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SUPREME COURT OF FLORIDA

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GLOBE NEWSPAPER COMPANY,

Appellant/Petitioner,

CASE NO. 84,676

vs.

District Court of Appeal
1st District No. 94-1108

MATTHEW J. KING,

Appellee/Respondent.

**ON APPEAL FROM THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

✓
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STATEMENT OF THE CASE AND FACTS

As the record in this case is limited to the documents filed with the First District Court of Appeal, the pertinent provisions of that record will be referred to as follows: (1) Petition for Writ of Certiorari ("Pet."); (2) Appendix to the Petition for Writ of Certiorari ("Pet./App."); (3) Response to Petition for Writ of Certiorari and Supplemental Appendix ("Res." or "Res./App."); and (4) Petitioner's Reply to Plaintiff's Response to Petition for Writ of Certiorari and Supplemental Appendix ("Rep." or "Rep./App.").

In this appeal, the Defendant/Petitioner, Globe Newspaper Company ("Globe"), invoked the jurisdiction of this Court pursuant to Rules 9.030(a)(2)(A)(vi) and 9.120(b) of the Florida Rules of Appellate Procedure to review the decision of the First District Court of Appeal in this case. Globe timely filed a Petition for Writ of Certiorari to the First District Court of Appeal. (Pet. and Pet./App. A). The Petition sought review of the trial court's order permitting the plaintiff, Matthew J. King, to amend his Complaint to state a claim for punitive damages and holding that the plaintiff proffered sufficient record evidence to establish a claim for punitive damages against Globe under Florida law. (Pet./App. A).

The trial court's order departed from the essential requirements of law and will cause Globe irreparable harm if certiorari review is not granted. See Pet. and Rep. The Plaintiff did not produce sufficient record evidence to provide a basis for a punitive damages claim against Globe as a matter of Florida law.

Id. Nevertheless, the First District Court denied certiorari. The court did, however, certify its decision as being in direct conflict with the decisions of the Third District Court of Appeal in Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994), and the decisions of the Fourth District Court of Appeal in Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991), and Kraft General Foods, Inc. v. Rosenbloom, 635 So. 2d 106 (Fla. 4th DCA), rev. den., Table No. 83,809 (1994), on the same question of law. See Opinion rendered October 11, 1994.

SUMMARY OF THE ARGUMENT

ORDERS GRANTING LEAVE TO AMEND TO STATE A CLAIM FOR PUNITIVE DAMAGES OR DENYING MOTIONS TO STRIKE OR TO DISMISS SUCH A CLAIM SHOULD BE REVIEWED BY CERTIORARI BECAUSE, WHEN ISSUED IN ERROR, THEY DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW AND VIOLATE THE SUBSTANTIVE RIGHTS CREATED BY §768.72, THEREBY CAUSING DEFENDANTS IRREPARABLE HARM.

Certiorari should be granted to review orders granting leave to amend a complaint to state a claim for punitive damages or denying motions to strike or to dismiss such a claim. If a plaintiff has not proffered sufficient evidence to support a claim for punitive damages, but the trial court nevertheless permits the claim to proceed, the trial court's action necessarily departs from the essential requirements of law. In addition, the defendant will suffer irreparable harm, if immediate review of the trial court's action is not granted.

Section 768.72 of the Florida Statutes (1991) provides a substantive legal right not to be required to defend a punitive damage claim or to provide financial worth discovery until an appropriate finding of a sufficient basis for the claim has been made. If a trial proceeds in violation of that right, plenary appeal cannot restore it. As a result, certiorari review is the only appropriate remedy. Therefore, this Court should hold that orders relating to the propriety of claims for punitive damages are reviewable by certiorari.

ARGUMENT

ORDERS GRANTING LEAVE TO AMEND TO STATE A CLAIM FOR PUNITIVE DAMAGES OR DENYING MOTIONS TO STRIKE OR TO DISMISS SUCH A CLAIM SHOULD BE REVIEWED BY CERTIORARI BECAUSE, WHEN ISSUED IN ERROR, THEY DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW AND VIOLATE THE SUBSTANTIVE RIGHTS CREATED BY §768.72, THEREBY CAUSING DEFENDANTS IRREPARABLE HARM.

