IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,491

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

Petitioner,

vs.

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

Respondent.

SPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This petition was brought to review the decision of the Second District Court of Appeal in Maggiocomo v. Beverly Enterprises-Florida, Inc., 651 So. 2d 816 (Fla. 2d DCA 1995), on the grounds of conflict with the decision of the First District Court of Appeal in Globe Newspaper Co. v. King, 643 So. 2d 676 (Fla. 1st DCA 1994), approved 20 Fla. L. Weekly S317 (Fla. July 6, 1995).

In this brief, the parties will be referred to as BEVERLY and MAGGIOCOMO, or alternatively, as they stood in the court below. The symbol "A" will designate the Appendix to Respondent's Brief on the Merits.

All emphasis is supplied by counsel, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner, DOUGLAS STALLEY, as Personal Representative of the Estate of MARGARET MAGGIOCOMO, deceased, brought this action against BEVERLY, operator of a nursing home, pursuant to section 400.023, Florida Statutes (1993), for alleged deprivations of Ms. MAGGIOCOMO's nursing home resident's rights. [A.1-14] The original one-count complaint alleged that an employee of BEVERLY had stolen a diamond ring from Ms. MAGGIOCOMO's finger while she was a resident at the nursing home. [A.54-57]

BEVERLY filed a Motion to Dismiss asserting, inter *alia*, that section 400.023 did not provide a cause of action for deprivations of a nursing home resident's rights where the deprivation did not result in the death of the resident. [A.15-18] While the motion to

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dismiss was still pending, the plaintiff filed a motion for leave to amend the complaint to separate the causes of action pled, and to plead a claim for punitive damages, pursuant to section **768.72,** Florida Statutes **(1993).** [A.19-21]

The proposed amended complaint filed in support of the motion included seven[1] separate causes of action, each of which is based on essentially the following factual allegations:

a. **Ms. MAGGIOCOMO** was a resident at the nursing home;

b. Paula Gibson Sweet was an employee of the nursing home, and was assigned to care for **Ms. MAGGIOCOMO** on or about January **2, 1993;**

c. On January **2, 1993, Ms. MAGGIOCOMO's** chart documents that the ring she always wore was missing from her finger;

d. **A** police investigation determined that Sweet was responsible for the theft;

e. The ring was never returned to **Ms. MAGGIOCOMO** or her family; and

f. Ms. MAGGIOCOMO suffered physical injury as a result of having the ring forcibly removed from her finger.

The causes of action alleged include four separate counts brought under section **400.023,** Florida Statutes **(1993 ,** for

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[1] The first amended complaint which was later filed pursuant to the order under review included eight counts, based upon essentially the same factual allegations. **[A.58-75]** Because the trial court's order and the decision of the district court were based upon the proposed first amended complaint **[A.1-14],** the discussion in this brief is limited to the proposed pleading which was before the trial court at the time it ruled on the plaintiff's motion for leave to amend.

violations of Ms. MAGGIOCOMO's nursing home resident's rights. Because Ms. MAGGIOCOMO died shortly after the incident, these counts are alleged as "survival" **actions.**[2] **[A.2-8]** The remaining causes of action include counts for "negligence per **se"** for violations of Chapter 400[3]; vicarious liability for assault and battery; vicarious liability for theft; and negligent hiring and retention. [A.8-14] Each count of the proposed amended complaint includes a prayer for punitive damages.

Three days before the hearing on plaintiff's motion for leave to amend, plaintiff filed a "proffer of evidence" in support of the amendment to assert a claim for punitive damages. **[A.22-23]** The **"proffer"** consisted of a reference to "any portion of MARGARET MAGGIOCOMO'S nursing home chart that is relevant to the theft of MARGARET MAGGIOCOMO's one carat diamond engagement ring," the police report pertaining to the theft of the ring, and the affidavit of Sam MAGGIOCOMO, the deceased's husband. [A.24-26]

The affidavit of Mr. MAGGIOCOMO stated that Ms. MAGGIOCOMO always wore her wedding band and a one-carat diamond engagement ring on her left hand while she was a resident at the nursing home.

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[2] The amended complaint does not allege that Ms. Maggiocomo died as a result of the alleged deprivations related to the taking of the ring. But see Fla. Stat. § 400.023 (1993) (action may be brought by personal representative of estate of deceased resident "when the cause of death resulted from the deprivation or infringement of the decedent's rights.")

[3] But see Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994); Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987); Freehauf v. School Board of Seminole County, 623 So. 2d 761 (Fla. 5th DCA), rev. dismissed, 629 So. 2d 132 (Fla. 1993); Fischer v. Metcalf, 543 So. 2d 785 (Fla. 3d DCA 1989).

