

IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

PENNY BYRD, et al.,

Petitioners,

v.

CASE NO. 72,788

RICHARDSON-GREENSHIELDS  
SECURITIES, INC., et al.,

2D DCA CASE NO. 87-1368

Respondents.

---

**AMICUS CURIAE BRIEF ON THE MERITS OF  
FLORIDA DEFENSE LAWYERS ASSOCIATION**

NANCY P. MAXWELL, ESQUIRE  
MARK WAYNE KLINGENSMITH, ESQUIRE  
METZGER, SONNEBORN & RUTTER, P.A.  
Attorneys for FLORIDA DEFENSE  
LAWYERS ASSOCIATION  
Suite 300, Barristers Building  
1615 Forum Place  
Post Office **Box** 024486  
West Palm Beach, Florida 33402-4486  
(407) 684-2000

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
A.    THE INTENT AND POLICY BEHIND THE FLORIDA WORKERS' COMPENSATION ACT SUPPORT THE EXCLUSIVITY OF REMEDY IN THIS CASE	
B.    THE SECOND DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED CASE LAW REGARDING THE EXCLUSIVITY OF THE WORKERS' COMPENSATION ACT <b>AS</b> IT APPLIES TO INTENTIONAL TORTS	
CONCLUSION	17
CERTIFICATE OF SERVICE	18

## TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
<u>American Freight System, Inc. v. Florida Farm Bureau Casualty Insurance Company,</u> 453 So.2d 468 (Fla. 2d DCA 1984)	4
<u>Brown v. Winn-Dixie Montgomery, Inc.,</u> 469 So.2d 155 (Fla. 2d DCA 1985)	1, 7, 10, 13
<u>Carnegie v. Pan American Linen,</u> 476 So.2d 311, 312 (Fla. 1st DCA 1985)	6
<u>Chamberlain v. Florida Power Corporation,</u> 198 So. 486 (Fla. 1940)	3
<u>Fisher v. Shenandoah General Construction Co.,</u> 498 So.2d 882 (Fla. 1986)	2, 7-8, 10, 15
<u>Grice v. Suwannee Lumber Manufacturing Company,</u> 113 So.2d 742 (Fla. 1st DCA 1959)	2, 5, 9, 11, 12
<u>Hillsborough County Employees Credit Union v. Tamarco,</u> 477 So.2d 652 (Fla. 1st DCA 1985)	5, 9

TABLE OF CITATIONS (Continued)

<u>Case</u>	<u>Page</u>
<u>Lawton v. Alpine Engineered Products, Inc.,</u> 498 So.2d 879 (Fla. 1986)	2, 10, 15
<u>Mullarkey v. Florida Feed Mills, Inc.,</u> 268 So.2d 363 (Fla. 1972)	4
<u>Schwartz v. Zippy Mart, Inc.,</u> 470 So.2d 720 (Fla. 1st DCA 1985)	1, 8, 11-14
<u>Tampa Maid Seafood Products v. Porter,</u> 415 So.2d 883 (Fla. 1st DCA 1982)	6
<u>W.T. Edwards Hospital v. Rakestraw,</u> 114 So.2d 802 (Fla. 1st DCA 1959)	6
<u>Other Authority</u>	
Fla. Stat. S440.09	5
Fla. Stat. §440.11	3, 4, 6, 16

## STATEMENT OF THE CASE AND FACTS

FLORIDA DEFENSE LAWYERS ASSOCIATION adopts the Statement of the Case and Facts of respondents in its entirety as if fully set forth herein.

### SUMMARY ( AR

The workers' compensation system in Florida has been reviewed and interpreted by the appellate courts of this state since its inception. The courts have consistently upheld application of its provisions, including the exclusivity provision. Petitioners' claims in this case originate from a not insubstantial physical contact; petitioners therefore have a remedy under the Workers' Compensation Act. The legislature has expressed no intent to exclude injuries which originate with sexual harassment and the courts should refrain from creating such an exclusion without the benefit of the legislature's actions.

Appellate court opinions in Florida which have addressed the issue of the exclusivity of the Workers' Compensation Act have applied it to determine that acts similar to those petitioners have claimed are covered by the Workers' Compensation Act. The per curiam opinions, Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 2d DCA 1985) and Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985) support the Second District Court of Appeal's decision in the

instant case. The different dissents do not provide a unified basis for ignoring the well-reasoned opinions of the First District Court of Appeal.

