

IN THE SUPREME COURT OF FLORIDA

FILED

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NOV 8 1995

GEORGE KORDON, ET UX.,

Petitioners,

v.

WAL-MART STORES, INC.,

Respondent.

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO. 85,922

District Court of Appeal,
2nd District - No. 94-03943

PETITIONER'S REPLY BRIEF

COMES NOW, the Petitioners by and through their undersigned counsel and file the following Reply to the Respondent's Answer Brief.

ARGUMENT:

In its Answer Brief, the Respondent fails to address dictates of Globe Newspaper Co. v. King, 658 So. 2d 518 (Fla. 1995) which mandates reversal of the Second District decision in this case. Clearly, from a reading of Globe and the other cases cited in Petitioners' briefs, appellate courts do not have the jurisdiction to consider a lower court's denial of a motion to strike punitive damages if the procedural requirements of §768.72 Fla. Stat. (1993) are followed. In this case, it is undisputed that the trial court followed the procedure outlined by §768.72 Fla. Stat. (1993).

The Respondent attempts to cloud the issue before this court by arguing the absence of a basis to award punitive damages justifying the Second District's decision.

Assuming that this issue is properly before the court, the Respondent's argument does not support an affirmance of the Second District's decision.

Respondent's argument that a managing agent did not make the defamatory statements and therefore Respondent cannot be liable for punitive damages is misdirected. Respondent 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. 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 damages award.

In Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1958), 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”.

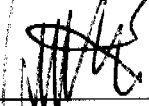
In Pier 66 Company v. Poulos, 542 So.2d 377 (Fla. 4th DCA 1989) an employee in the sales depart of the hotel owned by Pier 66 Company served as a juror in a trial which lasted several weeks. When she returned to work she was fired by the sales director which was confirmed by the personnel director of the hotel. The president of the hotel was later quoted in 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. However, the court held that the claims against the manager of Pier 66 Company and his employer, Pier 66 Company, including that punitive damages could be retried. Nowhere does the Pier 66 court state the Pier 66 Company could not be held liable for punitive damages based on the conduct of its manager. Thus, contrary to Respondent’s argument, Pier 66 supports an award of punitive damages against Respondent and in the instant case provided that a “managing agent” of Respondent 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 Respondent made certain defamatory statements concerning Petitioner. An assistant manager made statements to low-level employees concerning Petitioner’s termination acknowledging his termination for “stealing” and implying that there was something more to it. The assistant manager also communicated to a prospective employer the fact that Petitioner was not rehireable because he violated company policy even though the disclosure of this information was prohibited by Respondent’s policy. An associate testified that she attended a store-wide meeting where it was disclosed that Petitioner had been let go. This was at a time when rumors were circulating in the store about his termination. Further there was testimony proffered to the court at rehearing of Respondent’s motion to strike that a low-level employee was told by the loss prevention manager that Petitioner had been fired for stealing candy. Petitioner 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 Respondent published defamatory statements about Petitioner. Thus, Respondent can be liable for punitive damages based on the acts of its managing agents.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U.S. Mail to Vincent M. D'Assaro, Esquire, 15 West Church Street, Orlando, Florida 32801-3301, this 7th day of November, 1995.

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