IN THE SUPREME COURT OF FLORIDA

GEORGE KORDON and
LEONA KORDON, his wife,

Petitioners,

v.

WAL-MART STORES INC.,

Respondent.
_____/

Case No. 85922
DCA Case No. 94-03943

PETITIONERS' JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

Lon Worth Crow IV, Esq.
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14 South Lake Avenue
Avon Park, Florida 33825
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Attorney for Petitioners
Fla. Bar. No. 0898228

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STATEMENT OF THE CASE AND FACTS

This action involves a claim by Petitioners for damages against the Respondent for defamation. It is alleged that the Respondent directly through its managing agents made certain statements which were defamatory against the Petitioner. It is further alleged that the statements were made with malice and the conduct of Respondent was outrageous. (A-1). On February 28, 1994, the Petitioner filed a Motion to Amend the Complaint to Allege Punitive Damages citing §768.72 Florida Statutes. (A-5). The Motion was set for hearing on June 22, 1994, in which the trial court reviewed the evidence both in the record and proffered to the court. The trial court determined that there was a "reasonable basis" to warrant an amendment to allege punitive damages. (A-6). On July 1, 1994, the Respondent filed a Motion for Rehearing/Reconsideration arguing that the decisions by the trial court was error in light of several new cases cited. (A-8). The Petitioners filed a response of July 13, 1994. (A-13). On August 1, 1994, the trial court again heard extensive argument from counsel and by order dated August 10, 1994, denied Respondent's Motion. (A-16). On August 5, 1995, the Respondent filed a Motion for Partial Summary Judgment as to the claim for punitive damages. (A-18). On September 8, 1994, the trial court again heard extensive argument from counsel and by order dated September 13, 1994, denied the Respondent's Motion for Partial Summary Judgment. (A-20). On September 26, 1994, Respondent filed another Motion for Rehearing/Clarification. (A-22). On September 27, 1994, the Petitioners' filed their response. (A-25). On October 6, 1994, the Respondent filed a Motion to Strike Plaintiffs' Claim for Punitive Damages/Motion for Bifurcation. (A-28). On October 17, 1994, after again hearing extensive argument from counsel, the trial court denied Respondent's Motion to Strike. (A-35). On November 7, 1994, the Respondent filed a Motion to Stay Trial Proceedings for the trial scheduled for November 14, 1994, citing as grounds the simultaneous filing of a Petition for Writ of Certiorari in the Second District Court of Appeal. (A-37). The motion was denied by the trial court. On November 8, 1994, the trial court ordered that the Respondent produce a statement of net worth. (A-39). On November 10, 1994, the Respondent filed an Emergency Motion for Stay of Lower Court Proceedings with the Second

District Court of Appeal. On November 10, 1994, the Second District Court of Appeal granted the Emergency Motion for Stay. (A-40). On November 22, 1994, the Second District Court of Appeal ordered the Petitioner to file its response to the Respondent's Petition for Writ of Certiorari. (A-41). On December 12, 1994, the Petitioner filed its response to Respondent's Petition for Writ of Certiorari. (A-42). On June 2, 1995, the Second District Court of Appeal granted the Writ of Certiorari and quashed the trial court's order denying the motion to strike the claim for punitive damages and ordering production of financial discovery. (A-53).

SUMMARY OF THE ARGUMENT

The Petitioners filed an appropriate motion in the trial court under §768.72 Florida Statutes (1993) to amend their complaint to allege punitive damages. After examining the record and the evidence proffered by the Petitioners, the trial court found that there was a "reasonable basis" to support an amendment to the pleadings to allege punitive damages. As the trial court followed the exact procedure for considering an amendment to allege punitive damages under §768.72 Florida Statutes (1993), the Second District Court of Appeal did not have jurisdiction to issue a Writ of Certiorari quashing the trial court's decision. The district court's decision directly and expressly conflicts with the decision of this Court and of other district courts.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

The Decision of the Second District Court of Appeal in this Case Expressly and Directly Conflicts with the Decisions of the Supreme Court in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), the First District Court of Appeal in Globe Newspaper Co. v. King, 643 So. 2d 676 (Fla. 1st DCA 1994), review granted, 651 So. 2d 1193 (Fla. 1995), the Fourth District Court of Appeal in Sports Products, Inc. of Fort Lauderdale v. Estate of Marianne Inalien, 20 Fla.L.Weekly D13 (Fla. 4th DCA December 21, 1994), review granted (May 5, 1995) and the Fifth District Court of Appeal in Harley Hotels, Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993).

The Second District Court of Appeal ruled that a denial of a motion to strike a claim for punitive damages after an amendment to the pleadings according to §768.72 Florida Statutes (1993) is reviewable by Certiorari. As analyzed below, the decision of the district court conflicts with decisions of this Court and other district courts. The Petitioners respectfully submit that this Court should grant discretionary review and resolve the conflict by quashing the decision of the district court.

The district court "expressly" found it had jurisdiction by way of Certiorari to review an order denying Respondent's motion to strike a claim for punitive damages. The district court decision is in direct conflict with the decision of this Court in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987) where in this Court expressly stated that:

> we cannot agree that certiorari is a proper vehicle for testing denial of a motion to strike a claim for punitive damages. Were we to permit certiorari review of such orders, either directly, as in the case at bar, or in connection with review of a discovery order, we in essence would be creating a new category of non-final orders reviewable on interlocutory appeal. We are unwilling to do so for a number of reasons.

Id. at 1099.

The district court's opinion is also in direct conflict with decisions from other district courts. In Globe Newspaper Co. v. King, 643 So. 2d 676 (Fla. 1st DCA 1994), review granted, 651 So. 2d 1193 (Fla. 1995), the First District denied certiorari certifying a conflict on whether certiorari is appropriate to review orders related to punitive damage claims. In Sports Products,

Inc. of Fort Lauderdale v. Estate of Marianne Inalien, 20 Fla.L.Weekly D13 (Fla. 4th DCA December 21, 1994), review granted (May 5, 1995), the Fourth District court held:

> The court's certiorari jurisdiction is not so broad as to permit review of a finding that the plaintiff's evidentiary basis for punitive damages was sufficient to comply with the requirements of section 768.72, Florida Statutes, thereby permitting amendment of the complaint.
>
> This court has certiorari jurisdiction to require that the trial court make a factual finding prior to granting leave to amend. See, e.g., Kraft General Foods, Inc. v. Rosenblum, 635 So.2nd 106 (Fla. 4th DCA), rev. denied, 642 So.2nd 1363 (Fla. 1994) (table); Henn v. Sandler, 589 So.2nd 1334 (Fla. 4th DCA 1991). However, the fact that this court will conduct an immediate review to determine whether the trial court has conducted the inquiry required by the statute does not also mean that we will exercise certiorari jurisdiction to conduct an immediate review of the findings of fact made in the course of that inquiry.

Id. In Harley Hotels, Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993) the Fifth District held:

> We are constrained to deny certiorari review of an order permitting a claim for punitive damages. Martin-Johnson, Inc. v. Savage, 509 So.2nd 1097 (Fla. 1987). In doing so, we acknowledge the defendant's valid concern regarding the extent of plaintiff's right to engage in discovery of defendant's financial resources. Nevertheless, we remind defendant that the supreme court has expressly approved the use of Rule 1.280(c) to limit such discovery. Tennant v. Charlton, 377 So.2nd 1169 (Fla. 1979).

Id.

The decision of the Second District in this case is in conflict with the cases cited above to the extent that it allows certiorari review of a lower court's decision granting leave to amend a complaint to allege punitive damages after full compliance with §768.72 Florida Statutes (1993). available to review this type of non-final order of trial courts. Thus, this Court should now reaffirm its previous position by accepting discretionary review and quashing the contrary decision of the district court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's arguments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished to Vincent M. D'Assaro, Esquire, Cameron, Marriott, Walsh, Hodges & D'Assaro, 15 West Church Street, Orlando, Florida 32801 by Regular U.S. Mail on June 14, 1995.

KELLY & CROW

LON WORTH CROW IV
Attorney for Petitioner
14 South Lake Avenue
Avon Park, Florida 33825
(813) 453-7509
Fla. Bar No. 0898228

IN THE SUPREME COURT OF FLORIDA

GEORGE KORDON and
LEONA KORDON, his wife,

Petitioners,

v.

Case No. _____
DCA Case No. 94-03943

WAL-MART STORES INC.,

Respondent.
_____/

APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs. CASE NO. 92- -G

WAL-MART STORES INC.,
a foreign corporation,

Defendant.
_____/

COMPLAINT

Plaintiffs, GEORGE KORDON and LEONA KORDON, his wife, by and through their undersigned attorney, sue defendant, and allege:

COMMON ALLEGATIONS

1. This is an action for damages exceeding $10,000.00.

2. The plaintiffs have been residents of Highlands County, Florida at all times pertinent to this action.

3. Defendant is a foreign corporation authorized to do business in the State of Florida.

4. At all times pertinent hereto, plaintiffs have been married to each other.

5. Plaintiff, GEORGE KORDON, was employed at the store owned by defendant located in Sebring, Florida from on or about November 5, 1984 until November 25, 1991.

