SUPREME COURT OF FLORIDA

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PENNY BYRD, ET AL.,

PETITIONERS,

v.

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

RESPONDENTS.
_____/

CASE NO. ~~72,788~~

DCA CASE NO. ***87-1368***

PETITIONERS' REPLY BRIEF ON THE MERITS

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III. ARGUMENT

A. PLAINTIFFS FILED A TIMELY NOTICE OF APPEAL WITH THE DISTRICT COURT

Respondents (hereafter "Defendants") argue that Plaintiffs' petition to this Court should be dismissed because Plaintiffs' Notice of Appeal to the District Court of Appeal was not timely filed and that since "this Court's jurisdiction is derivative of the jurisdiction of the District Court of Appeal, petition should be dismissed." (Def. Brief, Pg. 12).

Defendants' argument is wrong and should be rejected by this Court as it was by the Second District Court of Appeal. See, Order of August 24, 1987.

It is well established that the timely service of a motion for rehearing pursuant to Fla.R.Civ.P. 1.530 tolls the time in which to file a Notice of Appeal. Twenty-five years ago, this Court started the rule which is equally applicable today. State ex rel. Owens v. Pearson, 156 So.2d 4, 7 (Fla. 1963)

> This Court has never departed from the principle that where a petition for rehearing has been properly made within the time fixed by appropriate statute or rule, the trial court has complete control of its decree with the power to alter or change it until said motion has been disposed of. It therefore follows that the judicial labor has not been terminated and could not be terminated until the trial court had disposed of such petition. Until that time the decree or judgment was not final and the time for taking the appeal did not commence to run until the date of entry of such order.

On February 2, 1987, the Circuit Court entered an Order dismissing Plaintiffs' action against Defendants RICHARDSON-GREENSHIELDS SECURITIES, INC., and INTERSTATE SECURITIES CORPORATION, with prejudice (R.96-97). On February 11, 1987, Plaintiffs served their timely motion for rehearing, or in the alternative amendment of judgment, pursuant to Fla.R.Civ.P. 1.530. (R.98-101). On April 22, 1987, the trial court denied Plaintiffs' motion for rehearing or in the alternative Amendment of Judgment (R.102). On May 1, 1987, or 14 days later, Plaintiffs filed their Notice of Appeal (R.103).

Defendants apparently argue that, although otherwise timely, Plaintiffs' Rule 1.530 Motion lacked the requisite "substance" to toll the time to appeal. (Def. Brief Pg. 11).

The purpose of the Plaintiffs' motion for rehearing was to obtain an amended order from the trial court which contained substance, [1/] instead of a general, difficult-for-appellate-review order, granting the Corporate Defendants' motion to dismiss without specifying the trial court's reasons. The cases cited by Defendants, regarding the failure of the trial court to be explicit in its reasons for dismissal, stand only

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1/ Plaintiffs sought to eliminate any question as to the basis for the trial court's February 2, 1987 order, which was the subject of the appeal to the Second District Court of Appeal. Defendants had advanced several alternative reasons for the trial court to dismiss Plaintiffs' lawsuit (R.58-61; 62-66; 71-80). The trial court's February 2, 1987 Order of dismissal

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for the proposition that an appellate court can affirm a judgment below on **any** grounds in the record, notwithstanding the lower court's conclusions of law or findings.[2/] The cases do **not** stand for the proposition that a trial court order with no reason is desirable, or that the parties are forbidden to request rehearing and clarity before appealing. Indeed, if Plaintiffs had only filed a notice of appeal while the motion for rehearing was pending, this court would **not** have jurisdiction to hear this appeal. **See**, State ex rel. Owens **v.** Pearson, 156 So.2d 4, 8 (Fla. 1963).

However, because Plaintiffs filed a timely motion for rehearing, they were reauired to await the disposition of the

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with prejudice does not specify which grounds were relied upon by that court. (R.96-97). Plaintiffs had sought, through their post-judgment motion, to have the trial court clearly indicate that the sole basis for the February 2, 1987 Order, dismissing Plaintiffs! lawsuit with prejudice, was the jurisdictional bar of exclusivity provision of the Workers! Compensation Act. (Fla.Stat. 5440.11). If the reasons had been given, this would have eliminated any possibility that Defendants might have sought the affirmance of the February 2, 1987 Order on the alternative grounds raised in their motion to dismiss.

