

IN THE SUPREME COURT OF OHIO

General Electric Co., et al., : Supreme Court Case No. 2007-1490
: :
Appellants, : :
: :
v. : On Appeal from the Trumbull
: County Court of Appeals,
Eleventh Appellate District
: :
Barry P. Tenney, : Court of Appeals
: Case No. 2005-T-0119
Appellee. : :
:

REPLY MERIT BRIEF OF
APPELLANTS GENERAL ELECTRIC CO. AND JOANNE O'NEIL

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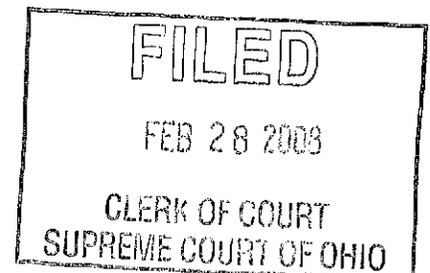


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REPLY MERIT BRIEF

Appellee Barry Tenney spent over half of his merit brief reciting facts that are not germane to the only issue that is before this Court. The apparent purpose of Tenney's lengthy factual recitation is to demonstrate that his intentional infliction of emotional distress claim is based on more than the time-barred assaults. However, although Tenney's claim is based on several incidents involving different actors over several years of his career at General Electric, the only facts relevant to this appeal are the time-barred incidents involving the intentional injury to Tenney's penis and the alleged sexual assault by O'Neil. (A-23.)

Tenney did not oppose Appellants' memorandum in support of jurisdiction yet he now asserts for the first time in his merit brief that Proposition of Law III is not properly before the Court because Appellants did not raise the statute of limitations issue in the trial court. Tenney waived any such argument by filing a waiver of memorandum in response to jurisdiction. Moreover, Appellants pleaded a statute of limitations defense in their amended answer (Second Supplement at 4.), and argued the statute of limitations defense in connection with their motions for summary judgment. Thus, the issue is properly before this Court. *Lawyers Cooperative Pub. Co. v. Muething* (1992), 65 Ohio St.3d 273, 603 N.E.2d 969 at syl. ¶ 1 ("Where the issue of the state of limitations has been raised in the trial court, the fact that a party asserts the applicability of a different statute of limitations on appeal shall not bar this court from considering the issue.").

Tenney's attempts to distinguish the case law relied upon by Appellants' misses the mark. First, Tenney tries to distinguish *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 532 and *Manin v. Diloreti* (1994), 94 Ohio App.3d 777 on the

grounds that those cases involved “exclusively criminal conduct”—sexual assault in *Doe* and physical assault in *Manin*. The incidents at issue here, Lissi’s physical assault and O’Neil’s sexual assault, are both criminal offenses as well. Thus, the holdings of *Doe* and *Manin* are controlling.

Tenney’s reliance upon *Vandiver v. Morgan Adhesive Co.* (1998), 126 Ohio App.3d 634 is misplaced. In *Vandiver*, the court of appeals held that the employee’s claims for emotional distress, which were premised upon allegations that co-workers sprayed him with a fire extinguisher and rolled ice bombs into the restroom stall at work, were based primarily upon claims of assault and battery and thus governed by the statute of limitations applicable to assault and battery. *Id.* at 639-640. The Ninth District Court of Appeals went on to distinguish the cases cited by *Vandiver*—the same cases cited by Tenney: “In each of the cases *Vandiver* cites, the facts make clear that the victims were subjected not only to offensive physical contact, but also to significant, nonphysical harassment that could, by itself, potentially have been considered outrageous.” *Id.* at 638. Unlike cases cited by *Vandiver* and Tenney at page 10 of his merit brief, Tenney was not subjected to “significant, nonphysical harassment that could, by itself, potentially have been considered outrageous.” Indeed, the appellate court below identified the O’Neil assault as the “incident that stands out” as extreme and outrageous” and “the very definition of extreme and outrageous.” (A-23.)

The additional law cited by Tenney as examples of cases involving both physical and nonphysical employee harassment where courts permitted claims for both intentional infliction of emotional distress and battery are inapposite. Those cases did not rely upon *Doe* or *Love* and the statute of limitations was not at issue in those cases. See *Kearns v.*

Porter Paint Co. (1991), 61 Ohio St.3d 486, 575 N.E.2d 428; *Helmick v. Cincinnati Word Processing* (1989), 45 Ohio St.3d 131, 543 N.E.2d 1212; *Chrihfield v. Monsanto Co.* (S.D. Ohio 1994), 844 F. Supp. 371.

While *Hidey v. Ohio State Hwy. Patrol* (10th Dist. 1996), 116 Ohio App.3d 744, 689 N.E.2d 89 presented the same question as that which this Court has agreed to review, it is factually distinct from Tenney's claim. In *Hidey*, the court distinguished the holdings of *Doe* and *Love* on the grounds that the nature of the acts giving rise to the complaints in those cases was intentional offensive touching. Whereas in *Hidey*, the state patrol officer's touching was limited to pulling the plaintiff's pants away from her body. The remainder of his conduct (shining a flashlight down her pants and requiring her to expose her breast to him) did not involve touching. Thus, the crux of her claim was invasion of privacy as opposed to assault. In contrast, the incidents at issue in this case involve an intentional physical injury and sexual assault. Accordingly, *Hidey* is not controlling.

Tenney has not put forth a reason why this Court's holdings in *Doe* and *Love v. Port Clinton* (1988), 37 Ohio St.3d 98 do not govern his claim. Because the divided decision below would largely vitiate the statute for claims of assault, battery, libel and slander, it should be reversed, and the trial court's decision granting summary judgment should be affirmed.

Respectfully submitted,

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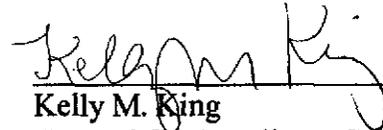
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CERTIFICATE OF SERVICE

I certify that a copy of this Reply Merit Brief of Appellants General Electric Company and Joanne O'Neil was sent by ordinary U.S. mail to Thomas A. Sobeki, 405 Madison Avenue, Suite 910, Toledo, Ohio 43604, attorney for Appellee, this 23 th day of February, 2008.



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