SUPREME COURT OF FLORIDA

GLOBE NEWSPAPER COMPANY,

Appellant/Petitioner,

v.

MATTHEW J. KING,

Appellee/Respondent.

Case No. 84,676
District Court of Appeal
First District No. 94-1108

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

It is accepted that the record in this case is limited to the documents filed with the First District Court of Appeal, and for the sake of consistency, the following pertinent provisions of that record are referred to in the Statement of the Case and Facts contained in Appellant/Petitioner's Initial Brief and will be similarly referred to in this brief:

1. Petition for Writ of Certiorari ("Pet.");
2. Appendix to the Petition for Writ of Certiorari ("Pet./App.") and
3. Response to Petition for Writ of Certiorari and Appendix to Response to Petition for Writ of Certiorari ("Res." and "Res./App.").

The Appendix to Respondent's Brief on the Merits shall be referred to herein as "App."

Appellant/Petitioner, Globe Newspaper Company ("Globe"), has attempted to invoke the jurisdiction of this Court pursuant to Rules 9.030(a)(2)(A)(vi) and 9.120(b) of Florida Rules of Appellate Procedure to review the decision of the First District Court of Appeal in this case. Appellee/Respondent, Matthew J. King ("King"), agrees that Globe timely filed a Petition for Writ of Certiorari to the First District Court of Appeal and that said Petition sought review of the trial court's Order permitting King to amend his Complaint to state a claim of punitive damages and holding that King proffered sufficient record evidence to establish a claim for punitive damages against Globe under Florida law and, specifically, pursuant to Section 768.72, Florida Statutes (1991).

However, King disagrees with Globe's assertion that jurisdictional conflict actually exists between the instant decision rendered by the First District Court of Appeal and those cases with which that honorable court certified conflict. Furthermore, and in the event that this Court determines conflict to exist, King asserts that the trial court's Order did not depart from the

essential requirements of law and would not in any way cause Globe irreparable harm if certiorari review was not granted. King produced sufficient record evidence to provide a basis for a punitive damages claim against Globe pursuant to Section 768.72, and, as a matter of law, orders pursuant to Section 768.72 are not reviewable by certiorari because there is no irreparable harm that cannot be remedied by plenary appeal.

Although the First District Court of Appeal certified conflict as stated in Globe's Statement of the Case and Facts, it is submitted that the district court's per curiam affirmance certification is insufficient to establish conflict. As Justice Boyd stated in his dissent in Stevens v. Jefferson, 436 So.2d 33, 36 (Fla. 1983), "The mere suggestion by the District Court that contrary authority exists without discussing any points of law, should not be deemed sufficient to create express and direct conflict."

As will be discussed below, the cases cited by the Globe are all distinguishable from the facts of the instant case and, therefore, present no conflict with the instant case.

SUMMARY OF THE ARGUMENT

AN ORDER GRANTING LEAVE TO AMEND TO STATE A CLAIM FOR PUNITIVE DAMAGES SHOULD NOT BE REVIEWED BY CERTIORARI BECAUSE THERE IS NO IRREPARABLE HARM TO A DEFENDANT AND A DEFENDANT HAS AN ADEQUATE REMEDY AT LAW BY WAY OF PLENARY APPEAL.

Certiorari should not be granted to review an order granting leave to amend a complaint to state a claim for punitive damages. Section 768.72, Florida Statutes (1991) provides certain rights regarding the presentation and pleading of a claim for punitive damages in civil actions. It remains to be determined whether all rights conferred thereunder are substantive, procedural or remedial in nature. Contrary to Globe's assertion that certiorari review of orders rendered pursuant to Section 768.72 is proper, it is not axiomatic that all rights conferred under this statute are in fact substantive in nature. There is no statutory authority for permitting an appeal of any trial court decision relating to the evidentiary hearing which Section 768.72, Florida Statutes (1991) requires.

