IN THE SUPREME COURT OF FLORIDA

GEORGE KORDON and
LEONA KORDON, his wife,

Petitioners,

vs.

CASE NO. 85,922
DCA Case No. 94-03943

WAL-MART STORES, INC.,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No. 0471690
HUNTER A. HALL, ESQUIRE
Florida Bar No. 0906972
CAMERON, MARRIOTT, WALSH, HODGES
& D'ASSARO, P.A.
15 West Church Street
Orlando, Florida 32801
407/841-5030
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent, WAL-MART STORES, INC., is in agreement with Petitioners' statement of the case and the specific procedural actions taken at the trial Court level and before the Second District Court of Appeals. Respondent, WAL-MART STORES, INC., would supplement the Petitioners' statement of the case and facts and add to it that the Petition for Writ of Certiorari as to the trial Court's denial of Respondents' Motion to Strike Claim for Punitive Damages was filed and served on November 8, 1994, contesting the Order denying the Motion to Strike dated October 17, 1994 (Appendix A). On November 8, 1994, the trial Court ordered the Defendant, WAL-MART STORES, INC., to produce financial information in compliance with F.S. §768.72. Citing this as additional grounds for its Petition for Writ of Certiorari, Respondent amended its initial Petition for Writ of Certiorari to include the November 8 Order compelling discovery. This amendment was filed November 10, 1994 (Appendix B).

SUMMARY OF ARGUMENT

The Second District Court of Appeals reversed the trial Court's grant of punitive damages based on two (2) specific principles: the first, that they found no egregious conduct which they would classify as wanton and willful on the part of WAL-MART STORES, INC. which would rise to the level of punitive damages. But as an alternative ground, it was also determined that punitive damages should not lie against WAL-MART STORES, INC. because there

was no independent showing of fault on the part of WAL-MART as a corporation, using the analysis derived by the Supreme Court in Mercury Motor Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). The Court, after examining the record, found no grounds for a claim for punitive damages to lie and properly reversed the trial Court.

ARGUMENT

> The Second District Court of Appeals' decision is based upon two (2) independent grounds, the first of which is derived from the case of Key West Convalescent Center v. Doherty, 619 So.2d 367, 369 (Fla. 3d DCA 1993), which requires some willful or wanton conduct on the part of the defendant in order for a claim for punitive damages to be plead. The second ground for their decision is that, to hold a corporate employer vicariously liable for punitive damages, there must be some fault on the employer's part in addition to willful and wanton employee conduct. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). Based upon these grounds, the Court acted appropriately in striking the claim for punitive damages.

This cause of action arose after the termination of GEORGE KORDON from his employment at a Wal-Mart store in Sebring, Florida (See generally Appendix A, Page 3). Mr. Kordon was terminated from his employment for theft and, after his termination, brought a claim for defamation. At the trial Court level, three (3) specific statements by Wal-Mart personnel were pointed to as being a basis for the claim for defamation (See Appendix A, pp. 3-5). The three (3) statements or portions of testimony which the Plaintiff points to as being grounds for a claim for defamation do not rise to anywhere near the elements necessary to carry forward a claim for defamation. They further do not show the necessary wanton, willful misconduct on the part of Wal-Mart employees which would create a

sufficient basis for punitive damages.

In Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), this Honorable Court set forth that the District Court should not review by certiorari an interlocutory order denying a motion to dismiss or strike a claim for punitive damages. This court made its position clear that defendants should not be running to the District Courts every time a trial judge grants an amendment to the pleadings to allow a claim for punitive damages pursuant to F.S. §768.72. In the case at bar, the Second DCA did not accept this petition for writ of certiorari filed by respondent, WAL-MART STORES, INC., solely based upon the argument that there was no basis in fact for allowing a punitive damage claim, and that Wal-Mart was wronged by the trial Court's allowing the claim to be plead without a sufficient factual basis.

