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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
JUN 12 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

The Estate of MARGARET MAGGIACOMO, deceased, by and through the Personal Representative, DOUGLAS B. STALLEY,

Petitioner,

v.

Case No. 85,491

BEVERLY ENTERPRISES - FLORIDA. INC., d/b/a/ BEVERLY GULF COAST - FLORIDA, INC., d/b/a/ WELLINGTON MANOR NURSING HOME,

District Court of Appeal
2d District - No. 94-03823

Respondent.
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ON APPEAL FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF

Wilkes & McHugh

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STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, Petitioner, DOUGLAS B. STALLEY, as personal representative of the estate of MARGARET MAGGIACOMO, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed March 10, 1995. The Petitioner was the original Plaintiff below and the Respondent before the District Court of Appeal. The Respondent, BEVERLY ENTERPRISES - FLORIDA, INC., d/b/a/ BEVERLY GULF COAST - FLORIDA, INC., d/b/a/WELLINGTON MANOR NURSING HOME, was the original Defendant in the trial forum and was the Petitioner before the District Court of Appeal.

DOUGLAS B. STALLEY, as the Personal Representative of the Estate of MARGARET MAGGIACOMO, sued BEVERLY ENTERPRISES - FLORIDA, INC., d/b/a/ BEVERLY GULF COAST - FLORIDA, INC., d/b/a/ WELLINGTON MANOR NURSING HOME (hereinafter "Beverly"), and sought damages for the deprivation of Mrs. Maggiacomo's nursing home rights, pursuant to section 400.023, Florida Statutes (1993). On June 29, 1994, Plaintiff below moved to amend the complaint to add a claim for punitive damages. On September 28, 1994, the Honorable Manual Menendez, Jr. Granted Plaintiff's Motion to amend, permitting the Plaintiff to amend the complaint to add a claim for punitive damages.

Defendant below filed a Petition for Writ of Certiorari seeking to have the Second District Court of Appeal review the decision of the trial court on Plaintiff's

Motion to Amend the Complaint to add a claim for punitive damages. On March 10, 1995, the Second District Court of Appeal filed its decision in which the court granted Defendant's petition for a Writ of Certiorari and quashed the decision of the trial court.

SUMMARY OF THE ARGUMENT

The issue presented in this appeal is whether it is appropriate for an appellate court to review by certiorari an interlocutory order permitting the amendment of a complaint to add a claim for punitive damages. This court has recently applied the standard for certiorari review to the issue raised in this case. In Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), this court concluded that certiorari review was not appropriate.

This court's analysis in Martin-Johnson is as valid today as it was when Martin-Johnson was decided. The application of the standard for certiorari review to the issue of the reviewability of interlocutory orders of the trial courts on the issue of the sufficiency of a decision regarding the ability of parties to plead claims for punitive damages yields the same result as that reached in the Martin-Johnson case. The alleged harm that might result from the discovery of financial information is still not the type of irreparable harm contemplated by the standard for certiorari review. Permitting interlocutory appeals by certiorari will still result in the disruption of the proceedings in the trial court, and strong policy concerns continue to militate against review Finally, sufficient means continue to exist to protect against irreparable harm. Accordingly, it is not appropriate to review, by certiorari, interlocutory orders of the trial courts permitting the amendment of complaints to add a claim for punitive damages.

When Martin-Johnson was decided, the added protection to litigants found in section 768.72 did not exist. This court decided, however, **that even**

without this added safeguard, certiorari review of punitive damages claims was not appropriate because the harm that might result from such a claim was not "the type of 'irreparable harm' contemplated by the standard of review for certiorari." Id, at 1099. In light of the fact that the statute provides additional protection from such harm, **thereby reducing the possibility of unwarranted disclosure of financial information,** the need to employ the extraordinary remedy of certiorari is likewise reduced. Accordingly, the enactment of Florida Statutes § 768.72 reinforces this courts decision in the Martin-Johnson case and provides no new basis for certiorari review.

