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#L982-1093:02-26-85

IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,888

JOELLA DEGRIO,

Petitioner,

vs.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Respondent.
_____/

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REPLY BRIEF OF PETITIONER

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JOELLA DEGRIO,

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REPLY BRIEF OF PETITIONER

I

RESPONSE TO STATEMENT OF THE FACTS

Before the Circuit Court, Plaintiff was the prevailing party. Therefore, in reviewing the facts, Plaintiff is entitled to have the facts and all inferences taken therefrom, assessed in a light most favorable to her. This Court does not reweigh the evidence to substitute its judgment for that of the trial court. Shaw vs. Shaw, 334 So.2d 13 (Fla. 1976). While National Union has favored this Court with a lengthy recitation of facts favorable to its case, such a presentation begs the issue presented. Even if this Court would have reached a different conclusion on the evidence if it had been sitting as the trier of fact, it is the obligation of this Court to affirm if the trial Court's judgment is supported by competent substantial evidence. Herzog vs. Herzog, 346 So.2d 56 (Fla. 1977). Plaintiff stands by her statement of the facts which is consistent with the findings of the trial Court.

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II

POINTS INVOLVED ON APPEAL

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WHETHER FLORIDA SHOULD ABROGATE THE IMPACT RULE AND ALLOW RECOVERY FOR THE PHYSICAL CONSEQUENCES RESULTING FROM MENTAL OR EMOTIONAL DISTRESS CAUSED BY A NEGLIGENT OMISSION ON THE PART OF A DEFENDANT IN THE ABSENCE OF BOTH PHYSICAL IMPACT UPON THE PLAINTIFF AND MALICIOUS CONDUCT BY THE DEFENDANT.

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POINT I

FLORIDA SHOULD ABROGATE THE IMPACT RULE AND ALLOW RECOVERY FOR THE PHYSICAL CONSEQUENCES RESULTING FROM MENTAL OR EMOTIONAL DISTRESS CAUSED BY A NEGLIGENT OMISSION ON THE PART OF A DEFENDANT IN THE ABSENCE OF BOTH PHYSICAL IMPACT UPON THE PLAINTIFF AND MALICIOUS CONDUCT BY THE DEFENDANT.

National Union does not take issue with Plaintiff's contention that the impact rule should be abolished in Florida. AFGE's contention is that even if this Court does away with the impact rule, Plaintiff should not be allowed recovery because Plaintiff is not within any of the substitutes which have replaced the impact rule. In so arguing, National Union has misconstrued the replacements for the impact rule as applied to this cause.

A. Reasonable Foreseeability

For the first time on appeal, National Union argues before this Court that the Plaintiff's injury is not foreseeable. This argument was **not** made before the District Court of Appeal. Consequently, this Court should consider National Union's argument with regard to foreseeability as waived. The District Court was never asked to consider foreseeability in this matter and therefore this Court should not tread where the District Court of Appeal did not.

National Union argues that Plaintiff does not come within the reasonably foreseeable test utilized by the Courts of other states as a replacement for the now critisized impact rule. See,

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Wallace vs. Coca Cola Bottling Company, 269 A.2d 117 (May, 1970); Hunsley vs. Giard, 87 Wash.2d 424, 553 P.2d 1096 (1976). First National Bank vs. Langley, 314 So.2d 324 (Miss. 1975); Corso vs. Merrill, 119 N.H. 647, 406 A.2d 300 (1979). Defendant relies upon Hunsley vs. Giard, supra., in arguing that the reasonably forseeable test should not apply because the test applies only to "normal" persons.

In Hunsley, the Court substituted a standard of reasonable foreseeability for the impact rule. The Court stated:

> "Inherent in the formula is the principle that the Plaintiff's mental distress must be the action of a normally constituted person". Id. at 1103.

National Union argues that Plaintiff was not a normally constituted person and therefore Plaintiff's damage sustained as a result of her emotional distress is non recoverable. However, National Union ignores the remainder of the paragraph in the Hunsley decision:

> "In other words, was Plaintiff's reaction that of a reasonable man ? (citations omitted). This principle goes to the standard of liability, not the extent of recovery once liability is established." Id. at 1103.

