

>> We now move to the second case on our docket today Kitroser.

>> Good morning.

May it please the court.

Bard Rockenbach on behalf of the petitioner.

As you know this case arises out of a motor vehicle collision which occurred on U.S. Highway 27 south of Belgrade.

As part of the third complaint the plaintiff added causes of action against the individual Airgas employees who were supervisors of the driver of the Airgas truck that caused the collision.

>> Was the driver of the truck a Florida resident?

>> Yes.

>> Because I was thinking, and you put this analogy and, that under the theory of the defendant he was from out of

state to working for the company  
individually in Florida.

>> Correct.

We don't have that problem here  
because he was a Florida  
resident, but taking the rule as  
proposed by the respondent, the  
corporate shield doctrine --  
this decision in the fourth DCA  
would materially change the way  
personal jurisdiction is viewed.

When we have these cases  
involving out-of-state residents  
coming to Florida for various  
activities.

It could be a convention or a  
sales call or anything that they  
can complain to their employer  
and say I'm not here because I  
want to be.

I'm here because I was forced to  
be because my employer told me  
to come here and be in Florida  
so therefore I can't be sued in  
Florida.

That would be a material change.

I don't think there are  
statistics on that.

Lawsuits arise out of this kind  
of situation but there are a  
lot.

>> The plain language of the  
jurisdiction statute as read  
over the years says a person  
whether or not a citizen or a  
resident of the state, who  
commits a tortious act within  
the state and there are  
issues -- no question in another  
state.

There was maybe even a question  
of statutory interpretation but  
you are alleging negligent  
training within the State.

>> Within the state, yes.

Our position here is whether or  
not the corporate shield  
doctrine is still valid, that  
rule does not apply to this case  
because the section 48.193

clearly says that if you personally committed a tort in this state then you are subject to jurisdiction, and so when the fourth District took the Doe versus Thompson decision from this court and applied it, because Doe versus Thompson it discussed the corporate shield doctrine but as a way of explaining why the CEO in that case was not liable, couldn't be held for personal jurisdiction in Florida because he didn't commit a tort in Florida but the opinion doesn't expressly state that it is based on the fact that the CEO was not present in the state and did not commit a tort.

And so the fourth District took that as an indication that the fact that he was just a corporate employee, an officer, that was the reason he was not

held personally responsible in  
Florida and had to go to Texas.

>> Let the ask a question about  
the allegations here.

The allegations are that each of  
them were in Florida training  
and that they personally  
supervised or trained this  
employee, correct?

>> Yes.

>> Now if they can test and say  
yes we were in Florida but we  
had nothing to do with the  
training of this employee, at  
what stage -- so ultimately they  
would be found not liable  
because they had nothing -- I  
mean they could be found not  
liable for a lot of reasons.

But they were not involved with  
that training.

At what stage of the proceedings  
is that determination made?

Is that something that can be  
made at the beginning or is that

except the allegations and later on if they are found not having anything to do with this, that they are just summary judgment claims?

>> Under the analysis and the Venetians salami case, the concern that you raised can be dealt with that has to be dealt with in the pleading stage to decide whether there is personal jurisdiction.

>> And I thought that was the case but I also thought they had said something about contesting that they really were involved with the training and supervision.

>> Yes, they have never countered or disputed the fact that they were involved in the training and supervision in Florida.

>> We have a procedure that is set up and if they want to

contest that they can come in  
and have an evidentiary hearing  
and the trial judge has to make  
a decision at that point.

That is the whole concept of the  
Venetian salami case and that is  
how it is handle.

>> Having done at an early point  
in the case to decide whether a  
court can do anything.

It was never contested.

The only issue raised was his  
corporate shield doctrine and it  
was raised just as a blanket  
jurisdictional immunity that I  
am here because I was employed  
to be here and therefore you  
cannot sue me in Florida.

You have to sue me where I live  
and that is just not what the  
Florida statute says and even if  
we apply the corporate shield  
doctrine it wouldn't require  
that result anyway.

>> They never alleged a cause of

action against them?