For these reasons, the decision of the Second District Court of Appeal in this matter should be quashed, and the case remanded to the trial court with direction to reinstate the claim for punitive damages and for such further proceedings as are consistent with this court's opinion.

ARGUMENT

The issue presented in this appeal is whether it is appropriate for an appellate court to review by certiorari an interlocutory order permitting the amendment of a complaint to add a claim for punitive damages. The district courts of appeal are divided on this issue. Certain of the lower tribunals permit review by certiorari of such orders. Manor Care of Florida, Inc. v. Olt, 620 So.2d 1297 (Fla. 2d DCA 1993); 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), review denied, 634 So.2d 624 (Fla. 1994); Kraft General Foods, Inc. v. Rosenblum, 635 So.2d 106 (Fla. 4th DCA 1994); Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991).

Others do not. Globe Newspaper Co. v. King, 643 So.2d 676 (Fla. 1st DCA 1994), pending on review, No. 84-676 (Fla., briefing schedule issued Nov. 9, 1994, initial brief due Dec. 5, 1994); Chrysler Corp., Inc. v. Pumphrey, 622 So.2d 1164 (Fla. 1st DCA 1993); Harley Hotels v. Doe, 614 So.2d 1133 (Fla. 5th DCA), review denied, 626 So.2d 205 (Fla. 1993). This court has jurisdiction. Art. V, § 3(b)(4), Fla Const.

The cases cited above arise in different contexts. These differences will be discussed below. Essentially, however, the issue of reviewability by certiorari of punitive damage claims remains at the heart of each of the cases. The

discussion of this issue requires, therefore, review of the basis for certiorari review of non-final interlocutory orders of the lower tribunals.

Rule 9.130 of the Florida Rules of Appellate Procedure provides a list of the non-final orders subject to appeal before final judgment. As a general proposition, review of any non-final order of the trial court that is not specifically listed in Rule 9.130 must await an appeal from final judgment. An exception to this general rule is found in Rule 9.100 of the Florida Rules of Appellate Procedure. That rule provides that the several district courts of appeal may, in their discretion, review lower court orders by writ of certiorari.[1]

Certiorari is not, however, a substitute for plenary appeal and is not designed to permit two bites of the apple - one appeal of an issue raised in a non-final order during the proceedings in the lower tribunal and another in plenary appeal. Certiorari is an extraordinary remedy which is to be narrowly applied in limited, exceptional, circumstances. To apply this writ in other settings would result in the inundation of interlocutory appeals from non-final orders of the lower tribunals and would disrupt the orderly procedure of matters in those courts. Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987). Accordingly, the appellate court's discretion in granting review by certiorari must be cautiously applied to non-final orders of the lower tribunals concerning matters that are not within the ambit of Rule 9.130.

The general formula for distinguishing those cases needing review by way of certiorari requires that (1) the order must constitute a departure from the

[1] Thic rule is derived from Article V, §5(b), 4(b)(3) of the Florida Constitution.

essential requirements of the law; (2) the order must cause material injury throughout the remainder of the proceedings; and, (3) the injury must be irreparable, i.e., one for which there will be no adequate remedy by way of plenary appeal. Dairyland Insurance Co. v. McKenzie, 251 So.2d 887 (Fla. 1st DCA 1971); Gulf Cities Gas Corp. v. Cihak, 201 So.2d 250 (Fla. 2d DCA 1967). This, then, is the standard that must be applied to the circumstances in this case.

Application of the test

This court has recently applied this standard for certiorari review to the issue raised in this case. In Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), the Florida Supreme Court addressed the following issue:

> whether it is appropriate for an appellate court to review by certiorari an interlocutory order denying a motion to dismiss or strike a claim for punitive damages.

Id., at 1098. In Martin-Johnson, this court concluded that certiorari review was not appropriate. In discussing this issue, this court applied the general formula outlined above to the circumstances of disclosure of financial information in relation to, and the defense of, punitive damage claims. Because this court found that the petitioner in Martin-Johnson had an adequate remedy at law by way of plenary appeal, this court had no need to pass on the correctness of the trial court order.