Viewed through the Hunsley prism, the focus is whether the reasonable man would suffer mental distress as a result of the complained of action, as contrasted to the occurrence of mental distress as a result of the unusual characteristics of the Plaintiff. Here, such is not the situation as an ordinary person would suffer mental distress as a result of the actions of the Union. National Union's citation to Justice Adkins' dissent in

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Gilliam vs. Stewart, 291 So.2d 593 (Fla. 1974) is misplaced for the same reason.

A foreseeable consequence is one which a prudent man would anticipate as likely to occur for an act. Firestone Tire and Rubber Company, Inc. vs. Lippincott, 383 So.2d 1181 (Fla. 5 DCA 1981). If the injury is not foreseeable, then there can be no recovery. However, foreseeability is to be distinguished from the extent of harm. As noted by this Court in Railway Express Agency vs. Brabham, 62 So.2d 713, 715 (Fla. 1952) (en banc):

> "One cannot be legallly be held liable for injury or damage...unless,...he could have foreseen not the extent of the injury or damage or the manner in which it occurred but could have foreseen that some injury or damage to the person or property of another would reasonably be expected to ensue as a result of his action or conduct."

It is not necessary that a tortfeasor be able to foresee the exact nature and extent of the injuries in the precise manner in which they occur but only that some injury is likely to result as a consequence of his negligence. Leahy vs. School Baord of Hernando County, 450 So.2d 883 (Fla. 5DCA 1984); Crislip vs. Holland, 401 So.2d 1115 (Fla. 4 DCA 1981), pet. for rev. den., 411 So.2d 380 (1981). All that is necessary is that some injury will occur in some manner.

National Union's position goes not to the standard of liability but to the extent of recovery. National Union seizes upon the Plaintiff's condition in arguing the extent of recovery is not foreseeable. As Prosser, in his treatise, Law of Torts, Section 43 (5th Ed. 1984) states:

> "The defendant is held liable when the defendant's negligence operates upon a concealed physical condition, such as pregnancy, or a latent disease, or susceptibility to disease, to produce consequences which the defendant could not reasonably anticipate. The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable, such as tuberculosis, paralysis, pneumonia, heart or kidney disease, blood poisoning, cancer, or the loss of hair from fright."

This is precisely the situation in the case sub judice. In the present case, it is foreseeable that if the Union did not appear, the agrieved individual would permanently lose her job and suffer emotional upset from either the loss of her job or the non performance of the National Union employee. The negligence of the National Union caused Plaintiff emotional upset which operated upon her latent condition to produce unanticipate consequences. Damages for such consequences are recoverable.

B. Zone of Danger

National Union argues that the Plaintiff does not fall within the zone of danger recognized as one of the theories upon which the impact rule has been overcome. Typical of the cases adopting the zone of danger is Culbert vs. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982). The zone of danger applies to those persons who suffer mental distress as a result of the Defendant's conduct and are within the zone or threat of physical harm. Contrary to AFGE's argument, Plaintiff certainly is within the zone of risk in that her present is not only known to the tortfeasor but National Union was acting as the agent of the Plaintiff. Clearly, National Union's contention that Plaintiff is not within the zone of danger is nothing short of specious.

C. Restatement of Torts is not contrary to Plaintiff's Position

The National Union relies heavily upon the Restatement of Torts, Section 313(1), comment (c), (1965). However, the National Union fails to interpret the section in its entirety. Section 313(1) states that the actor who unintentionally causes emotional distress:

> "is subject to liability to the other for resulting illness or bodily harm if the actor:
> a. Should have realized that his conduct involved an unreasonable risk of causing the distress . . . and,
> b. From facts known to him should have realized that the distress . . .might result in illness or bodily harm."

Clearly, the National Union must have realized the importance of this hearing to the Plaintiff. Additionally, the National Union must have realized that its neglect, in not appearing at the hearing, would result in emotional distress. Nothing in this section addresses the extent of the distress. In the instant case, the ramifications of the National Union's negligence were more serious than might have been expected. However, nowhere in the Restatement does it say that the specific effects of the emotional distress must be foreseeable.

