SUPREME COURT OF FLORIDA

PENNY BYRD, ET AL.,

PETITIONERS,

v.

RICHARDSON-GREENSHIELDS SECURITIES, INC., ET AL.,

RESPONDENTS.
_____/

CASE NO. *72,788*

DCA CASE NO. *87-1368*

PETITIONERS' BRIEF ON THE MERITS

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I. TABLE OF CONTENTS

TABLE OF CONTENTS, continued

11. TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, continued

TABLE OF AUTHORITIES, continued

TABLE OF AUTHORITIES, continued

FLORIDA CONSTITUTIONAL PROVISIONS AND CODES

TABLE OF AUTHORITIES, continued

ADDITIONAL AUTHORITY

III. STATEMENT OF THE CASE AND OF THE FACTS

A. NATURE OF THE CASE

This appeal raises the issue of whether the exclusivity bar of the Florida Workers' Compensation Act, Section 440.11(11), Florida Statutes (1985), bars a common law tort action for emotional injuries by female employees against their former employer for acts now commonly referred to as "sexual harassment."

In an opinion filed June 24, 1988, now reported at 527 So.2d 899, the District Court of Appeals for the Second District affirmed the Circuit Court's order which dismissed with prejudice Plaintiffs' claims against their former employer on the grounds that the exclusivity bar of the workers' compensation law precludes the action.

However, the Court of Appeals did certify to this Court "as of great public importance, the contention in this case concerning the exclusivity of workers' compensation remedies." 527 So.2d at 902.

B. FACTS OF THE CASE[1/]

1. THE PARTIES

The Petitioners (herein "Plaintiffs") are six women who were employed as secretarial and support staff personnel at the Ft.

1/ Plaintiffs' statement of the facts are based directly on Plaintiffs' First Amended Complaint (R.Vol. 11, Pgs. 39-50) since the February 2, 1987 Order of Dismissal with Prejudice by the Circuit Court which was affirmed by the Second District Court of Appeals granted the employer Defendants' Motions to Dismiss Plaintiffs' Amended complaint.

(Footnote continued to next page)

Myers office of the Defendant RICHARDSON-GREENSHIELDS SECURITIES, INC., a retail securities firm during various times between 1983 and 1985. One Plaintiff, MARJORIE HENSLEY, was also employed by Defendant INTERSTATE SECURITIES CORPORATION which on April 1, 1985, acquired several Florida retail sales offices from RICHARDSON-GREENSHIELDS, INC. including the Lee County office where Plaintiff HENSLEY continued to be employed.

Plaintiff PENNY BYRD worked at the RICHARDSON-GREENSHIELDS SECURITIES, INC. firm's Lee County office for approximately 12 months during the time period between September, 1983 through October, 1984. First Amended Complaint, R.Vol. II, p. 40, ¶3(a), R.40 ¶3(a). MARJORIE HENSLEY, the only Plaintiff employed by the successor corporation INTERSTATE SECURITIES CORPORATION, as well as RICHARDSON-GREENSHIELDS SECURITIES, INC., worked at the office for 12 months from June 1984 to April 15, 1985. Id. at p. 40, ¶3(b), ¶4. JANEY MAINARD SWAHN was employed for 10 months, from December 1983 to September 1984, at the office. Id. at p. 40, ¶3(c). DEBBIE K. SMITH worked for six months, from March 1984 to September 1984. Id. at p. 40, ¶3(d). MARY ANN VANDLANDEGHEM was employed at RICHARDSON-GREENSHIELDS SECURITIES, INC. for seven months, from December

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(Footnote 1 continued from previous page)

Accordingly, in reviewing this appeal, this Court must assume that "all facts alleged in appellants' amended complaint to be true as well as all reasonable inferences therefrom." Simon v. Tampa Elec. Co., 202 So.2d 209, 211 (Fla. 2 DCA 1967); Ellison v. City of Ft. Lauderdale, 175 So.2d 198, 200 (Fla. 1965) ("For purposes of the Motion [to Dismiss] the well pleaded material allegations of the Complaint are taken as admitted.").

1983 until June 1984. Id. at p. 40, ¶3(e). DENISE LARSON worked at the office for five months, from February 1984 to June 1984. Id. at p. 40, ¶3(f).

Defendant RICHARDSON-GREENSHIELDS SECURITIES, INC., is a New York corporation which maintained several retail stock brokerage offices in Florida, including a branch office in Lee County where the Plaintiff was employed. Id. at pp. 40-41, 116.

On April 1, 1985, Defendant INTERSTATE SECURITIES CORPORATION acquired several Florida retail sales offices from RICHARDSON-GREENSHIELDS SECURITIES, INC., including the Lee County office. Id. at p. 41, ¶7. Howard Jenkins, Branch Supervisor of the RICHARDSON-GREENSHIELDS SECURITIES, INC.'s Lee County office commencing May 1984, remained Branch Supervisor when the branch was acquired by INTERSTATE SECURITIES CORPORATION on April 1, 1985. Id. at p. 40, 115.

2. WORKPLACE SEXUAL HARASSMENT

The Plaintiffs were subjected to sexual harassment by the Branch Managers of the Lee County office from September 1983 through April 1985.

Charles Gill was Branch Manager at RICHARDSON-GREENSHIELDS SECURITIES, INC.'s Lee County retail office from approximately January 1983 until March 1984. Id. at p. 45, ¶26. Plaintiffs PENNY BYRD, JANEY MAINARD SWAHN, MARY ANN VANDLANDEGHEM, and DENISE LARSON worked at the brokerage firm office while Charles Gill was Branch Manager. Id. The position of Lee County Branch Manager was vacant from March 1984 to May 1984.

Howard Jenkins was Branch Manager at the Lee County brokerage firm office beginning May 1984. Id. at p. 40, ¶5. From May 1984 through April 1, 1985, Howard Jenkins was employed by RICHARDSON-GREENSHIELDS SECURITIES, INC. Thereafter, Howard Jenkins was employed as Branch Manager of the Lee County office by INTERSTATE SECURITIES CORPORATION, which acquired the office on April 1, 1985. Id. at p. 41, ¶7. All Plaintiffs were employed at the brokerage firm office and worked under Howard Jenkins' supervision, while he was Branch Manager. Id.