With regard to the adequacy of permitting a claim for punitive damages to be litigated in the event of a trial court order erroneously permitting the claim to

go forward, this court held (1) that the harm that might result from discovery of a litigant's finances is not the type of irreparable harm contemplated by the standard of certiorari review, (2) that to permit interlocutory appeals by certiorari in this instance would result in unwarranted harm to our system of procedure, (3) that strong public policy reasons militate against review, and (4) that sufficient means exist to protect litigants from irreparable harm due to the release of financial information. This court, therefore, held that orders permitting a claim for punitive damages were not reviewable by way of certiorari.

This court's analysis in Martin-Johnson is as valid today as it was when Martin-Johnson was decided. Nevertheless, several of the district courts have determined that they are not bound to follow that decision. The rationale employed by those courts is based on the enactment of Florida Statutes §§ 768.72 (1993). As stated in Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA 1991), in light of the enactment of Florida Statutes $768.72, "[w]e find it difficult to understand how Martin-Johnson can any longer control this issue."

Section 768.72 provides that:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall

> proceed until after the pleading concerning punitive damages is permitted.

As noted by the district courts, this statute created additional, substantive rights in parties that were not present at the time that the Martin-Johnson case accrued. Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987). This additional protection against baseless claims for punitive damages was not discussed in the Martin-Johnson case because the statute was not applicable to that action.[2]

Before this statute went into effect, the standard procedure for review of punitive damages claims was for the party opposing the claim to move for a protective order regarding financial worth discovery. The trial court would then determine the sufficiency of the punitive damages claim in the context of this motion. See, e.g., Tennant v. Charlton, 377 So.2d 1169 (Fla. 1979). This review included a determination of whether or not a factual basis existed for an award of punitive damages before determining whether financial worth discovery could be had. Id. If the court found that there were insufficient grounds for a claim for punitive damages, the protective order would be granted, and punitive damages discovery could not proceed.

Section 768.72 provides that a party asserting a claim for punitive damages must provide a reasonable showing by evidence in the record or by proffer of a reasonable basis for punitive damages before such a claim may

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[2] When Marîin-Johnson, supra, was decided in July of 1987, this court was plainly aware that the legislature had entered the field of pleading requirernents for punitive damages. Some six weeks earlier, this court had expressly held this provision to be constitutional. Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987).

proceed. In other words, the trial court must determine whether a factual basis exists for an award for punitive damages before determining whether financial worth discovery should be had. The statute, therefore, essentially codified the standard procedure for review *of* punitive damage claims and financial worth discovery that existed before the enactment of the statute.

The statute did not change the legal basis for a claim for punitive damages. Generally, under Florida law, the character of negligence necessary to sustain an award of punitive damages must be willful, wanton, or intentional misconduct sufficient to sustain a conviction for manslaughter. White Constr. Co. v. DuPont, 455 So.2d 1026 (Fla. 1984). This standard is not affected by the statute.

Furthermore, the statute has not changed the right of the parties to be free from baseless or frivolous punitive damages claims. The right to be free from frivolous claims certainly predates the adoption of this statute.

Neither has the statute eliminated the right of Plaintiffs to plead and recover punitive damages in those cases where there is a reasonable basis in law and fact for the award of such damages. Meadowbrook Health Services of Florida, Inc. v. Acosta, 617 So.2d 1104 (Fla. 3d DCA 1993). Of course, the right to plead and prove such damages certainly predated the adoption of this statute. Martin-Johnson, supra.

Finally, the statute does not limit or in any way alter the information discoverable in a punitive damages action. Where the basis for a punitive

damages claim exists, the parties are free to conduct any discovery that was permissible before the adoption of the statute. There are no additional measures in section 768.72 guarding information gathered as part of a claim for punitive damages.