The National Union also points to comment (c) of the Restatement, Section 313, in support of its argument. However, there is a critical distinction between the analysis in the comment and the facts of the instant case. The comment refers to a situation where the negligent party acts toward an unidentified party. Clearly, absent physical contact, a negligent driver of an automobile can not foresee an extreme reaction to being

startled. However, that situation is not analogous to the instant cause where the National Union Representative knew exactly what his duty was, and knew that there would be emotional ramifications to his negligence. The Plaintiff does not contest the Restatement's position that a negligent driver of an automobile will not be held accountable for exceptional physical sensitivities. However, that rational has no applicability to the present situation where the Defendant negligently breached his duty to this particular Plaintiff, **realizing that emotional distress would result.** In this case, the law is that National Union is responsible for all consequences evolving from the distress caused to the Plaintiff. Therefore, there is nothing in the applicable Restatement provisions that precludes recovery for the emotional damages incurred by the Plaintiff.

POINT II

THE DISTRICT COURT OF APPEAL IMPERMISSABLY REWEIGHED THE EVIDENCE IN HOLDING THAT MALICE SUFFICIENT TO OVERCOME THE IMPACT RULE HAD NOT BEEN SHOWN.

Petitioner relies on the argument in Point II of her main brief for this point.

POINT III

ASSUMING THE IMPACT RULE IS STILL VALID IN THIS STATE, THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT ALL OF PLAINTIFF'S DAMAGES WERE CAUSED BY THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND THEREFORE BARRED UNDER THE IMPACT RULE.

Petitioner relies on the argument of her main brief for this point.

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POINT IV

THE NEGLIGENCE OF NATIONAL UNION IS THE PROXIMATE CAUSE OF PLAINTIFF'S DAMAGES.

The existence of proximate causation is a question for the finder of fact unless reasonable men could not differ. Florida Standard Jury Instruction (Civil) 5.1. This Court has defined causation as whether the Defendant's conduct was a material and substantial factor in producing the result. Loftin vs. Wilson, 67 So.2d 185 (Fla. 1953); Banat vs. Armondo, 430 So.2d 503 (Fla. 3 DCA 1983), pet. for rev. den. 446 So.2d 99 (Fla. 1984). Overlooking the foregoing test, the National Union argues that Plaintiff's preexisting condition was not caused by the incident in question and therefore its negligence is not the proximate cause of Plaintiff's medical injuries. The Record does not support this contention.

The National Union overlooks concurrent causation. A wrongdoer remains liable for consequent harm when the result is caused by the congruence of a negligent act with a natural force or condition. Goodman vs. Becker, 430 So.2d 560 (Fla. 3 DCA 1983). Assume the Plaintiff was subject to seizures prior to the failure to appear. The factual situation presented resembles that of the "eggshell Plaintiff" who suffers death where a normal person would have only had a bump on the head. Dulieu vs. White, 2 K.B. 669, 679 (1901).

In Hamilton vs. Walker Chemical and Exterminating Company, 233 So.2d 440 (Fla. 4 DCA 1970), the Court noted that a person is liable for damages which are in part the result of other causes, if it can be said that the other causes alone would not have been sufficient to produce the injury. See also, De La Concha vs.

Pinero, 104 So.2d 25 (Fla. 1958). Here, even if Plaintiff did have seizure condition, she had not had a seizure in years and no doctor who testified had a prior history of seizures.

The testimony of Dr. Dwight Burley, Plaintiff's personal physician, was that he had no confirmed history of seizures on Plaintiff's part although he admitted that the Plaintiff was on antiseizure medication (Plaintiff's Exhibit 29, Pp. 21, 23, 27). Dr. Burley stated that the Plaintiff denied to him ever having seizures (Plaintiff's Exhibit 29, P. 13). Drs. Burley, Goode and Wallach all stated that severe emotional upset is known to trigger a seizure (Plaintiff's Exhibit 29, Pp. 32-33, Plaintiff's Exhibit 31, Pp. 12, 28, 52). Dr. Mark Orin, a hemotologist, testified that although prior to Plaintiff's fall in September, 1976, she was suffering from a low blood platelet count due to a defect in her body, this low platelet count was not related to her fall in September of 1976 (Plaintiff's Exhibit 32, Pp. 8, 9). Dr. Orin stated that the removal of dilantin to an individual who had an active seizure disorder would only end the suppression of the seizure focus and therefore that a seizure could occur (Plaintiff's Exhibit 32, P. 24).