6. At all times during his employment, plaintiff, GEORGE E. KORDON, was a faithful and hardworking employee for the defendant.

7. Before the slanderous statements made by defendant which are hereinafter described, plaintiff, GEORGE KORDON, enjoyed a reputation for honesty, integrity, and trustworthiness in the Highlands County, Florida community.

8. On or about November 25, 1991, plaintiff, GEORGE KORDON, was informed by defendant that he was being fired because he had been stealing candy located at the claim's station within the store.

9. Before the discharge of said plaintiff, defendant had a long practiced custom that its store employees could eat candy and other food placed at the claims station without paying for the merchandise since it would be thrown away by the defendant from time to time.

10. All the managing personnel of the defendant had knowledge of the above-described custom before the discharge of the plaintiff, GEORGE KORDON.

11. After firing the plaintiff, GEORGE KORDON, defendant publicly accused said plaintiff of stealing its merchandise by informing its lower level employees of the accusation and by disseminating the slanderous allegations throughout the Highlands County, Florida community.

12. The statements of the defendant accusing the plaintiff, GEORGE KORDON, of stealing are false, malicious, and defamatory and were stated by defendant with complete disregard of their obviously harmful effect on said plaintiff's reputation and good standing in the community. In addition, the words themselves have caused said plaintiff to be regarded with scorn, contempt, ridicule and disrespect by members of the Highlands County, Florida community and will continue to do so in the future.

COUNT I

13. Plaintiff, GEORGE KORDON, re-alleges paragraphs 1 through 12.

14. As a direct and proximate result of the above-described statements, plaintiff, GEORGE KORDON, suffered

injury to his business and personal reputation and will continue to do so in the future.

15. As a direct and proximate result of the above-described statements, said plaintiff has suffered psychological and physical injury, mental anguish, public humiliation and embarrassment and will continue to do so in the future.

COUNT II

16. Plaintiff, LEONA KORDON, re-alleges paragraphs 1 through 12.

17. As a proximate result of the injuries to her husband, said plaintiff has suffered grave mental anguish, loss of her husband's services, society and comfort, loss of consortium and will suffer said losses in the future.

WHEREFORE, plaintiffs request that the court award them damages, costs and further demand trial by jury.

JAMES W. KELLY
Attorney for Plaintiff
Fla. Bar No. 206237
P.O. Box 1880
Avon Park, Florida 33825
ii. 453-7509

Not yet

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON and LEONA KORDON, his wife,

Plaintiffs,

vs. CASE NO: GC-92-134

WAL-MART STORES, INC., a foreign corporation,

Defendants.
_____/

MOTION TO ALLOW PLAINTIFFS TO AMEND COMPLAINT TO ALLEGE PUNITIVE DAMAGES

Plaintiffs, GEORGE KORDON and LEONA KORDON, his wife, by and through their undersigned attorney, move this court to allow them to amend their complaint to include an allegation for punitive damages on grounds that the depositions and evidence discovered in this case justify the Court granting this motion pursuant to the criteria under F.S. 768.72, Florida Statutes.

WHEREFORE, Plaintiffs request that this Court allow this motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Vincent M. D'Assaro, Esquire, 15 West Church Street, Orlando, Florida, 32801, this 28th day of February, 1994.

JAMES W. KELLY LAW OFFICES

_____
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FLA BAR # 898228
227 N. Ridgewood Drive
Sebring, Florida 33870
(813) 382-2202

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON

Plaintiff,

v. CASE NO: GC-92-134

WAL-MART STORES INC.,

Defendant.

_____/

ORDER

THIS MATTER having come before the Court on the Plaintiff's Motion to Amend their complaint to allege punitive damages. Present at the hearing was the attorney of record for the Plaintiff, Lon Worth Crow, IV, Esquire, and the attorney of record for the defendant, Hunter Hall, Esquire. After considering the evidence in the record and proffered by counsel, and after hearing the argument of counsel, the Court finds as follows:

1. Based upon the evidence in the record and proffered by counsel, there is a reasonable basis for the award of punitive damages as is required under F.S. 768.79.

It is therefor ORDERED AND ADJUDGED THAT:

1. The Plaintiff shall have 20 days to amend his complaint to add a count for punitive damages against the Defendant.

DONE AND ORDERED in chambers at Sebring, Highlands County, Florida this 20th day of June, 1994.

s/ ROBERT E. PYLE

THE HONORABLE ROBERT E. PYLE
Circuit Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail to Lon Worth Crow, IV, Esquire, 227 North Ridgewood, Sebring, Florida 33870 and Hunter Hall, Esquire, 15 West Church Street, Orlando, Florida 33801 on this the 20th day of June, 1994.

Elaine B. Gaunos
Judicial Assistant

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.
_____/

MOTION FOR REHEARING/RECONSIDERATION

COMES NOW the Defendant, WAL-MART STORES, INC., by and through their undersigned attorney, and requests this Honorable Court grant them an opportunity to be heard and request a rehearing of Plaintiffs' Motion to Amend Complaint to Add a Claim for Punitive Damages, or in the alternative, clarification of this Order, and in support thereof would state the following:

1. Previously in this action, the parties came before the Court on Plaintiffs' Motion to Amend, adding a claim for punitive damages to their Complaint. Specifically, by Order of this Court dated June 20, 1994, Plaintiff was given twenty (20) days within which to file their Amended Complaint.

2. Defendant would request this Honorable Court revisit the issue and give further consideration to the arguments of defense counsel in opposition to this amendment adding a claim for punitive damages.

3. At the hearing before this Court, Plaintiffs cited specific portions of the deposition of Ora Taylor, specifically

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Page 14 of that deposition, and in addition, the deposition of Lou Della Bowers, at Pages 42, 43 and 46. The Plaintiffs also relied on the deposition of Donald Larson, specifically at Page 13.

4. The testimony of the three (3) witnesses cited hereinbefore given the privileges involved and the elements of defamation, it would appear to fall short of presenting a claim for defamation, let alone interposing punitive damages. In this regard, Defendant would request the Court revisit the Plaintiffs' Motion permitting the amendment to the Complaint adding a claim for punitive damages.

5. As for the testimony of Lou Della Bowers, an assistant store manager, if her comments were even to fall under the gambit of defamation, referring specifically to her testimony on Page 46, Line 15, wherein she states in reference to a telephone conversation with a member of management from Scotty's, who was supposedly inquiring about Mr. Kordon's termination, the only comment she made in reference to a question about why they could not rehire George Kordon, was "I said because of company policy, violated company policy." That comment, along with her testimony at Page 43, Line 4, wherein she came upon several associates discussing George Kordon's termination, and in asking them to stop talking about what occurred with George Kordon, she stated by her own testimony, "Maybe there is more to it, let's don't talk about it. Because you shouldn't be out on the floor gossiping." Specifically, Defendant would point to the above-referenced testimony by Lou Della Bowers as the only testimony which Plaintiff can truly point to as showing a claim for defamation, and not only

does this testimony fall short of being defamation, it falls woefully short of attaining the level of malice required for punitive damages. Specifically, the Defendant fails to see how any malicious intent is evidenced by any of the comments. That malicious intent would be necessary to get past any privileges which may apply and it would take a further level of malice to justify a claim for punitive damages.

6. In the context of punitive damages, Defendant would refer the Court to the case of Pier 66 Co. v. Poulos, 542 So.2d 377 (Fla. 4th DCA 1989), wherein a claim for punitive damages was brought against a company and the court rejected the punitive damages claim because the corporation can only be held liable if a managing agent of the corporation itself can be charged with being the cause of the defamatory statements. In Pier 66 Co., an individual was terminated and due to the circumstances of the termination, a report in a newspaper was made. A manager of the hotel which was owned by Phillips Petroleum made an alleged defamatory statement in a newspaper about the circumstances of the individual's termination. He stated: "The timing of the firing was very poor, but was bound to happen because Ms. Poulos hasn't been working out in her post as a sales representative."

Specifically, the court would not hold Phillips Petroleum liable for the punitive damages because a managing agent of the corporation must be charged with making defamatory statements. They specifically rejected that the manager of an individual hotel was sufficient to support a claim for defamation and punitive damages against the defendant. In Poulos, the plaintiff joined not

only the parent company of Phillips Petroleum, but also the manager, Clyde Chu, as well as other individuals alleged to be involved in the defamatory statements. The court specifically rejected the claim against the parent company, but sustained the claim against the person who made the alleged defamatory statement. The court stated as follows:

> Additionally, Phillips Petroleum incurs no liability for punitive damages on either claim for wrongful discharge or defamation. Generally, there must be proof of employer fault in order to impose liability for punitive damages. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). No showing of independent fault is required where the corporate agent is in fact the owner or the managing agent of the corporation sought to be charged. See Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985). However, the defendant Chu was only the hotel manager for Pier 66 Company; he was clearly not a managing agent of Phillips Petroleum Company. (citations omitted).