Recent decisions by this court offer an alternative analysis of the instant case. In Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986) and Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986), this court defined the elements required to demonstrate an intentional tort by an employer against an employee. Petitioners' complaint does not and cannot contain allegations meeting the requirement set forth in Fisher and Lawton.

#### **ARGUMENT**

A. THE INTENT AND POLICY BEHIND THE FLORIDA WORKERS' COMPENSATION ACT SUPPORT THE EXCLUSIVITY OF REMEDY IN THIS CASE

The Florida Workmen's Compensation Act, as enacted in 1935 and as applied to date, represents a quid pro quo which balances benefits and gains with sacrifices and losses. The Act constitutes social legislation which in its overall objective is intended to benefit the employee and employer alike, but which at the same time withdraws from each certain rights otherwise secured at common law. Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742, 745 (Fla. 1st DCA 1959). The Act affords the exclusive remedy for recovery of damages arising from

compensable and potentially compensable injuries in the workplace. Fla. Stat. §440.11 states:

- (1) The liability of an employer ... shall be exclusive and in place of all other liability of such employer ... to the employee .....

In the few years following the enactment of the Florida Workers' Compensation Act, it became judicially recognized that although an injury fell within the exclusive purview of the Act, monetary compensation would not always automatically follow. For example, in Chamberlain v. Florida Power Corporation, 198 So. 486 (Fla. 1940), the court ruled that the personal representative of a deceased employee could not maintain a suit at law for damages against an employer for the alleged wrongful death of the employee when the employer had complied with and the employee accepted the provisions of the Act, notwithstanding that employee left no dependents to take compensation under the Act. The Act did not provide for payment of compensation to anyone other than the deceased employee's dependents. Thus, the court rejected the argument that a remedy under the Act cannot be "exclusive" where no right of action exists. Chamberlain, 198 So. at 487-488.

Likewise, the Florida Supreme Court has rejected a contention that the Act is unconstitutional when applied to deprive the father of a deceased minor/employee of workers' compensation benefits. The court held that the exclusive

liability section of the Act, §440.11, was a rational method to carry out the Act's purpose. Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363, 365 (Fla. 1972). In commenting on the purposes of the Act, the court noted:

Distribution of the inevitable costs of industrialism on a rational basis is within the interests of the citizens of this State. General welfare costs are reduced to the extent that compensation keeps the injured and his dependents from the public dole. Protracted litigation is superseded by an expeditious system of recovery (citations omitted).

...[T]he concept of exclusiveness of remedy embodied in Fla. Stat. §440.11, F.S.A. appears to be a rational mechanism for making the compensation work in accord with the purposes of the Act. In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation (emphasis added).

Mullarkey, 268 So.2d at 366.

By accepting the benefits of workers' compensation, including the concomitant right to compensation and medical expenses, the employee relinquishes the traditional common law right to remuneration for every element of damage suffered by him for the injury. American Freight System, Inc. v. Florida Farm

Bureau Casualty Insurance Company, 453 So.2d 468, 470 (Fla. 2d DCA 1984).

In this case, had petitioners suffered emotional injuries as a result of the alleged assault at their place of employment, any psychiatric or psychological medical expenses which would have been incurred as a direct result of that occurrence would be compensable under the Act. Hillsborough County Employees Credit Union v. Tamarco, 477 So.2d 652 (Fla. 1st DCA 1985). "If the compensation thus provided is considered inadequate or allowance should be made to the employee for all or part of the common law elements or ingredients of relief known to the law of negligence, the change should be effectuated by legislation and not by judicial fiat." Grice v. Suwannee Manufacturing Company, supra.

Additionally, the Act as it was amended in 1978 was clearly intended to encompass the situation where an employee was the victim of a wilful and intentional assault by a co-employee. The only exception within the Act, found in Fla. Stat. §440.09, provides that an employee is not entitled to compensation if he sustains an injury which is occasioned primarily by his wilful intention to injure or kill another. Thus, if an employee becomes injured due to an assault or battery by a co-employee at work, the issue of whether compensation is to be provided will

turn on whether the employee seeking compensation is the aggressor. Fla. Stat. §440.11.

