NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1646

DEBRA JONES & SUSAN MARINO

VERSUS

STATE OF LOUISIANA, DIVISION OF ADMINISTRATION,
WHITMAN J. KLING, JR., & OFFICE FACILITIES CORPORATION

Judgment Rendered: **May 8, 2009**

* * * * * * *

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT,
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA,
DOCKET NUMBER 509,108, DIVISION "I(24)"

THE HONORABLE R. MICHAEL CALDWELL, JUDGE

* * * * * * *

M. Todd Alley
W. Michael Stemmans
Mark D. Plaisance
Baton Rouge, LA

Attorneys for the Plaintiffs
Appellants-Debra Jones
& Susan Marino

John P. Murrill
Baton Rouge, LA

Attorney for the Defendants
Appellees-State of Louisiana,
Whitman J. Kling, Jr., & Office
Facilities Corporation

BEFORE: PETTIGREW, McDONALD, HUGHES, JJ.

Pettigrew, J. Concurs

McDONALD, J.

In June 2003, petitioners Debra Jones and Susan Marino filed a petition for damages in the 19th Judicial District Court against the State of Louisiana, Whitman J. Kling, Jr., and the Office of Facilities Corporation. The petition alleged that the defendants were solidarily liable to petitioners for damages. The damages alleged were incurred due to exposure to harmful environmental conditions in their workplace, the newly completed Claiborne Building, a state office building located in Baton Rouge, Louisiana. The petition alleged that defendants' actions or inactions were intentional, and also that they were "extreme and outrageous" and subjected the plaintiffs to severe emotional distress. In September 2003, the petition was amended to include allegations pursuant to La. R.S. 23:967 and La. R.S. 30:2027, which are "whistleblower" statutes.

Plaintiffs also filed a claim for benefits pursuant to workers' compensation law. The workers' compensation cases were tried in May 2006. The workers' compensation judge ruled that Susan Marino had already been paid all benefits to which she was entitled; however, she was awarded penalties and attorney fees because the state took too long to pay the benefits. Debra Jones was awarded approximately $2,000.00 in benefits in addition to penalties and attorney fees.

In February 2008, the defendants filed a motion for summary judgment in the district court on the intentional tort and whistleblower claims, which was heard on April 28, 2008. In accordance with rules of the Nineteenth Judicial District Court, which provide that argument of counsel are not transcribed, we have no record of the hearing, with the exception of the oral reasons for judgment issued by the trial court and evidence admitted. The trial court's oral reasons note that "they now come before this court with claims of intentional tort, which, of course, is an exception to the exclusive remedy provided by workers' compensation, also asserting whistle-blower claims, and now asserting that really, in fact, they weren't

subject to the Workers' Compensation Act so they have regular tort remedies against these defendants." After a hearing on this matter, the trial court granted summary judgment in favor of the defendants, and dismissed all claims asserted by the plaintiffs against all defendants with prejudice. The plaintiffs appeal, asserting three errors by the trial court.

First, contending that the Workers' Compensation Act provides coverage only for an employee's illness that arises out of a work-related accident or occupational disease, and that the plaintiffs' illnesses resulted from exposure to mold, which is not a work-related accident or occupational disease, plaintiffs assert that the trial court erred in finding that Jones' and Marino's claims were not recoverable in tort.

The second error alleged is that the Office of Facilities Corporation has only those defenses available to the state with regard to claims by employees and because the claims of Jones and Marino do not fall under the Workers' Compensation Act, the trial court erred by dismissing the claims against Office of Facilities Corporation.

Lastly, it is asserted that La. R.S. 30:2027 requires that an employee, when making a disclosure to his supervisor, reasonably believe that the employer is in violation of an environmental law, rule, or regulation, but does not require an actual violation of law. The trial court ruling that La. R.S.30:2027 requires a violation of law, therefore, is clearly wrong.

DISCUSSION

The contention that plaintiffs have a tort remedy rather than a workers' compensation remedy is based on a decision rendered by the Fourth Circuit Court of Appeal in December 2006, ***Ruffin v. Poland Enterprises, L.L.C.,*** 06-0244 (La. App. 4 Cir. 12/13/06), 946 So.2d 695, *writ denied, 07-0314 (La. 4/20/07), 954 So.2d 163.* In *Ruffin,* the fourth circuit held that exposure to mold and other

contaminants is not an accident or an occupational disease, and that these are the only two claims for which the Workers' Compensation Act provides coverage.

The defendants maintain that the plaintiffs cannot rely on *Ruffin* to create a remedy in tort in this case for three reasons: (1) it is an impermissible collateral attack on Judge Laramore's 2006 judgment; (2) they are estopped from making the argument because they elected to adjudicate their claim in the workers' compensation court, which is inconsistent with a claim of negligence in district court; and (3) *Ruffin* has no precedential authority in the first circuit and was decided after the judgment had been rendered in the plaintiffs' favor in the workers' compensation trials.