Certiorari is the proper vehicle through which to review orders granting leave to amend a complaint to state a claim for punitive damages or denying motions to strike or to dismiss such a claim. If those orders are entered based upon an erroneous finding that the plaintiff proffered sufficient evidence to support a claim for punitive damages where no such basis exists under Florida law, the orders necessarily depart from the essential requirements of law. In addition, §768.72 of the Florida Statutes (1991) provides a substantive legal right not to be required to defend a punitive damages claim or to provide financial worth discovery until an appropriate finding of a sufficient basis for the claim has been made.

If the trial court's finding on the sufficiency of the evidence is erroneous and the defendant is nevertheless forced to defend the claim and to provide financial worth discovery, plenary appeal cannot restore the defendant's statutory right to have been free from those obligations. As a result, defendants will suffer irreparable harm if erroneous findings as to the legal basis for the claim are permitted to remain without immediate review. Therefore, certiorari is the only remedy available in this situation. Accordingly, this Court should rule that the District Courts of Appeal in the State of Florida have jurisdiction to, and

should, issue common law writs of certiorari to review orders permitting claims for punitive damages pursuant to §768.72 of the Florida Statutes (1991).

The Third and Fourth District Courts of Appeal have held that orders permitting claims for punitive damages or premature orders permitting financial worth discovery are properly reviewed upon a Petition for Writ of Certiorari. Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994); Key West Convalescent Center, Inc. v. Doherty, 619 So. 2d 367 (Fla. 3d DCA 1993); Torcise v. Homestead Properties, 622 So. 2d 637 (Fla. 3d DCA 1993); Wolper Ross Ingham & Co., Inc. v. Liedman, 544 So. 2d 307 (Fla. 3d DCA 1989); Will v. Systems Engineering Consultants, Inc., 554 So. 2d 591 (Fla. 3d DCA 1989); Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA), rev. den. Table 38,308 (1994); and Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991). The First and the Fifth District Courts of Appeal, however, have held to the contrary. See Harley Hotels, Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993); and Chrysler Corp. v. Pumphrey, 622 So. 2d 1164 (Fla. 1st DCA 1993). In this case, based upon the authority of Pumphrey, supra, the First District Court of Appeal denied certiorari jurisdiction, but certified the conflict between this case, Henn, supra, Kraft General Foods, supra, and Rockhead, supra. (Appendix to Appellant's Initial Brief ("App.") 1). This conflict should be resolved in favor of the cases from the Third and Fourth District Courts of Appeal as they have given appropriate deference to the substantive right created by the Florida Legislature when it enacted §768.72.

In 1986, the Florida Legislature enacted §768.72 of the Florida Statutes, which provides:

[i]n any civil action, no claims for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages . . . No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

FLA. STAT. §768.72 (1991). The legislature's intent in creating this statutory section was to eliminate the harassment and expense of frivolous claims for punitive damages, which, prior to the statute, could be pled without any showing whatsoever. In March of 1986, the Florida Senate Committee on Commerce issued its "Interim Report - Tort Reform" in which it advocated the adoption of the Model Punitive Damages Statute.

The Model Punitive Damages Statute recommended that no evidence of a defendant's wealth or financial condition should be admissible during the liability phase of the trial. Florida Senate Committee on Commerce, "Interim Report - Tort Reform," dated March, 1986, pp. 33-50, 86-90, 174-188. (App. 2). It further advocated that no discovery of a defendant's financial condition should occur unless liability for punitive damages had been found by the jury. Id. The rationale for this position was to protect defendants from harassment through discovery of their net worth in cases where plaintiffs had only alleged, but had not established, a cause of action for punitive damages. Id., (quoting Rupert v. Sellers, 48 A.D. 2d 265, 368 N.Y.S. 2d 904 (1975)). A further justification was that barring financial worth discovery in cases where the plaintiff could not prove an entitlement to punitive damages would

conserve resources. Id. While the provision actually adopted by the legislature is more narrow than that contained in the Model Statute, the rationale for requiring the evidentiary basis for punitive damage claims before allowing them to proceed is the same.

That rationale is exemplified by Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991). In Henn, the Fourth District Court of Appeal, en banc, granted certiorari to review an order denying a protective order where no affirmative finding was made that there was a reasonable basis for a punitive damage claim. The en banc court concluded that a Petition for Writ of Certiorari is the appropriate method to seek review of an order prematurely allowing discovery of a defendant's financial worth. Id. at 1335-36. In so doing, the court noted:

[i]f the party had to obey an order compelling a response to the discovery requests and could raise the subject only upon an appeal after final judgment, the right would be meaningless. The very circumstance which the legislature sought to eradicate in §768.72 would be allowed to occur. This is precisely the kind of situation for which certiorari is designed.