Although there is case law from other circuits citing one of the more recent cases, Commercial Carrier Corp. v. Cheryl Rockhead, 639 So.2d 660 (Fla. 3d DCA 1994), wherein the Circuit Courts accepted a writ of certiorari and found that there was no reasonable basis for the trial Court to have allowed a claim for punitive damages to be plead. The Third District Court specifically states:

> On the merits, it is apparent that the circumstances of this case - a motor vehicle accident in which there is evidence of little, if anything more than simply negligent driving by either or both of the parties involved - fall short of those required to support an action for punitive damages.

Id. at 661

In Commercial Carrier Corp. the Third DCA may have been taking

a forceful stance in attempting to change the well established law set forth in Martin-Johnson v. Savage prohibiting such writs of certiorari, Respondent would ask the Court to revisit its opinion of Martin-Johnson v. Savage and allow the District Courts more latitude in picking and choosing petitions for writ of certiorari on this issue of whether a reasonable basis has been in fact presented. Respondent believes that the District Courts should have the wherewithal to assess whether a reasonable basis exists and act accordingly.

The opinion of the Second DCA which is before this Court in the present case is clearly distinguishable from Commercial Carrier Corp. v. Rockhead, in that the Second DCA not only noted in their opinion that there was a lack of a reasonable basis for allowing punitive damages, but also that there must be fault on the part of the corporation for punitive damages to be plead. The Second District Court of Appeals states as follows:

> To support a claim of punitive damages, a party must commit 'willful, wanton, and intentional misconduct.' Key West Convalescent Center, Inc. v. Doherty, 619 So.2d 367, 369 (Fla. 3d DCA 1993).
>
> The Second DCA's opinion goes on to state:
>
> 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, 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.

It is clear from the Second DCA's opinion that, as this Honorable Court set forth in Mercury Motors Express, Inc. v. Smith,

in order for punitive damages to be brought against an employer or corporation such as Wal-Mart, it must be shown that there was some independent fault on the part of the employer in addition to any alleged willful and wanton misconduct of the employee. This reasoning by the Second DCA which incorporates Mercury Motors Express, Inc. v. Smith is not in conflict with any other DCA or this Honorable Court's opinion in Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987). The District Court is basing its opinion on the alternative ground that, in order for a claim for punitive damages to be brought against Wal-Mart, the corporation who is the sole defendant in this action, there must be some showing of independent fault on their part. There simply was no such showing presented in the record before trial Court. The Second DCA is not relying on a challenge of a reasonable basis found in the evidence presented at the trial Court, but in fact has found a legal basis, removed from the factual "reasonable basis," for overturning the trial Court's decision to allow punitive damages to be plead.

CONCLUSION

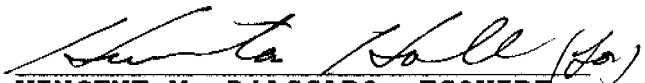
Respondent, WAL-MART STORES, INC., would show this Court that the Second District Court of Appeals acted appropriately and within the confines of established case law and is in fact by its opinion not in conflict with the other District Courts of Appeal or this Honorable Court. Respondent would further request that this Honorable Court refuse discretionary jurisdiction and allow the well reasoned opinion of the Second District Court of Appeals to

stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lon Worth Crow, IV, Esquire, Attorney for Petitioners, Post Office Box 1880, Avon Park, Florida 33825, by United States Mail, this 7th day of July, 1995.

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

71620_1/ms

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

CASE NUMBER:

WAL-MART STORES, INC.,

Petitioner

vs.

GEORGE KORDON and LEONA KORDON, his Wife,

Respondents.
_____/

Lower Tribunal: In the Circuit Court of the Tenth Judicial Circuit, In and For Highlands County, Florida

Case No. GC-92-134

PETITION FOR WRIT OF CERTIORARI

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

TABLE OF CONTENTS

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Respondents.
_____/

Lower Tribunal: In the Circuit Court of the Tenth Judicial Circuit, In and For Highlands County, Florida

Case No. GC-92-134

PETITION FOR WRIT OF CERTIORARI

COMES NOW the Defendant/Petitioner, WAL-MART STORES, INC., by and through their undersigned counsel, and files this its Petition for Writ of Certiorari, and would state as follows:

JURISDICTION

This Petition seeks a Writ of Certiorari regarding a non-final Order dated October 17, 1994, denying Defendant's Motion to Strike Plaintiffs' Claim for Punitive Damages, which was permitted by the Court, the Court finding that a reasonable factual basis existed in the record evidence. Petitioner respectfully submits that the Order denying Defendant's Motion to Strike Plaintiff's Claim for Punitive Damages entered by the Circuit Judge constitutes an abusive discretion and departs from the essential requirements of the law.

