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SUPREME COURT OF FLORIDA

GLOBE NEWSPAPER COMPANY,

Appellant/Petitioner,

vs.

MATTHEW J. KING,

Appellee/Respondent.
_____/

CASE NO. 84,676

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

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

REPLY BRIEF OF APPELLANT

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ORDERS GRANTING LEAVE TO AMEND TO STATE A CLAIM FOR PUNITIVE DAMAGES OR DENYING MOTIONS TO STRIKE OR TO DISMISS PUNITIVE DAMAGES CLAIMS 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.

The primary thesis in King's Answer Brief is that this Court should reaffirm the efficacy of Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), Tennant v. Charleton, 377 So. 2d 1169 (Fla. 1969), and their predecessors, notwithstanding the enactment of §768.72 of the Florida Statutes (1991). King argues that the statute is primarily procedural and cites Martin-Johnson and Tennant to support that proposition. King's reliance upon these decisions is inapposite, however. Section 768.72 did not apply to those cases, and as a result, the outcome of those cases would likely be vastly different now. See Henn v. Sandler, 589 So. 2d 1334, 1335 (Fla. 4th DCA 1991).

Additionally, contrary to King's arguments, §768.72 creates substantive rights, rather than merely procedural ones. See Smith v. Department of Insurance, 507 So. 2d 1080, 1092, n.10 (Fla. 1987). Those substantive rights are: 1) the right to be free from having to defend punitive damages claims; and 2) the right to be free from producing financial worth discovery prior to the evidentiary showing required by the statute. Thus, the statute has two elements, a pleading element and a discovery element. See Al-Site Corp. v. VSI International, Inc., 842 F. Supp. 507, 509 (S.D. Fla. 1993). Both elements, because they are

intimately related, must be treated as substantive rights to give effect to the full intent of the statute. Id. at 513; and Smith, 507 So. 2d at 1092, n.10. King, Martin-Johnson, Tennant, and the other cases which pre-date the statute focus only upon the discovery element of the statute; whereas, Globe is focusing upon the pleading element.

For example, in Tennant, the court stated only that in determining the scope of permissible financial worth discovery in punitive damage cases, the court may consider whether a claim for punitive damages exists. In contrast, §768.72 requires that a determination be made that a punitive damages claim is supported by record evidence before the claim for punitive damages may even be plead. FLA. STAT. §768.72 (1991). The issue of the scope of the discovery cannot be reached at all until the plaintiff has established its right to plead the claim pursuant to the statute. Globe acknowledges that once the pleading element has been properly resolved, Rule 1.280(c) generally provides adequate protection related to the discovery element. Thus, the efficacy of the Tennant and Martin-Johnson cases arguably remains as to the discovery element of the statute, but not as to the pleading element.

In contrast, after the passage of §768.72, plenary appeal can no longer remedy the harm suffered by the defendant in the event of an error related to the pleading element. If a trial court erroneously permits a plaintiff to state a claim for punitive damages where the record evidence is insufficient, the

defendants' substantive rights are necessarily violated and the order allowing the claim departs from the essential requirements of law. In addition, if the pleading is allowed in error, the defendant would then be required to defend a claim for punitive damages through trial even though the claim was unsupported as a matter of Florida law. Once the defendant is required to defend a meritless claim through trial, the substantive right (to have avoided that claim until sufficient record evidence of the claim exists) cannot be remedied upon plenary appeal. A new trial cannot restore the lost right.

King also argues that the nature of the requested discovery is not of the type that should be protected under the statute. Again, King's argument misses the point. It addresses only the discovery element of the statute and not the pleading element.