Under both Branch Managers, the women were chased around the office, pinched, fondled, grabbed and squeezed by first Charles Gill and later Howard Jenkins. Id. at p. 42, ¶12(a-f); p. 45, ¶26(a-d). Charles Gill and Howard Jenkins intentionally sexually harassed the women, and the harassment was uninvited, unwanted, and unauthorized. Id. at p. 41, ¶12; p. 45, ¶27. In addition to the physical sexual harassment, Charles Gill and Howard Jenkins made verbal sexual advances consisting of threats to force the women to have sexual relations, and degrading sexually-oriented comments about their bodies. Id. at p. 43, ¶15; p. 45, ¶26.

Specifically, while Mr. Gill was Branch Manager, Plaintiff BYRD was subjected to continuous flirtations and sexually overt remarks from him. Id., ¶26a. While Mr. Jenkins was Branch Manager, he continually touched, kissed, and grabbed Plaintiff BYRD; and rubbed her breasts, buttocks, back, and shoulders. Id., ¶12a.

Plaintiff SWAHN was subjected to continuous attempts by Mr. Gill to kiss her. Gill also continually made comments of a sexual nature about her appearance and repeatedly touched her body. Id., 1126. Mr. Jenkins similarly touched and hugged Plaintiff SWAHN's back and shoulders, held her hands, and hugged her forcibly. Id., ¶12c.

Plaintiff VANDLANDEGHEM was continually touched by Mr. Gill and he also rubbed her legs and kissed her. Id., ¶26c. Mr. Jenkins continually put his hands on her shoulders and waist and continually brushed up against and bumped her. Id., ¶12e.

Plaintiff LARSON was persistently and continually asked by Mr. Gill in a sexually suggestive manner to accompany him to parties or for drinks. Id., ¶26d. Mr. Jenkins continually touched Plaintiff LARSON including her chest and shoulders, and would rub her from behind and put his arms around her. Id., ¶12f.

Plaintiffs HENSLEY and SMITH were not employed by either Defendant while Mr. Gill was Branch Manager. While Mr. Jenkins was Branch Manager, Plaintiff HENSLEY was continually touched and rubbed by him on her shoulders, back, and buttocks. He also repeatedly attempted to kiss her. Id., ¶12b.

Plaintiff SMITH was continually touched by Mr. Jenkins which included his rubbing her arm, shoulders, and neck; and stroking her and her clothing (e.g., turning down collars and touching buttons on blouses), Id., ¶12a.

3. DEFENDANTS HAD KNOWLEDGE OF THE SEXUAL HARASSMENT BUT FAILED TO TAKE ANY CORRECTIVE ACTION

Defendant RICHARDSON-GREENSHIELDS was aware of the complaints of sexual harassment occurring at the Ft. Myers branch office during 1984.

On or about June, 1984, Ken Fuller, President of RICHARDSON-GREENSHIELDS SECURITIES, INC. and Bill Lewis, Vice President of RICHARDSON-GREENSHIELDS SECURITIES, INC., were advised that acts of sexual harassment were occurring at the Lee County branch office. Id. at p. 46, ¶30. Additionally, numerous conversations with RICHARDSON-GREENSHIELDS SECURITIES, INC.'s District Operations Manager in Palm Beach, Fred Cirillo, by Lisa Sides, and DEBBIE K. SMITH between May 1984 and September 1984 also put RICHARDSON-GREENSHIELDS SECURITIES, INC. offices on notice of sexual harassment at its Lee County office. Id. at p. 46, 111130–31.

Notwithstanding the complaints, Defendant RICHARDSON-GREENSHIELDS took no corrective action nor instituted any investigation regarding the complaints of workplace sexual harassment against its employees Messrs. Jenkins and Gill. Id., ¶32.

Following its acquisition of the Lee County office of Defendant RICHARDSON-GREENSHIELDS, Defendant INTERSTATE SECURITIES CORPORATION continued to employ Howard Jenkins as the manager of that office. Ken Fuller, who, as president of RICHARDSON-GREENSHIELDS, had received the complaints of sexual harassment at the Lee County office where Plaintiffs were employed, became President of INTERSTATE SECURITIES CORPORATION

after its purchase of retail sales offices in Florida. Id., *1142.* Like RICHARDSON-GREENSHIELDS, Defendant INTERSTATE SECURITIES CORPORATION took no action nor conducted any investigations regarding complaints of the sexual harassment by Mr. Jenkins.

C. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

1. THE FIRST AMENDED COMPLAINT

Plaintiffs' First Amended Complaint consists of a five count complaint. Counts 111, IV, and V are directed against Plaintiffs' former employers Defendants RICHARDSON-GREENSHIELDS SECURITIES and INTERSTATE SECURITIES CORPORATION, and are the only claims germane to this appeal.[2/]

In Counts III and IV of the First Amended Complaint, all Plaintiffs sue Defendant RICHARDSON-GREENSHIELDS SECURITIES, INC. for damages based on intentional infliction of emotional distress (Count 111) (Id. at pp. *43-44),* and based on that Defendant's negligent hiring and retention of employees, namely branch managers, Howard Jenkins and Charles Gill. Plaintiffs allege that this Defendant was made aware these employees were committing acts of sexual harassment against the Plaintiffs but failed to take any corrective action (Count IV) (Id. at pp. *44-47).*

2/ In Count I, the Plaintiffs sue Howard Jenkins individually based on a common-law battery tort claim (R.Vol. II, pp. *41-42).* In Count II, the Plaintiffs sue Howard Jenkins individually based on a common-law tort assault claim (Id. at p. *43).* The claims against Defendant Howard Jenkins were not dismissed with prejudice by the Circuit Court in its December *8*, 1986 Order and consequently Mr. Jenkins was not a party to the appeal before the District Court of Appeals, or to this Court.

Counts V and VII are brought by Plaintiff MARJORIE HENSLEY against Defendant INTERSTATE SECURITIES CORPORATION based on that Defendants' negligent hiring and retention of branch manager Jenkins after it acquired the Lee County office of Defendant RICHARDSON-GREENSHIELDS SECURITIES INC. in August, 1985; and Defendant INTERSTATE's intentional infliction of emotional distress (Id. at pp. 47-50).