The plaintiffs dismiss these contentions, maintaining that *Ruffin* is dispositive of the issue before the court, and they cannot now inject a defense of collateral attack, election of remedies, or without specifically saying, res judicata, because none of these defenses were alleged by the defendants in the trial court.

We do not agree. After trial on their claims, the workers' compensation judge found that the injuries complained of were compensable under the Workers' Compensation Act, and judgment so ordering was rendered. This judgment was final before the *Ruffin* decision was rendered. The trial court was aware of the fourth circuit decision, and correctly noted that it did not carry the weight of law or binding authority. The trial court further noted that the argument that the claim is outside of workers' compensation was one that he was very familiar with, and had heard both sides when the decision was made to take heart attacks out of workers' compensation law. In its opinion, it is an unsettled issue, and it thought "clearly, this is something that would fall under the Workers' Compensation Act, that workers compensation court felt it fell under the Workers' Compensation Act, and awarded benefits to the plaintiffs accordingly." There is no doubt that the claims

of the *Ruffin* plaintiffs[1] and the plaintiffs before us here were workplace injuries. Arguably, they do not meet the statutory definition of "personal injury by accident" or of an occupational disease as defined in La. R.S. 23:1031 and 23:1031.1. However, the judgment of the workers' compensation court is not before us.[2]

Further, the judgment is not "void on its face ab initio." The supreme court has instructed that "No principle of law has received greater and more frequent sanction, or is more deeply imbedded in our jurisprudence, than that which forbids a collateral attack on a judgment or order of a competent tribunal, not void on its face ab ignitio." *Allen v. Commercial National Bank in Shreveport,* 243 La. 840, 848, 147 So.2d 865, 868 (La. 1962). A collateral attack is defined as an attempt to impeach a decree in a proceeding not instituted for the express purpose of annulling it. *Lowman v. Merrick,* 06-0921 (La. App. 1 Cir. 3/23/07), 960 So.2d 84, 90. We do not address the merits of the substantive issue of whether injury from exposure to mold or other contaminants in the workplace is compensable under workers' compensation law because judgment adjudicating that issue has already been rendered, and that judgment is not before us.

The defendants filed a motion for summary judgment on the plaintiffs' claims of intentional injury and intentional infliction of emotional distress, as well as of whistleblower retaliation/reprisal under La. R.S. 23:967 and 30:2027. It was submitted that the plaintiffs cannot prove those claims, and the defendants were entitled to summary judgment. The judgment appealed dismissed all claims with prejudice. On the issue of intentional infliction of emotional distress, the trial court found as follows:

---

[1] Significantly, the *Ruffin* plaintiffs did not bring an action pursuant to Workers' Compensation law, but rather filed their claim in district court, arguing that Workers' Compensation law was not applicable.

[2] Plaintiffs argue that the defendants Whitman J. Kling, Jr. and the Office of Facilities Corporation are additional defendants not named in the May 2006 workers' compensation judgment, however, we note that La. R.S. 39:1798.5 provides: "In any claim or lawsuit against the corporation ... for damages arising out of personal injury or death of an official or employee of the state ... the exclusive, compulsory and obligatory relief shall be limited to the remedies and relief afforded under Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, including but not limited to R.S. 23:1034."

> [T]he general rule on summary judgments is that intent is not something that is subject to a summary judgment because it depends greatly on the credibility given to the witnesses. However, the question of an intentional tort exception to the Workers Compensation Act is sort of an exception to that rule because the burden is so high on the plaintiffs. And as indicated, and as I indicated in response to the previous summary judgment, when the defendants raise an issue upon which the plaintiff will have the burden of proof at trial, the burden is on the plaintiff to come forward with positive evidence showing they can carry that burden at trial. I have reviewed the tremendous stack of documents that were submitted in opposition to this motion for summary judgment, and I don't see anything that establishes anything close to intent on the part of the State. The intent that is required is that the State knew that it was substantially certain to happen or desired the adverse effect. There was, of course, no evidence that they desired the adverse effect, and no evidence that they were absolutely certain this was going to happen. People complained of problems with the new building; the State took steps to try to alleviate those problems. Apparently they were eventually alleviated, though there has been no evidence about that. But it was an on-going investigation. The State was doing what it could to try to alleviate the problems as pointed out. The Plaintiffs were entitled to take, and did take extensive sick leave and annual leave to avoid exposure to these conditions. They were paid workers compensation benefits to compensate them for time they took away or time that they missed because of this. Their medical expenses were paid for through workers compensation. There is absolutely nothing to show that the state intended these injuries.

We find no error in this determination by the trial court.

After careful *de novo* review of the record, we find no merit in the claims of the plaintiffs for relief pursuant to La. R. S. 23:967 or 30:2027 because we fail to find evidence that any reprisals were taken against them. The trial court found that the claims had no merit and we agree.

We have reviewed the entire record in this matter *de novo* as mandated for appellate review of a trial court grant of summary judgment. Having found no reversible error, the judgment is affirmed. Costs of this appeal are assessed to plaintiffs, Debra Jones and Susan Marino.

AFFIRMED.