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.
______________________________________/

REPLY 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.

(AB) – Answer Brief

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

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?

Although Respondents have argued the Court should follow Doe v. Thompson, 620 So.2d 1004 (Fla. 1993), they have made an argument which, if adopted, would create a new corporate shield doctrine which suspends Florida law according to the class of tort committed. Respondents admit that the corporate shield doctrine cannot be applied to a salesman driving a car in Florida on corporate business because the salesman has to be in Florida to commit the physical tort. But, they argue, if the tort committed is not a physical tort, the corporate shield doctrine protects the salesman from being forced to answer for his act in Florida. They dub this "physical" tort a "non-corporate tort" because "it is not one encompassing his or her employment duties" (AB16). Finally, they conclude that the torts committed by Respondents in this case were "corporate torts" because "take away the employer, and there is no tort" (AB16).

The primary problem with Respondents' reasoning is that the salesman's

negligence in the example given is no different than the negligence alleged by the Respondents in this case. The Airgas Carbonic, Inc. ("Airgas") employees, such as Robert Hurt, are alleged to have come to Florida and physically participated in Dale E. Dickey's ("Dickey") training at Airgas's Bartow facility, observed him, spoke with him, went of his driving record, and then gave Dickey an award for being an exemplar driver. It is also alleged the Airgas employees reviewed Dickey's performance while in Bartow and had knowledge of his incompetence as a driver, yet still approved him to drive for Airgas. In both the fictional salesman and the actual allegations of this case, the employees were in Florida on their employer's business at the exact moment they were negligent. There is no difference.

The reasoning offered by Respondents is convoluted and problematic because the distinction is contrived. There is no logic to making a distinction based on whether the tort is physical and must be performed in Florida or, by contrast, one that could have been committed outside of Florida. For example, a firearm manufacturer's representative who negligently fires the weapon while in Chattahoochee, Florida and injuring someone nearby could use Respondents' argument to fight personal jurisdiction in Florida because he could have inflicted the same injury without being in Florida. Chattahoochee is only a few hundred yards from the Georgia border, so he did not have to physically be in Florida. There is little dispute that such a result would

be unjust, yet it would fit within Respondents' "physical" tort concept.

Application of Respondents' version of the doctrine gets no clearer in other situations. While Respondents' version of the doctrine would subject a salesman who drives a car negligently to jurisdiction in Florida, it would prevent jurisdiction over that same salesman for making a negligent misrepresentation during a sale just before the collision. Two Florida residents having claims against the same salesman on the same business trip would have greatly different outcomes. The Florida resident suing the salesman for negligent misrepresentation (not just repetitions of corporate sales information) would have to litigate where the salesman lives, while the Florida resident with the personal injury claim could litigate that claim in Florida.

Another good example would be a resident of Alabama who is an employee for a trucking company based in Pensacola. If that employee travels to Florida to inspect the trucks, and knows that a truck needs new brakes but decides not to order the repair, the Florida resident who is later injured in an accident cannot bring a suit in Florida against the Alabama resident, who is an employee of a Florida corporation, for negligence committed in Florida. The injured Florida resident would have to hire an attorney and file suit in Alabama, at great inconvenience and expense.

There is also no clear line between Respondents' so-called corporate and non-corporate duty torts. Trying to make a distinction based on whether the tort was part of

the employee's duties is vague, at best. If a large trucking company had to fly a mechanic to Florida to handle a specialized problem and that employee spilled oil during the work which caused someone to fall and be injured, the commission of the tort of creating dangerous condition is certainly one "encompassing his or her employment duties" (AB16). Yet Respondents attempt to draw a line between the commission of that tort by the mechanic, and their own negligent conduct of creating a dangerous condition by negligently training and negligently approving a dangerous driver to operate an Airgas truck. There is no way to logically say an employee can commit a tort in the course and scope of his employment such as driving, but also say that the act of driving is not one of his employment duties (See Respondents' argument AB16).

The only argument offered by Respondents to show the inequity caused if the doctrine is abolished is that an employee has no choice where he travels for his employer's business, so it is unfair to hold him accountable for his torts committed in those places. However, there is no injustice in holding the employee accountable in the state where he or she commits a tort, regardless of why he or she is in the jurisdiction. The corporate shield doctrine was originally intended to prevent the employee from being subjected to personal jurisdiction based on the employer's business activities. But in this case, Respondents are trying to use it to protect themselves from the

consequences of their own tortious acts. Using the rule as advocated by Respondents would mean everyone who commits a tort in Florida can escape jurisdiction by showing he or she was forced to be in the state. Professional and college athletes, salesmen, executives at conferences and other similar individuals would almost be raised to the level of diplomatic immunity.