2. PROCEEDINGS BEFORE THE CIRCUIT COURT

(a) DEFENDANTS' MOTIONS TO DISMISS

Defendants RICHARDSON-GREENSHIELDS and INTERSTATE SECURITIES CORPORATION filed Motions to Dismiss Plaintiffs' First Amended Complaint.[3/] Both Defendants argued that "the complaint fails to state a cause of action and the court lacks subject matter jurisdiction because the claims alleged are subject to the the exclusive remedies of the Florida Workers' Compensation Statute" (R.Vol. 11, pp. 53, 62).

Additionally, both corporate Defendants argued that the Plaintiffs had not satisfactorily stated a cause of action for intentional infliction of emotional distress and for the negligent hiring and retention of its employees. (R.Vol. 11, pp. 92-93).

b. DISPOSITION IN THE CIRCUIT COURT

On December 8, 1986, the Circuit Court (Nelson, J.) heard oral argument on the Motions to Dismiss.

3/ Defendant Howard Jenkins also filed a Motion to Dismiss. As previously stated, the Circuit Court's disposition of Defendant Jenkins' Motion is not before this Court.

At the December 8, 1986, hearing, the Honorable William J. Nelson, Circuit Judge indicated his intention to grant the Motions to Dismiss by the corporate Defendant employers with prejudice with respect to all Counts directed to each corporate Defendant on the basis that the Workers Compensation Statute is the exclusive remedy. (See R.Vol. 11, pp. 81-84) (Excerpt of Proceedings of December 8, 1986).

At the hearing, Plaintiffs moved ore tenus to amend their complaint to conform with the pleading standards for an intentional tort articulated by this Court only 12 days earlier in Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986). (R.Vol. 11, p. 82). In response to Plaintiffs' request to amend the pleading, the Circuit Judge indicated that the request would be denied because no amendment would overcome the exclusivity bar of the Workers' Compensation Act. Id. On February 2, 1987, the Circuit Judge entered the written Order granting the Defendant employers' Motions to Dismiss with Prejudice. (R.Vol. 11, pp. 96-97).

3. DISPOSITION BY THE SECOND

In an opinion filed June 24, 1988 now reported at 527 So.2d 899, the Second District Court of Appeals affirmed the Circuit Court's "ruling that the exclusivity of workers' compensation remedies bars this suit against the employers." 527 So.2d at 900.

The Court of Appeals concluded that although based on a pleading deficiency, no cause of action was stated against the

employers, "the amended complaint could be further amended to cure the deficiency [however] such further amendment would be futile because the workers' compensation laws provide the exclusive remedy in this case." Id. The Court reasoned that the "workers' compensation laws cover emotional injuries resulting from not insubstantial physical contacts" and that the bar "is not precluded by an intentional tort committed by an employee, not the alter ego of the employee--notwithstanding prior notice of such conduct by the employer." Id.

The Court of Appeals also stated that the type of conduct by an employer which would render the exclusivity of workers' compensation remedies inapplicable as described by this Court in Fisher v. Shenandoah General Construction Co., supra, and Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986), requires a showing that the employer "deliberate[ly] intend[ed] to injure or engage in conduct which is substantially certain to result in injury or death" citing Fisher, 498 So.2d at 883. Id. at 901-902.

The Appeals Court additionally rejected the argument that the exclusivity bar should not apply because the "remedies under the workers' compensation laws for injuries in this type of situation are insufficient." 527 So.2d at 902. The Court stated that if the remedies provided by the Act are insufficient, this should be addressed by the Legislature. Id.

Finally, the Appeals Court certified to this Court "as of great public importance, the contention in this case concerning the exclusivity of workers' compensation remedies." Id. at 902.

IV. SUMMARY OF ARGUMENT

A. LEGISLATIVE ORIGINS

A review of the origins of the workers! compensation system as it developed in Florida and throughout the United States indicates that it was not designed or intended to cover claims for "non-physical in nature emotional injuries" or to cover emotional injuries caused by workplace sexual harassment.

Workers! compensation was designed to cover physical injuries from on-the-job accidents. Sexual harassment will neither involve a physical injury nor is it a typical workplace accident. Common law tort claims caused by workplace sexual harassment like other causes of action by an employee against an employer such as defamation, false imprisonment, libel, malicious prosecution, invasion of the right of privacy, fraud, and deceit, fall outside the workers! compensation system,

B. VIEW BY FIVE FLORIDA JUDGES

The inapplicability of the Florida Workers! Compensation exclusivity bar to common law tort claims for workplace sexual harassment has support in the Florida appellate judiciary. Five of the eleven judges of the Florida First District Court of Appeals in two en banc decisions have explicitly concluded that the workers' compensation exclusivity bar does not apply because "acts now commonly referred to as 'sexual harassment! were never intended to be governed by" the Florida workers! compensation law. Schwartz V. Zippy Mart. Inc., 470 So.2d 720, 731 (Fla. 1st DCA 1985) (Smith, J., dissenting), and Brown v. Winn-Dixie Montgomery. Inc., 469 So.2d 155, 163 (Fla. 1st DCA 1985) (Smith, J., dissenting) (en banc).

The same result reached by five judges was reached by Judge Ervin in a second dissenting opinion in these cases. However, unlike the five judges who viewed the workers' compensation bar as inapplicable because sexual harassment is not the "type of wrong" covered by the act, Judge Ervin focused on the "type of injury" and reasoned that "[i]f the essence of the tort is non-physical, then the tort action should not be barred." ***470*** So.2d at ***706.***

C. VIEW BY COURTS IN OTHER STATES

Plaintiffs' position that workplace sexual harassment falls outside the workers' compensation scheme is neither new nor novel. Numerous state appellate courts throughout the United States including courts in Georgia, North Carolina, Arizona, and Missouri, have concluded that common law tort claims for emotional injuries for workplace sexual harassment are not barred by that state's workers' compensation laws. Numerous other state appellate courts which have not yet addressed the issue in a workplace sexual harassment context have similarly concluded that claims for emotional--as distinct from physical injuries incurred in the workplace--are not barred by that state's workers' compensation laws. Although the workers' compensation statutory scheme may vary from state to state, the general policy considerations and analyses relied upon by these courts are persuasive and applicable to this case.