>> No.

I would like to reserve the rest  
of my time for rebuttal.

Thank you.

>> May it please the court.

Dinah Stein.

The corporate shield doctrine  
recognizes the unfairness of  
bringing nonresidents into the  
state to defend themselves.

>> Isn't that the legislative  
decision?

I cannot understand.

[INAUDIBLE]

Here it is not contested the  
your client, the defendant were  
in Florida and the allegations  
of the negligence that form the  
basis for the form of action  
occurred in Florida.

>> That is correct Your Honor --

>> And so tell me where then if  
it were one step more where the  
defendant who drove the truck

was an out-of-state resident  
working for the Corporation at  
the time and under your version  
he would not be able to visit  
Florida either?

>> Well I don't necessarily  
agree with that.

Obviously it was not an issue in  
this case and if you go outside  
either in Florida or outside  
Florida, and I think this is  
important.

>> Now so you agree that the  
person that drove the truck for  
a corporation who is working  
solely within his corporate  
capacity injured someone in  
Florida in Florida, that there  
was no question that they could  
be sued in Florida?

>> I believe that is the case.  
I believe driving --

>> What is the difference?  
This is a negligent act that  
occurred in Florida that they

are saying caused the death of  
the victim.

>> Thank you Your Honor and that  
is the heart of it.

Our position is that the  
corporate shield doctrine  
applies to so-called corporate  
tort and if we look at and and a  
counsel in these cases, and you  
can see dozens of cases going  
back 50 years in Florida and all  
of the country dealing with this  
doctrine, and not one of those  
cases has ever applied to  
doctrine to an automobile  
accident and I think the reason  
for that is it has never been  
deemed to apply to your basic  
toured where you cannot separate  
the physical portion of the  
towards from the jurisdiction.

In other words, if Mr. Dickey is  
in Florida driving, he has  
duties to be a safe driver in  
Florida period and if he causes

a crash due to negligence,  
Florida has personal  
jurisdiction over him.

Well now when you take it  
traditional corporate toured in  
a look at all these cases, they  
deal with misrepresentation,  
antitrust contract.

In this case we have a  
derivative type of court with  
negligent training.

Doe is similar.

>> It is an actual recognized  
port of recognize supervision  
and training.

It is is not a vicarious  
liability.

>> My point is that the place of  
the tort in this case, Florida,  
the negligent training tort is  
completely incidental to the  
injuries.

>> But that is your argument  
maybe you would be successful on  
a proximate legal cause.

The issue of whether they are  
subject to jurisdiction for  
having come to Florida.

Is there a training center in  
Florida?

>> I know that --

>> Is there a training center?

>> I don't know.

What if on the same day when  
they were training him one of  
them gave him a bottle of  
tequila and watched him drink it  
and then let them go out on the  
road.

Is that a derivative tort?

>> I think that would be a  
different situation because that  
would be the actual tort of  
giving somebody the alcohol.

>> But you see that is the  
problem.

Aren't we just making up  
something that is different from  
me statutory language?

>> First of all, and we are

going by the strict language of  
Doe and Doe consider personally  
whether you are strictly in your  
place of employment.

>> When we look at Doe I  
understand there is language in  
there you can use to support  
your decision and that is what  
you are here to do and I  
understand that it don't we  
really, and determining the  
holding of Doe, don't we really  
have to consider the facts that  
were at issue there and there  
may be some broad language in  
there that doesn't really fit  
those facts, and I mean that is  
what this case is about.

You have broad language that you  
can use to support your position  
but the facts bear are clearly  
distinguishable on this case.

So, don't we have to look at the  
facts?

>> We certainly have to look at

the facts and I'm not asking  
this court to ignore the facts  
of Doe.

What we are doing is extending  
to the other cases.

This doctrine didn't evolve  
spontaneously and Doe.

>> I have never seen -- I must  
tell you I looked at this and I  
can't believe this is the law  
because it does make sense for a  
man or woman sitting in Texas  
making decisions that may affect  
other states but they never  
leave Texas.