Dr. Rafael Good, a psychiatrist, stated that Plaintiff is a truthful person who does not consciously exaggerate her problems (Plaintiff's Exhibit 31, P. 14). In the doctor's expert opion, the emotional upset of the nonappearance of the Union representative at Plaintiff's hearing, was the straw that broke the camel's back with regard to her mental state (Plaintiff's Exhibit 31, P. 25-27). The doctor indicated that as a result of

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the nonappearance, Plaintiff believes that she has been unfairly treated (Plaintiff's Exhibit 31, P. 29). From the Plaintiff's vantage point, the failure of the representative to show at the hearing, indicates to the Plaintiff that no one cares about her and that everyone is against her (Plaintiff's Exhibit 31, Pp. 32, 59). Dr. Good stated, within a reasonable degree of medical probability, that the events which culminated in the nonappearance of the Union representative, resulted in the Plaintiff's suffering a seizure which caused her to fall at home (Plaintiff's Exhibit 31, Pp. 34-37). He indicated, within a reasonable degree of medical probability, that the stressful emotional event was related to her fall (Plaintiff's Exhibit 31, P. 48).

Dr. Howard Wallach, first saw the Plaintiff on September 17, 1976, in Doctor's Hospital after her fall (Plaintiff's Exhibit 28, P. 4). In his opinion, within a reasonable degree of medical probability, the Plaintiff had a seizure episode which caused her to become unconscious and fall causing injury to the back of her head (Plaintiff's Exhibit 28, Pp. 8, 21, 22).

Dr. Donald Dooley operated on the Plaintiff and observed a torn cortical artery which was bleeding (Plaintiff's Exhibit 33, P. 7). He believed that the torn artery was related to Plaintiff's fall at home (Plaintiff's Exhibit 33, Pp. 8-9). This in turn caused a subdural hematoma (Plaintiff's Exhibit 33, P. 12).

The Record thus reveals competent substantial medical testimony that emotional stress can cause a seizure (R. 894).

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The evidence shows that Plaintiff was under severe emotional distress after her dismissal from federal service. Mary Galloway saw Plaintiff after her termination and noted that the Plaintiff was severely distraught and consumed with the fact that Mudgett did not show up at the hearing (TR. 243). Plaintiff's husband testified that subsequent to the hearing the Plaintiff was morose and emotionally hurt (TR. 334-335, 342). The Plaintiff testified that her whole life had gone away from her after the representative did not show up (TR. 407). She stated that the whole world was against her and that her life was going down the drain (TR. 408). Plaintiff's testimony is consistant with the testimony of the psychiatrist, Dr. Rafael Good (Plaintiff's Exhibit 32). The evidence supports a conclusion that Plaintiff underwent severe emotional distress caused by the failure of Mr. Mudgett to attend the hearing and that the stress brought on the occurrence of a seizure, which caused Plaintiff to fail and strike her head and suffer a subdural hematoma. There being competent substantial evidence to support the trial Court's decision, it follows that this point does not raise reversible error.

POINT V

THE TRIAL COURT WAS CORRECT IN DETERMINING THAT IT HAD SUBJECT MATTER JURISDICTION OF THE CAUSE

The issue of subject matter jurisdiction has been litigated from day one in this case. The trial Court found that the Plaintiff was not a member of the Exclusive Bargaining Unit of Local 2447 and therefore this cause did not involve the duty of

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fair representation and the matter was not preempted. On appeal, the District Court affirmed this finding:

> "It is apparent that there is a direct relationship between the existence of a duty of fair representation and the exclusive bargaining status of the Union . The duty is imposed only on a Union when it is the exclusive representative of a bargaining unit. This duty is imposed for the benefit of the members of the unit because they have given up their individual rights of representation for the good of the unit as a whole. Where a Union is not the exclusive bargaining representative of a Union member, there is no statutory duty of fair representation owed by the Union to that member. . . In the present case, it is undisputed that Degrio was not a member of the Exclusive Bargaining Unit. . . The National Union was not her exclusive bargaining representative, and, consequently, did not owe her a duty of fair representation."

