SUPREME COURT OF FLORIDA

NO. SC-06-1617

SPEEDWAY SUPERAMERICA,
Petitioner/Defendant,

vs.

ERMA DUPONT,
Respondent/Plaintiff.

Petition Seeking Discretionary Review
Of a Decision of the Fifth District Court of Appeal
Certifying a Question of Great Public Importance
(5th DCA Case No. 04-14)

PETITIONER'S REPLY BRIEF

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I. There Is Insufficient Competent Evidence to Support Dupont's Sexual Harassment Award

A careful review of the relevant evidence in this matter leads to the unmistakable conclusion that the jury verdict in favor of Dupont is not supported by sufficient competent evidence to withstand Speedway's directed verdict motion. To overcome this deficiency, Dupont relies upon repetitive and exaggerated characterizations of the evidence, upon irrelevant evidence of non-sexual, non-gender based conduct and upon unprecedented arguments seeking to unreasonably overhaul the law of actionable harassment in Florida.

A. Dupont Cannot Bootstrap Her Claim of Sexual Harassment With Evidence of Non-Sexual, Non-Gender Based Harassment

As she has done throughout this case, Dupont again attempts to improperly bootstrap the meager evidence of sexual or gender-based conduct onto more pervasive instances of non-actionable conduct. In determining whether harassing conduct is sufficiently severe or pervasive to be actionable under the FCRA, it is critical that only those incidents which are actually indicative of *sexual* harassment be included. Conduct which is not sexual in nature and which is not based upon gender is not properly included in this assessment, lest the FCRA become a general civility code imposing liability for the routine trials and tribulations of the

workplace.[1] *Menefee v. Montgomery County Bd. of Educ.*, 137 Fed. Appx. 232, 233, 2005 WL 1444211 (11th Cir. 2005); *Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675, 676-77 (7th Cir. 2005); *Dunlap v. Kansas Dept. of Health and Environment*, 127 Fed. Appx. 433, 436, 2005 WL 737585, **4 (10th Cir. 2005); *Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 954, 2005 WL 517294, **5-**6 (6th Cir. 2005).

B. Dupont Improperly Attempts to Bolster Her Claim With Repetitive, Mischaracterized and Exaggerated Evidence

Dupont asserts that she was subjected to harassment during her typical shifts for an eight to nine week period. The record evidence, however, reveals that this characterization is grossly overstated, as the majority of the conduct to which she is referring is either not sexual or gender-based (such as Coryell's indiscriminate use of profanity or displays of anger), occurred on only one (1) occasion or is temporally exaggerated as compared to the record evidence.

As detailed in Speedway's initial brief, Dupont testified that she began working with Coryell in March 1997, working with him on average only two times

[1] Speedway does not contest the principle that evidence of sexual harassment must be assessed under a totality of the circumstances approach. However, this standard must be applied consistent with established Title VII and FCRA precedent to maintain uniformity with respect to sexual harassment law in Florida. Further, Speedway contends that this assessment must only include evidence of *sexual* or *gender-based* harassment, as opposed to non-sexual conduct directed at both males and females. This is not the equivalent of employing a "divide and conquer" approach whereby admittedly sexual or gender-based incidents are judged standing alone.

per week. (Vol. XIV, p. 216). Between March 20, 1997 and April 9, 1997, Dupont and Coryell only worked one (1) shift together. (Vol. XVII, Def. Ex. 1, pp. 75, 81-82, 92-93). Similarly, between April 10, 1997 and April 24, 1997, Dupont and Coryell worked on the same shift only one (1) time (April 12, 1997). (Vol. XVII, Def. Ex. 1, pp. 95-96, 110, 115, 120, 125). After April 24, 1997, Dupont and Coryell were never scheduled to work the same shift with the exception of a one-hour store meeting attended by all employees and the shift which precipitated her resignation on May 29. (Vol. XVI, pp. 541-542).[2] Consequently, Dupont's "eight or nine week" approximation was, in actuality, a much shorter time period. Moreover, it must also be considered in its context which demonstrates that, for the bulk of that period, Dupont actually worked alongside Coryell on a very infrequent basis.