D. FISHER AND LAWTON ARE NOT DISPOSITIVE

Decisions by this Court in Fisher v. Shenandoah and Lawton v. Alpine Engineered Products. Inc., ***498*** So.2d ***879*** (Fla. ***1986)***

which articulate the standards which must be satisfied in establishing whether an employer's actions amount to an intentional tort, are not dispositive here. Unlike the injured employees in both Fisher and Alpine who suffered physical injury or death as a result of their work-related activities, Plaintiffs here suffered emotional not physical injuries from workplace sexual harassment unrelated to the normal work activity.

V. ARGUMENT

A. THE HISTORY, INTENT AND POLICY BEHIND WORKERS' COMPENSATION ACTS SUPPORT THE VIEW THAT SEXUAL HARASSMENT CLAIMS ARE OUTSIDE THE WORKERS' COMPENSATION SYSTEM

A review of the origins of the workers' compensation system as it developed in Florida and throughout the United States indicates that it was not designed to cover claims for emotional injuries for workplace sexual harassment.

Beginning with New York in 1910, the states began to enact workers' compensation laws. See Larson "The Nature and Origins of Workmens' Compensation" 37 Cornell L. Rev. 206, 232-233 (1952). By 1920, the process of legislative reform had gone so quickly that all but eight states had enacted workers' compensation acts. Id. at 233. Florida was one of the last states to adopt the workers' compensation system for industrial injuries and death, in the 1935 "Florida Workmens' Compensation Act."

Laws of Florida **1935**, Chapter *17481* now codified at Chapter *440* Florida Statutes.[4/]

The fundamental purpose of the workers' compensation acts was to provide the victims of industrial accidents with some compensation for loss of wage-earning capacity. See, e.g., City of Hialeah v. Warner, 128 So.2d **611** (Fla. **1961**).[5/]

The theory behind the workers' compensation acts to remedy the harshness of the common law, which left most of the victims of industrial accidents destitute was, in the words of an early Florida case, that "economic loss to the individual by injury in the line of duty should be borne in part by the industry in

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4/ The Florida Workmens' Compensation Act, originally House Bill No. *29*, was called:

> An Act to Provide for and Adopt a Comprehensive Workmen's Compensation Law for the State of Florida; to Provide Compensation Thereunder for Disability or Death Resulting from an Injury Arising out of and in the course of Employment; Limiting, Regulating: and Prohibiting Resort to Defenses in cases Falling: Within the Purview of this Act; Imposing Certain Duties and Exactions Upon Employers and/or Employees Falling within the Scope of this Law; Defining the Employments Subject Hereto and Delimiting the Application of this Act as Applied to Other Employments and Setting up an Agency of the State for the Administration Hereof.
>
> Laws of Florida **1935**, Chapter *17481* (emphasis added)

5/ For a review of the first fifteen years of the application of the Florida Workmens' Compensation Act, see Burton, "Florida Workmens' Compensation **1935** to **1950**," **5** Miami L.Q. *74* (1951).

which he is employed in order that his dependents may not want." Duff Hotel Co. v. Ficara, 7 So.2d 790, 791 (Fla. 1942).

Florida cases repeatedly emphasize that the economic theory behind the Florida workers' compensation act is that the cost of human accidental injury and death resulting from industry should be removed from the individual (the common law result) and placed upon industry, which will ultimately transfer the cost to the consumer as a cost of production. C.F. Wheeler Co. v. Pullins, 11 So.2d 303, 305 (Fla. 1943).

In the workers' compensation statutory scheme, the employee bargains away his common-law tort rights to sue his employer in exchange for accepting the no-fault workers' compensation as the exclusive remedy for claims covered by the workers' compensation statute. However, when the injuries incurred in the workplace are of a nature not covered by the workers' compensation law, the claim is the proper subject of a civil action. Davis v. Sun Banks of Orlando, 412 So.2d 937 (Fla. 1st DCA 1982); Williams v. Hillsborough County School Board, 389 So.2d 1218, 1219 (Fla. 1st DCA 1980) ("Those injuries under such circumstances or other situations not covered by the act are free to pursue common law remedies."); Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742, 744 (Fla. 1st DCA 1959) ("an employee is free to pursue his common law remedies for damages resulting from injuries not encompassed within the express provisions or intendments of the Act.").

Professor Larson, author of the highly respected and authoritative treatise on workers' compensation which has been repeatedly relied upon by this Court,[6/] writes that the Workers' Compensation Act and its exclusivity provision apply only to those claims within what Professor Larson calls the basic coverage formula for the workers' compensation acts--"personal injury by accident arising out of and in the course of employment". 2A Larson, The Law of Worker's Compensation, ***568.30*** at ***13-40 (1985).*** In other words, while it is accurate to state that the workers' compensation act has been liberally construed to provide employees with compensation for covered injuries and death at the workplace, it is completely inaccurate to expand

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6/ Professor Larson's treatise The Law of Worker's Compensation has been cited as authoritative source by the Florida Supreme Court in twenty different cases since ***1960.*** **See**, Fisher v. Shenandoah Gen. Constr. Co., ***498*** So.2d ***882, 886*** (Fla. ***1986);*** Mathias v. City of So. Daytona, et al., ***350*** So.2d ***458, 459*** (Fla. ***1977);*** Riddle v. Brevard Cty. Bd. of Public Instr., ***286*** **So.2d** ***557, 560*** (Fla. ***1973);*** Hester v. Westchester General Hospital, ***260*** So.2d ***505, 508*** (Fla. ***1972);*** **Worden v. Pratt & Whitney** Aircraft, et al., ***256*** So.2d ***209,*** 211 (Fla. ***1971);*** Zippner v. Peninsular Life Ins. Co., ***235*** So.2d ***473, 475*** (Fla. ***1970);*** Cooper v. Waverly Growers Co-operative, ***216*** So.2d ***196, 198*** (Fla. ***1968);*** Evans v. Fla. Industrial Commission, ***196*** So.2d ***748, 751*** (Fla. ***1967);*** Stephens v. Winn-Dixie Stores, Inc., 201 So.2d ***731, 738, 740*** (Fla. ***1967);*** Millender v. City of Carrabelle, ***174*** So.2d ***740, 742*** (Fla. ***1965);*** Sosenko v. American Airmotive Corp., ***156*** So.2d ***489, 492*** (Fla. ***1963);*** Sharer v. Hotel Corp. of America, ***144*** So.2d ***813, 815*** (Fla. ***1962);*** Taylor v. Brennon Constr. Co. ***143*** So.2d ***320, 321*** (Fla. ***1962);*** J.J. Murphy & Son Inc. v. Gibbs, ***137*** So.2d ***553, 562*** (Fla. ***1962);*** Carr v. United States Sugar Corp., ***136*** So.2d ***638, 640*** (Fla. ***1962);*** Oolite Rock Co. v. Deese, ***134*** So.2d ***241, 243*** (Fla. ***1961);*** Edwards v. Metro Tile Co., ***133*** **So.2d** ***411, 412*** (Fla. ***1961);*** Escarra v. Winn-Dixie Stores, Inc., ***131*** So.2d ***483, 485*** (Fla. ***1961);*** Lobnitz v. Orange Memorial Hospital, ***126*** So.2d ***739, 741*** (Fla. ***1961);*** Mac Don Lumber Co. v. Stevenson, ***117*** So.2d ***487, 491, 493*** (Fla. ***1960);*** Wick Roofing Co. v. Curtis, 110 So.2d ***385, 387*** (Fla. ***1957).***