King relies upon Gache v. First Union National Bank of Florida, 625 So. 2d 86 (Fla. 4th DCA 1993), rev. dismissed 632 So. 2d 1026 (1994) for the proposition that the right of certiorari review of orders requiring financial worth discovery in punitive damages cases did not exist before §768.72 and it does not exist now. In Gache, the Fourth District Court of Appeal cited to Martin-Johnson to hold that wrongfully having to produce financial information is not the type of irreparable harm required to permit certiorari review. Gache, 625 So. 2d at 87. That case involved discovery in aid of execution in a post-judgment collection proceeding. Section 768.72 was not in issue. Therefore, the pleading element of §768.72 was not addressed.

Accordingly, King's reliance upon Gache, which does not even involve §768.72, is misplaced.

Moreover, contrary to King's assertion, the bifurcated trial procedure established in W.R. Grace v. Waters, 638 So. 2d 502 (Fla. 1994) does not protect defendants from the violation of their substantive rights created by §768.72. King argued that if a bifurcated trial is conducted, the defendant is protected because the amount of punitive damages sought would not be presented to the jury until the jury first determined that liability for punitive damages existed under the facts of the case. King's argument misapprehends the nature of the right created by §768.72 and the W.R. Grace decision.

In W.R. Grace, this Court imposed a requirement of a bifurcated trial on the issues of the liability for and the amount of punitive damages where the defendant requests it. The first phase of the trial would address the issues of liability for compensatory damages as a whole and only liability for punitive damages. W.R. Grace, 638 So. 2d at 506. The second phase of the trial would address the amount of punitive damages, only if the jury determined that they were warranted under the facts of the case. Id.

The bifurcated nature of the trial proceeding does not mitigate the harm to a defendant who is required to defend a punitive damages claim where the pleading element of §768.72 has been violated. Where insufficient record evidence existed to support the claim at the pleading stage, bifurcation would not be

necessary because the defendant should not be faced with the claim at trial as a matter of law. If the defendant is forced to face the claim in error, a new trial will not restore the lost right regardless of the jury's ruling on the issue of liability of punitive damages in the first phase. Thus, even under the bifurcated trial procedure, the defendant's statutory rights are irreparably lost if a trial judge permits the claim to be plead and therefore presented at trial, even though the record evidence is insufficient as a matter of law.

Additionally, the bifurcated trial procedure was not established to address the problem presented by this case. Instead, it resulted from this Court's concern about the impact to defendants caused by the introduction of evidence related to prior punitive damage awards in the liability phase of mass tort cases. Id. at 504-5. The court acknowledged, however, that even defendants who had not faced prior punitive damage awards for the same conduct were prejudiced by the current procedure which permitted the amount of punitive damages to be discussed before the jury determined the question of liability. Thus, the court held that the bifurcated procedure should apply to all defendants who requested it.

In establishing the bifurcated procedure, however, the court did not intend to alter or amend the substantive rights created by §768.72. Rather, the court specifically stated that "[t]his new procedure, of course, is meant only to supplement, not replace, the limitations on punitive damages set forth by the

legislature in sections 768.71-768.74, Florida Statutes (1993)." Because the bifurcated procedure does not address the problems resulting from the permission of the presentation of evidence related to punitive damages where the record evidence is insufficient, King's arguments related to the W.R. Grace case are inapplicable to this case.

Likewise, King's argument that Key West Convalescent Center, Inc. v. Doherty, 619 So. 2d 367 (Fla. 3d DCA 1993) and Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1993) are inapplicable to this case is not correct. King argues that these cases do not apply because they are the progeny of Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991). King further argues that Globe's reliance upon Henn is inappropriate because the trial court in that case did not have an evidentiary hearing under §768.72.[1] That fact notwithstanding, the trial courts in

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[1] Please note that notwithstanding the court's decision to defer its determination on the question of jurisdiction, King also advances this argument to suggest that despite the certification of the conflict by the First District Court of Appeal, no conflict jurisdiction exists in this case. King contends that the court's decision in this case is a per curiam affirmance, which cannot form the basis for this Court's conflict jurisdiction. King is apparently confused about the nature of the conflict jurisdiction applicable to this case.