Pier 66 Co. v. Poulos, 542 So.2d at 381.

7. Defendant would cite the Court to P.V. Construction Corp. v. Atlas Pools of the Palm Beaches, Inc., 510 So.2d 318 (Fla. 4th DCA 1987), wherein the court states that in order to find punitive damages directly against a corporation, the person causing the offensive act must be a managing agent or primary owner of the corporation. The court specifically states, in referring to the Mercury Motors Express, Inc. v. Smith, infra, that that decision was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation. In the case at bar, we fall under almost the same facts of the Pier 66 Co. v. Poulos, where a manager of an individual hotel (or in our case, a store) is the

CAMERON, MARRIOTT, WALSH, HODGES & D'ASSARO, P.A., 15 WEST CHURCH STREET, ORLANDO, FLORIDA 32801-3301

focus of the alleged defamatory statements. Ms. Bowers is assistant store manager, not unlike Mr. Chu in the Pier 66 Co. v. Poulos case. There is no evidence of any managing agent from WAL-MART STORES, INC. being attributed with a defamatory comment.

8. Defendant has attached a copy of the above-cited cases for this Court's review, in addition to Mercury Motors Express v. Smith, 393 So.2d 545 (Fla. 1981); and P.V. Construction Corp. v. Atlas Pools of the Palm Beaches, Inc., 510 So.2d 318 (Fla. 4th DCA 1987).

WHEREFORE, for the reasons set forth above, Defendant would request this Court revisit the issue of Plaintiffs' Motion to Amend Complaint to Add a Claim for Punitive Damages or, in the alternative, provide clarification as to how such a claim should be applied to Defendant, WAL-MART STORES, INC.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James W. Kelly, Esquire, Attorney for Plaintiff, Post Office Box 1880, Avon Park, Florida 33825, by United States Mail, this 1st day of July, 1994.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.

VINCENT M. D'ASSARO, ESQUIRE
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15 West Church Street
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407/841-5030
Attorney for Defendant

44761_1/ms

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs. **CASE NO. GC-92-134**

WAL-MART STORES INC.,
a foreign corporation,

Defendant,
_____/

RESPONSE TO MOTION FOR REHEARING/RECONSIDERATION

Plaintiffs reply to the defendant's Motion for Rehearing/Reconsideration as follows:

The defendant's cases concern the quantum of proof necessary to create a jury issue of punitive damages. This court's order allowing the plaintiffs to amend their complaint to allege punitive damages is not based on a determination whether there is sufficient evidence to present the issue of punitive damages to a jury. This court properly determined that there was evidence in the record to support the allegations of punitive damages pursuant to the requirements of §768.72, Florida Statutes. This statute states that the rules should be liberally construed (emphasis added) to permit the amendment.

In Dolphin Cove Ass'n v. Square D. Co. , 616 So.2d 553 (Fla.App. 2 Dist. 1993), the Second District reversed a trial court's determination that there was not an adequate factual predicate in the record to allow the plaintiff to amend his complaint and request punitive damages. The court held that it was not proper for the trial judge to prejudge the evidence in denying the plaintiff's motion to amend.

In numerous cases decided since Mercury Motors, courts have allowed punitive damages to be presented to juries where a corporation's employees have committed an intentional or reckless tort. See, Robinson v. Winn-Dixie Stores, Inc. , 447 So.2d 1003 (fla. 4th DCA 1984); McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So.2d 535 (Fla. 3rd DCA 1986); Zayre Corp. v. Martinez, 439 So.2d 333 (Fla. 3d DCA 1983).

In the above cases, the court allowed the issue of punitive damages to go to the jury where there was some evidence that the corporate defendant had been negligent in hiring the employee causing the damage or that the employee's tortious act reflected the policy of the corporation.

In the instant case, the direct and circumstantial evidence shows that the plaintiff, George Kordon, was falsely accused of theft by the management level employees of the defendant. There is some circumstantial evidence that this reflected a corporate motive to remove the plaintiff as a result of his age and tenure. Furthermore, the record shows an intentional or negligent misrepresentation on the part of management of a corporate policy concerning eating of food stuffs in the claims area of stores.

It is also important to note that the accusations against the plaintiff of theft were reviewed by higher officials than the local management of the defendant and that those accusations were ratified by the defendant.

In the Robinson case cited above, the court held that Winn-Dixie's policy concerning the training of employees in the manner of stopping of shop lifters was held sufficient to create corporate liability and justified the award of $750,000.00 in punitive damages. In its opinion, the court stated:

> Moreover we conclude that, even accepting appellant's hypothesis, the evidence satisfies the "some fault" requirement of Mercury Motors thereby justifying punitive damages. Winn-Dixie's own fault is evidenced by its publication and implementation of policies governing the conduct of employees who observe

shoplifting. Thus it was error for the trial court to grant the motion directing out punitive damages. Accordingly, we reverse that order.

In the Zayre case cited above, the court allowed the issue of punitive damages against Zayre to go to the jury on the basis that there was some evidence that Zayre had not adequately trained its security guards.

CONCLUSION

This court was correct in allowing the plaintffs to amend their complaint based on the record in the case. In the first place, the record shows that management level employees of the defendant committed the tortious acts and therefore the defendant is directly liable. Furthermore, even if Mercury Motors applies in this case, there is a suffcient basis to allow the amendment.

JAMES W. KELLY
Attorney for Plaintiff
Fla. Bar No. 206237
P.O. Box 1880
Avon Park, Fl. 33825
(813) 453-7509

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to VINCENT M. ASSARO, Esq., 15 West Church Street, Orlando, Florida, 32801, this the 13th day of July, 1994.

JAMES W. KELLY

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON,

Plaintiff,

v. CASE NO. GC-92-134

WAL-MART STORES, INC.,

Defendant.
_____/

ORDER FOR REHEARING/RECONSIDERATION

THIS MATTER having come before the court on the Defendant's motion for reconsideration. Present at the hearing was the attorney of record for the Plaintiff, Lon Worth Crow IV, Esquire, and the attorney of record for the Defendant, Hunter Hall, Esquire. Based upon the argument of counsel and considering the evidence proffered by the parties, it is therefore ORDERED AND ADJUDGED

1. That the Plaintiff's motion for reconsideration is hereby DENIED.

2. That the Plaintiff's motion to compel the production of documents is hereby GRANTED. The Defendant is hereby ordered to produce the documents which purported represent the Plaintiff's employment file. It is specifically ordered that the Defendant produces documents contained within the file which were objected to at the hearing on relevancy and work-product grounds. The Defendant is further ordered to represent to the court within thirty (30) days of the date of the hearing whether or not there is an additional personnel file for the Plaintiff, GEORGE KORDON, in the possession of the Defendant.

3. That based upon the court's denial of the Defendant's motion for reconsideration, the Plaintiff shall have twenty (20) days from the date of this order in which to file an amended complaint alleging punitive damages.

RECEIVED
AUG 15 1994

DONE AND ORDERED in Chambers at Highlands County, Florida, this 10 day of August, 1994.

s/ ROBERT E. PYLE
ROBERT E. PYLE
Circuit Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U.S. Mail to Hunter Hall, Esquire, 15 West Church Street, Orlando, Florida 32801 and Lon Worth Crow IV, Esquire, P.O. Box 1880, Avon Park, Florida 33825, this 10 day of August, 1994.

D. R. Coleman
Judicial Assistant

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.
_____/

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

COMES NOW the Defendant, WAL-MART STORES, INC., by and through their undersigned attorney, and files this their Motion for Partial Summary Judgment as to Punitive Damages, and in support thereof would state the following:

1. Pursuant to Fla.R.Civ.P. 3.510(c), the Defendant would show the Court that there is no material issue of fact in dispute as to the issue of punitive damages and Defendant is entitled to judgment in its favor as a matter of law.

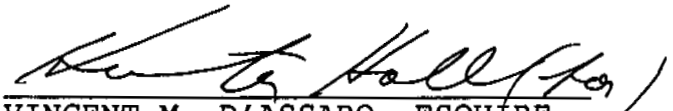
2. Previously this Court has permitted Plaintiffs' counsel to amend their Complaint to add a claim for punitive damages based on the record testimony provided by Lou Della Bowers and Donna Larson. Defendant has filed a Motion for Summary Judgment as to any count of defamation and would show the Court that in addition to there being no defamation and no material issue of fact in dispute as to the existence of an action for defamation, there is no evidence and no dispute of fact as to whether a claim for punitive damages should lie in this action.