American Federation of Government Employees vs. Degrio, 454 So.2d 632, 637 (Fla. 3 DCA 1984). Both the trial Court's decision and the District Court of Appeal's decision is a correct statement of the law. However, from AFGE's standpoint, hope springs eternal and they have raised the point yet again before this Court.

This is not a case involving breach of the duty of fair representation. That duty was created by the Supreme Court in Steele vs. Louisville and Nashville Railroad Company, Inc., 323 U.S. 192, 202 (1945):

> "We think the Railway Labor Act imposes upon the statutory representative of a craft . . . a duty to protect equally the interests of the members of the craft . . ..

> We hold that the language of the Act, to which we have referred, read in a light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees a duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts."

Steele was a railway labor act case. The duty of fair representation was extended to cases arising under the National Labor Relations Act by the Supreme Court in Wallace Corporation vs. National Labor Relations Board, 323 U.S. 948 (1945). The source of duty of fair representation is the exclusivity of the Union as the bargaining representative. International Brotherhood of Electrical Workers vs. Faust, 442 U.S. 42 (1979); Journeyman Pipe Fitters Local 392 vs. National Labor Relations Board, 712 F.2d 275 (6th Cir. 1983); Sanders vs. Youth Craft Coats and Suits, Inc., 700 F.2d 1226 (8th Cir. 1983); Riley vs. Letter Carriers Local 380, 668 F.2d 224 (3rd Cir. 1981); United Steel Workers of America vs. National Labor Relations Board, 692 F.2d 1052 (7th Cir. 1982). The same proposition conversely stated is that where the Union is not the exclusive bargaining representative there is no duty of fair representation owed. Archer vs. Airline Pilots Association International, 609 F.2d 934 (9th Cir. 1979). There exists a **direct relationship** between the existence of the duty of fair representation and the exclusive bargaining status of the Union .

It is apodictic that the factual findings of a Court sitting without a jury are entitled to the same weight as a jury verdict. Marsh vs. Marsh, 419 So.2d 629 (Fla. 1982). If there is any

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competent evidence in this record to support the trial court's determination, then the decision of the Judge sitting without a jury should be affirmed. Wales vs. Wales, 422 So.2d 1066 (Fla. 1 DCA 1982); Laufer vs. Norma Fashions, Inc., 418 So.2d 437 (Fla. 3 DCA 1982). Here the Judge has found, as a matter of fact, that the Plaintiff was not a part of the exclusive bargaining unit but was a member of the Union (R. 882-883). This is supported by the record (TR. 162-163, 638). Furthermore, the Plaintiff was not shown to be within the bargaining unit of the National Union. For these two entirely separate reasons, there is no duty of fair representation owed by the National Union to the Plaintiff.

National Union, a public sector Union, argues that a different rule applies to public sector Unions with regard to the duty of fair representation. The National Union argues that any duty owed must have arisen under the executive order. Section 10e of Executive Order 11491, by which President Kennedy established collective bargaining in the public sector states:

> "The duty of fair representation arises when the labor organization has been accorded exclusive recognition".

Under any reasonable interpretation of section 10e of the Executive Order, the duty flows from the exclusive status of the Union as bargaining representative. Here, as previously mentioned, the National Union, or for the matter Local 2447, was not the Plaintiff's exclusive bargaining representative and Plaintiff was not in the exclusive unit. No duty of fair representation is owed.

The essence of the National Union's contention is that certified status is immaterial because even absent certified status, the Union may represent the employees in various statutory matters. The National Union's argument misses the mark because the duty of fair representation is only present where the basis of the representation arises from the certified status of the Union. If the National Union had been the certified bargaining representative of the Plaintiff, then even in administrative appeals or adverse action appeals, the duty would arguably be owed. However, the Plaintiff was not in a certified unit and duty of fair representation was owed as a matter of law.