This Court has jurisdiction to review the conflict certified by the First District Court of Appeal pursuant to Article V, §3(b)(4) of the Florida Constitution and Rules 9.030(a)(2)(A)(vi) and 9.120(b) of the Florida Rules of Appellate Procedure. Pursuant to Article V, §3(b)(4) of the Florida Constitution as opposed to §3(b)(3), an express and direct conflict need not exist for the court to exercise its discretion in favor of accepting jurisdiction of the case. Rather, the court may acknowledge the conflict perceived by the certifying court and accept jurisdiction under Article V, §3(b)(4), even on the basis of a per curiam decision

both Key West and Rockhead held a hearing and reviewed the sufficiency of the evidence to support the punitive damages claims. Thus, the fact that no hearing was held in Henn is of no consequence.

Moreover, in both Key West and Rockhead, the appellate courts granted certiorari to review the trial courts' findings on the sufficiency of the evidence. Upon review, the Third District Court of Appeal determined that the trial courts' findings were in error in that the record evidence was insufficient as a matter of law, quashed the orders allowing the punitive damages claims, and remanded the proceedings. Thus, those cases are direct support for the Globe's position that certiorari should be granted to review trial courts' findings on the sufficiency of the evidence under §768.72.

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without opinion. See Padovanno, Philip J., Florida Appellate Practice, West Publishing Co., Minn. 1988, s.2.11, pg. 26 (which states that "[o]ne major difference [between Article V, §3(b)(3) and §3(b)(4)] is that a decision certified as being in 'direct conflict' under §3(b)(4) need not 'expressly conflict' with another appellate decision. Even a summary type decision made upon the basis of a single citation, in the absence of any stated legal reasoning, will qualify for a review if it is certified to be in conflict").

Accordingly, this Court has discretion under Article V, §3(b)(4) to accept jurisdiction to review this case. Although the court has deferred its decision on whether it will accept jurisdiction of this case, the Globe urges the court to hear this appeal. The District Courts of Appeal are in conflict over the propriety of certiorari review under the circumstances present in this case. This conflict was illustrated again recently by the Fourth District Court of Appeal's decision in Sports Products, Inc. of Ft. Lauderdale v. Estate of Marianne Inalien, 20 Fla. L. Weekly 13 (Fla. 4th DCA 1994), which was issued after the filing of Globe's Initial Brief to this Court.

Furthermore, King misinterpreted the holding in the Key West case in his Answer Brief at pgs. 6-7. King argued that the trial court did not conduct a hearing regarding the sufficiency of the evidence in Key West and that the court's ruling was merely that the procedure followed by the trial court was insufficient under §768.72. To the contrary, the trial court did not apply §768.72 and stated that §400.022 did not require a preliminary finding of the sufficiency of the evidence to support a claim for punitive damages before the pleading could be amended to include one. Key West, 619 So. 2d at 368. The trial court further stated, however, that even if such a showing were required, the affidavit offered by the plaintiff was sufficient record evidence to support a claim for punitive damages. Id.

The Third District Court of Appeal quashed the trial court's order. In so doing, the court did not state that the procedure followed by the trial court was inappropriate under §768.72; rather, the appellate court stated that the "affidavit provides an insufficient basis to add the claim for punitive damages, as it failed to establish a reasonable basis for recovery of punitive damages." Id. at 369. The court made this statement in consideration of the sufficiency of the evidence of punitive damages under §768.72, not upon any procedural defects in the trial court. Thus, the Third District Court of Appeal has held consistently that certiorari is appropriate to review a trial court's finding that the evidence is sufficient to support a claim for punitive damages under §768.72. See also Commercial

Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994) (where the court granted certiorari review of the trial court's denial of the motion to strike the punitive damages claim, held that the evidence presented below was not sufficient to support a claim for punitive damages, and quashed the trial court's order), and Torcise v. Homestead Properties, 622 So. 2d 637 (Fla. 3d DCA 1993)(where the court quashed the trial court's order allowing a punitive damages claim where it found there was insufficient record evidence presented at hearing to support it); see also, the discussion of the Rockhead case in the Initial Brief at pgs. 12-13.[2]

