214 (Fla. 4th DCA 2006), the defendant was a Washington resident and his only contact with Florida was to write a letter to a Florida resident from his office in Washington.

All of these decisions involve a different factual situation than the claims against the Airgas employees in this case, and which are clearly outside the scope of § 48.193, Fla. Stat. Section 48.193, Fla. Stat., gives Florida courts jurisdiction over anyone who

personally commits a tort, and contemplates that a non-resident may be the defendant. There is no exception for people who commit torts in the course and scope of their employment.

The decision in Doe was previously described by the Fourth District to mean that "section 48.193(1)(b) does not subject an employee to personal jurisdiction who has performed a negligent act outside of the state solely in his corporate capacity even if the injury occurs in Florida." Silver v. Levinson, 648 So.2d 240, 242 (Fla. 4th DCA 1994) (emphasis added). This is an important limitation of Doe which was not recognized by the district court below. The corporate shield doctrine only protects an employee who performs a negligent act outside of Florida which causes an injury inside Florida. It does not protect an employee of a foreign corporation who comes into Florida and commits a tort in Florida which injures a Florida resident. If the employee comes to Florida and commits a tort, then the employee has committed the tort personally and is subject to jurisdiction under § 48.193, Fla. Stat.

Other courts have recognized that a different analysis is required when the employee is alleged to have committed a tort in the state. In Delong Equipment Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 851 (11th Cir. 1988), the court explained:

> We conclude that it is reasonable and comports with notions

> of 'fair play' and 'substantial justice' to extend a forum's long-arm statute to a non-resident individual who commits an act in the forum for which he can be held substantively liable, even if his actions in and contacts with the forum were entirely in his capacity as a corporate officer or director. The crucial matter is whether the individual defendant can be held personally liable for acts committed in the forum, not whether his contacts with the forum arose in his personal capacity. If substantive liability can extend to an individual for acts performed on behalf of a corporation, then the individual is amenable to the forum's long-arm statute, at least in situations where the nonresident individual physically was present in the forum when he participated in the tort.

See also Columbia Briargate Co. v. First Nat. Bank in Dallas, 713 F.2d 1052, 1064 (4th Cir. 1983) ("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 without the forum under the applicable state long-arm statute as authorized by Rule 4(e), 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"); Schiller-Pfeiffer, Inc. v. Country Home Products, Inc., 2004 WL 2755585, 5 (E.D.Pa. 2004) ("One commonly recognized exception to the corporate shield doctrine exists when the corporate officer or director was personally involved in tortious conduct.") Delong, Columbia Briargate and Schiller-Pfeiffer recognize that an employee who comes to a state and personally commits a tort is subject to personal jurisdiction in that

state.

The same point was made more recently in Lane v. XYZ Venture Partners, L.L.C., 322 Fed.Appx. 675, 679, 2009 WL 822475, 3 (11th Cir. 2009) (unpublished opinion), in which the court wrote that the holding in DeLong "was limited to situations where the nonresident individual physically was present in the forum when he participated in the tort," and pointed out that in Lane "the Lanes have not alleged that [the corporate employees] were physically present in Florida when they participated in a tort. Indeed, the Lanes' claim for overtime wages does not even sound in tort." The Fourth District should have recognized the same limitation of the Doe analysis and affirmed the trial court's decision denying the Motions to Dismiss.

The Validity of the Corporate Shield Doctrine

In his concurring opinion, Judge Gross attempted to determine whether the version of the corporate shield doctrine adopted by this Court in Doe was still valid. Doe cited to Estabrook v. Wetmore, 129 N.H. 520, 529 A.2d 956 (1987), and Marine Midland Bank v. Miller, 664 F.2d 899 (2d Cir. 1981), as the source for the doctrine (referred to in those decisions as the "fiduciary shield doctrine"). Estabrook cited to Boas & Assocs. v. Vernier, 22 A.D.2d 561, 257 N.Y.S.2d 487), as the genesis of the corporate shield doctrine. A later New York decision, Kruetter v. McFadden Oil Corp., 71 N.Y.2d 460, 522 N.E.2d 40 (N.Y 1988), recognized that the decision in Boas

was limited because it involved an employee's liability on a contract he signed on behalf of his corporate employer, and New York law provides that an employee who signs only in his representative capacity on behalf of his employer is not personally liable on the contract.

The Kreutter court went on to note that despite the limitation of the facts and holding in Boas, the idea that New York had accepted the shield doctrine proliferated and was accepted by federal and state courts. Id. at 468. The court ultimately refuted that misunderstanding, and held that "it is neither necessary nor desirable to adopt the fiduciary shield doctrine in New York." The decision in Marine Midland, which was issued between the decision in Boas and the decision in Kreutter disapproving the fiduciary shield doctrine, was applying New York law in a diversity case. It is, therefore, based on a refuted principle of law. The result is that the two decisions on which Doe is based no longer have any precedential value. It, therefore, appears that the corporate shield doctrine adopted by this Court in Doe is no longer effective.

CONCLUSION

This Court should answer the certified question in the negative, quash the decision of the Fourth District and reinstate the trial court's decision. The action should be remanded to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached service list, by mail, on March 15, 2011.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioners hereby certify that the type size and style of the Brief of Petitioners on the Merits is Times New Roman 14pt.

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