The statute, therefore, has not dramatically changed the law of punitive damages in the state of Florida. As appropriately summarized by Chief Judge Harris in Simeon, Inc. V. Cox, et al., 20 Fla. L. Weekly D1105 (Fla. 5th DCA, May 5, 1995):

> In short, section 768.72 is little more than a codification of the law predating it: the defendant should not be exposed to financial discovery until the Plaintiff has properly pleaded a claim for punitive damages and has proffered evidence sufficient to create a prima facia entitlement to such damages to the satisfaction of the trial court.

Id, at 1106.[3] The adoption of this statute has, nevertheless, been held to provide a new basis for certiorari review of interlocutory orders permitting claims for punitive damages

The argument in support of such certiorari review provides that the enactment of this statute created a new right not to be exposed to a claim for punitive damages until the court has determined that there is a reasonable basis for such damages. If, therefore, the trial court permits the addition of a claim for punitive damages without the requisite pre-determination, a substantive procedural right has been lost.

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[3] Following this discussion, Chief Judge Harris concluded that "Because section 768.72 did not dramatically change the prior law, it has not superseded Martin-Johnson." Id, at 1106.

The argument also provides that if the court's finding on the sufficiency of the evidence to support a punitive damages claim is erroneous and the defendant is nevertheless forced to defend the claim and to provide financial discovery, plenary appeal cannot restore the defendant's right to have been free from those obligations. In either case, it is argued that defendants will suffer irreparable harm if erroneous findings as to the legal basis for the claim are permitted to remain without immediate certiorari review. Accordingly, the decision to permit review of such claims by way of certiorari is necessary to preserve the substantive statutory rights enacted by the legislature.

The statute, however, is silent on the issue of appellate review. This court must then apply the standard for certiorari review, as it did in Martin-Johnson, to determine whether the application of the statute has affected the Martin-Johnson analysis and conclusion

In Martin-Johnson this court held that:

> 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....We cannot characterize the information requested here in [the same vein as cases appropriate for certiorari review]. 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.

Id., at 1099.

Has the type of harm alleged to arise from the discovery of financial worth information changed from the type of harm from the discovery of financial worth information found to be insufficient to support review by way of certiorari in the Martin-Johnson case? We suggest that it has not. The nature of financial worth information is the same. The legislature has not adopted a new statutory privilege. The rules regarding the work product privilege have not changed to incorporate financial worth information. This is certainly not information the release of which will put lives in danger, such as the release of confidential informant information. Certainly, § 768.72 has not altered the nature of financial information. Accordingly, the harm alleged to arise from the release of financial worth information has not changed since the time of the Martin-Johnson decision.

This court next considered the effect of such reviews on this state's system of judicial procedure:

> Second, to permit interlocutory appeals by certiorari in this instance would result in unwarranted harm to our system of procedure. The rationale employed in this case [by the petitioner] could as easily be applied to the erroneous denial of a motion for summary judgment or a motion to join or dismiss a party. For example, a defendant in a medical malpractice case could claim "irreparable harm" to reputation and needless cost of litigation flowing from the denial of a motion for summary judgment. Litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to permit certiorari review. See, Wright v. Sterling Drugs, Inc., 287 So.2d 376 (Fla. 2d DCA 1973), cert. Denied, 296 So.2d 51 (1974).

Martin-Johnson, at 1100. Applying this test to the rationale employed by the proponents of certiorari review of punitive damages claims under the statute yields the same result as that reached in the Martin-Johnson case. The arguments regarding the irreparable harm issue could as easily be applied *to* the erroneous denial of a motion for summary judgment or a motion to join or dismiss a party. The authorities are still clear that this type of harm is not sufficient to permit certiorari review.

This court next discussed the effect of permitting certiorari review of all punitive damage determinations by the trial courts on the judicial system in this state:

> Moreover, if we permitted review at this stage, appellate courts would be inundated by petitions to review orders denying motions to dismiss such claims, and trial court proceedings would be unduly interrupted.