Id. at 1336. In reaching its decision that certiorari was the proper vehicle through which to review matters pursuant to §768.72, the court was cognizant of this Court's decision in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), which held that certiorari was not appropriate to review discovery orders in cases involving punitive damages. Id. at 1334-35.

The Fourth District Court of Appeal noted that §768.72 was not applicable in the Martin-Johnson case. As a result, the court believed that the Martin-Johnson decision may well have been different had §768.72 applied. Id. The court explained:

. . . we read section 768.72 as creating a positive legal right in a party not to be subjected to financial worth discovery until the trial court has first made an affirmative finding that there is a reasonable evidentiary basis for the punitive damages claim to go to the jury. That finding necessarily includes a legal determination that the kind of claim in suit is one which allows for punitive damages under our law. Thus, to that extent, the legal sufficiency of the punitive damage pleading is also in issue in the section 768.72 setting. Because the supreme court itself has held that section 768.72 creates substantive legal rights and that its procedures are intimately tied to those substantive rights, see Smith v. Department of Insurance, 507 So. 2d 1080, 1092, n. 10 (Fla. 1987), we find it difficult to understand how Martin-Johnson can any longer control this issue.

Id. at 1335-36. Thus, the court concluded that in light of the substantive rights created by §768.72, a party must be allowed to seek review by certiorari of an order allowing discovery of financial worth without a sufficient evidentiary basis. Id. at 1336, (citing to Wolper Ross Ingham & Co., Inc. v. Liedman, 544 So. 2d 307 (Fla. 3d DCA 1989); and Will v. Systems Engineering Consultants, Inc., 554 So. 2d 591 (Fla. 3d DCA 1989)).

Similarly, in Will, a defendant moved to strike the plaintiff's complaint which included a claim for punitive damages. Will, 554 So. 2d at 591. The trial court denied the motion and directed that the issue be presented as a Motion for Partial Summary Judgment on the issue of punitive damages. Id. After hearing argument, the court denied the Motion for Partial Summary Judgment and directed the defendant to provide discovery on his financial worth. Id. Upon defendant's petition, the Third District Court of Appeal accepted certiorari jurisdiction to review the trial court's decision regarding the plaintiff's ability to go forward with the punitive damages claim. Id. at 592.

On review, the court noted that both the claim for punitive damages and the discovery order were governed by §768.72. Id. at 591. Citing to Wolper Ross, 544 So. 2d 307, the court stated that the burden is on the plaintiff to show some right to plead a claim for punitive damages. As a result, a summary judgment analysis, which would place the burden upon the defendant to show no genuine issue of material fact, is inappropriate. Id. at 592. The court stated that these issues are better reviewed on motions to dismiss or to strike. Id. Accordingly, the court quashed the trial court's order and remanded with instructions to reconsider the issue by way of a motion to dismiss or a motion to strike. Id.

In footnote one, the court indicated that the parties also wanted the court to determine the sufficiency of the evidence to support the punitive damage claim. The court declined the parties' invitation. In so doing, the court cited the Wolper Ross standard and stated that the trial court must first make this finding before it was subject to review by the district court. Id. at 592, n. 1. The implication here was that the trial court's decision on the sufficiency of the evidence would also be reviewable upon a timely Petition for Writ of Certiorari, if challenged. In Key West Convalescent Center, Inc. v. Doherty, 619 So. 2d 367 (Fla. 3d DCA 1993), the court did exactly that.

In Key West, the Third District Court of Appeal granted certiorari to review a trial court's finding that the plaintiff's evidence was sufficient to permit a punitive damages claim. Id. In that case, which is procedurally analogous to this case, the defendant filed a Petition for Writ of Certiorari, which sought to

quash the trial court's order granting the plaintiff leave to amend its complaint to add a claim for punitive damages under §400.023 of the Florida Statutes. Section 400.023 relates to the standard of nursing home care required under Florida law. Id. at 368.

The trial court found that §400.023 did not require pleading or proof of malicious conduct to obtain punitive damages. The trial court further held that, even if such a showing were required under the statute, the affidavit filed in support of the motion was sufficient evidence of malicious conduct. Id. Accordingly, the trial court permitted the plaintiff to amend the complaint to include a claim for punitive damages.