the exclusivity provisions of the workers' compensation act to subsume common-law and statutory causes of action providing remedies for matters which are clearly outside the remedies, doctrine, and purpose of the workers' compensation statutory reform.

Professor Larson suggests a "type of injury" test to determine what matters are covered by the Act. Usually, the test is easy to apply, a broken leg is a physical injury covered by the Act, while an injury to character is a non-physical injury not covered by the Act. However, Professor Larson recognized that sometimes both physical and nonphysical elements could be part of a cause of action. In such cases, Professor Larson would examine the "essential nature" of the alleged injury - is it essentially a claim for physical injuries? If so, it is covered within the Act. See Larson, supra, 568.30. However, if the action is for injuries which are essentially non-physical, even though a slight physical injury may be present, Professor Larson would use the essentially nonphysical nature of the injury to place the cause of action outside the workers' compensation act.7/

7/ Professor Larson states:

> If the essence of the tort, in law, is non-physical and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort.
>
> Larson, supra, §68.34(a) at 13-62 - 13-63

Similarly, Professor Larson states that "[w]hen no compensation remedy is available, these tort actions [those involving non-physical injury torts, such as false imprisonment, libel, malicious prosecution, fraud, deceit, and intentional infliction of emotion distress] fall squarely within the broad class of cases...which do not come with the fundamental coverage pattern of the Act at all,..." Larson, supra, 568.30 at 13-40 (1985).

Professor Larson's analysis should be applied in this case and is consistent with the legislative intent of the Florida Workers' Compensation Act. For instance, it is difficult to conceive that in 1935, when the Florida legislature enacted the worker's compensation law, it intended to bar employees from suing their employer for the common law tort now called "intentional infliction of mental distress," which was not recognized as an independent cause of action by this Court for a half a century later in 1985. See Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277, 278 (Fla. 1985). Even the title of the acts demonstrates that sexual harassment was beyond the purview of the workers' compensation statutes, which were called "workmens' compensation acts" at the time, obviously reflecting the overwhelmingly male workforce and the fact that few women worked outside the home at that time. Florida did not change the title of its act from "Workmens' Compensation" to "Workers' Compensation" until 1979. See Laws of Florida 1979, Chapter 79-40, §1.

B. FLORIDA APPELLATE JUDGES HAVE CONCLUDED THAT TORT CLAIMS FOR ACTS COMMONLY REFERRED TO AS SEXUAL HARASSMENT ARE NOT BARRED BY THE EXCLUSIVITY BAR OF THE FLORIDA WORKERS' COMPENSATION ACT

The most thorough review by any Florida court of the issue raised in this case was done by the First District Court of Appeals in two en banc decisions rendered in 1985. In these decisions, five members of the First District Court of Appeals in four separate dissenting opinions provide an analytical basis for this Court of find that common law tort claims for workplace sexual harassment are outside the workers' compensation system. In Brown v. Winn-Dixie Montgomery. Inc., 469 So.2d 155 (Fla. 1st DCA 1985) (en banc), and Schwartz v. Zippy Mart. Inc., 470 So.2d 720 (Fla. 1st DCA 1985) (en banc), the severely divided 11 member court authored four separate decisions and split 6-5 on precisely the issue before this Court on appeal--whether the workers' compensation act bars an action in tort against an employer for a supervisor's sexual harassment of an employee. However, the decisive swing vote in both the Brown v. Winn-Dixie and Schwartz v. Zippy Mart cast by Judge Wentworth, would have ruled that the sexual harassment claims were not barred in the case if there had been "prior notice of specific acts."[8/] Brown, supra, 469 So.2d at 160 and n. 1, and Schwartz, supra, 470 So.2d at 725 and n. 1.

8/ The narrowest holding, expressing the views of all 6 members of the First District majority in Brown v. Winn-Dixie and

(Footnote continued to next page)

Judges Smith and Ervin each rendered dissenting opinions in both Brown and Schwartz. Although each Judge approaches the issue from a somewhat different perspective, the analysis reflected in each decision provides a sound basis to find sexual harassment common law claims are not barred by the Florida Workers' Compensation law.

1. THE DISSENTING OPINION BY JUDGE SMITH - THE TYPE OF WRONG TEST

In his dissenting opinion in both Schwartz and Brown, Judge Smith, joined by Ervin, C.J., and Judges Mills, Booth, and Zehmer, stated:

> I dissent. I would hold that acts constituting what is now commonly referred to as "sexual harassment" were never intended to be governed by Chapter 440, Florida Statutes, and similar legislation, as interpreted and applied by the courts. I would reverse and remand to the trial court for determination of the employer's

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(Footnote 8 continued from previous page)

Schwartz v. Zippy Mart, would be that summary judgment may be properly granted in favor of an employer against employees in a sexual harassment case where the employees do not establish facts sufficient to infer that the employer had prior knowledge of the sexual harassment and failed to respond.