The National Union relies upon the decision of the District Court in Butler vs. American Federation of Government Employees, Case No: C 81-482 (N.D. Ohio 1982), a non reported decision appearing in the appendix of the National Union 's brief. The opinion of the United States District Court for the Northern District of Ohio suggests that Butler was a member of the bargaining unit. Plaintiff is not in the bargaining unit. Therefore, Butler is not controlling.

The basis of the lawsuit is that the National Union breached a common law duty owed to the Plaintiff to appear as her representative in the administrative proceedings. As noted in the final judgment, the duty of reasonable care arises from the common law (R. 891-892). This is not the same duty as that contained within the duty of fair representation.

The National Union attacks the decision rendered below by the District Court of Appeal as "inherently absurd" (Brief of

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Respondent at 30). Quite to the contrary, the decision of the District Court which held that subject matter jurisdiction is present is consistent with decisional precedent. Here, Plaintiff was not a member of the bargaining unit. The National Union did not negotiate Plaintiff's contract with the government. In short, the relationship between Degrio, a non bargaining unit member and the National Union is vastly different, from the relationship of a bargaining unit member and the National Union. Despite the inherent difference in the relationship, National Union argues that its duties to both union members within the bargaining unit and union members outside the bargaining unit should be exactly the same. Such a contention is incorrect.

In the present cause, Plaintiff was recruited by the Union to be a member. If she had not **voluntarily** joined, there would be no relationship whatsoever between Plaintiff and the National Union. The "cement" of the relationship is **not** Federal Labor Law but the common law since Plaintiff's relationship with the National Union is neither created nor protected by Federal Law. The essence of the National Union's position is that it acquires **greater rights** solely because it is a union and regardless of whether it acts within or without the bargaining unit, it is entitled to protection due to its union status. When the National Union moves outside of the bargaining unit, there is no duty of fair representation, see, Steele vs. Louisville and Nashville Railroad Company, Inc., supra.; Archer vs. Airline Pilots Association International, supra., and the National Union is acting under the common law. It does not enjoy greater rights

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than, for example, a social club, or an association solely because it is a union. When the duty of fair representation was created by the United States Supreme Court in Steele, the Court explained why the duty existed:

> "We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interest of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Here, Plaintiff was not a member of the bargaining unit. The National Union **voluntarily** chose to remove itself from the protective veil of the exclusive bargaining unit when Plaintiff was allowed to become a Union member. The National has also accepted the concomitant responsibilities imposed upon it by the common law. Its argument here, seeking to apply the duty of fair representation to a non-bargaining unit member is nothing more than a smokescreen.

National Union has cited cases in its brief which National Union maintains are controlling. However, none of these cases are even factually close to this cause. In Wood vs. American Federation of Government Employees, 318 S.E. 2d 568 (S.C. 1984), the decision suggests that the union members were in the exclusive unit. The Court speaks of the duty of fair representation in that cause which does not apply here. Similarly, Marlow vs. Department of Defense, No. C-2-83-2010 (S.D.Ohio 1984) does not control becuase the union in that cause was the exclusive bargaining representative of Marlow.

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a. Primary Jurisdiction

Cases in the labor relation area do not generally involve the doctrine of primary jurisdiction. Primary jurisdiction involves an area of conduct which must be completely left free from state regulation. Local 100 of the United Association of Journeyman and Apprentices vs. Borden, 373 U.S. 690, 698 (1963). The National Union contends that this case involves the National Union 's failure to represent a constituent and then interpolates that it must follow that only "national policy" is at stake. The conclusion does not follow, for here, there is no federal requirement (whether through the duty of fair representation or otherwise) that the Union represent the Plaintiff. Consequently, the doctrine of primary jurisdiction is not involved in this cause.

The National Union maintains that negligence and breach of the duty of fair representation are the same (Appellant's brief page 23). This is clearly not the law. Simple negligence does not breach the duty of fair representation. Curtis vs. United Transportation Union ., 700 F.2d 457 (8th Cir. 1983); Higden vs. United Steel Workers of America, 706 F.2d 1561 (11th Cir. 1983). In Ruzicka vs. General Motors, 649 F.2d 1207, 1212 (6th Cir. 1981), the Court stated:

> "We can not hold a Union liable for breach of duty of fair representation based upon simple negligence".