On appeal, the petitioners argued that the trial court's ruling infringed upon their substantive right to be free from financial worth discovery until the trial court makes an appropriate finding of a sufficient evidentiary basis for punitive damages under §768.72. Id. at 368-69. The Third District Court of Appeal agreed and found that the affidavit was insufficient to create an evidentiary basis for punitive damages under Florida law. Id. at 369. Citing to Henn, supra, and Wolper Ross, supra, the court stated that "certiorari is an appropriate remedy where a trial court permits financial worth discovery without first finding that a reasonable basis exists for recovery of punitive damages." Id., n. 1. Because the court specifically found that the affidavit proffered as evidence in support of the punitive damage claim was insufficient, the court granted certiorari, quashed the trial court's order allowing the punitive damages claim, and remanded the

case for further proceedings consistent with its opinion. Id. at 369.

The Key West case is procedurally analogous to the instant case. In this case, Globe filed a timely Petition for Writ of Certiorari to review the trial court's finding that Plaintiff had proffered sufficient evidence to establish a claim for punitive damages under Florida law. As in Key West, the Globe was seeking a determination by the First District Court of Appeal as to the sufficiency of the Plaintiff's evidence pursuant to Section 768.72. Because of the First District's ruling in its earlier case of Chrysler Corp. vs. Pumphrey, 622 So. 2d 1164 (Fla. 1st DCA 1993), however, the court denied certiorari.

In so doing, the court apparently did not recognize the distinction between the Pumphrey case and Key West. This distinction is discussed in more detail, infra, at pgs. 17-21. Nevertheless, just as the Third District Court of Appeals granted certiorari to review the sufficiency of the evidence proffered by the plaintiff in the Key West case, this Court should rule that the sufficiency of the evidence which forms the basis for punitive damages claims is reviewable by certiorari in all district courts of appeal in Florida. Any decision to the contrary would result in irreparable harm to parties forced to defend legally meritless claims. Certiorari is the only available remedy as it is the only way to prevent the violation of defendants' substantive right not to be required to defend a claim for punitive damages and to provide financial worth discovery before the plaintiffs have

demonstrated a sufficient basis for punitive damage claims against defendants under Florida law.

More recently, in Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994), the Third District Court of Appeal made it clear that certiorari is the appropriate vehicle through which to review the trial court's finding on the issue of the sufficiency of the evidence in support of the punitive damages claim. In Rockhead, the plaintiff filed a Motion to Amend Complaint to include a claim for punitive damages. See Rockhead Petition for Writ of Certiorari, Response to Petition for Writ of Certiorari, and Reply to Response to Petition for Writ of Certiorari, App. 3, 4, and 5, respectively. Rather than opposing that Motion, the defendant referred the trial court to the Third District's preference for reviewing the matter on motions to dismiss or to strike and preserved all objections to the Amended Complaint. (App. 2, pg. 2). Once the Amended Complaint was filed, the defendant moved to dismiss and to strike the punitive damages claim on the grounds that there was an insufficient evidentiary basis for the punitive damage claim. (App. 2, pg. 2). The trial court denied the Motion to Strike.

On the defendant's Petition for Writ of Certiorari, the Third District Court of Appeal again held that "an order denying a motion to strike a punitive damages claim as unjustified under section 768.72, Florida Statutes (1991) is reviewable by certiorari." (Cites omitted). Rockhead, 639 So. 2d at 661. In granting certiorari, the court stated:

[o]n the merits, it is apparent that the circumstances of this case--a motor vehicle accident in which there is evidence of little, if anything, more than simply negligent driving by either or both of the parties involved--fall far short of those required to support an action for punitive damages. See White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984).

Id. As a result of its determination that the evidence was not sufficient to support a claim for punitive damages under Florida law, the court granted the Petition for Writ of Certiorari and quashed the trial court's order denying the Motion to Strike. Id. See also Torcise v. Homestead Properties, Inc., 622 So. 2d 637 (Fla. 3d DCA 1993) (where the trial court's order allowing discovery of financial worth was quashed because there was no reasonable showing by evidence which would provide a reasonable basis for recovery of punitive damages), and Rep./App. B, C, and D.