The trial court's April 22, 1987 Order denied Plaintiffs' motion (R.102), which consequently left the Court's February 2, 1987 Order as the reviewable order in the appeal.

2/ **See**, Appellate v. Barnett bank of Tallahassee, 377 So.2d 1150, 1152 (Fla.1979) ("Even when based on erroneous reasoning, a conclusion or decision of a trial court will be affirmed if the evidence or an alternative theory supports it."); Swanson v. Gulf West International Corporation, 429 So.2d 817, 819 (Fla.2d DCA 1983) ("Although the final judgment does not set out the trial Court's reason for its finding of no usury, a decision of the trial court will generally be affirmed if it is correct under any applicable theory of law.").

motion before filing this appeal. See, Shelby Mutual Insurance Co. v. Pearson, 236 So.2d 1, 3 (Fla. 1970).

Defendants additionally argue that this Court's decision in St. Moritz Hotel v. Daughty, 249 So.2d 27, 28 (Fla. 1971) and Elmore v. Palmer First National Bank of Sarasota, 221 So.2d 164,166 (Fla. 2d DCA 1969) support their position. A review of these cases indicate otherwise.

Defendants cite St. Moritz Hotel, supra, 299 So.2d at 28, for the principle that a motion for rehearing on an order of dismissal does not toll the time in which to file a notice of appeal "unless the motion seeks an amendment of the trial Court's order on an issue that has been left in genuine ambiguity; or it seeks an amendment on a matter of 'substance'." However, St. Moritz Hotel did **not** involve a timely motion for rehearing filed pursuant to Rule 1.530 directed to a final order of dismissal. Instead, St. Moritz Hotel involved a sua sponte modification to an order entered by an Industrial Claims Judge.[3/] Defendants, argument, if

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3/ Defendants' reliance on Elmore, supra, 221 So.2d at 166, is also misplaced. Instead of providing support from Defendants' position, Elmore describes the breath of the modern day Rule 1.530 rehearing motion.

> Under modern rules of pleading a motion to rehear is not merely a vehicle by which the trial judge can reconsider facts above; rather, it provides a chance for the trial court to correct any error that it committed if it becomes convinced that it has erred. Since it is clearly within the trial Court's power to alter a judgment for a limited time period, See Fla.R.Civ.P. 1.530, a timely motion asking the Court to do so is proper.
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> Elmore, supra, 221 So.2d at 166.

accepted by this court, would literally require every litigant filing a Rule 1.530 Motion for Rehearing to simultaneously file a Notice of Appeal, out of concern the motion lacked the required "substance" and would not toll the time of appeal.

B. PLAINTIFFS DO NOT ASK THIS COURT TO LEGISLATE: BUT INSTEAD ASK THIS COURT TO DECIDE WHETHER THE WORKERS' COMPENSATION ACT WAS INTENDED TO COVER PLAINTIFFS' SEXUAL HARASSMENT CLAIMS

Defendants incorrectly argue that Plaintiffs seek to have this Court "legislate in violation of the Constitutional separation of powers in Florida." (Def. Brief Pg. 16).

Plaintiffs do not dispute "that under our scheme of things Courts are not clothed with the power to enact laws." State v. Herndon, 27 So.2d **833, 835** (Fla. 1946). However, as this Court expressed in Herndon, supra, 27 So.2d at **835**, it "does have the power and ...the duty to keep legislative and constitutional enactments ambulatory [and] ...to square the law with good morals and to harmonize constitutional and statutory precepts with reason and good conscience."