This Court has jurisdiction pursuant to Rule 9.100 and 9.030(b)(2), Fla.R.App.P., to make sure a Writ to the Circuit Court Judge quashing the aforementioned Orders entered on October 17,

1994. Certiorari is the proper review of this Order granting discovery, as an appeal after final judgment would provide an inadequate remedy due to the prejudice inherent in the substantive right to financial discovery afforded by F.S. §768.72. Commercial Carrier Corp. v. Cheryl Rockhead, 19 F.L.W. 1433 (Fla. 3rd DCA July 5, 1974). Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991); Will v. Systems Engineering Consultants, Inc., 554 So.2d 591 (Fla. 3d DCA 1989); Martin V. Johnson, Inc. v. Savage, 509 So.2d 1097, 1099 (Fla. 1987).

FACTS UPON WHICH THE PETITIONER RELIES

This cause comes to this Honorable Court on the trial Court's Order denying Defendant's Motion to Strike Claim for Punitive Damages. (Appendix A).

Petitioner, WAL-MART STORES, INC., is a Delaware corporation with its principal place of business in Arkansas, and owns a chain of retail and wholesale stores throughout the United States. Mr. Kordon was cerminated for eating candy which was still part of the Wal-Mart inventory, which is a violation of their store policy. (See Appendix B, deposition of Ralph Rawlings, pages 63 through 67). The trial Court permitted Plaintiffs to amend their Complaint, adding a claim for punitive damages by Order for Rehearing/Reconsideration dated August 10, 1994. (See Appendix C).

Plaintiffs' Second Amended Complaint containing the claim for punitive damages was previously filed, certificate of service August 8, 1994. (See Appendix D).

This Defendant/Petitioner, in an effort to eliminate the claim for punitive damages, initially incorporated this claim in its

Motion for Summary Judgment, which was denied on September 13, 1994. (See Appendix E). Defendant/Petitioner then moved to strike Plaintiffs' claim for punitive damages, and filed a Motion with accompanying Memorandum of Law. (See Appendix F). The trial Court denied this Motion by Order dated October 17, 1994. (See Order, Appendix A, and transcript of hearing, Appendix G at pp. 16-30).

The Plaintiff, GEORGE KORDON, is claiming that the management of Wal-Mart Store #666 published defamatory statements regarding his termination to the employees of the store. This is alleged in Plaintiffs' Second Amended Complaint. (See Appendix D). On this claim for defamation, the Plaintiffs could point to only three (3) statements by Wal-Mart employees which would amount to defamation, and those are as follows:

First, 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 14 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 was 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.

Further as to Ms. Bowers, Plaintiff pointed to a telephone call where a manager from Scotty's was inquiring into Mr. Kordon's

previous experience with Wal-Mart, on Page 46 of Lou Della Bowers' deposition, beginning at Line 10 through 18:

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

A They wanted to know his date of hire and date he left, and if he was rehirable.

Q Which is in the file?

A 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, a violated company policy.

Q Is that all you told this person?

A Yes, it is.

(See Appendix H, deposition of Lou Della Bowers; and Appendix I, transcript of proceedings on Defendant's Motion for Summary Judgment, pages 6 through 10).

As for any comment by Lou Della Bowers to a representative from Scotty's, a close friend of the Plaintiffs, Florene Shinn, is believed to have elicited this statement improperly. According to the testimony of Florene Shinn, while at the Plaintiffs' home and in the presence of the Plaintiff, GEORGE KORDON'S wife, LEONA KORDON, Ms. Shinn made a telephone call to Wal-Mart, representing that she was head of personnel from Scotty's, and that she was checking a reference regarding GEORGE KORDON. This is presumably the same conversation referenced in Lou Della Bowers' deposition, cited as Appendix H. According to Ms. Shinn, after representing

that she was head of personnel for Scotty's, she then asked if the Plaintiff, GEORGE KORDON, was eligible for rehire and what the circumstances for his termination were. (See Pages 10, 11 and 12, Appendix J). Ms. Shinn misrepresented herself in order to obtain this statement from Defendant, WAL-MART STORES, INC., which is one of the key statements which the Plaintiff relied on for both the defamation and punitive damages claims.