The Rockhead case is factually and procedurally analogous to this case. The defendant sought review of the trial court's finding that the plaintiff proffered sufficient record evidence to form the basis for a punitive damages claim. Upon review, the district court found the plaintiff's evidence to be insufficient. Rockhead involved essentially the same substantive issues as this case, i.e., the extent of an employer's vicarious liability for punitive damages. App. 3, 4, and 5. Like the record in Rockhead, the record before the First District Court of Appeal in this case demonstrated that there was no merit to Plaintiff's punitive damage claim against Globe under Florida law. See Pet., pgs. 8-29; and Rep., pgs. 10-18. Nevertheless, the court denied certiorari and refused to review the sufficiency of the Plaintiff's evidence in support of its punitive damages claim.

Appellate courts review the sufficiency of evidence all the time. As a result, it is not inappropriate to ask the appellate courts to review a trial court's finding of a sufficient basis for punitive damages, particularly where an erroneous finding results in irreparable injury to the party defending the punitive damages claim. The irreparable harm that will be suffered is not the additional cost and expense of a second trial after a favorable plenary appeal; rather, it is the harm that results from having to defend a claim for punitive damages and produce financial worth discovery in violation of the substantive right created by §768.72. That right, to be free from those obligations, cannot be remedied upon plenary appeal. Once a defendant has been forced to subject itself to the harassment of the discovery and the embarrassment of the public defense of such a claim, plenary appeal after final judgment cannot remedy those harms. Thus, just as certiorari review was appropriate in the Rockhead case, certiorari is appropriate in the instant case and all other similar cases which might come before the courts of this State.

Additionally, in Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA), rev. den. Table 38,308 (1994), the Fourth District Court of Appeal also ruled that matters relating to punitive damages claims under §768.72 were reviewable by certiorari. In that case, the court granted certiorari to quash an order denying a motion to strike punitive damages where no leave to state the claim for punitive damages had previously been given by the trial court. Id. at 107. The appellate court reviewed the case notwithstanding the trial court's scheduling of a hearing to

review the sufficiency of the evidence in support of the claim and barring all financial worth discovery pending the outcome of that hearing. Id. at 108.

Defendant, Kraft, argued that §768.72 was designed to prevent punitive damages claims from being infused into litigation until an appropriate evidentiary showing is made. Id. Kraft further argued that the legislature hoped to remove the unauthorized use of punitive damages claims for an in terrorem effect. Id. at 108. Kraft claimed that punitive damages claims give plaintiffs undue settlement leverage and force insurance companies to commit resources to claims in spite of their lack of legal merit. Id. As a result, Kraft argued, the legislature enacted §768.72, which constitutes a positive legal right not to be subjected to a punitive damage claim until a court first determines that there is sufficient evidence to support the claim. Id. Kraft further argued that the right not to be exposed to such a claim is irreparably undone if the trial court refuses to strike a claim that was previously unauthorized by the court. Id. at 108.

The respondent, Rosenblum, argued to the contrary and stated that there is no harm for which certiorari jurisdiction is justified. Rosenblum contended that the real purpose of §768.72 is to prevent financial worth discovery until the appropriate finding has been made. Id. at 108. Because the trial court barred any financial worth discovery until after the hearing on the sufficiency of the evidence, Rosenblum contended that there was no harm to Kraft resulting from the court's ruling from which certiorari could lie. Id. at 108-09.

The Fourth District Court of Appeal disagreed and found that irreparable harm did, in fact, exist. Id. at 110.

The court stated:

[t]he last inquiry is whether common law certiorari lies to redress an unauthorized pleading for punitive damages. The answer to that question is found in the nature of the right that the legislature has created. We have no doubt that, if the right were merely not to be liable for exemplary damages until a jury had determined the issue, certiorari would not be available to test a trial court's pretrial decision to allow a claim to be pleaded. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987).

On the other hand, a right not to be exposed to a mere claim for such extraordinary damages, without a judge first determining that a factual basis exists to allow the claim to be pleaded, would not be much of a right if one had to wait until the end of the case to take a final appeal to review the trial court's failure to strike an unauthorized pleading for such damages. Like some kinds of discovery, this cat would effectively be out of the bag before the bag was supposed to be opened. Martin-Johnson, 509 So. 2d at 1100. Claimant has offered no explanation as to how we could possibly remedy this unauthorized pleading violation on final appeal after a trial. Thus, our refusal to grant extraordinary review of this class of orders would render this particular statutory right, in effect, mythical.

Id. at 110. As a result of this reasoning, the court granted certiorari, quashed the trial court's order, and remanded with instructions. Id.

