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IN THE SUPREME COURT
STATE OF FLORIDA

ROBIN RIVERA and DIANE CORDERO,

Petitioners,

vs.

CASE NO. 84,844
(DCA NO. 94-03368)

RICHARD CHARLES BUNDSCHUH,
as Personal Representative
of the Estate of SCOTT
KENNETH BUNDSCHUH, deceased,

Respondent.

FILED
SID J. WHITE
JUN 7 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent does not disagree with the Petitioners' initial paragraph which states the status of the case and facts.

Respondent disagrees with the allegations of Petitioners' second paragraph and submits that the trial court did not depart from the essential requirements of the law and that Petitioners will not suffer irreparable harm if certiorari is not granted. Further, Respondent did produce sufficient record evidence to provide a basis for punitive damages, including the deposition transcript of an eye witness, Hilda Mendez, deposition transcript and complaint affidavit of Corporal Patrick W. Morrissey and affidavit of James L. Parrish, P.E.

SUMMARY OF ARGUMENT

This honorable court, along with the First, Fourth, and Fifth District Courts of Appeal, have previously held that certiorari jurisdiction does not exist to review orders denying motions to dismiss and/or strike punitive damage claims. The Third District Court of Appeals is the only appellate court that supports Petitioners' claim that certiorari jurisdiction exists to review orders denying motions to dismiss and/or strike punitive damage claims.

Existing case law does not support Petitioners' position that certiorari jurisdiction in the Florida District Courts of Appeal permit review prior to trial of a finding by the trial court that Plaintiff's evidentiary basis for punitive damages was sufficient to comply with the requirements of §768.72, Fla. Stat.

ARGUMENT

Initially, Respondent would like to bring to this court's attention the position that Respondent agrees with the proposition that orders denying motions to dismiss and/or strike punitive damage claims pursuant to §768.72, Fla. Stat. (1993) should be reviewable by certiorari to determine if the plaintiff has proffered sufficient record evidence to support a claim for punitive damages.

However, it is Respondent's duty to bring to this court's attention the line of cases which stand for the proposition that an order denying a motion to dismiss and/or strike a punitive damage claim is not reviewable by a District Court of Appeal's certiorari jurisdiction. As Petitioners have pointed out in their Initial Brief, the District Courts of Appeals are split on this issue.

ISSUE

WHETHER A TRIAL COURT'S ORDER DENYING A MOTION TO DISMISS AND/OR STRIKE PUNITIVE DAMAGES CLAIM IS REVIEWABLE BY WRIT OF CERTIORARI?

Although the case was decided before the passage of §768.72, Fla. Stat. (1993), the Florida Supreme Court has previously addressed this issue in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987). In this case, Savage filed a wrongful discharge action against Martin-Johnson seeking compensatory and punitive damages. Martin-Johnson moved to strike the punitive damages claim on the ground that the complaint did not allege ultimate facts of misconduct which could support an award of punitive damages. The motion to strike was denied and Martin-Johnson's petition for writ of certiorari followed. The First District Court of Appeal declined review by certiorari, holding that Martin-Johnson would

have an adequate remedy by way of appeal of a final order. The Florida Supreme Court upheld the ruling of the First District Court of Appeal that Martin-Johnson has an adequate remedy at law by way of appeal and therefore, concluded that appellate courts may not review such orders by certiorari. Martin-Johnson, 509 So. 2d at 1098.

The Florida Supreme Court emphasized 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.

Fla. R. App. P. 9.130 provides in pertinent part:

(a)(3) Review of non-final orders of lower tribunals is limited to those which:

(A) concern venue; (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions; (C) determine: (I) jurisdiction of the person; (II) right to immediate possession of property; (III) right to immediate monetary relief or child custody in domestic relations matters; (IV) the issue of liability in favor of a party seeking affirmative relief; or (V) whether a party is entitled to arbitration.

Elaborating further, the Florida Supreme Court stated that, "regardless of the route taken, the court 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 the review of a discovery order, we in essence would be creating a new category of non-final orders reviewable on interlocutory appeal. The court was unwilling to do so for a number of reasons." Martin-Johnson, 509 So. 2d at 1099.

First, the Florida Supreme Court stated that the potential harm that may result from discovery of a litigant's finances is not the type of irreparable harm contemplated by

the standard of review for certiorari. In that regard, the court stated that, "the harm suffered by this disclosure was not 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." Martin-Johnson, 509 So. 2d at 1100.

Secondly, the Florida Supreme Court stated that, "to permit interlocutory appeals by certiorari in this instance would result in unwarranted harm to our system of procedure. The court was concerned that if permission were given to review at this stage in the proceedings, appellate courts would be inundated by petitions to review orders denying motions to dismiss such claims, and trial court proceedings would be unduly interrupted. Further, the court stated that even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the court stated that the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less erroneous or less harmful in light of the development of the case after the order." Id.

Lastly, the Florida Supreme Court was sensitive to Martin-Johnson's "valid privacy interest in avoiding unnecessary disclosure of matters of a personal nature." In response, the court reasoned that, "our discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders." Id.

The Martin-Johnson, Inc. case is identical to the case at bar in that the district courts reached conflicting decisions as to whether it was appropriate for an appellate court to review by certiorari an interlocutory order denying a motion to dismiss and/or strike a claim for punitive damages.