Whether the Florida workers' compensation law is interpreted by this Court with a view toward what was intended by the **1935** state legislature, or whether this Court determines that this law "requires different interpretations today from what might have been required yesterday", the result is the same. As expressed by five members of the First District Court

of Appeal in both Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155, 165 (Fla. 1st DCA 1985) (en banc); and Schwartz v. Zippy Mart. Inc., 470 So.2d 720, 731 (Fla. 1st DCA 1985) (en banc), "acts constituting which is now commonly referred to as "sexual harassment" were never intended to be governed by Section 440, Florida Statutes and similar legislation, as interpreted and applied by the Courts." (emphasis added).

Likewise, Judge Ervin, in his dissenting opinions in Brown and Schwartz, adjudicates and not legislates by focusing on the legislative intent. See, e.g. Brown, supra, 469 So.2d at 161 (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"). (emphasis added).

Defendants' charge of "judicial lawmaking" obfuscates the central issue before this court, which can be simply stated as whether the Act is intended to govern acts now commonly referred to as "sexual harassment."

C. THE INTENTIONAL TORT ISSUE, PREVIOUSLY CERTIFIED TO THIS COURT IN FISHER and LAWTON, IS NOT THE ISSUE IN THIS CASE

Defendants apparently argue that, in reality, the question certified to this Court by the Second District Court of Appeal "is whether a claim that the employer has engaged in intentionally tortuous misconduct against an employee invokes an exception to the exclusive remedy provisions of the Act that

would permit an action at common law." (Def. Brief Pg. 17). Defendants further argue that, based on Fisher v. Shenandoah General Construction Company, 498 So.2d 882 (Fla. 1986) and Lawton v. Alpine Engineered Products. Inc., 498 So.2d 879, (Fla. 1986) Plaintiffs have not sufficiently pled an intentional tort and thus this Court should not address "whether intentional tortuous misconduct of a corporate employer removes immunity of the employer from suit in tort." (Def. Brief Pg. 19).

Defendants' arguments misconstrue the question certified by the Second District Court of Appeal, the proceedings before the trial court, and arguments advanced by Plaintiffs to this Court.

The District Court of Appeal certified 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. No language in the certified question limits the focus to the intentional tort exception question. Certainly, had the Second District Court of Appeal intended to certify to this Court the same question certified in Fisher and Lawton, it would have done so.

Additionally, as we set forth in our initial brief, pgs. 31-32, unlike workplace sexual harassment, both Fisher and Lawton involved the precise type of workplace injury which resulted from employment related duties indisputably covered by the workers' compensation act. In contrast, sexual harassment claims involve non-physical-injury torts that will not cause death, disability, or loss of income, and which result from a

type of wrong **not** intended to be covered by the workers' compensation law.

D. THERE EXISTS WIDESPREAD SUPPORT IN CASE LAW FROM OTHER STATES THAT COMMON LAW TORT CLAIMS FOR EMOTIONAL INJURIES CAUSED BY SEXUAL HARASSMENT ARE NOT BARRED BY WORKERS' COMPENSATION LAWS

In our initial brief, pgs. 24-30, Plaintiffs cited decisions from nine other states and the District of Columbia to illustrate that courts throughout the United States have construed their state's workers' compensation law favorable to the position argued by Plaintiffs in this appeal in cases involving sexual harassment, and in cases involving claims for emotional injuries.

In response, Defendants argue that "many" of the cases cited by Plaintiffs "do not stand for the proposition for which they were cited". (Def. Brief Pg. 20). Certainly Defendants may disagree with the reasoning by courts from around the nation; however, Defendants' contention that Plaintiffs have misled this Court on the many of these cases is wrong.

First, Defendants offer no criticism of Plaintiffs' characterization of decisions from the states of Arizona- Ford v. Revlon. Inc., 734 P.2d 580, 586 (Ariz. 1987) (sexual harassment tort claims not barred; 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

exclusive remedy provision."); District of Columbia- Newman v. District of Columbia, 518 A.2d 698 (D.C.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); 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 (Oregon Sup. Ct., August 10, 1988) (sexual harassment claims based on state law not barred).