In W.T. Edwards Hospital v. Rakestraw, 114 So.2d 802 (Fla. 1st DCA 1959), the court found that an injured employee was entitled to compensation under the Workmen's Compensation Act for injuries sustained in an altercation with a fellow employee at the employer's place of business while claimant was on duty, even though the argument was unrelated to the employer's business. The key to the question of whether the claimant suffered a compensable injury was the "he was not the aggressor in the altercation" (Emphasis in original). W.T. Edwards Hospital, 114 So.2d at 803. See also, Tampa Maid Seafood Products v. Porter, 415 So.2d 883 (Fla. 1st DCA 1982).

Other cases have held that assaults by co-employees constitute an injury which arises out of and in the course and scope of employment when the employment as in this case, is in some way a contributing factor to the altercation. Carnegie v. Pan American Linen, 476 So.2d 311, 312 (Fla. 1st DCA 1985); Tampa Maid Seafood Products v. Porter, supra.

B. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED CASE LAW REGARDING THE EXCLUSIVITY OF THE WORKERS' COMPENSATION ACT AS IT APPLIES TO INTENTIONAL TORTS

In its opinion in this case, the Second District Court of Appeal affirmed the exclusivity of the workers' compensation

remedies. Noting that workers' compensation laws cover emotional injuries arising from not insubstantial physical contacts, the court also stated that the statutes' exclusivity provisions apply where an employee commits an intentional tort if the employee is not the alter ego of the employer and the employer's only involvement is prior notice of similar conduct. The appellate court's conclusions have a firm basis in the statute and other opinions by district courts of appeal within the state.

Judge Lehan in the court's opinion first analyzed whether petitioners' complaint stated a cause of action against the employers. Agreeing with the trial court's dismissal, the court indicated that even with amendments, the complaint would still be dismissed because of the exclusivity of workers' compensation remedies. Examining the exception within the workers' compensation laws for intentional torts of employers, the court cited the following from Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986): "In order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death." Fisher, at 883. The allegations in the instant case do not rise to this level of a virtual certainty of injury.

The court next addressed the issue of workers' compensation remedies. Citing Brown v. Winn-Dixie Montgomery, Inc.,

469 So.2d 155 (Fla. 2d DCA 1985) and Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985), the court stated that the opinions on exclusivity in those cases were applicable to the instant case. In petitioners' brief on the merits, they discuss at length the opinions in Brown and Schwartz. Each of these decisions supports the Second District Court of Appeal's opinion in this case. For example, in Brown, six members of the court agreed that the plaintiff's suit in tort against the employer for alleged sexual harassment was barred by the exclusivity provisions of the Workers' Compensation Act. The per curiam opinion indicated that the employees' exclusive remedy was the Workers' Compensation Act regardless of the degree of the employer's negligence, if any, even in the face of allegations of negligent hiring and retention.

The Brown court also rejected an argument that workers' compensation did not apply because the incident was not an "accident" as that term is defined in the Workers' Compensation Act. Examining prior cases, the court noted an analogy to decisions concerning assaults or other intentional torts which were covered by workers' compensation.

Finally, the court examined the plaintiff's argument that based on the nature of her injury, she could receive no compensation therefore exclusivity did not bar a tort action.

Determining that the basis for the tort claim was the physical contact between the plaintiff and her supervisor, the court held that this physical contact was a sufficient physical injury or trauma to support a workers' compensation claim for mental distress or its resulting injury.

The court cited the following from Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742, 746 (Fla. 1st DCA 1959):

Every accidental injury suffered by an employee which arises out of and in the course of his employment is within the scope of the Act if it is of such character that it results, or might have resulted in a **loss** or diminution of earning capacity, either temporary or permanent, or for which the employer is obligated to furnish medical or other benefits. The fact that in a particular case the injury suffered does not in fact result in a loss of diminution or earning capacity is immaterial. (Emphasis supplied by court.)

The highlighted phrase in this quotation, "might have resulted," is particularly applicable in the instant case. Petitioners claim they have no remedy because they will receive no benefits for the mental distress suffered. The point of the Workers' Compensation Act is that it provides compensation for injuries that result or might have resulted in damages. Following petitioners' argument, if they had, for example, required psychological counseling, they would have a remedy in the reimbursement for this covered expense. See Hillsborough

County Employees Credit Union v. Tamarco, infra. This would place the employer and the courts in the untenable position of handling a tort claim where the harassment was minor, not leading to emotional injury, while dealing with a workers' compensation claim where the harassment was serious enough to incur expenses.

