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## STATEMENT OF THE CASE AND FACTS

In this appeal, the Petitioners, Robin Rivera and Diane Cordero, invoked the jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure to review a decision rendered by the First District Court of Appeal in this matter. The Petitioners timely filed a Petition for Writ of Certiorari from the trial court's order denying the Petitioners' Motion to Dismiss the Respondent's punitive damage claim. The First District denied the Petition based upon case law holding that certiorari was not an appropriate remedy for reviewing decisions concerning punitive damage claims.

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

## SUMMARY OF ARGUMENT

Certiorari should be granted to review orders granting leave to amend a complaint to state a claim for punitive damages or denying motions to dismiss or strike 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 the 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 (1993) 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 proceeded in violation of that right, plenary appeal cannot restore it. As a result, certiorari review is the only appropriate remedy and this Court should hold that an order relating to the propriety of claims for punitive damages are reviewable by certiorari.

## ARGUMENT

Orders denying motions to dismiss or strike punitive damage claims should be reviewable by certiorari because when issued in error they depart from the essential requirements of the law and vitiate the substantive rights that were created by Section 768.72 of the Florida Statutes (1993) thereby causing the petitioners irreparable harm.

Certiorari is the appropriate remedy to review orders denying motions to dismiss or strike punitive damage claims. If those orders are entered based upon an erroneous finding that the plaintiff proffered sufficient evidence to support a claim for punitive damages, the plaintiff is free to propound discovery on the defendant seeking otherwise protected financial worth information. In the present case, this has been done (see Appendix A). In addition, Section 768.72 of the Florida Statutes (1993) provides a substantive legal right to defend a punitive damage claim until there has been an appropriate finding that a sufficient basis exists for such a claim. Certiorari is the only available remedy to review a trial court's determination on this issue before irreparable injury occurs in the form of having to disclose otherwise protected information. If the trial court's finding on the sufficiency of the evidence is erroneous and the defendant is nevertheless forced to defend the punitive damage claim and to provide financial worth discovery, plenary appeal cannot restore the defendants' rights to be free from such disclosure. Accordingly, this court should rule that the District Courts of Appeal in the State of Florida have jurisdiction to issue common law writs of certiorari to review orders denying motions to dismiss or strike punitive damage claims.

Both 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 reviewable by 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); Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 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, 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). This conflict should be decided in favor of the cases from the Third and Fourth District Courts of Appeal as they have given appropriate preference to the substantive rights created by Section 768.72 of the Florida Statutes (1993).

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

If 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 Section 768.72 would be allowed to occur. This is precisely the kind of situation for which certiorari is designed.

Id. at 1336. Thus, the court concluded that in light of the substantive rights created by Section 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. Although the Petitioners are asking this court to accept certiorari jurisdiction involving orders denying motions to strike or dismiss claims for punitive damages, it is the threat of financial worth discovery which causes irreparable harm. In the present case, financial worth discovery has been propounded on the Petitioners, and without the ability of an Appellate Court to review the trial court's order denying the Motion to Dismiss, the Petitioners are faced with the exact type of irreparable harm the Common Law Writ of Certiorari was designed to prevent.

In Will v. Systems Engineering, 554 So. 2d 591 (Fla. 3d DCA 1989), a Defendant moved to strike the Plaintiff's Complaint which included a claim for punitive damages. 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. After hearing argument, the court denied the Motion for Partial Summary Judgment and directed the defendant to provide discovery on his financial worth. 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.

On review, the court noted that both the claim for punitive damages and the discovery order were governed by Section 768.72. Citing to Wolper Ross Ingham & Co. v. Liedman, 544 So. 2d 307 (Fla. 3d DCA 1989). The court stated that the burden is on the Plaintiffs to show some right to plead a claim for punitive damages as a right. A summary judgment analysis, which would place the burden on the Defendant to show no genuine issue of material fact, is inappropriate. The court stated that the issues are better reviewed on motions to dismiss or strike. 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.

In footnote 1, the court indicated that the parties also wanted the court to determine the sufficiency of the evidence to support the punitive damage claim. In declining the parties invitation, 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. The implication 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 granted certiorari to review a trial court's finding that the Plaintiff's evidence was sufficient to permit a punitive damages claim. In that case, the Defendant filed a Petition for Writ of Certiorari, which sought to quash a trial court's order granting the Plaintiff leave to amend its complaint to add a claim for punitive damages under Section 400.023 of the Florida Statutes.<sup>1</sup> The trial court found that Section 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. Accordingly, the trial court permitted the Plaintiff to amend the complaint to include a claim for punitive damages.