The reasoning in the Kraft General Foods case is applicable to this case, even though the trial court below found the proffered evidence to be sufficient where no such finding had yet been made in Kraft. Kraft General Foods illustrates that the substantive right created by the statute and acknowledged by this Court is the right not to be exposed to a meritless claim for punitive damages, not merely to avoid financial worth discovery. Because \$768.72 is a substantive right to be free from a claim for punitive damages

until a sufficient evidentiary basis has been shown, there can be no cure of a violation of that right after trial, if the evidence was not, in fact, sufficient. As this Court has stated previously, the procedural aspects of §768.72 are "intimately related to the definition of those substantive rights." See Smith, 507 So. 2d at 1092, n. 10. Therefore, a "refusal to grant extraordinary review of this class of orders would render this particular statutory right (to be free from punitive damages claims brought without a sufficient evidentiary basis), in effect, mythical." Plenary appeal would not protect the defendant from the violation of the defendant's right to avoid having to defend a punitive damages claim for which there was no legal basis as a matter of Florida law. After the issue has been fully tried, there can be no restoration of the right not to be faced with that legally baseless claim. As a result, review by certiorari is the only appropriate remedy.

Not all of the courts have agreed on this issue, however. Decisions from the First and Fifth District Courts directly conflict with Kraft General Foods and the other cases discussed previously which permit certiorari review of orders relating to punitive damages claims. See Chrysler Corp. v. Pumphrey, 622 So. 2d 1164 (Fla. 1st DCA 1993); and Harley Hotels Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993). Those conflicting cases either are distinguishable from this case or they do not give appropriate deference to the right created by the statute. As a result, this Court should resolve the conflict in favor of granting certiorari review of orders granting leave to amend to state a claim for

punitive damages or denying motions to dismiss or to strike punitive damages claims.

For example, the Pumphrey case is distinguishable from this case. Pumphrey, 622 So. 2d 1164. In that case, the court denied a defendant's Petition for Writ of Certiorari requesting review of the trial court's order denying its Motion for Protective Order. Pumphrey, 622, So. 2d at 1164. The status of the Pumphrey case when defendant filed the Petition for Writ of Certiorari is important. There, pursuant to §768.72, the plaintiff had filed a motion to reinstate her claim for punitive damages. Id. After reviewing the evidence in the record as of the date of the motion, the trial court held that there was sufficient evidence in the record to support the claim. Id. at 1165.

Defendant, Chrysler, did not seek review of this order; instead, Chrysler allowed that order to stand.¹ Id. at 1164. Subsequently, however, Chrysler filed a Motion for Protective Order attempting to avoid its fully matured obligation to produce

¹ Please note that it is impossible to determine from the Pumphrey decision whether the 30 days for filing a Petition for Writ of Certiorari on the order reinstating the punitive damages claim had run at the time of the filing of the Motion for Protective Order. That fact notwithstanding, the case is clear that the defendant did not seek review of the order permitting the plaintiff to amend her complaint to state a claim for punitive damages. Thus, the defendant appears to have failed to have invoked properly the certiorari jurisdiction of the First District Court of Appeals with respect to the order on the sufficiency of the record evidence related to the punitive damages claim. Had defendant sought certiorari review of this order instead of the denial of its Motion for Protective Order, perhaps the First District would have followed the Key West decision, which was handed down only two months before, and have granted certiorari.

financial worth data. Id. at 1164.² The trial court denied the Motion for Protective Order. The defendant then tried to obtain review by certiorari of this order denying the protective order. Id.

The First District Court of Appeal refused to grant certiorari. Id. at 1165. In so doing, the court relied upon Martin-Johnson, and held that certiorari was inappropriate for the review of orders relating to discovery on the issue of punitive

² Compare Pumphrey with Wolper Ross, 544 So. 2d at 307-08. In Wolper Ross, the Third District Court of Appeal appears to disagree with the notion that the defendant had waived the right to dispute the sufficiency of the evidence at this point in the case. See Wolper-Ross, 544 So. 2d at 308, n. 1. In Wolper Ross, the defendants sought certiorari to review an order compelling the production of financial statements and other documents related to their net worth. 544 So. 2d 307, 308. The discovery was related to the plaintiff's punitive damage claim. Id. at 308.