Id., at 1100. The cases cited above certainly suggest that the courts have devoted considerable resources to this issue since the adoption of the statute See, e.g., Manor Care of Florida, Inc. v. Olt, 620 So.2d 1297 (Fla. 2d DCA 1993); 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), review denied, 634 So.2d 624 (Fla. 1994); Kraft General Foods, Inc. V. Rosenblum, 635 So.2d 106 (Fla. 4th DCA 1994); Henn v. Sandler, 589 So.2d 1334 (Fla. 4th DCA

1991); Globe Newspaper Co. v. King, 643 So.2d 676 (Fla. 1st DCA 1994), pending on review, No. 84-676 (Fla., briefing schedule issued Nov. 9, 1994, initial brief due Dec. 5, 1994); Chrysler Corp., Inc. v. Pumphrey, 622 So.2d 1164 (Fla. 1st DCA 1993); Harley Hotels v. Doe, 614 So.2d 1133 (Fla. 5th DCA), review denied, 626 So.2d 205 (Fla. 1993). Should this court hold that such review is now appropriate, we suggest that many more petitions for review will arise, particularly in those districts which now deny such review.

Furthermore, this court's concern regarding the conservation of judicial resources is arguably stronger now than it was in 1987. Certainly the courts have not received such considerable additional resources from the state as to alleviate the concern over an inundation of petitions to review such orders. In fact, just the opposite may be true, that the work load of the courts have increased, adding continued emphasis to the limited and extraordinary nature of certiorari review.

A related issue regarding certiorari review is the effect of the order on the proceedings below. Motions to amend complaints to add claims for punitive damages may occur at any time after the proceedings have begun. It is possible for such motions to be denied upon a certain proffer, only to be reconsidered after other discovery in the case establishes that the claim for punitive damages is well founded. Will each of these decisions by the trial court be reviewable by way of certiorari? If so, the number of petitions for review may be expected to exceed even the number of punitive damages claims in the state.

As to this court's policy concerns, this court stated:

> Even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less onerous or less harmful in light of the development of the case after the order. Haddad, The Common Law Writ of Certiorari in Florida, 29 U.Fla.L.Rev. 207, 227-28 (1977).

Id., at 1100. These reasons militating against review have not changed as a result of the enactment of §768.72. Parties injured by the erroneous interlocutory order may still eventually win the case, mooting the issue, or the order may appear less onerous or less harmful in light of the development of the case after the order. The injured party may also prevail on a subsequent motion for summary judgment or a directed verdict on the punitive damages claim, also mooting the issue. Subsequent discovery may also confirm that the grounds for punitive damages are well founded, even though the proffer for the claim for punitive damages was insufficient, again rendering the issue moot.

Finally, this court in Martin-Johnson discussed the petitioners interest in the confidential nature of financial information:

> Lastly we do not ignore petitioner's interest in avoiding unnecessary disclosure of matters of a personal nature. We believe, however, that our discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders

Id., at 1100. As with each of the other factors in determining whether certiorari review is appropriate for orders of the trial court regarding the sufficiency of punitive damages claims, nothing has changed since the Martin-Johnson decision. Rule 1.280 continues to provide sufficient means to protect the privacy interests of those from whom discovery is sought. These discovery rules permit the trial court to prevent the disclosure of financial information. For good cause shown, parties are still entitled, and the trial court is still empowered to grant orders to protect a party in such circumstances. Certainly, it cannot be argued that $768.72 has repealed or diminished a party's right to appropriate protective orders on good cause shown.

The application of the standard for certiorari review to the issue of the reviewability of interlocutory orders of the trial courts on the issue of the sufficiency of a decision regarding the ability of parties to plead claims for punitive damages, therefore, appears to yield the same result as that reached in the Martin-Johnson case. The alleged harm that might result from the discovery of financial information is still not the type of irreparable harm contemplated by the standard for certiorari review. Permitting interlocutory appeals by certiorari will still result in the disruption of the proceedings in the trial court, and strong policy concerns continue to militate against review. Finally, sufficient means continue to exist to protect against irreparable harm. Accordingly, it is not appropriate to review, by certiorari, interlocutory orders of the trial courts permitting the amendment of a complaint to add a claim for punitive damages.