The third statement Plaintiff relies on to show punitive damages was by a co-employee, Donna Larson, in her deposition at Page 13, Line 2:

Q Do you recall his termination being discussed at any 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 disseminate any reason why he had been let go?

A I cannot remember.

(See Appendix K, deposition of Donna Larson).

All of the record evidence is absent any element of malice.

NATURE OF RELIEF SOUGHT

Petitioner seeks a Writ of Certiorari quashing the Order issued by the Circuit Court, which denies its Motion to Strike Punitive Damages, finding a reasonable basis, pursuant to F.S.

§768.72.

LEGAL ARGUMENT

The Plaintiff, GEORGE KORDON, has alleged that WAL-MART STORES, INC., after terminating him from their employment, made defamatory statements about him to his former co-employees. (See Appendix D).

The Plaintiffs moved to amend their Complaint to add a claim for punitive damages, as prescribed under F.S. §768.72, which states in relevant part:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such punitive damages.

The Court granted Plaintiffs' Motion to Amend Complaint based upon the proffered testimony from depositions filed as part of the lower Court's record. The record contains the following: (1) the deposition of store manager Ralph Rawlings (specifically at Pages 61 through 63, attached as Appendix B), and (2) the deposition of Lou Della Bowers, specifically at Page 42, Line 24 through Page 43, Line 5, and again at Page 46, Lines 10 through 18 (attached as Appendix H). Plaintiff also referred to the testimony of Donna Larson, found at Page 13, Lines 2 through 12 (a copy of this deposition is attached as Appendix K). The above record portions show the specific statements made by Wal-Mart personnel which Plaintiffs believe provide the factual basis not only for a claim for defamation, but further support their claim for damages.

In reviewing the key statements which have been presented as

the reasonable basis for the claim for punitive damages, the Petitioner, WAL-MART STORES, INC., would show the Court that a claim for defamation does not lie, according to the evidence presented. In going an additional step further to assume that a claim for punitive damages would lie stretches far beyond what the evidence demonstrates. Even assuming arguendo that a claim for defamation exists, the requisite level of malice and wrongdoing necessary in bringing a claim for punitive damages does not lie in this action.

The standard for allowing punitive damages is as follows: The Plaintiff must demonstrate that the Defendant acted in willful and wanton disregard of the rights of others. Smith v. Brantley, 455 So.2d 1063 (Fla. 2d DCA 1984). Specifically, in a claim for defamation, the standard has been stated in Eastern Airlines, Inc. v. Gellert, 438 So.2d 923 (Fla. 3d DCA 1983), as follows:

> A jury may assess punitive damages against a corporate employer when its employee, acting within the scope of his employment, has been guilty of willful and wanton misconduct, ... Mercury Motors Express, Inc. v. Smith, 372 So.2d 116, 117 (Fla. 3d DCA 1979).

Also, in the case of Commercial Carrier Corp., Petitioner v. Cheryl Rockhead, 19 F.L.W. 1433 (Fla. 3d DCA July 15, 1994), the Court found that a claim for punitive damages was unjustified and permitted review by certiorari of the Order denying the Defendant's Motion to strike the punitive damage claim as unjustified under §768.72, F.S. In Rockhead, the Court relied on Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991). In Henn, the trial Court acknowledged that a critical issue is that F.S. §768.72 not only

allows punitive damages to be plead, but also gives a substantive right for discovery into the financial worth of the defendant. In Henn, a writ of certiorari is taken from a trial Court Order granting a claim for punitive damages based primarily on the substantive right such a claim for punitive damages brings with it.

Wills v. Systems Engineering Consultants, 554 So.2d 591 (Fla. 3d DCA 1989) deals with again discovery of the defendant's financial worth and the substantive right that F.S. §768.72 permits. Not only was the discovery order quashed for the trial Court's failure to find a reasonable basis for allowing punitive damages, but the Court further determined that a writ of certiorari is the proper vehicle.