3. Defendant would refer to and incorporate by reference herein its Motion for Rehearing served July 1, 1994, as well as its response to Plaintiffs' Motion to Amend and Add a Count for Punitive Damages.

WHEREFORE, for all the foregoing reasons, Defendant would request this Honorable Court enter an Order granting partial summary judgment in its favor as to the issue of punitive damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James W. Kelly, Esquire, Attorney for Plaintiff, Post Office Box 1880, Avon Park, Florida 33825, by United States Mail, this 5th day of August, 1994.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.



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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON and LEONA KORDON, his wife,

PLAINTIFFS,

vs. CASE NO.: GC92-134

WAL-MART STORES, INC., a foreign corporation,

DEFENDANT.

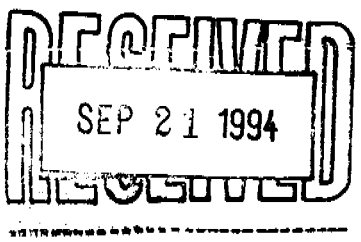
ORDER DENYING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE was heard on September 6, 1994, on Motions of Defendant for Partial Summary Judgment as to Punitive Damages and for Summary Judgment.

The Court heard arguments of counsel and has considered the law cited, together with the memoranda of law filed herein. The Court concludes that material issues are or could be present, requiring that doubt to be resolved against the movant. Jones v. Directors Guild of America, Inc., 584 So.2d 1057. It is thereupon

ORDERED that the respective Motions of the Defendant for Summary Judgment are DENIED.

DONE AND ORDERED this 13 day of SEPTEMBER, 1994, in Chambers, at Sebring, Highlands County, Florida.



ROBERT E. PYLE
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Lon Worth Crow, IV, Esq., 227 N. Ridgewood Drive, Sebring, FL 33870 and Vincent M. D'Assaro, Esq., 15 West Church Street, Orlando, FL 32801, this 13th day of September, 1994.

D. R. Coleman
JUDICIAL ASSISTANT

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.
_____/

MOTION FOR REHEARING/CLARIFICATION

COMES NOW the Defendant, WAL-MART STORES, INC., by and through their undersigned attorneys, and pursuant to Fla.R.Civ.P. 1.530, moves for a rehearing/clarification of this Honorable Court's Order denying Defendant's Motion for Summary Judgment, filed September 14, 1994, and in support thereof would state the following:

1. The Defendant believes the Court has possibly overlooked or misapprehended some of the points previously raised in both its Motion for Summary Judgment as to the action for defamation, and its Motion for Summary Judgment as to punitive damages.

2. Taking the punitive damages issue first, the Defendant would show the Court that a reasonable basis, as required under Florida law in the case law governing punitive damages, has not been adequately proven by Plaintiff's counsel to allow this claim for punitive damages to continue on before a jury. Will v. Systems Engineering Consultants, 554 So.2d (Fla. 3d DCA 1989).

3. The Defendant has shown to this Court that the record evidence in the form of testimony of several witnesses, including

Donna Larson, Lou Della Bowers and Ralph Rawlings, as well as that of the Plaintiff himself, failed to raise an issue of facts as to defamation. The Court has ruled to the contrary and found that material issues of fact do exist as to the defamation claim. Even in the face of this, Defendant would show the Court that there is no issue of fact in dispute as to the claim for punitive damages and the basis for that claim. Specifically, there is no showing of any malice or wrongdoing by Wal-Mart Stores, Inc., its employees or agents which would permit a claim for punitive damages to carry forward to a jury.

4. Defendant would,in the alternative, as to the punitive damages claim, request this Honorable Court give clarification as to the showing for the Plaintiff's reasonable basis to allow punitive damages to go to the jury. Thus far, in the Orders presented, both allowing Plaintiff's claim for punitive damages to come before the Court and the recent Order denying Defendant's Motion for Summary Judgment, there has been no clear statement of a reasonable basis or showing that would allow the Plaintiff's claim for punitive damages to stand.

5. Focusing on the Plaintiff's main claim for defamation, Defendant is unclear as to why the Court has denied its Motion for Summary Judgment in this regard as well. Specifically, the Defendant fails to see how there has been any showing of a material issue or fact in dispute which would cause the Motion for Summary Judgment to fail and would ask the Court to revisit this issue and reconsider its previous decision.

6. Again, in the alternative, Defendant would ask this

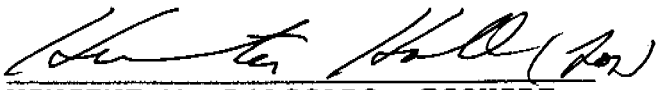
Honorable Court to provide in more clear statement as to its reasoning behind its denial of Defendant's Motion for Summary Judgment as to defamation.

7. Defendant would also refer this Honorable Court to the recent Supreme Court case, W. R. Grace & Company v. Thompson Waters, 19 F.L.W. S-286, which sets forth the proper procedure by which a claim for punitive damages may be brought.

WHEREFORE, for all the foregoing reasons Defendant would request this Honorable Court revisit its Motion for Summary Judgment as to punitive damages and the underlying defamation claim, and in the alternative provide clarification as to its ruling as to these two (2) Motions.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James W. Kelly, Esquire, Attorney for Plaintiff, Post Office Box 1880, Avon Park, Florida 33825, by United States Mail and facsimile transmission, this 26th day of September, 1994.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.



VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No. 0471690
15 West Church Street
Orlando, Florida 32801
407/841-5030 ms
Attorney for Defendant

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT IN AND FOR HIGHLANDS COUNTY, FLORIDA

GEORGE KORDON,

Plaintiff,

v. Case No. GC-92-134

WAL-MART STORES, INC.,

Defendant.
_____/

RESPONSE TO DEFENDANT'S MOTION FOR REHEARING/RECONSIDERATION

COMES NOW the Plaintiff by and through his undersigned attorney and responds to the Defendant's Motion for Rehearing/Reconsideration as follows:

1. Since the order entered by this court is a non-final order, a motion for rehearing is inappropriate. See, Irwin v. Walker, 468 So.2d 241 (Fla. 2nd DCA 1991); Franscisco v. Victoria Marine Shipping, Inc., 494 So.2d 1153 (Fla. 3rd DCA 1986).

2. Further, the motion filed by the Defendant is not within the requisite 10 day time period required by Rule 1.530(b) Fla.R.Civ.P.

3. While this court has authority to reconsider non-final orders prior to a final order being issued, the Plaintiff would suggest that the court has reconsidered the issues raised by the Defendant numerous times in the past and should decline to consider them further. A review of the court file will disclose that:

a. On February 28, 1994 the Plaintiff filed a motion to amend to allege punitive damages.

b. On May 18, 1994, the Defendant filed a response to Plaintiff's motion to amend.

c. On June 2, 1994, this court heard extensive argument from counsel and by order dated June 20, 1994 granted Plaintiff's motion to amend.

d. On July 1, 1994, the Defendant filed a motion for rehearing/reconsideration arguing that the previous decision by this court was error in light of several new cases cited.

e. On July 13, 1994, the Plaintiff filed its response.

f. On July 14, 1994, this court entered an order setting for hearing the Defendant's motion for rehearing/reconsideration.

g. On August 1, 1994, this court again heard extensive argument from counsel and by order dated August 10, 1994 denied Defendant's motion.

h. On August 5, 1994, the Defendant filed a motion for summary judgment as to the defamation cause of action and a motion for partial summary judgment as to the punitive damage issue. Along with Defendant's motions, a memorandum of law was filed by Defendant in support thereof.

i. On August 29, 1994, the Plaintiff filed its memorandum in opposition to Defendant's motions for summary judgment.

j. On September 8, 1994 this court again heard extensive argument from counsel and by order dated September 13, 1994 denied Defendant's motions for summary judgment.

k. On September 26, 1994, the Defendant has again requested this court consider the issues of punitive damages and defamation.

4. There is no need for the court to clarify its order denying the Defendant's motions for summary judgment as it has specifically found that there remain issues of fact concerning the issues of punitive damages and defamation thereby precluding summary judgment.

5. It is respectfully submitted that there is nothing new cited in the Defendant's motion for rehearing/reconsideration which would warrant this court entertaining any further argument. The Defendant has received a sufficient number of "bites at the apple" and should not be permitted to consume the court's time and counsel's time rehashing matters previously decided by this court.

6. As to the Defendant's mention of W.R. Grace & Company v. Thompson Waters, 638 So.2d 502 (Fla. 1994), the Plaintiff would point out that the procedure in no way affects the

issues previously raised before the court. Rather, W.R. Grace provides (upon proper motion) the assessment of punitive damages be bifurcated from the determination of the liability for punitive damages.