The distinction made by Judge Wentworth's concurring opinion in Brown rests simply on his opinion that actions which rise to a level of wilful intent should not shield an employer from tort liability. This court determined, in opinions issued subsequent to Brown v. Winn-Dixie, the level of activity required of an employer before the employer's actions are deemed to amount to an intentional tort. Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986), and Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986). Lawton requires a "virtual certainty" before the exclusivity provisions of the Workers' Compensation Act are waived. It is clear based on the facts of petitioners' complaint that they cannot amend to include allegations which would meet the requirement set forth in Fisher and Lawton.

Contrary to petitioners' argument, Judge Smith in his Brown dissenting opinion, did not engage in an extensive analysis of the wrong nor offer alternatives for the remedies. Rather, he simply registered his disagreement with the per curiam opinion's

result and indicated that sexual harassment as a unique action should not be governed by the workers' compensation statutes.

Judge Ervin's dissent in Brown focused on the character of the injury and determined that the injury resulting from alleged sexual harassment was not of the type intended to be covered by the Workers' Compensation Act because there is no compensating remedy provided for this type of injury. The dissent ignored earlier statements in Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742, 746 (Fla. 1st DCA 1959), as noted above that an injury is within the scope of the Act if it resulted or might have resulted in damages for which the employer is required to furnish benefits.

The injury in the instant case could have led to medical bills and temporary or permanent disability. The fact that it did not should not shape the vehicle for providing a remedy for the wrong. Judge Ervin's dissent requires the court to reshape the Act's compensation system in a fashion not contemplated by the statute's language. If the legislature intended to exclude the type of injury which may result from sexual harassment or any other type of injury from the Act's coverage or to remove this type of tort from the workers' compensation scheme, it has had numerous opportunities to do so since the statute's enactment. As the Second District Court of Appeal noted in this case, citing Schwartz, "[I]f the remedies

provided by the Act are insufficient, then,' if this is true, it should be addressed by legislature.'" Schwartz, 470 So.2d at 902.

The First District Court of Appeal in Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985), once again addressed the issue of the Workers' Compensation Act's exclusivity. The plaintiffs sued Zippy Mart for assault, battery and negligent retention and hiring based on sexual harassment by a supervisory employee. The lower court granted a summary judgment and the First District Court of Appeal affirmed on the basis of the exclusivity provisions. The plaintiffs argued, as Judge Smith did in his dissent in Brown, that the legislature never intended sexual harassment to be covered by the Workers' Compensation Act. The District Court of Appeal appropriately responded that that decision is one to be made by the legislature, not the court.

The plaintiffs also argued in Schwartz that they had no remedy under the workers' compensation laws because they had no compensable injuries. Citing Grice v. Suwannee Lumber Manufacturing Company, the court noted that an injury which results or might have resulted in damages is covered by the Act. It is the potentially compensable nature of an injury, rather than its ultimate result, which determines the Act's applicability.

Finally, the court also rejected the argument that the employer had been involved in the assaults by failing to remove the supervisory employee and this involvement prevented the employer from benefiting from the Act's exclusivity. Examining the allegations, the court determined that the acts were not of such a nature as to demonstrate intention on the part of the employer to harm the employee. Schwartz, at 470 So.2d at 724.

Six judges concurred in the per curiam opinion, with two of the judges writing special concurring opinions. Judge Wentworth again concurred in the result but repeated his reservation regarding allegations of prior notice. Judge Nimmons, going even further than the per curiam opinion, indicated that the Act's exclusivity provision should apply regardless of the degree of the employer's negligence. Judge Smith repeated the dissent he had expressed in Brown and Judge Ervin wrote a dissenting opinion which differed substantially from his opinion in Brown.

Contrary to petitioners' assertion, the dissents in Brown and Schwartz do not provide a unified basis for this court to avoid the per curiam opinions. Judge Ervin's dissent in Schwartz focused on the majority's conclusion regarding the employer's vicarious liability for its supervisory employee's intentional torts. According to Judge Ervin, an important question in these cases is whether the injury arose during the

course and scope of employment and, concomitantly, whether the assault was committed in the course of employment thus subjecting the employer to vicarious responsibility. Schwartz, 470 So.2d at 727-28. Following this analysis, if the assault was a private one then it should be noncompensable and should not subject the employer to vicarious liability.