They stay in their office and  
they make those decisions but as  
a result someone may be heard  
somewhere.

It is a far far different  
situation particularly here in  
Tallahassee.

In Miami you may not see people  
coming into the state as often  
as you do here in Tallahassee.

You have many people coming in every day from Georgia doing jobs for their employees as you do people from Florida.

And if this is the law, then thousands upon thousands upon thousands of people come into the state, cause harm while they are here and then they have residential immunity.

You can't sue me.

>> Well this doctrine has been alive in the states for now several decades and again if you look to the cases, they have -- the doctrine has been applied quite consistently.

Not the car accident torts which I would --

>> Could you answer for is conceptually because if I were here looking at Doe and what they listen to a guy from Texas on the phone, never left this day, there may be an issue of

minimum context and you may have  
it under the second due process  
that is satisfied so we have  
protection.

We just don't hail everybody  
from the whole world in Florida.

But yet we are concerned with  
protecting our Florida citizens  
and now with the Internet we  
have a whole other thing.

It seems light years different  
to take the facts of Doe and  
this fact which you called it  
again a derivative tort but it  
is actually a tortious act, the  
act that they committed was a  
tortious act.

So for us to wonder, you could  
argue in this Doe case that it  
was not a tortious act within  
Florida because it was done  
outside of Florida.

Here you can do that.

When I first read it I said Oh,  
you mean they were in Florida?

No, no they were in Florida  
committing their act so I would  
have the same problem.

Where does this morph into that  
situation?

>> Well, the reason is and if we  
take -- let's use this case as  
an example.

They have no control where -- .

>> That distinction, I don't see  
how that really gets you  
anywhere because the truck  
driver who is sent on a mission  
down here to deliver something  
for a corporation that is  
somewhere else, it has got no  
more choice of us coming down  
here than those people did.

>> Well, the corporate shield  
doctrine doesn't protect from  
the entire scope of employment  
and that is something Judge  
Posner pointed out in the Rice  
case.

I think that is an important

distinction as that you said

this is in furtherance of  
employment.

>> Let me ask you this.

How do you parse out the  
different torts?

That is what I don't understand.

You can agree that someone that  
works for corporation and they  
hit someone with a card, where  
do you draw the line?

I don't understand what your  
argument -- what torts would be  
included and what torts would  
not be included?

That pitted position we took and  
the brief.

>> He is driving the truck for  
his employment.

>> But driving it negligently  
doesn't further employment.

>> What is the difference?

>> Because the training towards  
simply can't occur in the  
absence of a the defendants

employment.

>> You said he was not a good driver.

>> We disagree with it factually but assuming that that did happen, they were still, again, if it weren't for their employment, they would have never been in Florida assessing is driving.

>> The same people came to Florida and they came here to negotiate with someone about a contract, and they made misrepresentation in the negotiations for this contract. Would they then be immune under your definition of a corporate --

>> Well Urahn or they would not be immune if these were intentional misrepresentations.

>> I mean not immune, they would be subject to jurisdiction.

>> If those were intentional

misrepresentations either in  
their personal interest or what  
have you they would absolutely  
not be immune from jurisdiction.

The corporate shield doctrine  
has never protected people --

>> I'm still struggling with  
where you are drawing the line.

What torts aren't what torts are  
not?

>> The torts that cannot occur  
absent employment and for those  
ports and I use as an example  
this one.

It could not have occurred  
absent the corporate employment  
of these defendants.

You can't just go out on the  
streets and negligently train  
people.

>> They would not be there  
negotiating their contract but  
for their employment.

>> First of on again I go back  
to the fact that this doctrine

has worked very well for many decades and has never been opening the doors to these types of torts.

>> You see, it is interesting you are saying it works very well.

If we had a situation where it was applied to a tort in Florida.

What case was that?

>> In the Tramel case the courts both noted physical presence in Florida.

Nib Ian trammel.

>> What were the facts of that?

>> That had to do with the plaintiffs were trying to get an injunction against some officers of a charity and the court said because they were in their corporate employments during the tort.