The issues involved in this negligence case and in a case involving the duty of fair representation are different. There is no primary jurisdiction problem as the subject dispute does not involve solely federal rights.

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A. Preemption

Not every labor case is preempted. The leading case concerning preemption is San Diego Building Trades Council vs. Garmon, 359 U.S. 236 (1979). There, the Supreme Court set down the test that preemption in labor matters applies to activities arguably subject to section 7 or section 8 of the National Labor Relations Act. State regulation of such matters must yield to the federal enactment.

In Sears, Roebuck and Company vs. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), the Court revisited the arguably prohibited language of Garman:

> "The critical inquiry, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the contraversy presented to the state court is identical to (as in Garner or different from as in Farmer) that which could have been, but was not, presented to the labor board. For it is only in the former situation that a state Court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the board which the arguably prohibited branch of the Garman doctrine was designedto avoid". Id. at 197.

Applying the above mentioned rule to the case at bar, the present contraversy, could not have been presented to the Labor Board. Additionally, the remedies available in common law are different from those available from the Labor Board and there is no danger of duplication of the remedies sought in a civil action. Consequently under Garman and under the Sears, Roebuck and Company, decision, there is no preemption.

Recently, the Supreme Court has considered two preemption cases. Both apply the Garman test as refined by the Court in Sears, Roebuck, supra. In Local 926, International Union of Operating Engineers, AFL-CIO vs. Jones, ____U.S.____, 103 S.Ct. 453 (1983), the Plaintiff sued a Union for interference with contract. The same individual who had previously filed an unfair labor practice complaint arising out of the same factual circumstances against the Union with the Regional Director of the National Labor Relations Board. This complaint had been dismissed. The Supreme Court held that the claim was preempted because the exact same claim could be and was made before the state court and National Labor Relations Board. The second case, Belkany, Inc. vs. Hale, ____U.S. ____, 103 S.Ct. 3172 (1983) involved strike breakers who were fired by an employer after a settlement of the strike despite employer promises of no layoff at the conclusion of the strike. The strike breakers sued for fraud and breach of contract. The Supreme Court in that case held that the claim was not preempted because the dispute presented to the Court and the Board were not the same. Thus, by virtue of the two cases decided it is apparent that if the cases are identical, although labeled differently, preemption applies. But if the disputes are different, then preemption does not apply. As previously mentioned, applying the foregoing rule to the present case, it is apparent that the disputes are different and therefore there is no preemption.

National Union relies upon Olguin vs. Inspiration Consolidated Copper Company, 740 F.2d 1468 (9th Cir. 1984), in an

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effort to establish that this cause is preempted. However, as is clearly pointed out in the opinion, Olguin was a member of the collective bargaining unit. Therefore the Court correctly ruled that Mr. Olguin's rights were a matter of federal law and no amount of "artful pleading" could metamorphise the essence of the lawsuit into a state law matter. In the present case, Plaintiff is not a member of the collective bargaining unit and no federal rights are at issue. Olguin is not controlling here.

C. Failure to Exhaust Administrative Remedies

Plaintiff has no dispute with the general rule that a failure to exhaust administrative remedies goes to the essence of the trial court's subject matter jurisdiction. Pushkin vs. Lombard, 279 So.2d 79 (Fla. 3 DCA), cert. den. 284 So.2d 396 (Fla. 1973). This rule has no application in this cause.

The administrative regulation referred to by the National Union concern the violation of fiduciary obligations. The National Union does not indicate what fiduciary obligations are covered by the administrative regulations. Needless to say here, the failure to attend the administrative proceeding on the part of the Union does not violate any fiduciary obligation. No exhaustion of administrative remedies is present.

Alternatively, since exhaustion was plead as an affirmative defense, the burden was on the Defendant to prove its defense. In this regard, the trial court found, in paragraph 37 of the final judgment, that Defendant had not proved either the Plaintiff's failure to exhaust administrative remedies or what administrative remedies were prerequisite to a suit for common

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law negligence (R. 891). This finding is supported by a reasonable view of the evidence. The Order ought be affirmed.