Further, the claim for punitive damages against WAL-MART STORES, INC., is improper without a showing of misconduct by a managing agent or owner. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 549 (Fla. 1981). In Mercury Motors, the Supreme Court specifically limited a claim for punitive damages in the context of the Respondeat Superior Doctrine. In Mercury Motors, the Court stated as follows:

> Before an employer may be held liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part.

Id. at 549.

In Mercury Motors, the Court specifically eliminated a claim for punitive damages against the main corporation based upon the actions of its employee. Specifically in this case, the Plaintiff is claiming that the statements of Lou Della Bowers, an assistant

manager of a single Wal-Mart store, be sufficient to hold the entire corporation liable for punitive damages. In this context, the case law is clear, that in order to find punitive damages against the corporation, a managing agent or owner of the corporation must be responsible for the acts arising to the level of punitive damages. Bankers Multiline Insurance Co. v. Farrish, 464 So.2d 530, 535 (Fla. 1985). This position is further set forth in PV Construction v. Atlas Pools, 510 So.2d 318, 319 (Fla. 4th DCA 1987).

Petitioner would also 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."

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.

Similar to the case at bar, the statements allowing the claim for punitive damages do not originate from managing agents. The statements come from low managers of a single Wal-Mart store.

Clearly, in this case, not only was the claim for punitive damages improper based on the evidence proffered, but also a claim for punitive damages should not lie against Wal-Mart Stores, Inc. based upon the actions of its employees or low level management.

Assuming arguendo, even if the Court does find defamation, another issue which would eliminate punitive damages in this case

is the Qualified Business Privilege which is afforded parties which have a similar interest in business, and their statements related to that interest or business are privileged.

Referring the Court to Axelrod v. Califano, 357 So.2d 1048 (Fla. 1st DCA 1978), the Court stated as follows:

> [t]he elements essential to the finding of a conditional privilege are:
>
> (1) good faith;
> (2) an interest to be upheld;
> (3) a statement limited in its scope to this purpose;
> (4) a proper occasion; and
> (5) publication in a proper manner (citations omitted)
>
> To be qualifiedly privileged, the communication must be made by a person having a duty or interest in the subject matter to another having a corresponding duty or interest.

Id. at 1051.

In the context of any statement made by personnel of Wal-Mart Stores, Inc., Defendant would show the Court that this qualified business privilege does apply. Specifically, in referring to the comment noted by Lou Della Bowers where she came upon a group of associates talking about George Kordon's dismissal, she at no time discussed the details of George Kordon's termination and the sole purpose (as is clear from her deposition) was to quiet the associates on the floor from gossiping. This statement by her was clearly within the privilege.

The effect of this limited privilege eliminates the implied malice which attaches when language is actionable per se. The Court in Lundquist v. Alewine, 397 So.2d 1148 (Fla. 5th DCA 1981), stated as follows:

> When the words published concerning a person tend to degrade him, bring him into ill repute, destroy confidence in his integrity or cause like injury, such language is actionable per se. (citations omitted).
>
> Malice is an essential element of slander and may be presumed by the actionable per se nature of the alleged publication. Where, however, a qualified privilege exists, the plaintiff must prove express malice or malice in fact in order to recover (emphasis supplied).

Id. at 1149.

The protection provided by the qualified privilege will be eliminated if express malice or malice in fact is shown. This type of malice is defined in Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984), quoting Montgomery v. Knox, 3 So. 211 (Fla. 1887):

> "Ill will, hostility, evil intention to defame or injure" are the elements which must be shown to prove express malice or malice in fact.

Clearly from the record before this Court, there is no showing of malice in fact or express malice. Quite to the contrary, it is clear that none of the management or persons deposed bore George Kordon any ill will.