Just as King has misinterpreted the Key West decision, King also has misconstrued the Rockhead case. King asserts that no case has yet been decided to permit the review by certiorari of a decision permitting the amendment of a complaint to state a claim for punitive damages against an employer based upon vicarious liability. Because of this argument, King contends that even if Key West and Rockhead permit certiorari review of the trial court's sufficiency finding in cases of direct liability for punitive damages, they are not authority to permit certiorari review of similar findings related to an employer's vicarious

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[2] Please note that although the published Torcise opinion does not indicate that the trial court held a §768.72 hearing, the fact that a hearing was held is apparent from the Petition for Writ of Certiorari that was filed in that case. That Petition is part of the record before this Court. See Rep./App. "B".

liability for punitive damages. Not only is this argument illogical, but it is also incorrect.

The Rockhead case involved a claim for punitive damages against an employer based upon vicarious liability. App. 3, 4, and 5. In Rockhead, the plaintiff sued Commercial Carrier Corporation for the wrongful death of the plaintiff's husband resulting from an automobile accident allegedly caused by Commercial Carrier Corporation's employee, Mr. Alvin George Bailey. App. 3, pg. 1-2. Mr. Bailey was not a party to the lawsuit. App. 3, pg. 2. The only difference between the Rockhead case and this case was that Commercial Carrier Corporation argued that the trial court did not even have to consider the evidence related to its independent fault under the standard created by Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981), because the plaintiff had not produced sufficient evidence to illustrate a claim for punitive damages against the employee. App. 3, pgs. 4-5. Commercial Carrier Corporation argued that if the evidence was insufficient as to the employee, there could be no cognizable claim against the employer for punitive damages based upon vicarious liability. App. 3, pg. 5. Thus, contrary to King's assertion, the Rockhead case, dealt squarely with the issue of vicarious liability for punitive damages.

In this case, no one disputed that King presented sufficient evidence to plead a punitive damages claim against the employee, Mr. Concannon. The dispute is whether King produced any evidence

of independent negligence by the Globe as required by Mercury Motors. Thus, Rockhead, which deals with the Mercury Motors standard for vicarious liability for punitive damages, is applicable to this case.

In any event, even if Rockhead is construed to pertain only to a direct claim for punitive damages, §768.72 does not make any distinction between direct claims for punitive damages and vicarious claims for punitive damages. All claims for punitive damages are governed by the statute. Similarly, all defendants faced with punitive damages claims, whether directly or vicariously, are entitled to the substantive protection the statute created. Therefore, the reasoning and the holding in Key West, which involved a direct claim for punitive damages, is equally as applicable to this case as Rockhead, which involved a vicarious claim for punitive damages. Thus, King's contrary arguments are incorrect.

Finally, King also argues erroneously that Globe is trying to create a right of appeal not anticipated by the statute. Instead, Globe is trying to preserve its substantive right not to have to defend a claim for punitive damages where the evidence presented by King did not provide such a right of action as a matter of Florida law. The legislature effectively created the right of certiorari review when it created the pleading element of §768.72, i.e., the substantive right to be free of punitive damages claims until a proper evidentiary showing is made to support them. Accordingly, this Court should acknowledge the

protection the legislature created and resolve the conflict certified by the First District Court of Appeal in favor of the Third District's decision in Rockhead.

CONCLUSION

For the reasons stated in the Initial Brief and above, this Court should hold that certiorari should be granted to review the trial court's finding on the sufficiency of the evidence under §768.72, and remand this case to the First District Court of Appeal with instructions for that court to review the trial court's determination that King produced sufficient record evidence to support a claim for punitive damages against Globe under Florida law.

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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 17th day of January, 1995.

Attorney

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