POINT VI

THE PUNITIVE DAMAGE AWARD SHOULD NOT BE STRIKEN.

In the final judgment, the trial Court realized that it had previously made a mistake in denying Plaintiff's punitive damage claim. The Court recognized that International Brotherhood of Electrical Workers vs. Faust, 442 U.S. 42 (1979) did not apply to labor Union s as a whole but only applied to labor Union s involved in breach of the duty of fair representation. Since this cause was governed by the comm considered that Faust did not bar punitive damages and awarded the Plaintiff $150,000.00 as punitive damages (R. 895).

The National Union argues on appeal that the award of punitive damages is harmful error because there is no predicate or prerequisite for punitive damages through the offering of evidence on the financial condition of the Defendant by Plaintiff. Such evidence is not required as part of the Plaintiff's case. Rinaldi vs. Aaron, 314 So.2d 762 (Fla. 1975). No reversible error is present.

As noted by the trial Court in the final judgment, and as argued in this brief, the evidence necessary to establish the required willful and wanton conduct overcome the impact rule is the same as to allow punitive damages to be awarded. Stetz vs. American Casualty Company of Reading, Pennsylvania, supra.. Therefore, the proof had to be the same to establish both Plaintiff's compensatory damage claim and punitive damage claim.

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Contrary to the argument of the National Union , no due process rights have been violated since the evidence from the Plaintiff would, of necessity, have been the same. The award of punitive damages should be affirmed.

CONCLUSION

Based upon the foregoing cases, statutes, arguments and other authorities, Petitioner, JOELLA DEGRIO, respectfully requests that this Court abrogate the impact rule in favor of the doctrine of reasonable foreseeability with regard to emotional injury, and reverse the decision of the District Court of Appeal denying Petitioner recovery due to the impact rule. Petitioner further requests that this court affirm the decision of the District Court of Appeal with regard to subject matter jurisdiction, punitive damages and proximate cause.

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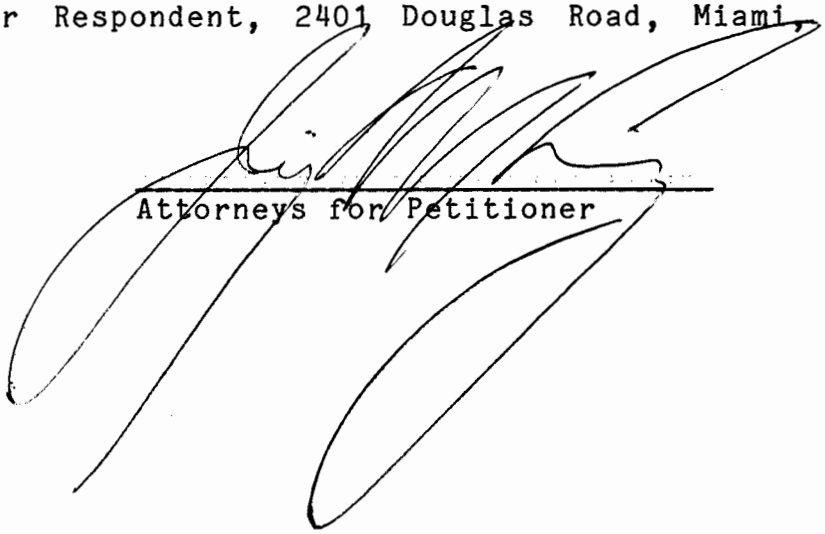
BY: _____
JAY M. LEVY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing **REPLY BRIEF OF PETITIONER** was mailed this 28th day of February, 1985 to HAROLD D. SMITH, ESQUIRE, Attorney for Respondent, P.O. Box 1780, Hollywood, Florida 33022 and to ARTHUR J. ENGLAND, JR., ESQUIRE, FINE, JACOBSON, BLOCK, ENGLAND, et al., Co-counsel for Respondent, 2401 Douglas Road, Miami, Florida 33134.



Attorneys for Petitioner