Dupont's reliance on mischaracterized or exaggerated evidence in lieu of actual evidence supporting her claim is most apparent from her list of 25 "incidents" of sexual harassment. (Dupont Answer Brief, pp. 4-7). A review of her list reveals exactly what Speedway has argued throughout this case – that Dupont's case is based almost entirely upon incidents which were not sexual or

[2] As thoroughly set forth in Speedway's initial brief, following the adjustment to the schedules, Dupont and Coryell only had contact with each other on four occasions, typically for brief periods during shift changeovers. (Vol. XIV, pp. 243; Vol. XVI, pp. 541-549, 584-585). On none of these occasions were Coryell and Dupont alone in the store. (Vol. XVI, p. 553).

gender-based and that the scant incidents which were arguably sexual or gender-based are repetitive and grossly exaggerated as compared with the actual record. In particular, of the 25 "incidents" listed by Dupont:

(A) Most are repetitive or refer to the same incident (Nos.[3] 1, 5, 19, 20 and 21 are duplicative, as are Nos. 3 and 6; Nos. 2, 9, 14 and 25; Nos. 12 and 13; and Nos. 12 and 18. Similarly, Nos. 10 and 11 refer to the same incident as do Nos. 8 and 15);

(B) Many refer to non-sexual, non-gender based conduct not properly considered part of a severe and pervasive *sexually*-hostile working environment (Nos. 1, 2, 5, 19, 20 and 21);

(C) Many only refer to Dupont's subjective reaction to Coryell's conduct or Speedway's response to her complaint, neither of which are relevant to whether Coryell's conduct was objectively severe and pervasive (Nos. 17, 22, 23, 24, 25); and,

(D) Several are misleading by omission in that Dupont emphasizes that, after she complained, Coryell was called in to work with her on one unscheduled occasion for several hours, but she fails to mention that no harassment occurred during this shift (Nos. 22, 23). (Vol. XIV, p. 247) ("So I worked a few hours with Joel and nothing happened that day").[4]

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[3] Each "No." referenced correlates to Dupont's list on pages 4-7 of her brief.

[4] Likewise, another prime example of Dupont's mischaracterization of the evidence is her repeated emphasis on the fact that Speedway had video cameras installed. However, the cameras only recorded time-lapsed still shots and did not record sound or motion. The video merely cycled through still snap shots from each camera. (Vol. XV, pp. 375, 436-437). Indeed, the record is undisputed that the camera setup was such that it would not be possible to witness the type of conduct that Coryell was accused of doing by simply reviewing the videos. (Vol. XV, p. 437). The fact that Speedway used loss prevention cameras is completely irrelevant to this case, particularly since Speedway accepted Dupont's complaint as true once she reported it.

Additionally, the record makes clear that Dupont's allegation that she was "harassed" by Coryell on a typical shift (Vol. XIV, pp. 220-221) was primarily referencing non-actionable harassment, such as Coryell's angry outbursts. In contrast, the touchings she references as part of this "harassment," even assuming *arguendo* that they constitute sexual conduct, only occurred on one (1) occasion. A review of the transcript reveals:

Incident	Frequency Per Dupont's Testimony
■ Coryell patted Dupont on the buttock as he walked past her without stopping. (Vol. XIV, pp. 222, 299-300).	One time (Vol. XIV, pp. 222, 299-300).
■ Coryell grabbed Dupont by her wrist. (Vol. XIV, pp.244-45, 300).	One time (Vol. XIV, p. 300).
■ Coryell snuck up behind her at the register and massaged her shoulders and neck. (Vol. XIV, pp. 298, 322).	One time (Vol. XIV, pp. 298, 322).
■ Coryell told her that he could not sleep and that he wasn't "getting any" and needed a girlfriend. (Vol. XIV, pp. 218, 301).	One time (Vol. XIV, p. 301).

Aside from these incidents, the only other evidence of arguably sexual conduct contained in the record were Coryell's relatively tame comments (as compared with the cases she relies upon) to the effect that Dupont looked good in her Speedway vest or that she would look hot as a biker chick. Even if these comments occurred on each of her two weekly shifts with Coryell, such conduct,

together with the isolated physical conduct, clearly does not rise to an actionable level. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (*en banc*), *cert. denied*, 529 U.S. 1068, 120 S.Ct. 1624, 146 L.Ed.2d 483 (2000); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 584-85, *reh'g and suggestion for reh'g en banc denied*, 229 F.3d 1171 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001). This conclusion is even more evident in light of Dupont's candid admission that, whenever she and Coryell worked together, she actually had little to no interaction with him and did not talk with him. (Vol. XIV, pp. 219, 301, 321).