The Third District Court of Appeal held that the trial court erred by requiring disclosure of financial worth before it made a finding that a basis existed for the recovery of punitive damages. Id. Accordingly, the court granted the defendants' petition for certiorari and remanded to the trial court for further proceedings on the punitive damage issue. In so doing, however, the court considered the plaintiff's argument that the defendants had waived their right to object to the discovery order, ostensibly because they did not object to the original pleading of the claim for punitive damages. Id., n. 1. The court stated:

[r]espondents' [plaintiffs'] argument that the petitioners [defendants] 'waived' the protection of the statute is not well taken. The supreme court has determined that section 768.72, Florida Statutes (1987), creates substantive rights and that the procedural provisions of the section are intertwined with the definition of those substantive rights. Smith v. Department of Insurance, 507 So. 2d 1080, 1092, n. 10 (Fla. 1987).

Id., n. 1. Thus, even if a defendant fails to move to dismiss or to strike a premature claim for punitive damages, the Third District Court of Appeal would likely grant certiorari and remand the case with instructions to the trial court to make the appropriate finding related to the sufficiency of the evidence supporting a claim for punitive damages.

damages. Id. The court further noted that the trial court previously ruled that a review of the applicable evidence supported the plaintiff's claim for punitive damages. This decision was the basis for the First District Court's decision to deny certiorari in this case and to certify the conflict with the Third and Fourth Districts. (App. 1).

In the case at bar, however, Globe did not seek review of a discovery order after ostensibly accepting the court's ruling on the sufficiency of the evidence; rather, it sought review of the trial court's determination pursuant to §768.72 that the evidence in the record as of the time of the hearing established a reasonable basis for Plaintiff's recovery of punitive damages. This holding, in light of the facts of the case, is a clear departure from the established principles of law relating to an employer's vicarious liability for punitive damages. See Pet., pgs. 8-29; and Rep., pgs. 10-18. In addition, the Globe's request for review was timely in that it was filed within 30 days of rendition of the Order on Plaintiff's Motion for Leave to Amend Complaint and Defendant Concannon's Motion to Continue. See Pet., pg. 30; Pet./App. A, pg. 1; and Fla. R. App. P., Rule 9.100(c)(1) (1994). Thus, the procedural posture of this case is distinguishable from that in Pumphrey when that defendant sought review.

Moreover, if the trial court's holding is not reviewed, Globe will suffer irreparable harm in that it will be forced to defend an unsupported claim for punitive damages in violation of the substantive right created by §768.72 of the Florida Statutes

(1991). This right, to be free from defending the punitive damages claim, is so intertwined with the procedural requirement that the trial court properly find a sufficient basis for a punitive damages claim, that it cannot be remedied upon plenary appeal. After a trial including a baseless punitive damages claim is concluded, the right to avoid having to defend that claim will have been lost forever. As a result, certiorari review is the only possible way to avoid the irreparable harm caused by the loss of that right and it should be granted to review this class of orders.

Only one district court has ruled to the contrary where the procedural posture of the case was similar to that in the instant case. See Harley Hotels, Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993). In Harley Hotels, the defendant sought certiorari to review an order granting leave to amend to add a claim for punitive damages. Id. at 1134. The Fifth District Court of Appeal denied certiorari on the basis of the Martin-Johnson decision. Id. The court noted, however, that it understood the defendant's concern regarding the extent of plaintiff's right to obtain financial worth discovery. Id. To alleviate that concern, the court referred the defendant to Rule 1.280(c) of the Florida Rules of Civil Procedure, which relates to protective orders.

This Court should not resolve the conflict in favor of the precedent established by the Fifth District Court of Appeal for three reasons. First, it does not acknowledge that §768.72 was neither effective in nor applicable to the Martin-Johnson decision. Therefore, there is some question as to whether the Martin-Johnson decision remains viable after the enactment of the statute. See

Henn, 589 So. 2d at 1336. Second, the court's reference to the defendant's ability to seek a protective order does not address the concern related to the substantive right created by the statute, i.e., to be free from having to defend a claim for punitive damages where the evidentiary basis for it is insufficient as a matter of law. Third, the court ignores the practical reality that exists in the trial courts. Once the claim for punitive damages has been allowed, the trial courts generally permit broad and liberal discovery into the financial worth of the defendant on the grounds that it is relevant to the amount of punitive damages to which the plaintiff may otherwise be entitled. See e.g., Pumphrey, discussed supra, pgs. 17-20 (where the First District Court of Appeal upheld an order denying a protective order under similar circumstances). As a result, the Harley Hotels case should not be adopted by this Court as the standard to be followed by all district courts.