The opinion is a plurality because neither the 5-judge per curiam opinions nor the 5 dissenting judges' opinions express a majority view on the issue of whether sexual harassment claims are barred by the exclusivity provision in the workers' compensation act. Five judges state that the bar applies, 5 judges would hold that it does not apply, and Judge Wentworth concurs with the 5 judges who would bar the claims, only because of the particular facts on review in Brown v. Winn-Dixie and Schwartz v. Zippy Mart. See Marks v. United States, 430 U.S. 188, 193 (1977) ("Narrowest ground" dictates holding.).

liability, or non-liability under the law applicable in tort cases.

Brown, supra, 469 So.2d at 165; Schwartz, supra, 470 So.2d at 731

Under Judge Smith's analysis, rather than focusing on the nature of the injury, the focus is on the essential nature of the wrong to determine whether the claim is outside the workers' compensation scheme. Judge Smith's "type of wrong" test makes sense since it results in placing the action outside the workers' compensation scheme when the wrong is not one ordinarily resulting from an inherent risk of danger of the employment and the essence of the tort action is non-physical with only incidental physical injury.

Additionally, Judge Smith's "type of wrong" approach comports with Florida law's recognition that the economic theory behind the Florida workers' compensation act is that the cost of human accidental injury and death resulting from industry should be removed from the individual and placed upon industry, which will ultimately transfer the cost to the consumer as a cost of production. See, e.g., C.F. Wheeler Co. v. Pullins, 11 So.2d 303, 305 (Fla. 1943) (burden should fall "upon the industry served"); Whitehead v. Keene Roofing: Co., 43 So.2d 464, 465 (Fla. 1949) (industry should pay the costs). Unlike genuine unavoidable injuries, the cost of the conduct associated with workplace sexual harassment should not be included in the cost of the product and passed to and paid for

by the consumer. See Ford v. Revlon, Inc., 734 P.2d 580, 591 (Ariz. 1987) (Feldman, J., concurring) ("By law, exposure to sexual harassment is not an inherent or necessary risk of employment, even though it may be or may have been endemic. The cost of such conduct ought not to be included in the cost of the product and passed to the consumer.").

2. JUDGE ERVIN'S DISSENTING OPINION - THE "TYPE OF INJURY" TEST

Judge Ervin also issued separate dissenting opinions in both Brown and Schwartz which provide an alternative analysis to that offered by Judge Smith as a basis to conclude the exclusivity bar does not apply. In Brown, Judge Ervin concluded that the "type of harm inflicted upon...Brown was not intended by the legislature to be subjected to the acts protections [because the] injury was one involving only non-disabling mental distress [which] falls beyond the parameters of the act," 469 So.2d at 161. As support for his analysis in Brown, Judge Ervin looks directly to the applicable statutory provisions of the Florida Worker's Compensation Act.

First, Judge Ervin states the "entire thrust" of the Act is "to furnish compensating benefits to the injured worker or his survivor when the injury is followed by medical care, physical or mental disability or death" which in Brown, as in the case sub judice, is not present. Second, applying Sections 442.02(6)

and 442.02(18)[9/] of the Act, Judge Ervin finds that no "injury by accident" as contemplated by the Act occurred.

Judge Ervin further reasons in Brown that even if the "injury was not caused solely by fright or excitement, but by an intentional battery as well," this fact would similarly require a holding that the claims are not confined to the act "for the simple reason that no compensating remedy is provided for an injury of this character." Id. at 162.

Similarly, in Schwartz, Judge Ervin focused on "type of injury" alleged to have occurred and concludes that "[i]f the essence of the tort is non-physical, then the tort action should not be barred," citing 2A Larson, THE LAW ON WORKMEN'S COMPENSATION §68.34(a) at 13-62 (1983 ed.), 470 So.2d at 726. Judge Ervin further stated that since the injuries alleged "charge no physical injuries that required medical attention, or any disabling mental conditions, only that as a result of the supervisory employer's actions, plaintiffs were placed in fear and endured mental suffering...[the] injuries clearly fall outside the coverage of the Florida Workers' Compensation statutes. Id. at 726.

3. APPLICATION OF DISSENTING OPINIONS

Under either Judge Smith's or Judge Ervin's view, the claims asserted by Plaintiffs here--which are virtually

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9/ Section 442.02(18) provides that a "mental or nervous injury due to fright or excitement only...shall be deemed not to be an injury by accident arising out of the employment." According to Judge Ervin, the claims in Brown do not constitute an accident because any touching that did occur "caused neither physical trauma nor residual mental disability."

identical to those claimed by plaintiffs in Brown and Schwartz--are not barred by the exclusivity provisions of the Workers' Compensation Act.

Consistent with Judge Smith's view as claims for "sexual harassment," Plaintiffs' action would not be governed by the workers' compensation law. Likewise, under Judge Ervin's view, Plaintiffs' claims are not barred since the essence of Plaintiffs' tort actions are non-physical.

C. NUMEROUS STATES WHICH HAVE CONSIDERED THE ISSUE HAVE CONCLUDED THAT COMMON LAW TORT CLAIMS FOR EMOTIONAL INJURIES CAUSED BY SEXUAL HARASSMENT ARE NOT BARRED BY THAT STATE'S WORKERS' COMPENSATION LAWS

Plaintiffs' position that workplace sexual harassment falls outside the workers' compensation scheme is neither new nor novel. Numerous courts throughout the country have construed that state's workers' compensation law favorable to Plaintiffs' position in cases involving sexual harassment, and in cases involving claims for emotional injuries.[10/]

10/ States which have construed state's workers' compensation law favorable to Plaintiffs' position include the following: Alabama, Garvin v. Shewbart, 442 So.2d 80, 83 (Ala. 1983) (Claim for emotional distress not barred); Arizona, Ford v. Revlon, Inc., 734 P.2d 580, 586 (Ariz. 1987) (sexual harassment tort claims not barred); California, Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482, 495 (9th Cir. 1983) (intentional infliction of emotional distress not barred);

(Footnote continued to next page)

Although each state's workers' compensation statutory scheme may vary from Florida law, the general policy considerations relied upon by the courts concluding that common law tort claims for sexual harassment are not barred by that state's workers' compensation law, are applicable here.

A brief review of the analyses and policy considerations employed by state appellate courts in Georgia, North Carolina, Arizona, Missouri, and California, provide this Court with several approaches as to why the workers' compensation exclusivity bar should not apply to sexual harassment common law tort claims.