If a trial court grants a motion for leave to amend a complaint to state a claim for punitive damages, as did the trial court in the instant case, plenary appeal provides a complete and adequate remedy for a party in Globe's position. The type of material or irreparable harm intended to be reviewed by a writ of common law certiorari does not include the "irreparable harm" Globe asserts in its Initial Brief that it will suffer. Therefore, certiorari review is an inappropriate remedy and, accordingly, this Court should hold that orders relating to the amendment of complaints to include punitive damages are not reviewable by certiorari.

ARGUMENT

AN ORDER GRANTING LEAVE TO AMEND TO STATE A CLAIM FOR PUNITIVE DAMAGES SHOULD NOT BE REVIEWED BY CERTIORARI BECAUSE THERE IS NO IRREPARABLE HARM TO A DEFENDANT AND A DEFENDANT HAS AN ADEQUATE REMEDY AT LAW BY WAY OF PLENARY APPEAL.

Certiorari is not the proper vehicle through which to review an order granting leave to amend a complaint to state a claim for punitive damages.

In Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), this Honorable Court specifically addressed the issue of whether it was appropriate to appeal a non-final order allowing a claim for punitive damages in a complaint. Additionally, the Martin-Johnson court addressed the question of whether it was appropriate to permit a petition for writ of certiorari relating to the specific type of discovery which accompanies an order permitting punitive damages. This Honorable Court unequivocally pronounced that neither circumstance in Martin-Johnson presented a basis for appeal or for certiorari review, as will be discussed later.

The holdings in Martin-Johnson apply to the evidentiary hearing requirements of Section 768.72, Florida Statutes (1991). In its Initial Brief, Globe consistently refers to a party's "statutory right" to be free from providing financial information to a party seeking punitive damages. Section 768.72 offers no such right. This statute, by its own concise language, simply requires a reasonable showing by evidence in the record or proffered by a claimant which would provide a reasonable basis for the recovery of such damages. Once the claimant meets this statutory prerequisite, there are no further rights of review afforded to the defendant party, such as Globe, except on plenary appeal.

In the interest of consistency, King will first address and distinguish the cases relied upon by Globe in the order in which they have been recited in its Initial Brief.

At the outset, Globe cites Commercial Carrier Corp. v. Rockhead, 639 So.2d 660 (Fla. 3d DCA 1994). The court, in its albeit brief opinion in Commercial Carrier, relies on the previous decisions of Key West Convalescent Center, Inc. v. Doherty, 619 So.2d 367 (Fla. 3d DCA 1993) and Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991) (*en banc*). The Henn decision should first be analyzed as it is clear that the subsequent Key West and Commercial Carrier cases are the progeny of Henn.

In resolving the alleged differences between the district courts of appeal regarding the issue of whether an order allowing the inclusion of punitive damages in a complaint is reviewable by certiorari, it is important to note that the Henn decision was an *en banc* opinion with eight judges supporting the findings of Henn and four judges strongly dissenting. In assessing the continuing viability of Martin-Johnson, it is also significant that the Commercial Carrier decision similarly was not unanimous. Globe places tremendous emphasis on the Commercial Carrier decision and, in order to distinguish that case and to show the flawed reasoning therein, the applicability of Henn must be reviewed.

The Henn decision is clearly distinguishable from the decision of the First District Court of Appeal in the instant case for several reasons. First, Henn involved a case that had a successor judge sitting as the pre-trial judge at the time when the order that was the subject of the appeal was entered. This Honorable Court is well aware of the difficulties and dilemmas that often ensue in having a successor judge take over the judicial administration of a pending case. In Henn, in presenting various motions for hearing to the successor judge, plaintiffs/respondents asserted that the sufficiency of the fraud claim therein (i.e. the Section 768.72 hearing) had previously been determined by the predecessor judge. The Henn court stated the following in noting that the predecessor judge had not previously determined the fraud issue:

> ". . . Petitioner moved for reconsideration and supplied the judge with a transcript of the November hearing showing that only the replevin count had been considered. Petitioner expanded on his protective order argument by contending that respondents could not have financial worth discovery until they had first made a showing under Section 768.72 of evidence in the record or by proffer that some reasonable basis exists for the recovery of punitive damages. In a separate motion, he also asked the judge to strike the claim for punitive damages because of the non-compliance with that statute. The court denied both motions on April 4, and on April 23, the Petition for Certiorari was filed."