The final privilege which would attach to any of the statements made by Wal-Mart is that which applies between two employers, where a prospective employer seeks a reference from a former employer. Specifically, the Defendant would refer the Court to Riggs v. Cain, 406 So.2d 1202 (Fla. 4th DCA 1981) and Kellums v. Freight Sales Centers, Inc., 467 So.2d 816 (Fla. 5th DCA 1985). These two cases provide that in the context of two employers discussing an employee, the previous employer may express his honest opinions about the employee and his statements will be protected by qualified privilege, and that, provided he does not

exhibit malice as defined above, his statements will be protected by the privilege. In the context of the action at hand, the Respondent would refer to the deposition of Lou Della Bowers, where she received an inquiry from a prospective employer of Mr. Kordon and it is clear from her testimony that she gave very limited information about the Plaintiff, and that which could be considered in any way defamatory and would be protected by this privilege.

Again, both of these privileges go to show that no defamation occurred, and therefore no claim for punitive damages should lie. A showing sufficient to allow a claim for punitive damages has not been made.

CONCLUSION

The Order of the trial Court dated October 17, 1994, constitutes an abuse of discretion by the lower Court and a departure from the essential requirements of the law. For the arguments and authorities set forth herein, either individually or taken together, this Court should issue a Writ of Certiorari and quash the trial Court's Order denying Defendant's Motion to Strike, reversing same.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lon Worth Crow, IV, Esquire, Attorney for Respondents, Post Office Box 1880, Avon Park, Florida 33825, by

~~United States Mail~~, this 8th day of November, 1994.
HAND DELIVERY

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

54511_1/ms

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

CASE NO. 94-03943

WAL-MART STORES, INC.,

Petitioner,

vs.

GEORGE KORDON and LEONA KORDON, his wife,

Respondents.
_____/

Lower Tribunal: In the Circuit Court of the Tenth Judicial Circuit, In and For Highlands County, Florida

Case No. GC-92-134

AMENDED PETITION FOR WRIT OF CERTIORARI

COMES NOW the Defendant/Petitioner, WAL-MART STORES, INC., by and through their undersigned counsel, and files this its Amended Petition for Writ of Certiorari to supplement the Petition for Writ of Certiorari previously filed herein, certificate of service November 8, 1994, and would state as follows:

JURISDICTION

This Amended Petition seeks a Writ of Certiorari as to the non-final Order dated November 8, 1994, compelling Petitioner to produce discovery of financial information, including a list of its assets and liabilities. Petitioner respectfully submits that the Order on Plaintiff's Motion to Compel entered by the Circuit Judge constitutes an abuse of discretion and departs from the essential requirements of the law. This Court has jurisdiction pursuant to Rules 9.100 and 9.030(b)(2), Fla.R.App.P., and this Court further has authority to issue a Writ of Certiorari to the Circuit Court Judge quashing the aforementioned Order entered on November 8,

1994. Certiorari is the proper review of this Order granting discovery, as an appeal after final judgment would provide inadequate remedy due to the prejudice inherent in the substantive right to financial discovery afforded by F.S. §768.72. Commercial Carrier Corp. v. Cheryl Rockhead, 19 F.L.W. 1433 (Fla. 3rd DCA July 5, 1974). Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991); Will v. Systems Engineering Consultants, Inc., 554 So.2d 591 (Fla. 3d DCA 1989); Martin V. Johnson, Inc. v. Savage, 509 So.2d 1097, 1099 (Fla. 1987).

In this case, a specific Order compelling discovery is at issue, and the Court has generally recognized that orders compelling discovery, because of the irreparable harm that can occur once the discovery is wrongfully disclosed. Florida Cypress Gardens v. Murphy, 471 So.2d 203, 204 (Fla. 2d DCA 1985). See also State Farm Mutual Automobile Insurance Co. v. Peters, 611 So.2d 597 (Fla. 2d DCA 1993).

FACTS UPON WHICH THE PETITIONER RELIES

In addition to the facts already supplied to the Court, in Petitioner's original Petition for Writ of Certiorari filed hereinbefore, the following additional facts have become relevant:

After the trial Court permitted Plaintiff/Respondent to allege a claim for punitive damages, Petition, WAL-MART STORES, INC., received a Request for Production, asking for the following:

> A statement of net worth, including a list of all assets and liabilities, as of the date of this request. (Appendix A).