(Footnote 10 continued from previous page)

Colorado, Kirk v. Smith, *674* F.Supp. *803, 805* (D.Col. *1987)* ("State law claims based mainly on mental suffering and humiliation, and only peripherally on physical pain and suffering, are not within the [Colorado Workmen's] Act's exclusive remedy provision."); District of Columbia, Newman v. District of Columbia, *518* A.2d *698* (D.Ct.App. *1980)* (claims for humiliation, embarrassment, etc., not barred); Georgia, Cox v. Brazo, *165* Ga.App. *888, 303* S.E. 2d *71* (1983), aff'd per curiam *251* Ga. *491, 307* S.E. 2d *474 (1983)* (sexual harassment tort claims not barred); Missouri, Hollrah v. Freidrich, *634* S.W.2d 221 (Mo. App. *1982)* (sexual harassment claims not barred); Massachusetts, O'Connell v. Chasdi, *511* N.E.2d *349* (Mass. *1987)* (sexual harassment claims based on state law not barred); North Carolina, Hogan v. Forsyth Country Club Co., *79* N.C. App. *483, 340* S.E. *116* (1985), aff'd *317* N.C. *334, 346* S.E.2d *140 (1986)* (common law tort claims for sexual harassment not barred); and Oregon, Palmer v. Bi-Mart Co.. Inc., ___P.2d___, *1988* W.L. *82258* (August 10, *1988)* (sexual harassment claims based on state law not barred).

States which have concluded otherwise include: Lui v. Intercontinental Hotels Corporation, *634* F.Supp. *684, 688* (D. Hawaii *1986)* (Hawaii law); Wisconsin, Zabkowicz v. The West Bend Company, *789* F.2d *540, 545* & n. *4* (7th Cir. *1986)* (Wisconsin law); and Wyoming, Baker v. Wendy's of Montana, Inc., *687* P.2d *885, 892* (Wyo. *1984).*

1. GEORGIA

In Cox v. Brazo, 165 Ga.App. 888, 303 S.E. 2d 71 (1983), aff'd per curiam 251 Ga. 491, 307 S.E. 2d 474 (1983), a former employee sued her former supervisor and former employer for acts of workplace sexual harassment by her supervisor which included his making sexual gestures and advances, and touching private areas of her body. In Cox, the Court of Appeals of Georgia rejected the employer's argument that plaintiff's claims were barred by the Georgia workers' compensation act because the injuries for which plaintiff sought recovery "were caused by the willful act of a third person and did not arise out of her employment," 303 S.E. 2d at 73. Claims by the plaintiff not barred included an action based on her employer's negligence in continuing her supervisor's employment after the employer knew or should have known of his alleged behavior. Id.

2. NORTH CAROLINA

In Hogan v. Forsyth Country Club Company, 79 N.C. App. 483, 340 S.E. 116 (1985), aff'd 317 N.C. 334, 346 S.E.2d 140 (1986), the Court of Appeals of North Carolina, in a decision affirmed by the North Carolina Supreme Court, concluded that common law tort claims for emotional distress were not barred by that state's Workers' Compensation Act. Id. at 120. In Hogan, four female employees subjected to sexual harassment brought suit against their former employer for intentional infliction of emotional distress and negligent hiring and retention of abusive employees responsible for the workplace sexual harassment. The Court concluded that the state's workers'

compensation law did not bar the action since "the essence of the tort of intentional infliction of emotional distress is non-physical; [and] the injuries alleged by plaintiffs do not involve physical injuries resulting in disability." Id. at 121.

Additionally, the Hogan Court rejected the employer's argument that the "claims for negligent retention of an employee [were] barred by the North Carolina Workers' Compensation Act." Id. at 124. While recognizing that the Act "eliminated negligence as a basis of recovery against an employer," the Court reasoned that "the Act covers only those injuries which arise out of in the course of employment." Id. In the Hoaan Court's view, an emotional injury resulting from "sexual harassment" is not a 'natural and probable consequence or incident of the employment' [since] [s]exual harassment is not a risk to which an employee is exposed because the nature of the employment but it is a risk to which the employee could be equally exposed outside the employment." Id.

3. ARIZONA

In Ford v. Revlon. Inc., 734 P.2d 580 (Ariz. 1987), the plaintiff sued her former employer for assault, battery, and intentional infliction of emotional distress caused by her supervisor's acts of sexual harassment which included unwelcomed touching and sexually related comments. In its majority decision, the Arizona Supreme Court rejected the employer's argument that the issue was "controlled by Arizona Workers'

Compensation laws and not by tort law" on the grounds that the plaintiff's "emotional distress injury was...unexpected and was essentially nonphysical in nature" and thus not considered a compensable "accident" under Arizona's workers' compensation law. 734 P.2d at 586.

In a concurring opinion, two Arizona Supreme Court justices reach the same result but for somewhat different reasons. Instead of finding that the plaintiff may recover in tort for her injuries because they were not caused "by accident" within the meaning of the workers' compensation scheme, Justice Feldman concludes that the Act does not bar her tort claim "because the wrong done her falls outside the workers' compensation scheme." Justice Feldman reasons that a claim "is outside the workers' compensation scheme only if the wrong is one not ordinarily resulting from the inherent risk or danger of employment and if the essence of the tort action ordinarily is nonphysical with physical injury only incidental to emotional, mental or other injury." Id. at 591. Applying this standard, Judge Feldman finds "[b]y law, exposure to sexual harassment is not an inherent or necessary risk of employment...[and that]...[t]he cost of such conduct ought not to be included in the cost of the product and passed to the consumer." Id. at 591.

4. MISSOURI

In Hollrah v. Freidrich, 634 S.W.2d 221 (Mo. App. 1982), the plaintiff brought suit against her former employer alleging that her prior employer "negligently failed to provide her with a safe place to work." Plaintiff alleged that her supervisor

on several occasion touched private parts of her body against her will, and made repeated suggestive, lewd and frightening propositions of sexual contact. The Court rejected the employer's argument that the plaintiff's suit was barred because the Workers' Compensation Act was the exclusive remedy. 634 S.W.2d at **223.** The Court reasoned that although the Act releases an employer from all liability "from injury or death of the employee by accident arising out of and in the course of his **employment,"** the Act does not apply to harms "which arise out of purely personal associations," in contrast to injuries "which are caused by the dangerous nature of the employee's duties, or the conditions under which he is required to perform them, and those which are unexplained or of neutral origin." Id. at 223 and n. *4.* See also **Pryor v. United States Gypsum** Co., 585 F.Supp. 311 (W.D. Mo. 1984) (sexual harassment tort claim not barred by Missouri workers' compensation act).