589 So.2d at 1335. The Henn court went on to state the following:

> "Turning to the critical issue, 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 had first made an affirmative finding that there is a reasonable evidentiary basis for the punitive damages claim to go to the jury . . .
>
> We are not alone in enforcing Section 768.72's substantive rights by requiring a factual inquiry into whether the necessary statutory predicate for punitive damages exists before a party can be forced to disclose personal financial worth discovery . . ." [Emphasis added.]

Id. at 1335, 1336.

As the Henn court pointed out, there was no Section 768.72 hearing at the trial level. In contrast, however, there was such a hearing in the instant case. See Res./App. A. (App. 1). Without conceding that Section 768.72 changes the law as enunciated in Martin-Johnson, supra, the fact of the matter is that there was no evidentiary hearing in Henn. Therefore, contrary to Globe's position, Henn has no application to the facts of the instant case.

The subsequent decision by the Third District Court of Appeal in Key West is similarly inapplicable to the facts of the instant case because in Key West, the court relied upon the holdings in Henn. Key West involved an action pursuant to Section 400.023, Florida Statutes (1991), which allows the recovery of "actual and punitive damages for any deprivation or infringement on the rights of a resident" regarding actions for damages against nursing homes.

The trial court in Key West simply held that Section 768.72 was not applicable and, therefore, no evidentiary hearing was necessary. As the Key West court stated:

> "The trial court interpreted this section (Section 400.022) to mean that a claim for punitive damages is allowed without pleading or proving malicious or wilful disregard for the rights of others. The trial court's interpretation of Section 400.023 conflicts with the requirements of Section 768.72. . . ."

619 So.2d at 369.

Again, in the Key West decision, as in Henn, there was no Section 768.72 hearing at the trial level, while in the instant case, the trial court held the requisite hearing. The Key West court did not review the sufficiency of the trial court's Section 768.72 determination, but merely stated that the procedures followed by the trial court were insufficient to comply with the type of evidentiary hearing mandated by Section 768.72.

It is respectfully submitted that a close reading of Key West shows that the Third District Court of Appeal simply stated that there was an insufficient compliance with Section 768.72 to establish a reasonable basis for recovery of punitive damages. Globe's interpretation of the Key West decision as ruling on the sufficiency of evidence submitted at a Section 768.72 hearing is misplaced. A clearer reading demonstrates that it was the Key West trial court's refusal to utilize Section 768.72 that was the issue before the appellate court. If the Key West trial court failed to hold a proper Section 768.72 hearing, how can Globe suggest that the Third District Court of Appeal in Key West ruled on the sufficiency of the evidence presented at a Section 768.72 hearing?

The Globe has cited other opinions to support its position that certiorari review is proper to review a trial court's decision under Section 768.72, including Kraft General Foods, Inc. v. Rosenblum, 635 So.2d 106 (Fla. 4th DCA 1994); 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) and Will v. Systems Engineering Consultants, Inc., 554 So.2d 591 (Fla. 3d DCA 1989). However, the Kraft decision is distinguishable from the facts of the instant case because there was no Section 768.72 evidentiary hearing held. As to the Torcise decision, it is submitted that the district court's *per curiam* affirmance is insufficient as a matter of law to establish conflict with the instant case. (See dissent of Justice Boyd, Stevens v. Jefferson, supra.) Additionally, the Will decision, likewise is inapplicable to the instant case because the Will trial court failed to properly conduct a Section 768.72 hearing:

> "The parties have, by way of alternative argument, invited us to pass on the sufficiency of the evidence pertaining to the punitive damage claims. After careful consideration of the parties thorough memoranda, we conclude that the issue should be presented to the trial court in the first instance under the standards set forth in Section 768.72 . . ." [Emphasis added.]