This court's holding that a District Court of Appeal does not have certiorari jurisdiction to review an order denying a motion to dismiss and/or strike a punitive damages claim should be given due consideration for its precedential value.

As Petitioners concede in their Initial Brief to this court, the Fifth District Court of Appeal has held that, "an interlocutory order striking a punitive damage claim in a personal injury or wrongful death case is not an appealable non-final order, under Fla. R. App. P. 9.130, nor is it reviewable by certiorari." Wisniewski v. Ireland, 636 So. 2d 587 (Fla. 5th DCA 1994). Furthermore, in Harley Hotels, Inc. v. Doe, 614 So. 2d 1133 (Fla. 5th DCA 1993), defendant, Harley Hotels, Inc., petitioned for certiorari review of the trial court's non-final order granting the plaintiff's motion for leave to add a claim for punitive damages to her complaint. The Fifth District Court of Appeal cited to Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987) and accordingly denied certiorari review of an order permitting a claim for punitive damages.

Also, as Petitioners concede in their Initial Brief to this court, the First District Court of Appeal has ruled on this issue in a manner which is contrary to the Petitioners' cause. In the present matter, the First District Court of Appeal relied upon Globe Newspaper Company v. King, 643 So. 2d 676 (Fla. 1st DCA 1994) in denying certiorari review. In King, "Globe Newspaper Company petitioned for a writ of certiorari to review an order granting the plaintiff's motion to amend his complaint to include a claim for punitive damages." In denying the petition for writ of certiorari, the First District Court of Appeal held that, "certiorari is inappropriate for a review of orders relating to discovery on punitive damages claims." Id.

Petitioners stated in their Initial Brief to this court that the Fourth District Court of Appeal has held that orders permitting claims for punitive damages or premature orders permitting financial worth discovery are reviewable by writ of certiorari. The Fourth District Court of Appeal in a relatively recent case of Sports Products, Inc. of Ft. Lauderdale v. Estate of Marianne Inalien, 20 Fla. L. Weekly D13 (Fla. 4th DCA December 21, 1994) made a very important distinction in determining exactly what was appropriate for certiorari review. In Sports Products, Inc. of Ft. Lauderdale, "appellant complained that the trial court erred in finding that the plaintiff's evidence met the criteria for pleading punitive damages. The Fourth District Court of Appeal stated that it would be proper to exercise certiorari jurisdiction to require that the trial court make a factual finding prior to granting leave to amend. However, it would not be proper to exercise certiorari jurisdiction to conduct an immediate review of the findings of fact made in the course of the factual inquiry conducted by the trial court. In denying the petition for writ of certiorari, the Fourth District Court of Appeal held that the court's certiorari jurisdiction is not so broad as to permit review of a finding that the plaintiff's evidentiary basis for punitive damages was sufficient to comply with the requirements of §768.72, Fla. Stat., thereby permitting amendment of the complaint." Id. at 13-14.

In the case currently pending before this court, Petitioner is asking the Florida Supreme Court to hold that certiorari jurisdiction in the Florida District Court of Appeals is so broad as to permit review of a finding that Plaintiff's evidentiary basis for punitive damages was sufficient to comply with the requirements of §768.72, Fla. Stat. The Fourth District Court of Appeal has specifically held that their certiorari jurisdiction is not so

broad as to encompass such a review. The court will only grant certiorari jurisdiction to require that the trial court make a factual finding pursuant to §768.72, Fla. Stat., not to review the factual finding itself. In the case currently pending before this court, the Circuit Court for Duval County specifically made a finding that the Plaintiff's evidentiary basis for punitive damages was sufficient to comply with the requirements of §768.72, Fla. Stat. Therefore, even the Fourth District Court of Appeal would not broaden their certiorari jurisdiction so wide as to encompass such a review.

The Third District Court of Appeal is the only appellate court that supports Petitioners' cause that certiorari jurisdiction exists to review orders denying motions to dismiss and/or strike punitive damage claims. This court along with the First, Fourth and Fifth District Courts of Appeal have previously held that certiorari jurisdiction does not exist to review orders denying motions to dismiss and/or strike punitive damage claims.

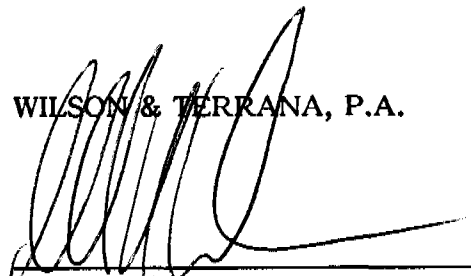
CONCLUSION

While Respondent has no philosophical quarrel with a review by certiorari of a trial court's decision regarding the sufficiency of the evidence to proceed with a punitive damages claim, Respondent would respectfully suggest that existing case law requires this honorable court to affirm the decision of the First District Court of Appeal which denied Petitioners' request for writ of certiorari review of the trial court's order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class United States Mail to Chobee Ebbets, Esquire, Ebbets, Armstrong & Chamberlin, 210 South Beach Street, Suite 200, Daytona Beach, Florida 32114, this 5th day of June, 1995.

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