This Court should also reject Respondents' invitation to leave for another day the question of whether Florida has personal jurisdiction over employees in the hypothetical situations discussed. The question raised by this Petition is not a trivial matter. Thousands of lawsuits are filed every year related to torts committed by employees of foreign businesses in Florida. As the law now exists, there is a serious question whether Florida courts have jurisdiction over those employees. A decision in this case which only deals with negligent supervision claims in a trucking situation will raise more questions than it answers, and will create greater confusion.

It is clear that Respondents' understanding of the corporate shield doctrine is illogical. A corporate employee who travels to Florida to commit a tort, even if it is on behalf of the employer with no benefit to the employee personally, has still inflicted injury on a Florida resident and committed a tort in Florida. By shielding the employee from liability, it leaves corporate employees free to commit torts in Florida without

immediate risk of liability.[1] Adopting or enforcing a doctrine which gives corporate employees a jurisdictional shield only encourages torts by non-residents. There is nothing in § 48.193, Fla. Stat., which says it applies only to unemployed people who commit torts in Florida. The statute clearly states that "any person, whether or not a citizen or resident of this state" who "commit[s] a tortious act within this state" submits himself to the jurisdiction of Florida courts.

Respondents have argued that the decision in Doe did not depend on whether the CEO was physically in Florida. That argument ignores the facts and holding. This Court held that the CEO could not be sued in Florida because he did not personally commit a tort in Florida. The holding necessarily depends on the CEO's physical location. Any person who is not in Florida will have to commit the tort in Florida through another person, and would therefore, not have personally committed the tort in Florida. By contrast, the act of approving Dickey to drive a truck on the streets in Florida knowing that he was incompetent and dangerous is the personal commission of

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[1] Many courts, including the Fourth District below, have stated that the corporate shield doctrine only applies to jurisdiction, not liability or to the existence of a cause of action. While this is certainly true, the statement does not recognize the practical effects of limiting jurisdiction. By closing the Florida courts to Florida residents in this situation, the chance of bringing the claim at all diminishes rapidly. Pursuing litigation in a foreign jurisdiction is expensive and complex. Many, if not most, Florida residents who are told they cannot bring a claim against a person who came to Florida and injured them will not have the financial or logistical ability to pursue the claim at all. So, while the corporate shield doctrine is not technically one of liability, the

a tort in Florida because the Respondents had to come to Florida to observe Dickey, train him (or fail to train him), and supervise the branch office. The Respondents have not been sued for setting up a broad policy from their offices far away. The lawsuit against Respondents is for coming to Florida and negligently training, supervising and/or retaining Defendant, Dickey to drive after being informed of incidents where he drove too fast for conditions, even during conditions of poor visibility. Moreover, Defendant, Dickey was even rewarded by some of the Respondents despite his reckless driving behavior which they were aware of.

The Limitless Provisions of Florida Long-Arm Jurisdiction

Respondents have also attempted to support application of the corporate shield doctrine to the torts committed in the state by claiming Florida's long-arm statute is not "coextensive" with federal due process (AB23). Respondents are incorrect in that statement. While the court in Bloom v. A.H. Pond Co. Inc., 519 F. Supp. 1162 (S.D. Fla. 1981), stated that § 48.193(a), Fla. Stat. (which extends long-arm jurisdiction over a non-resident who "Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state") was not coextensive with federal due process that does not mean the same is necessarily true of

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practical effect of the doctrine is to grant immunity in many instances.

the other provisions in the statute. See also Youngblood v. Citrus Associates of New York Cotton Exchange, Inc., 276 So.2d 505, 506 (Fla. 4th DCA 1973). Similarly, in Mallard v. Aluminum Co. of Canada, Ltd., 634 F.2d 236, 241 (11th Cir 1981), the court was considering a limited provision which acquires jurisdiction over any non-resident who causes injury to persons or property in Florida by act or omission in another state, if products that the non-resident processed, serviced or manufactured cause injury during use or consumption in Florida. The same is true of the decision in Dublin Co. v. Peninsular Supply Co., 309 So.2d 207 (Fla. 4th DCA 1975), which did not involve § 48.193(b), Fla. Stat.

Each subsection of the long-arm statute must be analyzed on its own. Moncrief v. Lexington Herald-Leader Co., 807 F.2d 217, 221, 257 U.S.App.D.C. 72, 76 (C.A.D.C. 1986) (explaining that each subsection of the long-arm statute must be analyzed separately). The subsection involved in this case extends long-arm jurisdiction to anyone who commits a tort in the state, which indicates an intention to reach the full extent of due process. The legislature did not express the intent to limit long-arm jurisdiction more than to the due process requirements. The same provision (regarding committing a tort) in the long-arm statute in West Virginia (which also contained the business provision discussed in Bloom) has been found to be coextensive with due process. W.Va.Code § 56–3–33; Henderson v. Metlife Bank, N.A., 2011 WL

1897427, 7 (N.D.W.Va. 2011) (unpublished decision). The West Virginia statute is the same as § 48.193(b), Fla. Stat. Section 48.193(b), Fla. Stat., expresses no intention to limit long-arm jurisdiction in any way.