Petitioner, WAL-MART STORES, INC., objected to this request by both an initial objection and a supplemental objection. (Appendices

B and C).

On November 8, 1994, the Plaintiff's Motion to compel the requested financial discovery was brought before the Court. The trial Court issued an Order compelling the discovery (Appendix D).

As for the facts pertaining to the reasonable basis for which the trial Court permitted this claim for punitive damages and the discovery, pursuant to F.S. §768.72, Petitioner would refer the Court to its initial facts set forth with attached Appendices in its initial Petition for Writ of Certiorari.

NATURE OF RELIEF SOUGHT

Petitioner seeks a Writ of Certiorari quashing the Order issued by the Circuit Court, which compels Petitioner, WAL-MART STORES, INC., to disclose a statement of net worth, including a list of all assets and liabilities. Further, Petitioner would request this Court strike the underlying claim for punitive damages brought pursuant to F.S. §768.72. Not only should Petitioner be relieved from the burden of producing the financial information, but the underlying claim for punitive damages should also be stricken.

LEGAL ARGUMENT

The Petitioner, WAL-MART STORES, INC., relied on its previous legal argument set forth in its Petition for Writ of Certiorari, certificate of service November 8, 1994, but specifically as to this Order, would offer this additional argument as follows:

F.S. §768.72 provides in relevant part:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of

such punitive damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. **No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted. No claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.** (emphasis supplied).

In the case at bar, the trial Court departed from the essential requirements of the law by permitting a claim for punitive damages to carry forward based upon the evidence presented. Further, the Respondent, GEORGE KORDON, seeks discovery of financial information. This information, if released unjustly, would cause irreparable harm to this Petitioner. The very nature of an Order compelling discovery carries with it the potential for such irreparable harm in that it would allow information which is privileged and not otherwise discoverable to become part of the public record. This Court has determined that orders related to discovery are proper subjects for certiorari in light of the possibility of irreparable harm which cannot be remedied by plenary appeal. Florida Cypress Gardens v. Murphy, 471 So.2d 203, 204 (Fla. 2d DCA 1985). See also State Farm Mutual Automobile Insurance Co. v. Peters, 611 So.2d 597 (Fla. 2d DCA 1993).

In Florida Cypress Gardens, this Court was dealing with the issue of an order compelling discovery. In considering the special nature of orders compelling discovery, this Court reasoned as follows:

> Orders requiring discovery are proper subjects for certiorari since an erroneously compelled disclosure once

made, may constitute irreparable harm which cannot be remedied by way of appeal.

It was argued at length in the initial Petition for Writ of Certiorari that no reasonable basis for punitive damages exists in the claim of GEORGE KORDON against WAL-MART STORES, INC. Accordingly, without a reasonable basis to allow such a claim for punitive damages, discovery of financial information of Petitioner, WAL-MART STORES, INC., should not be permitted. The trial Court departed from the essential requirements of the law by allowing a claim for punitive damages to go forth pursuant to F.S. §768.72.

The burden upon this Petitioner is to show not only that the Court departed from the essential requirements of the law, but also that there is no adequate remedy on final appeal. A discovery order by its very nature meets this second requirement. Should the Petitioner be required to release the financial information, the damage will be irreparable and the remedy on plenary appeal is accordingly inadequate.

CONCLUSION

The trial Court's Order on Plaintiff's Motion to Compel dated November 8, 1994, constitutes an abuse of discretion by the lower Court and a departure from the essential requirements of the law. Further, the Order compels discovery which, if disclosed, would cause irreparable harm and give this Petitioner no adequate remedy on plenary appeal. For the arguments and authorities set forth in this Amended Petition for Writ of Certiorari and in the Petition for Writ of Certiorari, Petitioner would request this Court enter an Order quashing the trial Court's Order compelling discovery, and further strike Respondent's claim for punitive damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lon Worth Crow, IV, Esquire, Attorney for Respondents, Post Office Box 1880, Avon Park, Florida 33825, and to The Honorable Robert E. Pyle, Circuit Judge, Highlands County Courthouse, Post Office Box 1827, Sebring, Florida 33871-1827 by United States Mail, this 10th 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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