The remainder of the incidents, upon which Dupont principally relies, involved non-sexual, non-gender based conduct which is not indicative of sexual harassment.[5] This conduct included Coryell's use of profanity,[6] his exhibitions of

[5] Dupont's primary reliance upon her reactions to Coryell's non-sexual, gender neutral conduct further illustrates her attempt to reduce the standard for actionable sexual harassment solely to a subjective component in lieu of the currently-recognized subjective and objective component. Speedway does not contest that Dupont subjectively believed she was harassed. However, contrary to the District Court's decision, Speedway contends that Dupont cannot satisfy the objective component of this standard simply because "she *perceived* Coryell's remarks, jokes, and physical touching as sexual and that his demeaning and intimidating actions were directed at her because she was female." *Speedway SuperAmerica LLC v. Dupont*, 933 So. 2d 75, 85 (Fla. 5th DCA 2006).

[6] Coryell often used the phrase, "god damn," and also "liked to call people stupid bitch or simple son of a bitch [and] dumb bastard," phrases which Dupont admitted were not derogatory terms toward women and were directed at males and females alike. (Vol. XIV, pp. 221-222, 285).

anger typically manifested by his throwing objects indiscriminately around the store,[7] and his hovering behind her as they counted the safe.[8]

The pitfall of relying upon hyperbole and repetitive evidence to support a claim of harassment is illustrated by a comparison of this case with Fourth DCA's recent decision in *Maldonado v. Publix Supermarkets*, 2006 WL 2956554 (Oct. 18, 2006). Under more egregious facts, the Fourth DCA reached the opposite conclusion, relying upon the Fifth DCA's mischaracterization of the evidence in this case that Dupont was "subjected to repeated, countless acts of verbal and physical harassment over a nine-week period[.]"

In contrast to this case, *Maldonado* involved unequivocal evidence of sexual advances from the harasser coupled with more egregious physical contact. Specifically, the harasser in *Maldonado,* in addition to touching the plaintiff between her hips and buttocks on one occasion, explicitly grabbed her buttocks while telling her that she was "going to be his". The harasser followed this up on

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[7] (Vol. XIV, pp. 218-220). Dupont admitted that Coryell did not target her when throwing objects around the store. (Vol. XIV, pp. 219-220, 279, 286-288, 318).

[8] (Vol. XIV, pp. 218, 225). The safe was located on the floor beneath the register, with very little space behind the register. Employees counted it by sliding a measuring stick into slots to gauge how much coin was in the safe. (Vol. XIV, pp. 227-229, 299). While Dupont indicated that Coryell often stood over her while she knelt down to count the safe, she admits he was "trying to watch [her] count it." (Vol. XIV, pp. 228-229, 256-257). She never asked Coryell to move or not stand behind her. (Vol. XIV, p. 298). This conduct, while perhaps subjectively intimidating to Dupont because of their relative sizes, is not evidence of objectively severe and pervasive *sexual* harassment.

multiple occasions by biting his lip toward the plaintiff in a provocative manner calculated to convey to her "you're really hot." Given the contemporaneous statement, there was no question that the grabbing of the plaintiff's buttocks was meant in a sexual manner and that the harasser conveyed a sexual desire to the plaintiff. There is no such evidence in the present case.

As illustrated by *Maldonado*, permitting the jury award in this case to stand based upon repetitive and exaggerated evidence and evidence of non-sexual, gender-neutral incidents would lead to disparate results, not only as between Florida and federal cases but also as between cases within Florida.

The other cases relied upon by Dupont are equally inapposite. In particular, she relies upon *Parker v. Atlanta Newspapers Name Holding Corp.*, 2006 WL 1594427 (11th Cir. June 12, 2006), and *Johnson v. Booker T. Washington Broadcasting Service*, 234 F.3d 501 (11th Cir. 2000). In addition to graphic expressions of sexual interest in the plaintiff coupled with offensive sexual conduct,[9] the harasser in *Parker* possessed significant authority over the plaintiff and gave her undesirable job assignments after she thwarted his advances. Such *quid pro quo* harassment is the prototypical case of actionable sexual harassment.