WHEREFORE, the Plaintiff requests that this court not consider the motion filed by the Defendant.

I CERTIFY that a true and correct copy of the foregoing was furnished to Vincent M. D'Assaro, Esq. and Hunter Hall, Esq., 15 West Church Street, Orlando, Florida 32801 by fax and regular U.S. Mail on September 27, 1994.

KELLY & CROW

LON WORTH CROW IV
Attorney for Plaintiff
14 South Lake Avenue
Avon Park, Florida 33870
(813) 453-7509
Fla. Bar No. 0898228

cc: Honorable Robert E. Pyle

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.
_____/

DEFENDANT'S MEMORANDUM OF LAW ON MOTION TO STRIKE PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES/MOTION FOR BIFURCATION

COMES NOW the Defendant, WAL-MART STORES, INC., by and through their undersigned attorney, and offers this its Memorandum of Law in support of its Motion to Strike Plaintiffs' Claim for Punitive Damages, and would state the following:

FACTS

The material facts which lead to the claim asserted by the Plaintiffs are undisputed. The Plaintiff, GEORGE KORDON, is claiming that the management of Wal-Mart Store No. 666 published defamatory statements and, among other things, believes that they published to the employees of the store spurious and defamatory allegations regarding George Kordon being terminated for theft. On Pages 61 through 63 of his deposition, Ralph Rawlings, the manager of Store No. 666 at the time of George Kordon's termination, recounts that the store was finding open boxes and empty wrappers of food in the storage areas. Loss prevention then commenced an investigation to determine what was occurring with regard to these losses, otherwise known as "shrinkage of inventory," or simply,

CAMERON, MARRIOTT, WALSH, HODGES & D'ASSARO, P.A., 15 WEST CHURCH STREET, ORLANDO, FLORIDA 32801-3301

"shrinkage." The Plaintiff, GEORGE KORDON, was seen eating a candy bar and disposing of the wrapper in a trash can. Matt Church matched the serial numbers of the candy bar wrapper which Mr. Kordon had thrown away to the package of damaged goods which had been turned into the service desk. The goods at the service desk had not been written off out of the inventory and were still considered merchandise of Wal-Mart Stores, Inc. This is confirmed in the deposition of Ralph Rawlings at Page 74, Lines 5 through 17, as well as in the deposition of George Kordon, beginning at Page 23, Line 4, and specifically the following exchange:

Q What else was said during this meeting [referring to a meeting between loss prevention director, Margaret Livingston, with Matt Church in attendance]?

A I believe that she asked me whether I, myself, ate candy.

...

Q And what did you -- What was your answer?

A I said: Yes.

The deposition goes on in more detail as to what occurred, but George Kordon admitted to consuming merchandise, both in his deposition and by the interview form which he identified and which was attached to his deposition. In that form, he specifically admitted to consuming merchandise with a pay-back value of $5.00 to $10.00.

If the Court would refer to the depositions of Ralph Rawlings, Lou Della Bowers and George Kordon, it is made clear in the record that consumption of merchandise is in fact a violation of company policy and will warrant termination without further consultation.

The above incident was the genesis of Plaintiffs' claim. The Plaintiff claims that during a storewide meeting, the fact that he was terminated, as well as the circumstances surrounding his termination, were discussed (see Plaintiff's deposition at Page 50, Line 15 through Page 51, Line 7). The Plaintiff claims 135 employees of Wal-Mart, to the best of his knowledge, heard a statement of a defamatory nature regarding his termination from Wal-Mart. Specifically, at this time, after the depositions of numerous employees employed at the time of the incident, none of them recount any meeting where the circumstances of Mr. Kordon's termination were discussed and only one can remember a mention that Mr. Kordon was no longer working at the store. There is simply no evidence and no dispute of fact that anyone from Wal-Mart held a meeting to a broad and general audience of employees and discussed damaging information regarding Mr. Kordon's termination.

Further, as for the Plaintiff's claim of defamation, he points to the deposition of Lou Della Bowers, wherein Ms. Bowers is reported to have made a statement to several employees who were discussing Mr. Kordon's termination. Specifically, referring to the deposition of Ms. Bowers at Page 42, Lines 24 through Page 43, Line 5, the following exchange occurred:

Q Did you ever communicate to anyone the fact that Mr. Kordon was terminated?

A I walked up one day and some associates were talking and one of them said about George being terminated. And I said, "Maybe there's more to it, let's don't talk about it because you shouldn't be out on the floor gossiping."

That comment by Ms. Bowers was made specifically by her to several employees on the floor.

Further, the Plaintiff would attempt to show a defamatory statement wherein Ms. Bowers refers to a telephone call she received from a manager of Scotty's inquiring as to Mr. Kordon's previous experience with Wal-Mart. On Page 46 of Lou Della Bowers' deposition, beginning at Lines 10 through 18:

Q And what were you asked by this person from Scotty's?

A They wanted to know his date of hire and date he left, and if he was rehireable. Which was in his file. No.

Q And his file says you can't rehire him? Were you asked anything else?

A She said, why. I said because of company policy, violated company policy.

Q Is that all you told this person?

A Yes, it is.

In essence, the statements above represent what Defendant would show the Court as the strong points of the Plaintiffs' case as for statements which could lead to proof of the Plaintiffs' claim for defamation. Specifically, none of these statements are in the context of defamation or libelous statements, and Defendant would further show that those which may even be argued as defamatory are in fact protected by privilege.

From the deposition of Donna Larson, the Plaintiffs have cited the following exchange:

Page 13, Line 2:

Q Do you recall his termination being discussed at any

CAMERON, MARRIOTT, WALSH, HODGES & D'ASSARO, P.A., 15 WEST CHURCH STREET, ORLANDO, FLORIDA 32801-3301

management meetings?

A Yes.

Q What was discussed?

A They - - I just remember them saying he had been let go.

Q Were those the exact words used?

A I can't remember.

Q Did management tell or dissiminate the reason why he had been let go?

A I can't remember.

Q And you don't recall where you got your information as to the reason why he had been let go?

A No.

The three quotes set forth above are all that Plaintiffs have presented in support of their claim for punitive damages.

Defendant would show the Court that the claim for punitive damages is lacking the necessary reasonable basis sufficient to bring a claim for punitive damages. According to Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991), F.S. §768.72 creates a substantive right to which the Plaintiffs should only be allowed after "the trial court has first made an affirmative finding that there is a reasonable evidentiary basis for the punitive damage claim to go to the jury." This is also set forth in Will v. Systems Engineering Consultants, 554 So.2d 591 (Fla. 3d DCA 1989) and Key West Convalescent Center, Inc. v. Doherty, 619 So.2d 367 (Fla. 3d DCA 1993).

The most recent case of Commercial Carrier Corp. v. Cheryl Rockhead, 19 F.L.W. 1433 (Fla. 3d DCA July 5, 1994), is the most

CAMERON, MARRIOTT, WALSH, HODGES & D'ASSARO, P.A., 15 WEST CHURCH STREET, ORLANDO, FLORIDA 32801-3301

recent case found on the issue. In Commercial Carrier Corp., the trial court allowed a claim for punitive damages based upon evidence of simple negligence in an automobile accident. The defendant moved to strike the claim for punitive damages, which motion was denied, and the 3d DCA allowed the court's denial of its motion to strike to be taken up by writ of certiorari. The trial court specifically states:

> As we have previously indicated in Key West Convalescent Center v. Doherty, 619 So.2d 367 (Fla. 3d DCA 1993), we follow Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991), en banc, in concluding - notwithstanding Martin Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), which did not consider the statute that an order denying a motion to strike a punitive damages claim as unjustified under §768.72, F.S. (1991), is reviewable by certiorari.

Not only is the claim for punitive damages inappropriate based on the lack of showing of a reasonable evidentiary basis, but Defendant would show once again the authority of Pier 66 Company v. Poulos, 542 So.2d 377 (Fla. 4th DCA 1989), wherein a claim for punitive damages was brought against a company and the court rejected the punitive damages claim because the corporation can only be held liable if a managing agent of the corporation itself can be charged with being the cause of the defamatory statements. In Pier 66 Company, an individual was terminated; due to the circumstances of the termination, a report in a newspaper was made. A manager of the hotel which was owned by Phillips Petroleum made an allegedly defamatory statement in a newspaper about the circumstances of the individual's termination. Specifically, citing the authority of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), the court would not hold Phillips Petroleum

liable for the punitive damages because a managing agent of the corporation must be charged with making defamatory statements. They specifically rejected that the lower level manager of an individual hotel was sufficient to support a claim for punitive damages against the manager's employer, Pier 66 Company. Further, the Defendant would cite to the Court P.V. Construction Corp. v. Atlas Pools of Palm Beaches, Inc., 510 So.2d 318 (Fla. 4th DCA 1987), wherein the court states that in order to find punitive damages directly against a corporation, the person causing the offensive act must be a managing agent or primary owner of the corporation, this case again relying on Mercury Motors Express, Inc. v. Smith, infra, as a key authority.