>> That is not a decision of of the score.

>> No, no.

The only decision from this court is Doe.

Let me make another point on this and I think it is important and that is the arbitrariness when we are drawing the line of physical presence.

This tort could've just could have just as well happened in Georgia by video.

>> But the legislature drew that line.

That is in the statute.

Is and it's?

>> Not according to the interpretation from Doe in that Doe --

>> One of the problems I have with this argument and maybe ultimately if it was a doctrine or at least some incarnations of it, that it just seems to be totally detached from the text of the Walmart statute.

That is putting off out there  
and you can't look at anything  
in the actual text of the  
statute adopted by the  
Legislature and come up with the  
distinctions or the contours of  
this doctrine that you are  
talking about.

It is all just kind of a  
creative enterprise and that  
concerns me.

>> Well again, if you look  
staying within Florida and there  
are many cases in Florida --

>> There are things in Florida  
that concern me.

Don't get me wrong.

>> Has been a stable doctrine  
and this is the first case I'm  
aware of where there has been  
this kind of fractured court and  
we could say this is because the  
facts are different here but I  
disagree with that.

>> I question your

representation to the court that  
this is a very stable doctrine  
and has always been this way.

If you look at the legislation  
when I first started practicing  
you didn't have the long arm  
statute as it is today and  
before it was much more  
restrictive but it is sort of  
opened up some with some of the  
U.S. Supreme Court cases and  
then this provision was placed  
in the law.

I am not aware of this case  
ever, ever ever where the  
employee came in to Florida  
applying some kind of corporate  
shield doctrine.

It has been reserved for those  
cases of somebody sitting in  
another state.

They never come into the state.

They don't act on their personal  
interest and they make some kind  
of corporate decision in another

state but that may have some  
impact in Florida.

Never, and you tell me where is  
the case if there is one from  
this court that you keep  
representing us having some kind  
of long history of stability.

>> Well Your Honor and I don't  
mean to represent there has been  
a lot of cases from this court.

I think we have been pretty  
consistent that Doe is the case  
from this court.

>> The chief has asked you is an  
out-of-state the person making a  
decision of corporate capacity  
never coming into the state.

Is not correct?

>> Yes that is correct and let  
me address that is why we are  
asking the court extend it to  
the effects.

Because Doe was the CEO of a  
large corporation.

He was alleged to have made bad

safety decisions from out of state, and he was insulated from jurisdiction whereas here, and they think the problem with applying it to physical presence just as an absolute rule, it hurts the lower, the lower employees who really don't have a choice of when they come into the State.

>> Here is my problem with what you are saying and that really goes back to what I've seen as a distinction in what the statute says which is it commits a tortious act within the state.

There have been some cases the talk about whether you commit a tort in the state but the actual words are commit a tortious act within the state.

We have said it doesn't always require physical presence but it is in some particular facts so when someone is -- and we would

be disregarding the plain language of the statute and the other thing that I think we are forgetting here is that as you said, you agreed that they could be sued.

They can be sued in their home state for something that they did for the corporation.

The only benefit that they get as does the plaintiff, is that the Corporation I am sure and I doubt they had to go out and hire their own counsel but the Corporation suspends them.

They are an employee and ultimately the Corporation will end up giving no being liable vicariously for acts done by its employees within the courts.

That is why we have got vicarious liability of a corporation.

So I think we are separating the ideal that they shouldn't have

to come to Florida to be sued  
when the upper-level does as if  
somehow they are going to be  
left on their own when they are  
in Florida.

And so began we have got the  
plain language of the statute  
and then we have fact that they  
act within that scope of their  
employment, the corporation is  
ultimately responsible  
vicariously for their action.

>> I agree with Adam let me just  
clarify one more time, we are  
not saying that any act within  
the court of employment a shield  
it.

That is not our position.

It is really for a narrow  
category of torts.

If you go beyond the scope of  
their employment Florida has  
always recognized an exception  
to that doctrine and I think  
that obeys Judge Farmers'

dissent because he did what --  
what he did say is you could end  
up protecting employees that the  
Corporation would disavow and  
that is not our corporation at  
all and never has been.