It has been argued, however, that the reason that certiorari review is now appropriate is because the legislature has now enacted a statute providing additional substantive protection from frivolous or groundless punitive damages claims. As stated above, the statute itself is silent regarding appellate review Nevertheless, it is argued that the enactment of this statutory right is itself a sufficient basis for certiorari review

The argument that certiorari review is now appropriate because a statutory right is involved, as opposed to the common law right to be free from baseless or frivolous claims, was discussed by Judge Griffin, in the Simeon concurrence:

> I am also dubious about the wisdom of embarking on this "statutory rights" course. The Florida statutes are no doubt full of such interlocutory "rights" that would yield to the same analysis. For example, in the very same section [of § 768.72], the *plaintiff* also is given a "right." "[T]he Rules of Civil Procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages." § 768.72, Fla. Stat. (1993). The same reasoning that opens orders allowing punitive damage claims to immediate review should also dictate that orders *denying* a plaintiff such discovery be reviewable.

Furthermore, in the footnotes, Judge Griffin elaborates on this line of reasoning:

> 1. Indeed, if this statute confers a *right* on a defendant not to be exposed to a claim where there is not a "reasonable showing" "which would provide a reasonable basis for recovery of such damages" then, presumably, by implication, if the statutory showing *is* made, a plaintiff has a *right* to pursue a punitive damages claim. Thus, if the trial court *denies* a plaintiff's punitive damages claim and the plaintiff

> contends his showing has been sufficient to trigger his "right," will the plaintiff have an equal right to certiorari in the court of appeal? 2. And why would a litigant be entitled to certiorari review of a statutory pleading requirement but not a pleading requirement imposed by rule? See, e.g., Fla. R. Civ. P. 1.120(B).

There are, indeed, many statutory rights affecting litigants. Certainly, however, it would be quite an imposing extension of certiorari review to hold that each time a party claims to have a right pursuant to a statute, a decision by the trial court regarding that right is automatically subject to certiorari review simply because the right is conferred by statute

It will surely be argued that failing to review these matters would make the right provided by the statute in effect, "mythical" as stated in the Kraft case However, it makes the right no more "mythical" than the right to be free from punitive damages discovery discussed in the Martin-Johnson case, or more "mythical" than any other right, whether at common law or statutory, which is not appropriate for certiorari review. **If the only non-mythical rights are those that are enforceable by way of certiorari, then certiorari review must be available to enforce any right, of any party, in any action, and to review the determination of the trial court on any decision.** Such is not the purpose of the extraordinary remedy of certiorari review.

Furthermore, the "statutory rights" argument generally fails to explain how the application of the factors necessary for certiorari jurisdiction to exist have changed. As presented above, the harm has not changed. The information

discoverable has not changed. The ability of the trial court to fashion protective orders has not changed. The effect on our system of procedure has not changed. The policy considerations have not changed. Accordingly, we submit that the basis for certiorari review has not changed from the time of this court's decision in the Martin-Johnson decision.

The statute has however, changed this area of the law by providing additional protection to litigants against whom punitive damage claims are asserted. Does this additional protection affect the analysis in the Martin-Johnson decision? We submit that the additional protection provided by the statute now makes the need for certiorari review less compelling than it was at the time of the Martin-Johnson decision.

When Martin-Johnson was decided, the added protection to litigants found in section 768.72 did not exist. This court decided, however, **that even without this added safeguard,** certiorari review of punitive damages claims was not appropriate because the harm that might result from such a claim was not "the type of 'irreparable harm' contemplated by the standard of review for certiorari." Id, at 1099. In light of the fact that the statute provides additional protection from such harm, **thereby reducing the possibility of unwarranted disclosure of financial information,** the need to employ the extraordinary remedy of certiorari is reduced.

