

FILED

SID J. WHITE

JUN 26 1995

CLERK, SUPREME COURT
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IN THE SUPREME COURT
STATE OF FLORIDA

ROBIN RIVERA and DIANE CORDERO

Petitioner,

vs.

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

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

Respondent.

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

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REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

It is apparent from the Respondent's Brief that they view the salient issue as being jurisdictional in nature. They contend that the issue is not whether irreparable harm can occur because of a lack of review powers by the appropriate court, but rather the District Court simply lack's review power under it certiorari authority. They rely upon the case of Martin -Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), as grounds for this proposition. In 1987, the philosophy of the Court was reflective of the law of this state at that point in time. However, as properly pointed out by the Appellee, this case pre-dates the enactment of Florida Statute 768.72 (1993). Therefore, it is the obligation of this Court to establish legal avenues for review that are consistent both with the Rules of Procedure as well as the Florida Statutes.

Respondents cite the holdings of the Fifth District Court of Appeal as being the better reasoned analysis on this point, however this proposition overlooks the dissents filed by Justice Peterson in Simeon, Inc. v. Cox, 20 Fla. Law Weekly D1105 (Fla. 5th DCA May 5, 1995) and Jim Peacock Dodge, Inc. v. Russell, Slip Opinion filed June 9, 1995 (see Appendix). In the Jim Peacock Dodge case, Judge Peterson stated, "I believe that certiorari should be available to review an order that allows a plaintiff to pursue a claim for punitive damages when there is non-compliance with section 768.72, Florida Statutes (1993)." He adopted the reasoning in Kraft v. General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994). In expressing his opinion as to why this was the better view he looked to the facts of the Peacock

case which are analogous to the facts before this Court. He recognized that the the review powers of the Court must be exercised to assure that the provisions of Florida Statute 768.72 were followed. His judicial reasoning expressed in the Peacock decision should be considered by this Honorable Court. He writes:

Section 768.72 was enacted to preclude a claim for punitive damages and the discovery of financial resources until the trial court has first determined whether a factual basis exists to support a claim for punitive damages. In enacting section 768.72, the legislature recognized the importance of financial confidentiality. The success or failure of a business can sometimes be affected by the disclosure of financial information which is normally vigorously protected. The denial of certiorari relief where a punitive damages claim has been allowed to go forward absent compliance with the statute irreparably harms defendants by stripping them of the protections the statute was intended to afford them. It also stimulates multiple subsequent motions by the defendant resulting in delay and more costly proceedings.

With all due respect to the argument made by opposing counsel as to the limitations of certiorari review under these situations expressed by the Fourth DCA in Sports Products, Inc. v. Estate of Inalien, 20 Fla. Law Weekly D13 (Fla. 4th DCA, 1994), this limitation of review power does not extend to the circumstances of this case. The Court did not conduct an evidentiary hearing as to the sufficiency of allegations against the petitioner herein. The trial court merely reviewed the allegations of the Complaint and concluded, *without making any factual findings*, that the evidence was sufficient to allow a count for punitive damages to stand against the Petitioner. This lack of adherence to the Statutory requirements is not addressed in the Sports Products case. Indeed, the court specifically held that certiorari jurisdiction was appropriate to require that the trial court make a fatal finding prior to granting any leave to amend. How does an order that merely states

that a sufficient evidentiary basis for punitive damages meet any test of due process? The Petitioner must know what those facts are so that they can be challenged at later stages of the proceedings. If this type of order can stand then a judge can make a ruling based upon illegal reasons and not be challenged. Such a result would defeat the purposes of the statute.

Respondents' argument against certiorari review of punitive damages questions at the pre-trial stage state that this Court should follow the Martin-Johnson decision or otherwise the "Appellate Courts will be inundated by Petitions to review orders denying Motions to Dismiss such claims..." (Page 5 of Respondents' brief.) This is simply an emotional argument without substance. Any statistical review of the circuit court civil filings will bear out the fact that very few cases seek punitive damages. This Court has limited the factual situations which will give rise to such relief. The legislature has further limited this avenue of relief by the passage of Florida Statute 768.72 (1993). It appears that in this area of law the legislature and Supreme Court are on the same path and that the law of Florida has developed a conservative jurisdiction with respect to the recovery of punitive damages. As with any area of the law, once an appellate case decides the issue in a specific district, the number of appeals will diminish as the law develops as to what evidentiary predicates are necessary to establish a right to proceed with punitive damages. It is clear at this point that the trial judges do not have a clear understanding of how the facts need to be evaluated before the otherwise private financial information can be revealed. As borne out by the case in review, a trial judge will look at the allegations of the Complaint and arguably inadmissible documents such as an infraction filed in a criminal proceeding and conclude that a plaintiff can seek punitive damages. This is simply not the law of this State and waiting for a final

appeal wreaks irreparable harm upon individuals who have had to reveal otherwise confidential financial information. It is respectfully submitted that the writ of certiorari was created to prevent this exact type of injustice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail this 23rd day of June 1995 to Richard H. Wilson, Esquire, P.O. Box 709, Tampa, FL 33601.



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