Because Florida's long-arm statute related to tortious conduct in Florida is coextensive with federal due process, the corporate shield doctrine does not apply to limit it. Columbia Briargate Co. v. First National Bank, 713 F.2d 1052 (4th Cir.1983). cert. denied sub nom, Pearson v. Columbia Briargate Co., 465 U.S. 1007, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984); see also Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522, 525 (4th Cir. 1987). This makes sense because the statute is not limited by the type of tort or the capacity in which the tort is committed. Respondents are, in essence, trying to add these limitations to an otherwise limitless expression of long-arm jurisdiction.

Physical Presence Is a Relevant Inquiry

In the Answer Brief, Respondents have made the argument that "district court have expressly recognized that the existing decisional law holds that a corporate agent's physical presence in Florida is not relevant to the analysis in Doe.". No court has made any such express statement. In Oesterle v. Farish, 887 So.2d 412 (Fla. 4th DCA 2004), the Fourth District held that the corporate shield doctrine did not apply

when the claim against the officer is for an intentional tort. Oesterle was accused of committing fraud (an intentional tort), so the doctrine had no application. The court did not make an express statement that the employee's physical presence in Florida was irrelevant to the corporate shield doctrine analysis.

In Snibbe v. Napoleonic Soc. of America, Inc., 682 So.2d 568, 569 (Fla. 2d DCA 1996), the plaintiff sought personal jurisdiction over four non-resident officers and directors pursuant to § 48.193(1)(a), Fla. Stat. (1995) (the "operating, conducting, engaging in, or carrying on a business or business venture in this state" provision). The court held that the long-arm statute did not apply because it is the corporation which is doing business, not the officer or director. The court did not expressly state that the employee's presence in the state was irrelevant to the analysis. The decision in Snibbe has no application here because, like the cases discussed above, the claim of personal jurisdiction was based on "doing business" in the state, not committing a tort. An officer or director who is acting on behalf of the corporation is not capable of doing business personally, whereas that same officer or director can commit a tort personally.

The Case Against the Corporate Shield Doctrine

As was pointed out by Judge Gross in the court below, the corporate shield doctrine has been abandoned by the state which first described it, and limited

significantly by other courts. The case against the corporate shield doctrine is well described by the court in Intermatic, Inc. v. Taymac Corp., 815 F.Supp. 290, 295 (S.D.Ind. 1993). The court in Intermatic noted:

> Although the doctrine developed without receiving much criticism, the questionable origins of the doctrine, the lack of articulation and analysis accompanying application of the doctrine, the fact that the doctrine served to obfuscate application of traditional due process analysis, and the fact that the doctrine allowed for easy but seemingly incorrect answers to jurisdiction questions, eventually caused commentators to suggest that the doctrine be abolished.

The application of the corporate shield doctrine to the employees in this case is emblematic of the problem. The doctrine was originally applied (if it ever existed at all) to a corporate agent signing on behalf of the corporation, not to an employee who commits a tort. Rene Boas and Assoc. v. Vernier, 22 A.D.2d 561, 257 N.Y.S. 2d 487 (N.Y. Appellate Div 1965). Many cases state that the rule applies to officers and directors, but do not mention low level employees. Applying it to the Airgas employees is a new concept. This case does not involve a commercial transaction where an officer or director signed a contract in his corporate capacity. This is a tort claim based on physical presence in the state when the tort was committed. At a time when many state and federal courts have limited or abandoned the doctrine entirely, the decision in this case expands the doctrine to include employees who actively and

personally commit a tort. Although siding with the majority in the court below, Judge Gross pointed out that the Sixth Circuit has refused to apply it to protect an employee who committed a tort. See Balance Dynamics Corp. v. Schmitt Industries, 204 F.3d 683, 698 (6th Cir. 2000).

The corporate shield doctrine is usually used to exclude actions undertaken in one's corporate capacity from the calculation of minimum contacts. Where an employee personally commits a tort, however, there is no need to use the corporate activities to establish that the employee has sufficient minimum contacts with the forum. See Krilich v. Wolcott, 717 So.2d 582, 583 (Fla. 4th DCA 1998) (recognizing that "[t]he commission of a tort in Florida is sufficient to establish minimum contacts and satisfy federal due process concerns"). The corporate shield doctrine simply never becomes part of the analysis when the claim against the employee is for commission of a tort in Florida. The CEO in Doe was never in Florida, so this Court's application to the claim against him was entirely different than the application of the doctrine in this case. The corporate shield doctrine should never apply to an employee who commits a tort in Florida.

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 June 3, 2011.

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CERTIFICATE OF TYPE SIZE & STYLE

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

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