If you do that you come to  
Florida period.

All bets are off and you don't  
get any protection.

This is again for a narrow  
category of cases and let me  
just also say, the flipside of  
what Your Honor is saying is  
that there is no real comment I  
mean practical, unfairness to  
the plaintiff, to apply this  
because as Judge Groth said  
during the oral argument below,  
plaintiff you have got your deep  
pocket.

You've got the corporation and  
it is not that the plaintiff is  
moving something other than  
again a practical advantage but

they are not being

disadvantaged.

>> Advantages or disadvantages,

that is not in the statute as

statute is that?

>> No Your Honor.

See what is unclear about

committing a tortious act in the

state when the person is here

and does something wrong?

>> The word personally in this

court has already interpreted

that to mean that it can't be in

here solely in your

compatibility is an employee.

>> And that was in the out of

state context.

>> That is correct although they

did not distinguish on that

aces.

>> Let me ask you this.

These folks come into Florida

and they are there to supervise

and they watch the mechanics of

one lug nut or two on the wheel

of a tractor-trailer.

Watch it, supervising and they have the obligation to supervise.

They need to train the people to put it on and they send the driver out in the truck wheel flies off and hits a school bus full of kids.

The corporate shield doctrine, I was only there.

>> First of all I don't think there's any question that the Corporation --

>> The individual listed there and watch that, and supervise negligently by not doing his or her job and supervising the placement of that wheel on that tractor-trailer.

>> I would submit in Your Honor's example that if there is evidence of intentional or so far out of the field of your corporate, what you are supposed

to be doing as an employee, that  
the corporate shield doctrine  
even under the law were dancing  
wouldn't protect them however if  
it is a straight negligence case

I would submit that is the  
result that would be.

I don't know but that is the  
comment.

Again we come up with a lot of  
hypotheticals and I don't know  
how often that happens then I  
would submit that it doesn't because  
this isn't a problem that has  
been addressed in any of these  
cases.

But I would submit that is  
probably the outer limits.

>> You are now in over time.

I will give you another 20  
seconds or so.

>> I appreciate your giving me  
the time and I will allow my  
opposing counsel to do his  
rebuttal.

Thank you.

>> Thank you.

Just a couple of --

>> Isn't there big difference?

I'm reading back in Thompson.

Thompson's affidavit states he

did not personally do anything

in Florida, he did not

personally do this and he didn't

personally commit a tortious

act.

I mean, maybe there are some

broader language in Thompson but

isn't that a significant

significant thing?

>> That is a significant

distinction and that was judge

farmer's point in the descendent

oral argument.

>> The argument could be for

Thompson, is that they didn't

personally committed tortious

act in the state.

It could have been done on a

statutory argument, not a

rewriting the law out of thin  
air argument.

WHAT, MAYBE THERE ARE SOME  
BROADER LANGUAGE IN  
THOMPSON, BUT ISN'T THAT THE  
SIGNIFICANT DISTINCTION?

>> THAT IS THE SIGNIFICANT  
DISTINCTION, THAT THE JUDGE  
FARMER'S POINT IN THE DECENT  
AND ORAL ARGUMENT.

>> IT COULD BE FROM  
THOMPSON, IS THAT THEY  
DIDN'T PERSONALLY COMMIT A  
TORT --

THEY DIDN'T COMMIT A  
TORTIOUS ACT IN THE STATE.  
IT COULD HAVE BEEN DONE, BUT  
NOT A REWRITING THE LAW  
THAT, OUT OF THIN AIR  
ARGUMENT.

THE MENTIONING WAS REALLY  
UNNECESSARY, BECAUSE THE  
COURT'S OPINION WAS BASED ON  
THE STATUTE.

THEY SAY YOU HAVE TO  
PERSONALLY DO SOMETHING AND  
THIS MAN DID NOT DO THIS ACT  
BECAUSE HE WAS IN TEXAS --

>> THIS WAS A SEXUAL ASSAULT  
IN FLORIDA AT A 7-11 STORE?