[9] These comments included "I want to f**k you for your birthday", "When are you going to let me taste you?", "I know it's good and tight cause you've never had kids", "You always have your legs open as if you want someone's head between them", "You have nice round breasts", and "You have some juicy thighs."

In this case it is undisputed that Coryell was less senior than Dupont and exercised no authority over her. (Vol. XV, p. 441).

Likewise, in *Johnson*, the harasser's conduct was more graphic and also included sexual advances and expressions of sexual desire toward the plaintiff. The harasser's conduct included, *inter alia*, revealing the outline of his penis, repeatedly rubbing his body against her, repeatedly rubbing her shoulders against her will, making obscene gestures to her with his tongue, putting his face next to her to kiss her, inquiring why she always covered her body and making sexual inquires and remarks to her. Unlike *Johnson*, in this case, it is undisputed that Coryell never commented on Dupont's sex life, never made sexually explicit or obscene comments as made in *Johnson*, never asked her out on a date and certainly never engaged in any conduct such as rubbing his genitalia against her repeatedly or revealing the outline of his penis to her.

C. **The Court Should Reject Dupont's Attempt to Overhaul the Law of Sexual Harassment**

In addition to exaggerating the factual record, Dupont also argues for an unprecedented overhaul of the standards applicable to unlawful harassment claims, essentially seeking the abrogation of the objective element of actionable harassment coupled with no judicial oversight of jury verdicts. Dupont contends that federal precedent should be ignored when construing the FCRA, that the Court adopt a "community standards" approach to define actionable harassment and

relinquish its role in reviewing the sufficiency of the evidence, and that the Court should establish a category of *per se* harassment for all cases involving touchings.

Florida courts have repeatedly held that, as the FCRA was patterned after federal law, federal authority is instructive in construing the FCRA, absent an explicit difference in the statutory language and so long as the authority is not inharmonious with the FCRA's spirit and policy. *Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947 (Fla. 4th DCA 2004); *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 377 (Fla. 3d DCA 2004); *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030, n.3 (Fla. 2d DCA 2002) (*per curiam*). In seeking a wholesale overhaul in the standards applicable to these cases and a departure from the familiar standards long utilized by both federal and state cases, Dupont does not articulate any logic for her position save for the fact that, as she readily admitted before the District Court, the application of federal precedent to this case leads to the inevitable conclusion that her claim falls well short of an actionable level. (See Dupont's Motion for Rehearing, Rehearing *En Banc* and for Certification). Indeed, the District Court even "agree[d] with Speedway that there are a few federal cases that, on facts similar or worse than the ones in this case, have determined there was insufficient sexual harassment to establish a hostile work environment." *Speedway*, 933 So.2d at 85.

Dupont next contends that the Court should always defer to the jury under the guise of a "community standards" test determining the severity and pervasiveness of unlawful harassment. Essentially, Dupont seeks to define actionable harassment as "whatever the jury in a given cases determines it to be," without regard to the sufficiency of the relevant evidence in the record. In advancing this argument, Dupont seeks a relinquishment of the courts' role under Rule 1.480 of ensuring that verdicts are supported by sufficient competence evidence.[10] Not only is Dupont unable to cite any authority applying this approach, but its adoption would certainly lead to disparate results.

Dupont next argues, again without any case support, that whenever evidence of a touching is introduced, it must be considered *per se* harassment.[11] Well-established precedent, however, has rejected this view, with courts routinely holding that sexual harassment has not been established even where a touching has occurred. *See e.g.*, *Mendoza*, *supra*; *Maldonado*, *supra*; *Miller v. Lectra USA, Inc.*, 145 Fed. Appx. 315, 317, 2005 WL 1901821, **2 (11th Cir. 2005).

[10] Even the authority cited by Dupont requires "competent, substantial evidence to support the verdict," *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675-76 (Fla. 2004), a standard Speedway contends has not been satisfied here.

[11] Dupont notes that a touching can constitute a battery under Florida law. To the extent Dupont felt that she had been subjected to a battery by Coryell, she could have pursued a claim against him, which she elected not to do. *See e.g.*, *Johnson v. Booker T. Washington Broadcasting Service*, 234 F.3d 501 (11th Cir. 2000).