After an analysis of opinions outside the State of Florida, Judge Ervin indicted that Florida courts had not accepted the principle that an employee's motive is the sole test for determining the employer's liability. In Schwartz, Judge Ervin argued that the work conditions of the plaintiff and defendants brought them together and led to the assaults. The employer should thus be responsible according to Judge Ervin for the alleged negligence in retention and hiring no matter what the motives of the employee leading to the assault and battery. Judge Ervin's two dissenting opinions discuss different aspects of the allegations and do not provide a unified basis for overruling the Second District Court of Appeal's opinion in the instant case.

Petitioners devote a considerable portion of their brief to a discussion of court opinions from other states. As indicated several times in Brown, Schwartz and the instant opinion from the Second District Court of Appeal, changes in the

workers' compensation scheme are more appropriately addressed by the legislature rather than the courts. The decisions in Florida have been consistent in their views as applied to the instant case and any alteration must be addressed by the legislature. It is the legislative intent of the State of Florida that controls this case, not the intent of the legislatures from other states.

In Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986) and Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986), this court expressed a reluctance to address the certified question whether the Workers' Compensation Act precluded an action against an employer for an intentional tort. In both of those cases, the court focused instead on whether the plaintiffs were able to allege an intentional tort against their employers. To allege or prove an intentional tort, the employee must show that the employers exhibit a deliberate intent to injure or engage in conduct substantially certain to result in injury or death. Based on the lack of allegations of such virtual certainty of harm, the court determined that the complaints were appropriately dismissed for failure to state a cause of action.

In the instant case, the Second District Court of Appeal initially addressed whether the petitioners had stated a cause of action for an intentional tort against the employer. After examining the allegations, the court indicated the

petitioners had failed to include sufficient allegations to demonstrate vicarious liability of the employers for the acts of their lower level employees. The court then went a step further and examined the Workers' Compensation Act's exclusivity and held that even with amendments, the petitioners would not be able to state a cause of action because of the exclusivity of remedies.

The Workers' Compensation Act has been amended numerous times since its initial enactment. Fla. Stat. §440.11, concerning exclusivity, itself has been amended frequently since 1970. Despite each of these opportunities to clarify or add to the exclusivity provisions alone, the legislature has chosen not to do so. If the legislature has not taken the opportunity to make this drastic change in the workers' compensation laws, this court should refuse to change by judicial fiat what the legislature has chosen to retain in its present form. The legislature has made the determination that employees benefiting from the Act must relinquish their rights to damages in tort. There are no explicit exceptions for sexual harassment nor other forms of harassment. Petitioners' injury in this case is of a nature to be covered by the workers' compensation law and is not the proper subject of a tort claim.

CONCLUSION

Petitioners are requesting this court to create by judicial opinion an exception to the Workers' Compensation Act for sexual harassment claims. This court should decline this opportunity and affirm the Second District Court of Appeal's decision that workers' compensation provides an exclusive remedy for petitioners' claim or, in the alternative, that petitioners have failed to state a cause of action for an intentional tort against their employers.

Respectfully submitted,

METZGER, SONNEBORN & RUTTER, P.A.  
Attorneys for FLORIDA DEFENSE  
LAWYERS ASSOCIATION  
Suite 300, Barristers Building  
1615 Forum Place  
Post Office Box 024486  
West Palm Beach, Florida 33402-4486  
(407) 684-2000

BY: Nancy P. Maxwell  
NANCY P. MAXWELL  
Florida Bar No. 298743

BY: Mark Wayne Klingensmith  
MARK WAYNE KLINGENSMITH  
Florida Bar No. 558930

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LIPMAN & WEISBERG, Attorneys for Petitioners, 5901 S.W. 74th Street, Suite 304, Miami, Florida 33143-5186, and to ROCHELLE Z. CATZ, ESQUIRE, Attorney for Petitioners, 6363 McGregor Boulevard, Fort Myers, Florida 33907-5936, and to TERENCE G. CONNOR, ESQUIRE, MORGAN, LEWIS & BOCKIUS, Attorneys for Respondents, 5300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2339, by mail, this 7<sup>th</sup> day of October, 1988.

METZGER, SONNEBORN & RUTTER, P.A.  
Attorneys for FLORIDA DEFENSE  
LAWYERS ASSOCIATION  
Suite 300, Barristers Building  
1615 Forum Place  
Post Office Box 024486  
West Palm Beach, Florida 33402-4486  
(407) 684-2000

BY: Nancy P. Maxwell  
NANCY P. MAXWELL  
Florida Bar No. 298743

BY: Mark Wayne Klingensmith  
MARK WAYNE KLINGENSMITH  
Florida Bar No. 558930