>> YES.

>> AND THEY WERE TRYING TO  
GET THE PRESIDENT WHO MADE  
DECISIONS.

>> CORRECT.

>> ON THE UNFAIRNESS ISSUE,  
THE U.S. SUPREME COURT FOR  
CALDER VERSES JONES, THEY  
COULD NOT FORCE AN EMPLOYEE  
TO COME TO THE STATE AND  
WORK AND COMMITTED A TORT  
BECAUSE THE EMPLOYEE  
PURPOSEFULLY DIRECTED SOME  
ACTIVITY TO THAT VENUE, AND  
CAN BE HELD ACCOUNTABLE.

THEY WERE SITED BY THIS  
COURT IN DOE VERSES THOMPSON  
AS ONE OF THE DOCTRINES.

BUT IN ESTABROOK, THEY HAD

NOT EVEN BEEN TO NEW  
HAMPSHIRE, THEY FORCED HIM  
TO COME TO DEFEND THE  
LAWSUIT AND THEY SAID THAT  
WAS NOT EQUITABLE TO DO  
THAT.

>> TRYING TO KEEP WITH  
JURISDICTION.

>> YOU LOOK FIRST THAT THE  
ACT --

NO QUESTION THIS DOES.

AND THEN YOU LOOK AT AN  
ISSUE OF WHETHER DUE PROCESS  
WOULD BE OFFENDED.

LAW SCHOOL WHICH IS LONGER  
AGO ALL THE TIME FROM WHEN I  
WAS THERE, IT ADDRESSES THE  
MINIMUM CONTEXT.

NO ONE IS ADDRESSING THESE  
DEFENDANTS HAD MINIMUM  
CONTACT WITH FLORIDA.

IN FACT, THEIR CONTACT, IS  
WHAT THEY'RE SAYING THE  
CONTACT WAS DIRECTLY  
RESPONSIBLE FOR THE

ACCIDENT.

AND IT IS SHOWN THEY DIDN'T  
NEGLIGENTLY TRAIN THEM, AND  
THEY'RE ADJUSTMENT IS FOR  
THEM.

IF THEY FILE AN OFFER OF  
JUDGMENT OR WHATEVER AND YOU  
LOSE, AND YOU WANT TO PAY,  
YOU HAVE ALL OTHER WAYS TO  
MAKE SURE --  
OR YOUR ALLEGATIONS ARE NOT  
TRUE, AND THE FRIVOLOUS  
LAWSUITS.

>> I DON'T KNOW IF I CAN  
HANDLE THE CASE FOR  
SETTLEMENT IN THERE.

THERE'S NO END TO IT.

>> KEEP THAT FOR THE NEXT  
ONE.

>> THAT'S TRUE.

THE SECOND POINT I WOULD  
LIKE TO MAKE IS THIS  
CORPORATE SHIELD DOCUMENT IS  
A RIVER WITHOUT A RIVER HEAD  
AT THIS POINT.

THOSE THAT ORIGINALLY  
CREATED IT HAVE NOT OBJECTED  
IT, AND THEN A HIGHER  
APPELLANT COURT, AND I  
ALWAYS MIX THAT UP BECAUSE  
THAT'S THE SUPREME COURT.  
THE COURT OF APPEALS, THE  
APPELLANT DIVISION, THEY  
REJECTED IT, BUT BY THAT  
TIME, THE FEDERAL SYSTEM HAD  
TAKEN THE BALL AND RUN WITH  
IT.

AND THAT'S WHY JUDGE POSNER  
SAID IT WAS AN IMPAIRED  
PRECEDENT.

THERE IS NO SOURCE FOR THIS  
RULE ANY MORE.

>> ECONOMIC LOSS RULE.

>> YES.

AND I KNOW DEFENDANTS WOULD  
SCREAM LOUD AND LONG WITH IF  
WE STARTED MAKING DECISIONS.

>> THE COURT WILL NOW STAND  
IN RECESS FOR 10 MINUTES.

>> ALL RISE.