IN THE SUPREME COURT OF FLORIDA

MARTIN-JOHNSON, INC.,

Petitioner,

vs.

TOMMIE SAVAGE,

Respondent.

CASE NO. 68,832
FIRST DISTRICT COURT OF
APPEAL NO. BM-150

PETITIONER'S REPLY BRIEF

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POINT I

THE FIRST DISTRICT COURT OF APPEAL ERRED IN FAILING TO REVIEW BY CERTIORARI THE LOWER COURT ORDER OF MARCH 27, 1986.

Respondent essentially raises three arguments in his Answer Brief on this particular point. None of the three arguments can withstand close scrutiny and all should be summarily rejected.

Respondent first asserts in response that an inquiry into the financial resources of the defendant does not subject the defendant to the same type of harm as an inquiry into matters subject to the work product privilege or the attorney-client privilege. Therefore, concludes Respondent, an adequate remedy at law exists by way of appeal of a subsequent final order.

Respondent's first assertion may be true or it may be false but in the present case it is irrelevant. The holdings of Allstate Ins. Co. v. Kelley, Sunrise Olds-Toyota, Solodky v. Wilson and Jaimot are all based upon the underlying theory that potentially subjecting a party to financial disclosure of a normally private and undiscoverable nature is sufficient to give rise to certiorari review pursuant to an appropriate petition for the writ. Furthermore, absolutely no case law

cited by Respondent even remotely suggests that the type of harm which must be encountered must be that akin to the work product privilege or attorney-client privilege before certiorari review becomes available. Respondent's first assertion should be rejected.

Respondent's second assertion is to the effect that since Petitioner has conceded that a claim for punitive damages may properly be asserted in a cause of action brought pursuant to Chapter 440.205, Florida Statutes, a discovery request for otherwise private financial disclosure is not unduly burdensome or oppressive. In point of fact, Petitioner has never conceded any such thing. The issue of whether punitive damages can be awarded in a successful §440.205, Florida Statutes, action has never been decided by any appellate court in Florida. It may even be that no such damages are available as a §440.205 claim really has all of the earmarks of a common-law breach of contract action for which punitive damages could never be recovered. E.g. U. Shop Rite, Inc. v. Richards Paint Mfg. Co., 369 So.2d 1033 (Fla. 4th DCA 1979), DeMarko v. Publix, 360 So.2d 134 (Fla. 3d DCA 1978), Henry Morrison Flagler Museum v. Lee, 268 So.2d 434 (Fla. 4th DCA 1972).

Certainly, the legislature has not directly mandated any punitive damages in §440.205 and this Court has already

implied that the present action is not akin to the common law tort of retaliatory discharge. Smith v. Piezo Technology & Prof. Adm'rs., 427 So.2d 182 (Fla. 1983)[1] In any event, Respondent's suggestion that punitive damages are ipso facto available is today without merit,[2] especially in view of the non-allegations of Respondent's initial complaint.

Respondent's third assertion is that since the present action is statutory in origin there is no need to allege additional or ultimate facts in order to support a punitive damages claim. Therefore, Respondent reasons, Jaimot and Sunrise Olds-Toyota are not really in conflict with the present case and opinion of the First District. This assertion totally ignores the present question which is whether an appellate court should review by certiorari, a lower court's failure to dismiss a cause of action which

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[1] "Some jurisdictions have recognized exceptions to this rule and one exception takes the form of a common law tort for retaliatory discharge [citations omitted]. Florida has not followed that path." 427 So.2d at 184.

[2] At least one commentator suggests punitive damages are recoverable in a §440.205, Florida Statutes, action. See "Handling Retaliatory Discharge Cases under the Workers Compensation Act", Florida Bar Journal/April, 1984 (p. 253-256). The conclusion of this article is based upon the authors' mistaken and erroneous reliance upon May v. Stratton, 183 So.2d 43 (Fla. 1st DCA 1966) and Chipley v. Atkinson, 1 So. 934 (1887).

carries potential punitive damages or failure to grant a motion to dismiss a claim for punitive damages from a complaint.

Respondent further overlooks the available legislative precedent in that statutory enactments which specifically allow for the recovery of punitive damages invariably state that such damages are recoverable upon an appropriate showing. E.g. §624.155, Florida Statutes (1985), §812.035(7), Florida Statutes (1983).[3] The fact that the present action is statutory in origin is wholly irrelevant with regard to the issue on appeal.

For the foregoing reasons, Respondent's assertions should fail in light of the present merits, the order of the First District should be reversed and certiorari review should be granted.

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[3] Section 624.155, Florida Statutes (1985), requires a showing substantially identical to that called for in Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308 (1936) and its progeny. Section 812.035(7), Florida Statutes (1983), allowed for punitive damages "when appropriate". Recovery of punitive damages under present §812.035(7), Florida Statutes (1985), was amended out of the statute by Chapter 84-304, Laws of Florida.

POINT II

THE FAILURE OF THE LOWER COURT TO STRIKE RESPONDENT'S DEMAND FOR PUNITIVE DAMAGES IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Respondent's argument on this point is simply to ignore Winn & Lovett Grocery Co., supra, Thompson v. City of Jacksonville, Jaimot, Carroll v. Magnaflux Corp., American International Land Corporation v Hanna, Rice v. Clements and Moore v. Southern Bell Telephone and Telegraph Company and instead again to suggest that he has no pleading burden on the punitive damages issue because the matter is statutory in origin and because, again, Petitioner has "conceded" that punitive damages are appropriate under §440.205, Florida Statutes.

Petitioner again states that it has never conceded, anywhere, the issue of whether punitive damages are appropriate (See p. 2 above). Additionally, the same arguments contrary to Respondent's unfounded assertion that punitive damages are ipso facto appropriate for a statutory violation apply here as well. (See p. 2-3 and fns. 1,2 and 3 above). In contrast, it appears that some civil causes of action for statutory violations do not even carry punitive damages as a recoverable element of damages. Hamilton v. Palm Chevrolet-Oldsmobile, Inc., 388 So.2d 638 (Fla. 2d DCA 1980).

Respondent failed to allege anything near adequate to sustain even a bare claim for punitive damages under all consistent case law precedent in Florida. The lower court acted contrary to the essential requirements of law by not striking the claim. Respondent implicitly, if not explicitly, admits that his pleadings are insufficient but he demands that he be treated differently than all other litigants who wish to assert claims for punitive damages. Respondent has not yet advanced any novel theory as to why he deserves such special treatment and in fact, no theory, novel or otherwise, exists to support Respondent's demands.

The lower court departed from the essential requirements of law when it failed to strike Respondent's demand for punitive damages and the lower court Order of March 27, 1986 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to J. NIXON DANIEL, Esquire, Post Office Box 12950, Pensacola, Florida 32576 this 22nd day of July, 1986.

Gordon D. Cherr

GORDON D. CHERR