II. Dupont's Award of Punitive Damages Is Improper

A. The Challenge to Dupont's Punitive Damages Award Is Not Moot

Dupont first asserts that this issue is moot as the District Court's certification is limited to seeking clarification of the proper standard for future cases. Dupont is mistaken. At trial and throughout the appeal of this matter, Speedway has consistently contended that the evidence adduced at trial was insufficient to support an award of punitive damages under the proper standard. Although the jury in this case was instructed that punitive damages could be awarded if they determined that Speedway's "alleged acts were done willfully, intentionally, or with callous and reckless disregard to [Dupont's] rights," this Court is still empowered to determine the sufficiency of the evidence to support the award.

In determining the sufficiency of the evidence, the proper standard must be applied. In unlawful harassment cases arising under Title VII, the jury verdict must be supported by evidence sufficient to comply with the standards set forth in *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). Under *Kolstad*, to withstand scrutiny a punitive damages award must be supported by record evidence establishing that the employer failed to take good faith efforts to comply with the law. 527 U.S. at 539-40. While the District Court inquired whether an employer may be held vicariously liable for the willful and wanton conduct of its employee as prescribed in *Mercury Motors Express, Inc. v.*

Smith, 393 So. 2d 545 (Fla. 1981), the determination of this issue necessarily entails determining whether the *Kolstad* standard applies to FCRA cases.

B. **There Was Insufficient Record Evidence to Support The Punitive Damages Award**

As the United States Supreme Court made clear in *Kolstad*, "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Kolstad*, 527 U.S. at 544-45.

As comprehensively set forth in Speedway's initial brief, to the extent that the Court's *Mercury Motors* standard (or the alternative standard in *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159-60 (Fla. 1995)) is applied to cases of co-worker sexual harassment, an award of punitive damages would necessarily be proper in every case of actionable harassment. While Dupont disputes this conclusion, her argument actually illustrates Speedway's point:

> [T]he jury still would evaluate whether . . . the employer's management had knowledge of the sexual harassment and failed to take the appropriate and timely remedial action which the law requires. If they did not, the jury could award punitive damages. If they didn't have the requisite knowledge or took appropriate remedial action, then the jury would not award punitive damages. (Dupont's Answer Br. p. 25).

To be actionable in the first instance, co-worker sexual harassment claims require that the plaintiff prove that the employer knew or should have known of the harassment and failed to take appropriate remedial action. Accordingly, based

upon Dupont's argument (and as illustrated by the District Court's decision) wherever actionable harassment is found, the jury is justified in awarding punitive damages, notwithstanding that the legislature did not intend that punitive damages be available in every actionable claim of harassment under the FCRA. Based upon this same reason, the standards enunciated in *Mercury Motors* and *Schropp* are ill-suited to FCRA claims and the standard enunciated in *Kolstad* should be adopted.

Under *Kolstad*, the record evidence in this case does not support a punitive damages award. It is undiputed that Speedway implemented a broad anti-harassment policy, trained its store managers with respect to harassment, posted its policy and complaint procedure on the store bulletin board and initiated a 1-800 hotline for complaints. Further, Speedway took affirmative steps to remedy Dupont's concerns by separating Coryell and Dupont and by counseling Coryell.

CONCLUSION

Throughout this case, Dupont has attempted to shift the focus of her allegations from allegations of sexual harassment to allegations of workplace violence unrelated to sexual or gender-based conduct. While Coryell's displays of anger were boorish and unprofessional and were certainly not condoned by Speedway, the proper focus of this case is whether Dupont has introduced sufficient evidence to establish actionable *sexual* harassment and, if so, whether the award of punitive damages was proper.

It is critical that the FCRA be interpreted consistently with established federal precedent so as to ensure that employers are not held to differing standards depending upon the forum chosen. Pursuant to such authority, the FCRA is not implicated every time an employee believes he or she was subjected to a "hostile working environment" based upon the harassing conduct of a co-worker. Rather, to be actionable, the employee must demonstrate that he or she was subjected to a *sexually* severe or pervasive hostile working environment. Reviewed in the light most favorable to her, it is clear that Dupont has not proven her claim in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 27th day of November, 2006 to: Wayne Allen and Adrienne E. Trent, 700 N. Wickham Road, Suite 107, Melbourne, Florida 32935.

/s/ Robert E. Larkin
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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief has been prepared in Times New Roman, fourteen (14) point, and complies with all applicable rules of Florida Appellate Procedure and other rules associated therewith.

/s/ Robert E. Larkin
Attorney