5. CALIFORNIA

In Russell v. Mass. Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983), the United States Circuit Court of Appeals for the North Circuit in a case not involving sexual harassment reviewed the applicable California law governing the relationship between tort claims by employees against the employer for emotional distress and the California Workers' Compensation laws. Based on its review of Renteria v. County of Orange, 82 Cal.App. 31, 833, 835, 147 Cal.Rptr. 447 (1978), and McGee v. McNally, 119 Cal.App. 3d 895, 174 Cal.Rptr. 253 (1981), the court concluded that under California law **"[a]n**

employee's cause of action for intentional infliction of emotional distress constitutes an implied exception to the exclusive remedy provision" and that the "California Workers' Compensation laws do not constitute [plaintiff's] exclusive remedy for the alleged intentional infliction of emotional distress by her employer." 772 F.2d at ***495.*** The Court reasoned that "where the primary injury is emotional distress, and that it is the gist of the complaint, a cause of action in common law tort lies, regardless of whether the emotional distress also manifests itself physically in some injury or causes some physical disability." Additionally, the Court cited a concern that "emotional injuries resulting from deliberate wrongdoing must be actionable at civil law--outside the confines of Workers' Compensation--if the deterrent factor of the law is to be served." Id. at ***495.***

6. APPLICATION OF APPROACHES FOLLOWED BY OTHER STATES

Although the reasoning and analysis followed by Courts in these various states differ, the general policy considerations are applicable here. As evident from a review of the facts presented in each of these cases, the characteristics of workplace sexual har ssment share a sickening commonality. Whether this Court concludes that the appropriate inquiry should focus on (i) whether the essence of Plaintiffs' claims is non-physical; (ii) whether Plaintiffs' claims stem from a "natural and probable consequence or incident of the employment; (iii) whether exposure to sexual harassment is an inherent or

necessary risk of employment; or (iv) whether sexual harassment is a type of wrong outside the workers' compensation system, each view--as applied to this case--provide a basis to conclude workers' compensation law does not bar this action.

D. DECISIONS BY THIS COURT IN FISHER v. SHENANDOAH AND LAWTON v. ALPINE ENGINEERED PRODUCTS ARE NOT DISPOSITIVE OF THE ISSUES RAISED IN THIS APPEAL

In the past several years, this Court has addressed various aspects of the exclusivity bar of the Florida Workers' Compensation law. In Fisher v. Shenandoah General Construction Co., supra, and Lawton v. Alpine Engineered Products, supra, this Court decided not to address whether the workers' compensation law precludes intentional torts since in the majority's view, the complaints in these cases did not adequately allege an intentional tort by the employer.

A review of the facts in Fisher and Lawton demonstrates why those cases are not dispositive of the issues raised in this appeal. Fisher and Lawton both involved exactly the type of injury indisputably covered by the workers' compensation act: workplace physical injuries resulting in death or disability and loss of income.

In Fisher, an employee had been killed as a result of being required to enter a pipeline in which fatally noxious gases were present. The complaint alleged that the employer should have known of the existence of these gases and their danger to plaintiff. However, the plaintiff in that case was instructed to enter the pipeline, exposing himself to the substantial risk of injury or death. 498 So.2d at 883.

In Lawton, the employee, a punch press operator, "caught his hand in the press when a co-worker accidentally put the press into operation as Lawton attempted to adjust the machine." As a result, the "press crushed Lawton's hand and caused the loss of all the fingers on that hand." 498 So.2d at 880.

As this Court stated in both Fisher and Lawton, "the Florida Workers'Compensation Act provides for the payment of compensation benefits whenever disability or death results from an injury arising out of and in the course of employment, §440.09(1), Fla.Stat. (1979)," and that "compensation under the act shall be the exclusive remedy available to such an employee," citing §440.11(1).

Unlike Fisher and Lawton, the Plaintiffs here have not suffered a disability or death arising out of employment, nor have the Plaintiffs here suffered the "type of wrong" which the Workers' Compensation Act was designed to cover.

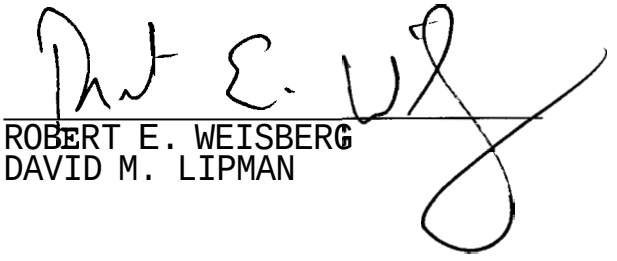
Whether policy reasons justify exempting intentional torts for covered injuries is **not** the question presented in this appeal--sexual harassment claims involve non-physical-injury torts that will not cause death, disability, or loss of income. Sexual harassment is the type of wrong not intended to be covered by workers' compensation in that it is not a natural and probable incident or consequence of employment.

CONCLUSION

For the reasons stated, this Court should reverse the Decision by the Second Court of Appeals that the exclusivity of workers' compensation remedies bars this action, and remand

this case to the trial court for determination of each employer's liability, or non-liability, under the law applicable in tort cases.

Respectfully submitted,



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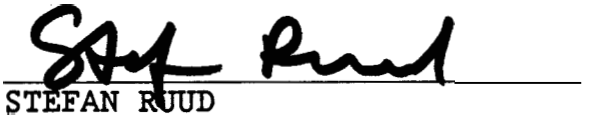

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1336B

SUPREME COURT OF FLORIDA

PENNY BYRD, ET AL.,

PETITIONERS,

v.

RICHARDSON-GREENSHIELDS SECURITIES, INC., ET AL.,

RESPONDENTS.

CASE NO. 72,788

DCA CASE NO. 87-1368

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been mailed to the following counsel of record:

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