Instead, this Court should rule that certiorari is the appropriate vehicle through which the district courts of this State are to review decisions relating to the sufficiency of the evidence supporting a claim for punitive damages. The courts should accept jurisdiction of these types of cases whether the Petition is timely filed after the granting of a Motion for Leave to Amend to Add Claim for Punitive Damages or after the denial of a Motion to Dismiss or to Strike a premature punitive damages claim. Although a simple discovery order dealing with the discovery of financial data may not be an appropriate matter for a court of appeal to

review on a petition for certiorari, that is not what is at issue here.³

While being forced to provide discovery relating to a valid punitive damage claim may not cause irreparable harm, the Florida courts have recognized that §768.72 creates a substantive legal right in a party not to be hauled into court to answer for or to provide discovery regarding a claim of punitive damages until affirmative evidence in the record establishes a reasonable basis for plaintiff's recovery of punitive damages. Smith, 507 So. 2d at 1092; Henn, 589 So. 2d at 1336. The purpose of this statute is to protect defendants from unnecessary harassment when no valid basis for the recovery of punitive damages exists. To withhold review of an order which allows a plaintiff who has not satisfied this standard under applicable Florida law to proceed through discovery and trial with the unsupported punitive damage claim intact would require this Court to disregard the substantive legal right created by the legislature. To disregard the substantive right would be to cause irreparable harm.

As stated in Kraft General Foods, the substantive right is to be free from defending a claim for punitive damages where no legal basis for that claim exists. If the defendant is forced to provide financial worth discovery and to defend the punitive damage claim at trial, the violation of that substantive right cannot be

³ On the other hand, because of the substantive right granted by the statute, the sufficiency of the evidence which provides the basis for the punitive damage claim may be reviewable at any time so long as the party seeking review invokes the certiorari jurisdiction of the court in a timely manner. See Wolper Ross, 544 So. 2d at 308, n. 1.

remedied upon plenary appeal. In actuality, the cat is already out of the bag and cannot be returned to it. Requiring the defendant to go through the entire trial without obtaining judicial review of the order permitting the punitive damage claim, renders §768.72 meaningless. See Henn, 589 So. 2d at 1336. It effectively deletes the safeguards which the Florida Legislature, in its far reaching attempt at "tort reform," enacted for the purpose of preventing this very situation (i.e., a defendant, against whom there is no basis for an award of punitive damages, being subjected to the harassment and embarrassment of a punitive damages claim and the public disclosures attendant to it). Id.

In recognition of these concerns, the Third and Fourth District Courts of Appeal have permitted defendants to obtain immediate review by certiorari of orders permitting claims for punitive damages to proceed. Similarly, this Court should hold that certiorari should be granted to review orders allowing plaintiffs to plead a claim for punitive damages where the sufficiency of the evidence proffered by the plaintiff is questioned. Certiorari review is the only way to protect the substantive legal right provided to defendants pursuant to §768.72 of the Florida Statutes (1991) as it interrelates with the procedural requirements of the statute. Accordingly, this Court should resolve the conflict certified by the First District Court of Appeal in favor of the Third and Fourth District Courts of Appeal and remand the case to the First District with instructions to grant certiorari and to review the trial court's order finding


the evidence to be sufficient to support Plaintiff's claim for punitive damages against Globe under Florida law.

CONCLUSION

For the foregoing reasons, Globe respectfully requests this Court to hold that orders granting leave to amend to state a claim for punitive damages or orders denying motions to strike or to dismiss punitive damages claims are reviewable by certiorari and to remand this case to the First District Court of Appeal with instructions for that court to grant certiorari and to review the trial court's order finding that the plaintiff had proffered sufficient evidence to establish a claim for punitive damages against Globe under Florida law.

FOLEY & LARDNER

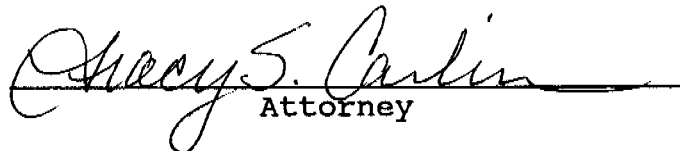
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to E. T. Fernandez III, Esquire, 2252 Gulf Life Tower, Jacksonville, Florida 32207, and Christopher A. White, Esquire, 8375 Dix Ellis Trail, Suite 401, Jacksonville, Florida 32256, by U.S. Mail, this 2nd day of December, 1994.


Attorney