A close review of Defendants' criticism of the law cited by Plaintiffs from the states of Alabama, Missouri, Massachusetts and California demonstrates that case law does not detract from Plaintiffs' position advanced to this Court. Defendant de minimis criticism of the Alabama and Missouri law does not alter the substance of those Courts' holdings.[4/]

4/ Plaintiffs cited the Alabama Supreme Court's decision in Garvin v. Shewbart, 442 So.2d 80, 83 (Ala. 1983) for the rule that claims for intentional infliction of emotional distress are not barred by that state's workers' compensation law. (Pl. Brief Pg. 25). Defendants contend Plaintiffs have misstated the holding because the Court also found that the claim was barred because the employer's conduct had such a tenuous connection to employment. The Court's holding that intentional infliction of emotional distress "cannot reasonably be considered to be within the scope of the Act" is supported and not limited by the fact that the employer's tortious conduct had a tenuous connection to the employment.

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Although Defendants correctly observe that changes have occurred in California law, Defendants fail to acknowledge that these recent legal developments support this Court finding that Plaintiffs' claims are not barred by the workers' compensation act.[5/]. Finally, Defendants correctly point out that the Massachusetts case cited by Plaintiffs applies to the employee, not the employer.[6/]

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Plaintiffs cited Hollrah v. Freidrich, 634 S.W.2d 221 (Mo.App. 1982) for the principle that a tort action by an employee against her former employer because the employer "negligently failed to provide her with a safe place to work" which resulted in her being sexually harassed by her supervisor was not barred by the Missouri Workers Compensation Act. Defendants correctly point out that this case was decided by summary judgment. However, the case is significant since it rejects the argument that as a matter of law, Plaintiffs' negligence claim was barred by the workers' compensation law.

5/ Defendants implicitly suggest that as a result of recent charges in California law, the law no longer supports Plaintiffs' position. Defendants are wrong. In the recent California Supreme Court decision, Cole v. Fair Oaks Fire Protection District, 729 P.2d 743 (Cal. 1987), the Court expressly distinguished Reneteria and similar cases on the grounds that unlike these cases, in Cole, the "conduct complained of has caused total permanent mental and physical disability". 729 P.2d at 744. Similarly, the recent California appellate decision, cited by Defendants, Hart v. National Mortgage & Land Co., 189 Cal.App 3d 1423, 235 Cal.Rptr. 68 (Cal.App. 4 Dist. 1987) supports Plaintiffs' position. In Hart, rather than focus on whether the harm was "physical versus emotional" to determine whether the action was barred, the Court focuses on "whether the acts complained of were a 'normal part of the employment relationship'" in finding the claims based on sexual harassment were not barred. 235 Cal. Rptr. at 73.

6/ Plaintiffs cited O'Connell v. Chasdi, 511 N.E. 2d 349 (Mass. 1987) for the holding that sexual harassment claims are not barred. Defendants correctly state that the Court held that

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As we previously stated, although the workers' compensation law varies from state to state, the policy considerations cited by these courts apply in Florida.

E. PLAINTIFFS' SEXUAL HARASSMENT CLAIMS DO NOT SATISFY THE STATUTORY DEFINITION OF "ACCIDENT"

Defendants argue that Plaintiffs' position in this case, that the "workplace sexual harassment" is outside the workers' compensation scheme, "would be contrary to the statutory definition of accident". (Def. Brief Pg. 28-29).

However, the statutory definition of "accident", as applied to Plaintiffs' allegations contained in the First Amended Complaint, indicates that Defendants' alleged conduct does not satisfy that statutory definition.

The Act defines "accident" to mean "only an unexpected or unusual event or result happening suddenly." Section 440.02(1) Fla. Stat. (1987). The sexual harassment to which Plaintiffs have been subjected is not an unexpected, or unusual event or a result happening suddenly. To the contrary, Plaintiffs have alleged that they were subjected to an ongoing pattern of

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the tort claims were not barred against a co-employee. However, the Court also stated that, under the facts of that case, they need not express an opinion as to whether a separate action against the employer would be barred by the exclusivity provisions of workers compensation act. See 511 N.E. 2d at 351, n.4.

sexual harassment by the Branch Managers of Defendants' Lee County office from September **1983** through April **1985** which Defendants' management officials were aware. See Pl. Brief, pgs. **3-7.** Unlike an isolated, suddenly-occurring accident which results in a physical injury, Plaintiffs' non-physical emotional injuries were the product of ongoing acts of sexual harassment extending over many months.