554 So.2d at 592, footnote 1.

Wolper is similarly inapplicable to the instant case because the trial court there failed to hold a Section 768.72 hearing. In sum, not only are the holdings of Henn, Kraft General Foods, Will and Wolper, inapplicable to the facts of the instant case because the trial courts in those cases did not conduct the requisite evidentiary hearings, but also because there were no such hearings in these cases, there is no conflict between the holdings of the Third and Fourth District Courts of Appeal in these cases and the First District Court of Appeal in the instant case.

This leads us back to the Commercial Carrier case. Without conceding that the review of the punitive damages claim in Commercial Carrier was proper, it is significant to note that in Commercial Carrier, the punitive damage claim that was under review dealt exclusively with the conduct of an employee, not an employer. In the instant case, the issue of punitive damages against the employee (Co-Defendant, Joseph P. Concannon, sports reporter for Globe) was never

addressed or contested before the First District Court of Appeal. The only issue that was before the trial court in the instant case, was independent negligence on the part of the employer (Globe) that would permit the recovery of punitive damages against the employer, Globe [see, Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981)]. The significance of this difference is that in every case cited by Globe, its reliance has been wrongfully placed on cases in which the punitive damages were sought directly against the party who committed the actual wilful, wanton and reckless conduct. Globe has conceded to the appropriateness of the amendment of the complaint herein for punitive damages against the employee. There is no Florida decisional case law that states that a Section 768.72 hearing as to the vicarious liability of an employer for the punitive damages of its employee is properly reviewable by a writ of certiorari. Without any such precedent, there can be no conflict with the decision of the First District Court of Appeal herein.

In light of the fact that the Commercial Carrier opinion was predicated exclusively on the prior Key West and Henn decisions, it is submitted that because those preceding decisions are inapplicable to the instant case, it necessarily follows that Commercial Carrier is similarly inapplicable to the instant case. In sum, and with all due respect for the certification of the First District Court of Appeal herein, there does not exist conflict between the instant case and those cited by Globe.

Because the above-referenced cases have been cited by Globe in its Initial Brief, it is incumbent upon King to distinguish them from the instant case and to show their inapplicability, yet the issue before this Court is most easily reviewed and best resolved by the Martin-Johnson decision. The decisions of the First District Court of Appeal in the instant case and its prior decision in Chrysler Corporation v. Pumphrey, 620 So.2d 1164 (Fla. 1st DCA 1993), which is

procedurally analogous to the instant case (App. 2), and the opinion of the Fifth District Court of Appeal in Harley Hotels, Inc. v. Doe, 614 So.2d 113 (Fla. 5th DCA 1993) are not in conflict with this Court's decision in Martin-Johnson, supra. However, the decisions of the Fourth District Court of Appeal in Henn, supra and Kraft General Foods, supra and the Third District Court of Appeal's decision in Commercial Carrier, supra are in conflict with and have misinterpreted Martin-Johnson. This Court should disapprove the Commercial Carrier, Key West, Kraft General Foods, Torcise, Will and Wolper decisions because of their conflict with Martin-Johnson, supra.

In relying upon the decisions of the Fourth and Third District Courts of Appeal, Globe has gone to great lengths to persuade this Honorable Court that because the Martin-Johnson case dealt with a cause of action that accrued prior to the effective date of Section 768.72, then this statute, along with all other portions of the Tort Reform and Insurance Act of 1986, was not applicable to the Martin-Johnson decision. In so doing, Globe has raised a question regarding the continuing viability of the Martin-Johnson decision after the enactment of Section 768.72.

It is Globe's implication, if not expression, that Section 768.72 has the practical effect of invalidating the holdings of this Honorable Court as previously set forth in Martin-Johnson and Tennant v. Charlton, 377 So.2d 1169 (Fla. 1979). Indirectly, Globe also attempts to render Fla. R. Civ. P. 1.280(c) a procedural nullity.

In Tennant, this Court approved an order that required the production of financial documents pursuant to punitive damage discovery and it adopted language of the trial court, finding that the Plaintiff seeking punitive damages may make appropriate discovery into a defendant's financial resources:

". . . The district court noted, however, that the trial court could limit such discovery pursuant to Fla. R. Civ. P. 1.280 to protect a party from annoyance, embarrassment, oppression or undue burden or expense."