On appeal, the Petitioner 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

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<sup>1</sup> Section 400.023 relates to the standard of nursing home care required under Florida law.

under Section 768.72. The Third District agreed and held that the affidavit was insufficient to create an evidentiary basis for punitive damages under Florida law. Id. at 369. Citing to Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991), and Wolper Ross Ingham & Co. v. Liedman, 544 So. 2d 307 (Fla. 3d DCA 1989), the court stated that “[c]ertiorari 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 Third District 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, the Petitioners timely filed a Petition for Writ of Certiorari to review the trial court’s finding that the Plaintiff had proffered sufficient evidence to establish a claim for punitive damages under Florida law. The Petitioners were seeking a determination by the First District Court of Appeal as to the sufficiency of the Plaintiff’s evidence pursuant to Section 768.72. However, the court declined to exercise certiorari jurisdiction and declined the writ.

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 damage claim. In Rockhead, the Plaintiff filed a Motion to Amend his complaint to include a claim for punitive damages. 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 preserve all objections to the Amended Complaint. 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. The trial court denied the Motion to Strike.

On the Defendant's Petition for Writ of Certiorari, the Third District 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. Id. at 661. In granting certiorari, the court stated:

On 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.

Id. at 661. 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. See also Torcise v. Homestead Properties, 622 So. 2d 637 (Fla. 3d DCA 1993).<sup>2</sup>

Additionally, in Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994), the Fourth District Court of Appeal also ruled that matters relating to punitive damage claims under Section 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

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<sup>2</sup> In that case, the Third District quashed the trial court's order allowing discovery of financial worth because there was reasonable showing by evidence which would provide a reasonable basis for recovery of punitive damages.

previously been given by the trial court. 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.

Defendant, Kraft, argued that Section 768.72 was designed to prevent punitive damage claims from being infused into litigation until an appropriate evidentiary showing is made. Kraft further argued that the legislature hoped to remove to unauthorized use of punitive damage claims for an "in terrorem effect." Id. at 108 (emphasis original). Kraft claimed that punitive damage 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 Section 768.72 not to expose a defendant to a punitive damage claim until a court first determines that there is sufficient record evidence to support the claim. Kraft further argued that the right not to be exposed to such a claim is irreparably harmed 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 Section 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 108-9.

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

The last inquiry is whether common law certiorari lies (sic) 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. 1983).

On the other hand, a right not to be exposed to a mere claim for extraordinary damages without a Judge first determining that a factual basis exists to all the claims 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 kind of discovery, this cat would effectively be out of the bag before the bag was supposed to be open. Martin-Johnson, 509 So. 2d 1100. Claimant has offered no explanation as to how we could possibly remedy this unauthorized pleading violation on final appeal after 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.

The reasoning in the Kraft General Foods case is applicable to the present case. Kraft illustrated that the substantive right created by the statute is not to be exposed to a meritless claim for punitive damages, not merely to avoid financial worth discovery. Because Section 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 Section 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 damage claims brought without a sufficient evidentiary basis, in effect, mythical." Id. at 110. Plenary appeal would not protect the defendant from the violation of the defendant's right to avoid having to defend a punitive damage 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 of this State have agreed on this issue; however, decisions with 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 damage 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 rights created by Section 768.72. As a result, this Court should resolve the conflict in favor of granting certiorari review of orders denying motions to dismiss or to strike punitive damage claims.

## CONCLUSION

The decision of the First District Court of Appeal that the Petitioners, Robin Rivera and Diane Cordero, were not entitled to certiorari for reviewing decisions concerning punitive damage claims is in direct conflict with decisions from other District Courts of Appeal cited herein.

The trial court's order denying the Petitioners' Motion to Dismiss the Respondents' punitive damage claim departed from the essential requirements of the law and will cause petitioners irreparable harm if certorari is not granted.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail this 22nd day of May 1995 to Richard H. Wilson, Esquire, P.O. Box 709, Tampa, FL 33601.

A handwritten signature in cursive script, appearing to read "Michael Ebbets", written over a horizontal line.

CHOBEE EBBETS, ESQ.

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(904) 253-2288  
Florida Bar No.: 218294  
Attorney for Appellant



IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT  
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA  
CIVIL DIVISION

**RICHARD CHARLES BUNDSCHUH,**

as Personal Representative  
for the Estate of  
SCOTT KENNETH BUNDSCHUH,  
Deceased Minor,

Plaintiff,

vs.

Case No.: 94-00971 CA  
Division: CV-G

ROBIN RIVERA and DIANE CORDERO,

Defendants.