Furthermore, this court should consider the ruling in W.R. Grace & Co. V. Waters, 638 So.2d 502 (Fla. 1994), in which this court held that, when presented

with a claim for punitive damages and upon motion by the defendant, the trial court should bifurcate the determination of the amount of punitive damages from the remaining issues at trial. As this court stated about that ruling, "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 506. This additional procedure provides the means for a complete remedy by plenary appeal for the party asserting harm as the result of an erroneous decision by the trial court on a punitive damages claim.

CONCLUSION

The application of the elements for certiorari review to the case of an interlocutory order on claims for punitive damages subject to Florida Statutes § 768.72, yields the same result as the application of those factors did in the Martin-Johnson case. The adoption of section 768.72 reduces the need to employ the extraordinary remedy of certiorari review, because the statute itself provides additional protection to litigants from punitive damages claims. Accordingly, this court should not recede from its decision in the Martin-Johnson case.

Procedural Review

As very briefly mentioned at the beginning of the argument presented above, there are procedural differences between the cases granting petitions for certiorari in the lower tribunals. In some of the cases, the appellate courts have permitted certiorari review where the lower courts has failed to offer the

procedural protections afforded under § 768.72. For example, review has been granted where the trial court permitted discovery to proceed on a punitive damages claim without first making a finding that a basis existed for their recovery. Wolper, Ross, Ingham & Co. V. Leidman, 544 So.2d 307 (Fla. 3d DCA 1989).

The argument in support of certiorari review of the procedural protections afforded under the statute provides that the enactment of this statute created a new right belonging to litigants not to be exposed to a claim for punitive damages until the court has determined that there is a reasonable basis for such damages. If, therefore, the trial court permits the filing of a claim for punitive damages without the requisite pre-determination by the trial court, a substantive procedural right has been lost. The irreparable harm in that instance is that the due process right to such review has been denied and that the right to pre-determination cannot be remedied on appeal.

This argument, of course, does not explain why the harm suffered by the party is any different from the harm found to be insufficient for certiorari review in the Martin-Johnson case. If the general formula for certiorari review is applied, the result is no different from the Martin-Johnson case. This argument also falls into the "statutory rights" category, and may present this court with another new basis for certiorari review of every such statutory right.

Nevertheless, this argument at least has the advantage of reducing the number of cases subject to certiorari review. Furthermore, once the procedural

aspects of the statute are ruled upon. the number of petitions for review should significantly decrease. Accordingly, should this court finds that litigants will suffer irreparable harm when the right provided by the statute is not protected, review by certiorari should be limited to review of procedural deficiencies as opposed to the decision of the trial court on the sufficiency of the claim for punitive damages.

The second argument provides that the appellate courts should review the determination of the trial court on the sufficiency of the evidence to support claims for punitive damages. This argument would permit certiorari review of each and every decision rendered by the trial courts in this state on the issue of punitive damages. This basis for review conflicts directly with the holding of the Martin-Johnson decision, and asks the appellate courts to conduct the same type of review that was rejected in the Martin-Johnson decision. This argument should be rejected.

The present case before the court involves the second type of review, as the trial court in this case did hold a hearing on the motion of the Plaintiff to amend the complaint to add a claim for punitive damages. Accordingly, the procedural requirements of Section 768.72 were met in this case. For all of the reasons discussed above, this type of review is not appropriate.

For the foregoing reasons, we respectfully request this court enter an order quashing the decision of the Second District Court of Appeal in this case, and to provide the Petitioner with such other relief as this court finds appropriate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was delivered by U.S. Mail to: **Gregory G. Frazier, Esquire, 4919 Memorial Hwy, Ste. 135, One Memorial Ctr., Tampa, FL 33634, Gail Leverett Parenti, Esquire, 113 Almeria Avenue, Coral Gables, Florida 33134** and **Bennie Lazarra, Esquire, 606 E. Madison St., Ste. 2001, Tampa, Florida 33602,** this 12th day of June, 1995.

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