377 So.2d at 1169. In Tennant, the Supreme Court *in dicta* stated:

". . . The trial court should always be sensitive to the protection of a party from harassment and from an overly burdensome inquiry. Fla. R. Civ. P. 1.280(c) provides that for good cause shown, the trial court may make any order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense that justice requires."

377 So.2d at 1170.

The Tennant decision is also noteworthy because *in dicta*, the court referred to the procedure which has now been codified in Section 768.72. The Tennant court specifically makes references to the trial court making its determination that there be a factual basis for an award of punitive damages in permitting punitive damage discovery and specifically stated the following:

"In determining whether defendants' motion for protective order under Rule 1.280(c) is "for good cause shown," the trial court may consider, among other things, whether or not an actual factual basis exists for an award of punitive damages."

Id.

The Martin-Johnson decision is entirely consistent with the decision in Tennant. Should Section 768.72 affect the previous holdings of this Court in Martin-Johnson? The answer is absolutely not. The Supreme Court in Martin-Johnson states at the outset:

"We agree with the district court below that petitioner has an adequate remedy at law by way of appeal; therefore, we need not pass on the correctness of the trial court order sought to be reviewed."

509 So.2d at 1098.

This Honorable Court in essence has held that regardless of the manner in which a trial judge determines that the pleading of punitive damages is appropriate under the facts of a particular case, this Court and, therefore, the District Courts of Appeal, under the law set forth in Martin-Johnson, should not rule on the correctness of the trial court order sought to be reviewed. This is, as this Court has explained, for the reason that the defendant in all of those cases has an adequate remedy at law by way of appeal. This court in Martin-Johnson stated:

> We emphasize, first of all, that common law certiorari is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders. [Emphasis added]

Id. The Martin-Johnson court went on to state:

> A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances. The order must depart from the essential requirements of law and must cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal.

Id. at 1097.

What has Section 768.72 done since its effective date of July 1, 1986 to change the prerequisites to have a matter reviewed by petition for certiorari? The answer is absolutely nothing. Again, this statute does not specifically provide for appeal, yet Globe seeks to create appeal from whence there is none.

Globe has gone to great lengths to attempt to distinguish the various cases, such as Chrysler Corporation, from the instant case to show the manner in which the issue of punitive damages was brought before the trial court (i.e. motion to dismiss, motion for protective order, motion to strike, etc.) and thereafter reviewed by the appellate court. Essentially, it does not matter what type of pleading these cases have utilized at the pre-trial stage and in their avenues of appeal. Again, the Martin-Johnson court stated that:

> "Regardless of the route taken, we cannot agree that certiorari is a proper vehicle for testing denial of a motion to strike a claim for punitive damages. Were we to permit certiorari review of such orders, either directly, as in the case at bar, or in connection with review of the discovery order, we, in essence, would be creating a new category of non-final orders reviewable on interlocutory appeal. We are unwilling to do so for a number of reasons."

Id.

Prior to the effective date of Section 768.72, the issue of including a claim for punitive damages was a matter of pleading and pleading only. In other words, the issue only revolved around the question of whether there were sufficient ultimate facts pled to permit a party to include a claim for punitive damages in his action. Has the advent of Section 768.72 changed this in any fashion? Yes, to the extent that instead of merely pleading sufficient ultimate facts to establish a cause of action for punitive damages, Section 768.72 requires a plaintiff to present matters of record to permit the trial judge to determine whether there is a reasonable showing by evidence of the record which would provide a reasonable basis for recovery of punitive damages. Section 768.72 requires a greater showing than was necessary, perhaps, prior to July 1, 1986. However, "regardless of the route taken," either prior to July 1, 1986 or subsequent thereto, certiorari was and still remains an improper vehicle for motions addressed to striking a claim (or amending a complaint) for punitive damages.

At the risk of speculation, and without conceding that Section 768.72 was not applicable to Martin-Johnson, what would the Martin-Johnson court have done, assuming arguendo, that Section 768.72 was applicable to that case before this Court? It is respectfully submitted that the Martin-Johnson decision, as it pertains to certiorari review of such trial orders, should stand exactly the same as it stands today, even if Section 768.72 were applicable.