Based upon all of the foregoing authorities, Defendant offers this Memorandum of Law in support of its Motion to Strike.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James W. Kelly, Esquire, Attorney for Plaintiff, Post Office Box 1880, Avon Park, Florida 33825, by United States Mail, this 6th day of October, 1994.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.

VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No. 0471690
15 West Church Street
Orlando, Florida 32801
407/841-5030
Attorney for Defendant

ms

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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO.: GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,
a foreign corporation,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

This cause having come before the Court on Defendant, WAL-MART STORES, INC's, Motion to Strike Plaintiff's Claim for Punitive Damages, and the Court having reviewed the Motion, and having heard argument of counsel, it is hereby

ORDERED and ADJUDGED that:

Defendant's Motion to Strike Plaintiff's Claim for Punitive Damages is hereby denied. The Court finding a reasonable basis in the record currently filed.

DONE and ORDERED in Chambers in Sebring, Highlands County, Florida, this 17th day of October, 1994.

s/ ROBERT E. PYLE

Robert E. Pyle
Circuit Court Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery to: LON WORTH CROW, IV, ESQUIRE, 14 S. Lake Avenue, P.O. Box 1880, Avon Park, Florida

33825, and VINCENT M. D'ASSARO, ESQUIRE, 15 W. Church Street, Orlando, Florida 32801, this 17 day of October, 1994.

D. L. Coleman
Judicial Assistant/Attorney

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO STAY TRIAL PROCEEDINGS

COMES NOW the Defendant, WAL-MART STORES, INC., by and through their undersigned attorney, and would give notice to all parties of its intention to file a Writ of Certiorari, and pursuant to Fla.R. App.P. 1.310(a), requests this Court for a stay of the lower Court proceedings, and in support thereof, would state the following:

1. Previously in this action, this Court has permitted Plaintiffs' attorney to proceed with a claim for punitive damages.

2. This Court, by Order of October 17, 1994, denied Defendant's Motion to Strike Plaintiffs' Claim for Punitive Damages.

3. Defendant has grounds to apply for a Writ of Certiorari based upon this Court's denial of its Motion to Strike Plaintiffs' Claim for Punitive Damages, by authority of Commercial Carrier Corp. v. Cheryl Rockhead, 19 F.L.W. D-1433 (3d DCA July 15, 1994).

4. This Defendant does not interpose this Motion for delay, nor take its Writ of Certiorari for the same reason.

WHEREFORE, for all the foregoing reasons, Defendant WAL-MART

CAMERON, MARRIOTT, WALSH, HODGES & D'ASSARO, P.A., 15 WEST CHURCH STREET, ORLANDO, FLORIDA 32801-3301

STORES, INC., requests this Honorable Court strike this matter from the trial docket and stay these proceedings until such time as the Writ of Certiorari has been determined.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lon Worth Crow, IV, Esquire, Attorney for Plaintiff, Post Office Box 1880, Avon Park, Florida 33825, by facsimile transmission and U.S. Mail, this 7th day of November, 1994.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.

VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No. 0471690
15 West Church Street
Orlando, Florida 32801
407/841-5030
Attorney for Defendant

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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO.: GC-92-134

GEORGE KORDON and
LEONA KORDON, his wife,

Plaintiffs,

vs.

WAL-MART STORES, INC.,
a foreign corporation,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION TO COMPEL

THIS CAUSE having come before the Court on Plaintiff's Motion to Compel, certificate of service August 8, 1994, and the Court having reviewed the Motion and the file, having heard argument of counsel, and being fully advised in the premises, it is hereby

ORDERED and ADJUDGED that Defendant has five (5) days from the date of this Order to supply a statement of net worth, including a list of all assets and liabilities, as of the date of this request.

DONE and ORDERED in Chambers in Sebring, Highlands County, Florida, this 8 day of Nov ~~October~~, 1994.

Robert E. Pyle
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery to: LON WORTH CROW, IV, ESQUIRE, 14 S. Lake Avenue, P.O. Box 1880, Avon Park, Florida 33825, and VINCENT M. D'ASSARO, ESQUIRE, 15 W. Church Street, Orlando, Florida 32801, this 9 day of ~~October~~ November, 1994.

RECEIVED
NOV 16 1994

K. K. Coleman
Judicial Assistant/Attorney

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

NOVEMBER 10, 1994

WAL-MART STORES, INC.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Case No. 94-03943
	)	
GEORGE KORDON and LEONA KORDON, his wife,	)	
	)	
Respondent(s).	)	

BY ORDER OF THE COURT:

Petitioner having filed an emergency motion for stay of lower court proceedings, it is ordered that respondents shall file a response to the motion by Monday, November 14, 1994, 5:00 P.M. The response may be by facsimile

A temporary stay is granted pending the response.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK by cs

c: Vincent M. D'Assaro, Esq.
Lon Worth Crow, IV, Esq.
Honorable Robert E. Pyle
Luke Brooker, Clerk

/BB

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

NOVEMBER 22, 1994

WAL-MART STORES, INC.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Case No. 94-03943
	)	
GEORGE KORDON and LEONA KORDON, his wife,	)	
	)	
Respondent(s).	)	

BY ORDER OF THE COURT:

Respondents shall file a response within 20 days to the amended petition for writ of certiorari.

This case is stayed pending disposition of the certiorari or further order of this court.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Hunter A. Hall, Esq.
Lon Worth Crow, IV, Esq.
Honorable Robert E. Pyle
Luke Brooker, Clerk

/BB

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327
LAKELAND, FLORIDA 33802

WAL-MART STORES, INC.,

Petitioner,

v. Appeal No. 94-03943

GEORGE KORDON and
LEONA KORDON, his Wife,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Plaintiffs/Respondents, GEORGE KORDON and LEONA KORDON, his Wife (herein KORDON), by and through their undersigned counsel and pursuant to this Court's Order, files this its response to the Defendant/Petitioner's, WAL-MART STORES, INC. (herein WAL-MART), Petition For Writ of Certiorari:

I. ARGUMENT IN RESPONSE

WAL-MART contends that the lower court abused its discretion in granting KORDON's motion to amend to allege punitive damages, denying WAL-MART's motion to strike punitive damages, and granting KORDON's motion to compel financial discovery. The basis for WAL-MART's contention is that there is no defamation in the present case, that if there is defamation privileges attach to the statements, no managing agents of WAL-MART published any defamatory statements, and the evidence does not satisfy the standard for punitive damages. For the reasons expressed more fully below, KORDON submits that the petition for writ of certiorari should be denied.

A. Lack of Jurisdiction

At the outset, KORDON contends that the petition should be dismissed because certiorari is not available as a remedy under the circumstances of this case. WAL-MART contends that the lower court abused its discretion by allowing KORDON to amend its

complaint to allege punitive damages and denying WAL-MART's motion to strike punitive damages. WAL-MART further contends that the order of the lower court compelling financial discovery was an abuse of discretion.

Review of the order permitting an amendment to the pleadings to allege punitive damages is not available. The order allowing an amendment to the pleadings was entered by the lower court on June 20, 1994. WAL-MART did not file an appropriate notice of appeal or petition for writ of certiorari within the jurisdictional time limits provided by the rules of Appellate Procedure. Therefore, review of the order allowing the amendment to allege punitive damages is barred.

WAL-MART next asserts that review by certiorari is appropriate for the lower court's order denying WAL-MART's motion to strike punitive damages. WAL-MART relies on *Commercial Carrier Corp., Petitioner v. Cheryl Rockhead*, 19 Fla. L. Weekly D1433 (Fla. 3d DCA July 15, 1994). It is unclear what facts were presented in *Rockhead* which led the court to grant certiorari. However, the cases relied upon by *Rockhead* indicate that certiorari is not appropriate where the lower court has followed the dictates of §768.72 Florida Statutes. *Rockhead* relied on *Henn v. Sandler*, 589 So. 2d 1334 (Fla. 4th DCA 1991), *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA 1994) and *Wolper Ross Ingham & Company, Inc. v. Liedman*, 544 So. 2d 307 (Fla. 3rd DCA 1989).

In *Henn v. Sandler*, 589 So. 2d 1334 (Fla. 4th DCA 1991), the plaintiffs filed a multi-count complaint which alleged, *inter alia*, fraud and demanded punitive damages. The plaintiffs served the defendant with interrogatories requesting financial worth information. Defendant moved for protective order. At the hearing, the plaintiffs argued that the financial information was authorized by the claim for punitive damages contained in the complaint. The plaintiffs erroneously represented to the court that the sufficiency of the punitive damage claim had been determined by the lower court at a previous hearing. The court denied the motion for protective order. Defendant moved for reconsideration

and moved to strike the claim for punitive damages arguing that plaintiffs did not comply with §768.72 Florida Statutes. The court denied both motions. The defendant petitioned for writ of certiorari. *Id.* at 1335.