As support for their argument, Defendants rely primarily on the plurality opinions in Brown and Schwartz and the decisions in Tampa Maid Seafood Products v. Porter, **415** So.2d **883** (Fla. 1st DCA **1982)** and Carnegie v. Pan American Linen, **476** So.2d **311** (Fla. 1st DCA **1985).** Significantly, unlike Plaintiffs here, the injured claimants in both Tampa Maid Seafood Products and Pan American Linen suffered physical injuries in an isolated incident as a result of friction between employees.

Defendants also disagree with Plaintiffs' position that workplace sexual harassment is not type of wrong intended to be covered by the workers' compensation law. Defendants argue that Plaintiffs' analysis "overlooks the statutory language that the Act covers 'injury arising out of an in the course of employment.'" §440.09(1), Fla. Stat. **(1987).**

Defendants' argument fails to address the significant differences between the inevitable frictions between employees that may develop in the workplace resulting in a personal altercation, and an ongoing pattern of sexual harassment by a supervisor toward women employees. Plaintiffs submit that "[t]here can be little doubt [the Plaintiffs' supervisors]...

acts as alleged had a questionable relationship to employment, and were neither a risk, or incident nor a normal part of [Plaintiffs']... employment" with Defendants. Hart v. National Mortgage & Land Co., supra, 235 Cal.Rptr. at 74. As that California appellate court stated, "when employers step out of their roles as such and commit acts which do no fall within the reasonably anticipated conditions of work, they may not hide behind the shield of workers' compensation." Hart, supra, 235 Cal.Rptr. at 75. This Court should similarly conclude that the shield of the workers' compensation act should not bar Plaintiffs' claims.

F. THE ACT WAS NOT INTENDED TO BAR ACTIONS THE ESSENCE OF WHICH ARE NON-PHYSICAL IN NATURE

Defendants argue that Plaintiffs' claims are barred because "mental distress or psychiatric disorders which are caused by a blow or some type of physical contact are covered injuries under the Act, even where the physical contact is relatively minor." (Def.Brief 31).

As analyzed by Judge Ervin in Brown, supra, 469 So.2d at 161, Defendants' argument should be rejected here since it "overlooks the fact that the battery caused neither physical trauma nor residual mental disability." Likewise, the facts presented here are readily distinguishable from Prahl Brokers, Inc. v. Phillips, 429 So.2d 386 (Fla.1st DCA 1983) (Emotional injury caused by having a gun placed to employee's head and ring physically removed from finger during on-the-job armed

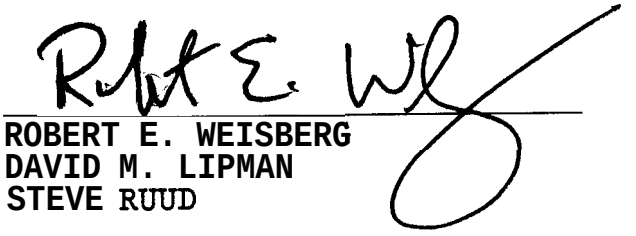
robbery), and Sheppard v. City of Gainesville Police Department, 490 So.2d 972, 974 (Fla. 1st DCA 1986) (Emotional injury suffered by police officer caused by fright and excitement and the trauma of being grabbed by the accident victim.)

As reviewed in our initial brief, as Professor Larson has recognized, " [i]f the essence of the tort, in law is non-physical and if the injuries are of the usual non-physical sort"... the suit should not be barred. (Pl.Brief pg. 17, n.7). Plaintiffs' claims here are indisputably "non-physical" in nature and should not be precluded by the workers' compensation exclusivity bar.

IV. CONCLUSION

For the reasons stated herein, and in Plaintiffs' initial brief, this Court should reverse the decision of the Second District Court of Appeal 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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DATED: November 1, *1988*

1359B

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CERTIFICATE OF SERVICE

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

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