Extensive mention has been made by Globe concerning the *in terrorem* effect that the pleading of punitive damages might have against a defendant. King submits that the oft-referred to "terror" never existed, but even if the *in terrorem* effect ever existed, it has been done away with by the procedural aspects of Section 768.72.

This, in turn, leads us to the recyclable cry of "irreparable and material harm." We seem to constantly incur these great injurious shouts of pain, when at most, if anything, there might only be a minor scratch. Fla. R. App. P. 9.100(f) requires that for a petitioner to pursue a writ of certiorari, it must show a "departure from the essential requirements of the law that will cause material injury for which there is no adequate remedy by appeal . . ." [Emphasis added.] No such showing has been made in this case, nor can any such showing be made. At the time of the accident in the instant case, Globe was a publicly held corporation with its principal place of business in Massachusetts. Subsequent to this accident, it was acquired by the New York Times Company, which is also a publicly traded company. Even if all other aspects of the claims by Globe are assumed to be true, the information King seeks is presented on an annual basis to stockbrokers, the Securities and Exchange Commission, Globe's stockholders and is available to the public in general. (App. 3). Attached to this Brief are the actual Interrogatories and Request for Production that were submitted to Globe regarding these financial matters. (App. 4, 5).

It is respectfully submitted to this Court that a review of the potential information being sought has been blown out of proportion by Globe. This Court in Martin-Johnson stated that notwithstanding the specific information sought:

> "First, we do not believe the harm that may result from discovery of a litigant's finances is the type of "irreparable harm" contemplated by the standard of review for certiorari."

509 So.2d at 1099.

Globe has stated that "the cat is already out of the bag and cannot be returned to it." (Pet., p.24) The reference to this cliche by Globe is particularly ironic because this same expression was used by this Court in Martin-Johnson when it stated the following:

> "We recognize that discovery of certain types of information may reasonably cause material injury of an irreparable nature. Illustrative is "cat out of the bag" material that could be used by an unscrupulous litigant to injure another person or party outside the context of litigation. . .
>
> We cannot characterize the information requested here in this same vein. We are not dealing with material protected by any privilege. Nor can we say Petitioner's privacy interest rises to the level of trade secrets, work product or information about a confidential informant. We cannot view the harm suffered by this disclosure as significantly greater than that which might occur through discovery in any case in which it is ultimately determined that the complaint should have been dismissed."

509 So.2d at 1100.

Contrary to assertions by Globe, the information sought in the instant case will not let the "cat out of the bag." The irreparable or material harm being asserted by Globe in an attempt to invoke certiorari review by previous decision of this Honorable Court simply does not exist under Florida law. It did not exist before the enactment of Section 768.72 and it has not existed since that statute's enactment. See also, Gache v. First Union Nat'l Bank of Florida, 625 So.2d 36 (Fla. 4th DCA 1993).

Globe is requesting that this Court give breadth to a statute that the prior decisional law of this state prohibits. Globe's attempts should be rebuffed on two primary grounds. First, there is no material injury that would be suffered by Globe regarding the potential discovery of publicly available financial information and, second, under Martin-Johnson, certiorari is simply not a proper vehicle for testing a denial of a motion to strike or the granting of a motion to amend a complaint to include punitive damages. In whatever manner the rights available to a

defendant pursuant to Section 768.72 are categorized, these rights do not in any way change the inapplicability of certiorari for the review of such pleadings. Globe wishes this Court to somehow arrive at the conclusion that the procedural aspects mandated by Section 768.72 magically create as yet some unnamed form of appellate review that heretofore has not existed under Florida law. Under the authority of Martin-Johnson, such is not and cannot be the case.