The *Henn* court granted certiorari finding that §768.72 Florida Statutes created a substantive right in a party not to be subjected to financial discovery until the trial court first made an affirmative finding that there is a reasonable evidentiary basis for the punitive damage claim to go to a jury. *Henn* at 1335. In *Henn*, the plaintiffs did not follow the dictates of §768.72 Florida Statutes. Rather, plaintiffs simply included a claim for punitive damages in the initial complaint and sought financial discovery based on the pleading. Thus, the *Henn* court granted common law certiorari only because there was not a finding by the lower court under §768.72 Florida Statutes of the sufficiency of the punitive damage pleading.

Similarly, in *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA 1994), the court held that a punitive damage claim cannot be made without prior leave of court. *Id.* at 107. The plaintiff filed its initial complaint and demanded punitive damages without leave of the lower court under §768.72 Florida Statutes. Defendant moved to strike the punitive damage claim. The lower court denied the motion and defendant petitioned for writ of certiorari. In granting certiorari, the *Kraft* court drew a distinction between the case where a lower court makes a determination of the sufficiency of a claim for punitive damages under §768.72 Florida Statutes and the case where a claim for punitive damages is made without the necessary leave of court. In the former case, certiorari is not available to test a court's pretrial decision to allow a punitive damage claim to be plead because there is no right to not be liable for punitive damages until a jury has determined the issue. However, in the latter case, there is a right created by §768.72 Florida Statutes not to be exposed to a claim for punitive damages without a judge first determining that a factual basis exists to allow the claim to be plead. Certiorari is available to review such an unauthorized pleading. *Id.* at 110. Thus, if a party applies to the court

for leave to amend to allege punitive damages and after a hearing and the motion is granted, certiorari is not available to review the court's decision as being unauthorized under §768.72 Florida Statutes.

Finally, in *Wolper Ross Ingham & Company, Inc. v. Liedman*, 544 So. 2d 307 (Fla. 3rd DCA 1989), plaintiff asserted a claim for punitive damages without first making a showing by the evidence in the record and proffered to the court that some reasonable basis existed to support recovery of punitive damages. The lower court granted plaintiff's motion to compel discovery of financial information and defendant petitioned for writ of certiorari. The *Wolper* court granted certiorari holding that the lower court erred in permitting financial discovery to proceed on a claim for punitive damages without first making a finding that a basis exists for the recovery of punitive damages. *Id.* at 308. Again, the critical determination was whether the original punitive damage pleading is with leave of court according to §768.72 Florida Statutes.

A number of cases stand for the proposition that certiorari is not available if the lower court permits a punitive damage pleading under §768.72 Florida Statutes. In *Globe Newspaper Company v. King*, 19 Fla. L. Weekly D2176 (Fla. 1st DCA October 11, 1994), plaintiff moved to amend its complaint under §768.72 Florida Statutes to make a claim for punitive damages. After conducting a hearing, the lower court granted the motion. Defendant petitioned for a writ of certiorari. The *Globe* court denied certiorari. *Id.*

Similarly, in *Chrysler Corporation v. Pumphrey*, 622 So. 2d 1164 (Fla. 1st DCA 1993), after hearing, the lower court reinstated plaintiff's claim for punitive damages. Plaintiff sought discovery of financial information and defendant moved for protective order. The lower court denied the protective order and defendant petitioned for writ of certiorari. The *Pumphrey* court denied certiorari holding that review of discovery orders on punitive damages by certiorari is inappropriate. *Id.* Obviously in *Pumphrey,* the lower

court had made a determination under §768.72 Florida Statutes of the sufficiency of the punitive damage claim.

Finally, in *Harley Hotels, Inc. v. Doe*, 614 So. 2d 1133 (Fla. 5th DCA 1993), plaintiff moved to amend its complaint to add a claim for punitive damages. The lower court granted the motion and defendant petitioned for a writ of certiorari. The *Doe* court denied certiorari holding that certiorari is not available to review an order permitting a claim for punitive damages. *Id.* at 1134.

A review of the applicable cases indicates that review by certiorari is available if there is an unauthorized pleading of punitive damages under §768.72 Florida Statutes. An unauthorized pleading is one which is made without first conducting the required hearing under §768.72 Florida Statutes. However, if the lower court has conducted the necessary hearing and grants leave to amend the complaint to allege punitive damages, certiorari is not available to review this decision or a later order compelling financial discovery. This conclusion avoids the concerns the Florida supreme court expressed in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987). In *Martin-Johnson*, the supreme court observed that to allow review by certiorari of orders denying motions to strike punitive damages either directly or in connection with review of a discovery orders would be to create a new category of non-final orders reviewable on interlocutory appeal. The supreme court was unwilling to create such a category. *Id.* at 1099. Furthermore, to allow review by certiorari would be to disrupt the trial courts and inundate the appellate courts with such petitions. *Id.* at 1100. Thus, if a litigant asserts a claim for punitive damages without leave of court under §768.72 Florida Statutes and the lower court denies a motion to strike the claim as unauthorized, review by certiorari would be appropriate given the obvious departure by the lower court from the essential requirements of law. However, if the lower court, after hearing under §768.72 Florida Statutes, grants leave to amend to allege a claim for punitive damages, review by certiorari would not be available since there is an adequate remedy available through final appeal.

In the instant case, the lower court conducted a hearing under §768.72 Florida Statutes to determine whether there was a reasonable basis in the record upon which punitive damages could be awarded. The lower court granted the motion to amend finding a reasonable basis in the record and by the evidence proffered by KORDON. The claim for punitive damages asserted by KORDON was authorized by §768.72 Florida Statutes. Thus, under the cases cited above and the policy dictates of *Martin-Johnson* this court should dismiss WAL-MART's petition for writ of certiorari.

B. Punitive Damages Properly Plead

Turning to the substance of WAL-MART's arguments, it is contended that the lower court abused its discretion in granting KORDON's motion to amend to allege punitive damages because: 1) no defamatory statements were made; 2) certain qualified privileges attach to the defamatory statements made; 3) a managing agent of WAL-MART did not publish the defamatory statements; and 4) the evidence in the record and proffered to the court does not support a claim for punitive damages.

1. Defamatory Statements and Qualified Privileges Not Basis For Review

Whether defamatory statements were made is not an issue which should be reviewed on certiorari. Nor is the existence of a privilege an issue which should be addressed by this court. The lower court repeatedly found that there were sufficient issues of fact to make it a jury question as to whether or not the statements made by WAL-MART were defamatory and whether or not qualified privileges existed. (See Appendix __). Thus, the conclusiory assertion of WAL-MART that the statements are not defamatory and qualified privileges apply cannot provide a basis to argue that the trial court abused its discretion in granting KORDON's motion to amend to allege punitive damages and denying WAL-MART's motion to strike.

2. Wal-Mart's "Managing Agents" Published Defamatory Statements

WAL-MART's argument that a managing agent did not make the defamatory statements and therefore WAL-MART cannot be liable for punitive damages is

misdirected. WAL-MART relies on *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981), *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985), and *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989) for the proposition that unless a president or member of a board of directors of a corporation publishes a defamatory statement, punitive damages cannot be assessed against the corporation.

In *Mercury Motors*, a low-level non-management employee while driving a truck for his employer lost control of the vehicle and hit another automobile killing the driver. The driver's estate sued the employer alleging vicarious liability seeking compensatory and punitive damages. A jury awarded the plaintiff compensatory and punitive damages. The employer appealed the punitive damage award which was affirmed by the district court of appeal. *Id.* at 546. The supreme court reversed holding that 1) an employer is vicariously liable for compensatory damages resulting from negligent acts of employees committed within the scope of employment without regard to fault of the employer; and 2) before an employer can be held vicariously liable for punitive damages, there must be some fault on the employers part. The *Mercury Motors* court found no allegations of fault on the part of the employer and therefore reversed the punitive damage award. *Id.* at 549.

In *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985), the Florida supreme court again addressed the issue of employer liability for punitive damages based on the conduct of its employees. In *Farish*, the supreme court held that a corporate employer could be held liable for punitive damages if the agent primarily causing the imposition of punitive damages was the "managing agent or primary owner of the corporation." *Id.* at 533.