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PLAINTIFF'S REQUEST FOR PRODUCTION

Plaintiff, ESTATE OF SCOTT BUNDSCHUH, by and through its undersigned attorney, pursuant to Florida Rules of Civil Procedure 1.350, and requests that Defendant, DIANE CORDERO, produce the following records, documents, and other materials within thirty (30) days of the date of this request:

1. Income tax records, income tax returns and W-2 or 1099 forms for the past seven (7) years, including any documents evidencing any profit sharing, retirement or other benefits constituting income which is taxable and reportable to the IRS.
2. Any and all monthly bank statements held either individually or jointly for the past five (5) years, including but not limited to statements for savings, checking, money market and all other banking accounts.
3. Any and all financial statements evidencing your financial net worth for the past five (5) years.

4. Any and all certificates of deposits, treasury notes, stock certificates, bonds, held either individually or jointly from the date of the subject accident to the present time.

5. Any and all individual retirement accounts, 401K, life insurance policy income statements, and any other retirement savings account held either individually or jointly from the date of the subject accident to the present time.

6. Any and all deeds, mortgages, promissory notes, land contracts and any other documents evidencing an interest you may have in any real estate from the date of the subject accident to the present time.

7. Any and all titles, certificates of ownership, and sales agreements for any and all property, including but not limited to motor vehicles, airplanes, boats, recreational vehicles, currently or previously owned either individually or jointly from the date of the subject accident to the present date.

8. Any and all documents relating to any trusts which you may be the beneficiary of, including but not limited to, accounting statements and documents evidencing current principle and interest balance.

9. Any and all photographs, diagrams, maps, street plats, etc., including but not limited to, those depicting the scene of the subject incident and the vehicles involved in the subject incident.

10. Any and all expert reports issues by any experts hired by you for the subject incident.

11. Copy of the registration and title to the Jaguar automobile which was involved in the subject incident.


12. Any and all documents, records, or reports relating to the driving record of Defendant, ROBIN RIVERA, including, but not limited to, tickets issued for any moving violations, arrest warrants, and any and all judgments entered against Defendant, ROBIN RIVERA.

13. Copies of any and all exhibits which you anticipate you will use or intend to use at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Plaintiff's Request for Production has been furnished by first class U.S. mail this 15 day of Apr, 1995, to Chobee Ebbets, Esquire, Ebbets, Armstrong & Chamberlin, P.O. Box 390, Daytona Beach, FL 32115.

WILSON & TERRANA, P.A.



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IN THE CIRCUIT COURT IN AND  
FOR DUVAL COUNTY, FLORIDA

RICHARD CHARLES BUNDSHUH,  
as Personal Representative of the  
Estate of Scott Kenneth Bundschuh,  
deceased,

Plaintiff,

Case No: 94-00971 CA

vs.

Div: CV-G

ROBIN RIVERA and DIANE  
CORDERO,

Defendant.

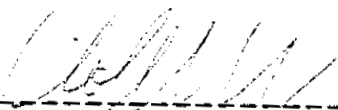
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**RESPONSE AND OBJECTIONS TO REQUEST(S) FOR PRODUCTION**

Defendants. Robin Rivera and Diane Cordero hereby respond to the Requests for Production served upon them April 7, 1995, saying:

1. Defendants hereby object to paragraphs, 1-8 of the Request on the grounds that to seeks financial information on the parties that is not relevant or discoverable until a showing of a right to punitive damages has been made. While punitive damages has been plead, that issue is before the Supreme Court of Florida which has accepted review of this matter. Before there is any discovery in this regard, the Supreme Court should be allowed to rule.
2. Secondly, assuming that the Plaintiff had a right to this information at some point in time, the traditional method for obtaining such documentation is by sealed discovery and in camera inspection by the Court. Such information is then only revealed in the event the Court allows the matter of punitive damages to go to the jury. Defendants would object to any discovery as to financial matters without specific orders from the court.

3. There are no photographs in the possession of defendants that the plaintiff does not already have. Defendants do not have any other items requested in paragraph 8.
4. Defendants have not requested any written reports from experts.
5. A copy of the registration on the Jaguar has been requested and will be sent via mail as soon as possible.
6. Defendants object to producing the driving records as he has not asked for such a document from the State of Florida. He has not kept any records of "tickets" as phrased. Plaintiff's can obtain this information from the appropriate agencies at their own expense. Defendant objects to producing "judgments" on the same grounds as set forth in paragraph 1 above.

I HEREBY CERTIFY that a copy of the foregoing was sent via US Mail to Richard H. Wilson, 215 W. Verne Street, Suite A, P. O. Box 709, Tampa, FL 33601 this 4th day of May, 1995.

  
-----  
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