It is respectfully submitted that there exists no conflict between the previously cited decisions of the First and Fifth District Courts of Appeal, and the decisions of the Third and Fourth District Courts of Appeal. However, in the event that this Court may determine that such conflict exists, this conflict should be resolved in favor of the precedent established in the Tennant and Martin-Johnson decisions. Martin-Johnson remains completely viable since the time of the enactment of Section 768.72. This Court should affirm the instant decision from the First District Court of Appeal and rule that certiorari is not an 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. Permitting certiorari review in such fashion would directly contravene the restrictions that this Court has previously placed on the use of common law certiorari review and would set a precedent that would present the district courts of appeal with a potential nightmare of certiorari review of not only Section 768.72 determinations, but any and all matters of a pre-trial or evidentiary basis on which a trial court may rule. This is the type of appellate "log jam" that the restrictive use of common law certiorari was intended to prevent and should still be utilized to prevent in this case.

The right afforded under Section 768.28 is to be free from defending a claim for punitive damages until there is a reasonable showing which would provide a reasonable basis for recovery of such damages. Once the trial court has made that determination, which basically sits as the

trier of fact regarding that determination, the so-called claims of "harassment" and "being hauled into court" by Globe become form without substance. The type of rights as categorized by Globe simply do not exist and more specifically have not been created to exist pursuant to the enactment of Section 768.72. Any matters relating to the trial court's determination regarding punitive damages are protected and can be remedied by plenary appeal.

This is particularly true in light of the recent holding by this Honorable Court in W. R. Grace & Co. - Conn. v. Waters, 638 So.2d 502 (Fla. 1994). In Grace, this Court stated the following:

> "We hold that henceforth trial courts, when presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial. At the first stage of a trial in which punitive damages are in issue, the jury should hear damages regarding liability for actual damages, the amount of actual damages, and liability for punitive damages and should make determinations on those issues. If at the first stage, the jury determines that punitive damages are warranted, the same jury shall then hear evidence relevant to the amount of punitive damages and should determine the amount for which the defendant is liable. . . This new procedure, of course, is only meant to supplement, not replace, the limitations on punitive damages set forth by the Legislature in Section 768.71-768.74 Florida Statutes (1993)."

638 So.2d at 506.

With this additional procedure, which can only inure to the benefit of defendants such as Globe, all matters relating to the trial court's initial determination regarding punitive damages are protected through the bifurcated trial process and can be remedied by plenary appeal.

In other words, defendants such as Globe are protected from unwarranted or unsubstantiated claims for punitive damages in three ways: 1) by the judge's determination at a Section 768.72 hearing, 2) by the jury's decision whether punitive damages are warranted and, most importantly, 3) by taking up the issue of any unjust punitive damages on plenary appeal.

Moreover, with the Grace safeguard of requiring a bifurcated trial when punitive damages are involved, defendants such as Globe are not required to even defend a claim for punitive damages until a jury first decides whether punitive damages are indeed warranted.

In recognition of the above, the First and Fifth District Courts of Appeal have properly refused to permit immediate review by certiorari of orders permitting claims for punitive damages. Similarly, this Court should adopt the specific holding of the First District Court of Appeal in the instant case and disapprove the decisions of the Third and Fourth District Courts of Appeal.

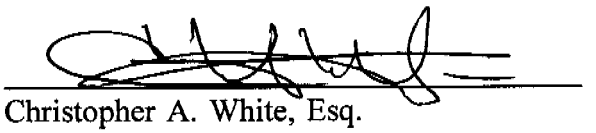
CONCLUSION

For the foregoing reasons, this Court does not have discretionary jurisdiction to review the decision below, and the Court should deny the petitioner's request to invoke its discretionary jurisdiction. Furthermore, even if this Court decides that it does have conflict jurisdiction to review the lower court's decision in this case, it should still find that orders permitting the amendment of complaints to include claims for punitive damages are not receivable on certiorari appeal and, therefore, it should deny the relief which Globe seeks.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been furnished to E.T. Fernandez, III, Esq., 2252 Riverplace Tower, Jacksonville, Florida 32207 and Steven A. Werber, Esq., 200 Laura Street, Jacksonville, Florida 32202 by hand delivery this 22nd day of December, 1994.

CRABTREE & WHITE, P.A.



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