In *Pier 66 Company v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989) an employee in the sales department of the hotel owned by Pier 66 Company served as a juror in a trial which lasted several weeks. When she returned to work she was fired by the sales director which was confirmed by the personnel director of the hotel. The president of the hotel

was later quoted in a newspaper as making certain defamatory statements about the fired employee. The employee filed suit for defamation against the hotel management individually, the hotel, and Phillips Petroleum. A jury awarded her compensatory and punitive damages. The defendant appealed the verdict on several grounds. The *Pier 66* court reversed the punitive damage award against Phillips Petroleum since the management level employees of Pier 66 Company were not managing agents of Phillips Petroleum. *Id.* at 381. However the court held that the claims against the manager of Pier 66 Company and his employer, Pier 66 Company, including punitive damages could be retried. *Id.* No where does the *Pier 66* court state that Pier 66 Company could not be held liable for punitive damages based on the conduct of its managers. Thus, contrary to WAL-MART's argument, *Pier 66* supports an award of punitive damages against WAL-MART in the instant case proved that a "managing agent" of WAL-MART was responsible for the defamation alleged.

It is clear from *Pier 66* and *Montgomery Ward & Company, Inc. v. Hoey*, 486 So. 2d 1368, 1371 (Fla. 5th DCA 1986) that management level employees of an employer are "managing agents" so as to make the employer liable for punitive damages. In *Hoey*, the court defined a store manager and a security manager as "managing agents" under the principles adopted by the supreme court in *Bankers Multiple Line Insurance Company v. Farish*, 464 So. 2d 530 (Fla. 1985).

In the instant case, there is evidence in the record which indicates that management level employees of WAL-MART made certain defamatory statements concerning KORDON. An assistant manager made statements to low-level employees concerning KORDON's termination acknowledging his termination for "stealing" and implying that there was something more to it. (See Appendix A). The assistant manager also communicated to a prospective employer the fact the KORDON was not rehirable because he violated company policy even though the disclosure of this information was prohibited by WAL-MART policy. (See Appendix B). An associate testified that she attended a

store-wide meeting where it was disclosed that KORDON had been let go. This was at the time when rumors were circulating in the store about his termination. (See Appendix C). Further, there was testimony proffered to the court at rehearing of WAL-MART's motion to strike that a low-level employee was told by the loss prevention manager that KORDON had been fired for stealing candy. (See Appendix D). KORDON himself testified that when he returned to pick up his last check a couple days after his termination, several employees already knew of the circumstances of his termination. Clearly, the evidence in the record and proffered to the court indicates that "managing agents" of WAL-MART published defamatory statements about KORDON. Thus, WAL-MART can be liable for punitive damages based on the acts of its managing agents.

3. Evidence Supports Punitive Damage Pleading

WAL-MART next argues that the evidence in the record and proffered to the court does not rise to the level of proof required for punitive damages. It is submitted that under §768.72 Florida Statutes that a "reasonable basis" for the recovery of punitive damages is required. The statute does not obligate the plaintiff to prove punitive damages to the court. Rather, the plaintiff must simply indicated to the court that the facts in the record provide a reasonable basis for the recovery of punitive damages. Further, §768.72 Florida Statutes provides that the rules governing amendments should be liberally construed to permit an amendment to allege punitive damages.

In *Dolphin Cove Ass'n v. Square D. Co.*, 616 So. 2d 553 (Fla. 2d DCA 1993), the court reversed a trial court determination that there was not an adequate factual predicate in the record to allow the plaintiff to amend his complaint to allege punitive damages. The *Dolphin Cove* court held that it was not proper for the trial judge to prejudge the evidence in denying the plaintiff's motion to amend. *Id. Dolphin Cove* follows the "reasonable basis" standard provided by §768.72 Florida Statutes.

The court in the instant case reviewed the evidence in the record and determined that there was a reasonable basis in the record to let punitive damages go to the jury. This

determination does not foreclose the possibility of the jury refusing to award punitive damages. (See, Fla. Std. Jury Instr. (Civ.) 4.4(g)). Nor does the lower court's decision foreclose this court from considering upon final appeal the sufficiency of an award of punitive damages. In this case, there is evidence in the record that:

- the consumption of damaged candy by employees was approved and condoned by the management of WAL-MART. (See Appendices E, F, and G).
- a number of employees saw management and other employees consuming damage candy on a regular basis. (See Appendices E, F, and G).
- a loss prevention investigation was being conducted in the WAL-MART store due to losses in the inventory area of the store unrelated to damaged merchandise. (See Appendix D)
- KORDON consumed an item of damaged candy and was subsequently accused of stealing and fired.
- KORDON was never thought to be the perpetrator of the inventory losses. (See Appendix B).
- KORDON was used as an example to stop the inventory thefts without regard to his conduct.
- WAL-MART management knew the consumption of damaged candy was approved and an accepted practice. (See Appendices E, F, and G).
- WAL-MART management published the facts of KORDON's termination to other low-level employees and was held up as an example of what would happen if theft from inventory continued. (See Appendices A and C).
- WAL-MART management published the facts of KORDON's termination to a prospective employer with full knowledge that KORDON's act was accepted by management. (See Appendix A).
- shortly after KORDON's termination, the policy regarding consumption of damaged candy changed and no one was permitted to consume the candy. (See Appendix C).

There is a reasonable evidentiary basis in the record and proffered to the court that would support a recovery of punitive damages against WAL-MART. It was entirely proper for the lower court to grant KORDON's motion to amend to allege punitive damages and to deny WAL-MART's motion to strike the punitive damage claim and order the production of financial discovery.

II. CONCLUSION

The petition should be dismissed on the ground that certiorari is unavailable to review a pretrial order denying a motion to strike punitive damages which were plead with leave of the lower court under §768.72 Florida Statutes. Alternatively, the petition should be denied on the merits since the petitioner has failed to establish that the lower court's order constitutes a departure from the essential requirements of law.

III. CERTIFICATE OF SERVICE

I CERTIFY that a copy off the foregoing response to the petition for writ of certiorari has been furnished to Vincent M. D'Assaro, Esq. and Hunter A. Hall, Esq., 15 West Church Street, Orlando, Florida 32801 by regular U.S. Mail this 12th Day of December, 1994.

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File

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WAL-MART STORES, INC.,	)	
	)	
Petitioner,	)	
	)	CASE NO. 94-03943
v.	)	
	)	
GEORGE KORDON and LEONA KORDON, his wife,	)	
	)	
	)	
Respondents.	)	
	)	
	)	

Opinion filed June 2, 1995.

Petition for Writ of Certiorari to the Circuit Court for Highlands County; Robert E. Pyle, Judge.

Vincent M. D'Assaro, of Cameron, Marriott, Walsh, Hodges & D'Assaro, P.A., Orlando, for Petitioner.

Lon Worth Crow, IV, of Kelly & Crow, Avon Park, for Respondents.

BLUE, Acting Chief Judge.

Wal-Mart Stores, Inc., seeks certiorari review of an order denying its motion to strike a claim for punitive damages and an order compelling discovery of financial worth information. We have jurisdiction. See Manor Care of Fla., Inc. v. Olt, 620 So. 2d 1297 (Fla. 2d DCA 1993); Beverly Enters.-Fla., Inc. v. Estate of Maggiacomo, 651 So. 2d 816 (Fla. 2d DCA 1995). But see Globe Newspaper Co. v. King, 643 So. 2d 676 (Fla. 1st DCA 1994) (certifying conflict on whether certiorari is appropriate to review orders related to punitive damages claims), review granted, 651 So. 2d 1193 (Fla. 1995). Because the complaint and evidence do not establish a reasonable basis for the recovery of punitive damages, we grant the writ and quash the orders under review.

George Kordon was employed by Wal-Mart and was fired after he was observed consuming store merchandise. He filed suit against Wal-Mart for defamation based on comments allegedly made by Wal-Mart employees regarding his termination. In his second-amended complaint, filed with leave of court, Kordon added a claim for punitive damages. Wal-Mart moved to strike the punitive damages claim, arguing that it was not supported by the evidence. The trial court denied the motion to strike and granted Kordon's motion to compel Wal-Mart to produce a statement

of net worth, including a list of all assets and liabilities. Wal-Mart timely filed petitions for certiorari as to both orders.

To support a claim of punitive damages, a party must commit "willful, wanton, and intentional misconduct." Key West Convalescent Ctr., Inc. v. Doherty, 619 So. 2d 367, 369 (Fla. 3d DCA 1993). To hold a corporate employer vicariously liable for punitive damages, there must be some fault on the employer's part in addition to the willful and wanton employee misconduct. Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). We have examined the record and conclude that it is insufficient to support a claim for punitive damages. Therefore, the trial court erred in denying the motion to strike.

Accordingly, we grant certiorari, quash the subject order, and direct the trial court to strike the punitive damages claim. Because the financial information is relevant only to the claim for punitive damages, the order compelling disclosure is also quashed. Our ruling is without prejudice to subsequent amendment of this claim and financial worth discovery if Kordon presents factual allegations and produces new evidence sufficient to sustain a claim of punitive damages.

Certiorari is granted and the matter remanded with directions for further proceedings consistent with this opinion.

FULMER and QUINCE, JJ., Concur.