[A.24] Mr. MAGGIOCOMO stated that on January 2, 1993, he noticed that Ms. MAGGIOCOMO's ring was missing from her left hand, and that her finger was severely bruised and swollen. [A.25] The staff of the nursing home searched for the ring, but was not able to locate it. [A.25] The next day, the theft was reported to the police. [A.25] Mr. MAGGIOCOMO's affidavit stated that Paula Gibson Sweet had provided care to Ms. MAGGIOCOMO in the days prior to the loss, and that he was "informed by the administration of [the nursing home] that other residents' rings were stolen around the same time the theft of MARGARET MAGGIOCOMO's ring occurred." [A.25]

The police report proffered by the plaintiff details the investigation into Mr. MAGGIOCOMO's complaint. [A.27-31] It states that Ms. MAGGIOCOMO was mentally incapacitated at the time of the loss. [A.29] The report reflects that the nursing home contacted Mr. MAGGIOCOMO to advise him that his wife's finger was badly swollen. [A.29] When he arrived at the nursing home, he noted that the engagement ring was missing. [A.29]

The investigation revealed that Paula Gibson had been hired by the nursing home as an aide on December 22, 1992, and was terminated on January 8, 1993. [A.30] When confronted by the director of nursing about the disappearance of the ring, Ms. Gibson stated that the ring was missing at the beginning of her shift. [A.30] After the disappearance of the ring, another resident advised the director of nursing that one of the aides had unsuccessfully tried to remove her ring. Although the resident did not know the identity of the aide, another aide stated that she had

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seen Ms. Gibson pushing this resident (not Ms. MAGGIOCOMO) back to her room, although Gibson did not work in the area this resident was located. [A.31]

A criminal background check showed that Ms. Gibson's correct name was Paula Sweet, and that she had several prior arrests for theft, and had several outstanding arrest warrants. [A.31] The state attorney's office determined that the evidence was not sufficient to charge Sweet with the theft of Ms. MAGGIOCOMO's ring. [A.31]

The nurse's notes from the nursing home chart reflect that on January 2, 1993, Mr. MAGGIOCOMO was asked if he wanted his wife's ring cut off her "extremely edematous" left hand. [A.32] When he saw his wife's hand, Mr. MAGGIOCOMO noted that the engagement ring was missing. He stated that Ms. MAGGIOCOMO had been in the hospital the prior week, and that they had unsuccessfully attempted to cut the ring off. The nursing home conducted a search for the ring, with no results.

After a hearing, the trial court granted plaintiff's motion for leave to amend the complaint to include a claim for punitive damages. [A.33] The Second District Court of Appeal, on certiorari review, quashed the trial court's order, stating:

> To amend a complaint to add a claim for punitive damages, the plaintiff must provide evidence of acts which prima facie show a malicious, wanton, or willful disregard of the rights of others. Kev West Convalescent Center, Inc. v. Doherty, 619 So. 2d 367 (Fla. 3d DCA 1993). To sustain this burden, Stalley relied on Mrs. Maggiocomo's medical chart which reflected that the ring was missing and the finger was bruised and a

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police report which stated that an employee was a suspect.

These facts are totally inadequate to sustain a claim for punitive damages against an employer based on vicarious liability. See Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). . .

[A.76-77]

This Court granted review on the basis of asserted conflict between the instant decision and the decision of the First District Court of Appeal in Globe Newspaper Co. v. King, supra,.

POINT INVOLVED ON CERTIORARI

WHETHER CERTIORARI JURISDICTION LIES TO PERMIT THE DISTRICT COURT OF APPEAL TO REVIEW *AN* ORDER PERMITTING THE AMENDMENT OF A COMPLAINT TO PLEAD A CLAIM FOR PUNITIVE DAMAGES, WHERE THE EVIDENCE IS PATENTLY INSUFFICIENT TO SUPPORT SUCH A CLAIM?

S OF ARGUMENT

The trial court's order which permitted a punitive damages claim to be pled in the absence of any *evidence* regarding the nursing home's actions plainly constituted a departure from the essential requirements of law for which certiorari review should be permitted. On its face, this case simply does not present that rare and extreme set of circumstances in which the imposition of punitive damages would serve their proper function.

This Court is urged to reconsider its decision in Globe Newspaper Co. v. King, supra, to the extent that it recognizes the propriety of certiorari review of an order permitting the pleading of a punitive claim where the trial court made a procedural error in the application of section 768.72, but not where the trial court's error was substantive in nature. Stripped from their

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substantive moorings, the procedural rights afforded by section 768.72 are rendered meaningless.

The failure to afford the substantive protection created by the statute gives rise to the same irreparable harm as denial of the statute's procedural protections; thus, either species of harm should be sufficient to support certiorari jurisdiction.

In this case where there was absolutely no evidence proffered regarding what the nursing home did wrong which would warrant the imposition of punitive damages, the district court should have sufficient discretion to reach the trial court's serious substantive error on certiorari review.

ARGUMENT

CERTIORARI JURISDICTION LIES TO PERMIT THE DISTRICT COURT OF APPEAL TO REVIEW *AN* ORDER PERMITTING THE AMENDMENT OF A COMPLAINT TO PLEAD A CLAIM FOR PUNITIVE DAMAGES, WHERE THE EVIDENCE IS PATENTLY INSUFFICIENT TO SUPPORT SUCH A CLAIM

In Globe Newspaper Co. v. King, supra, this Court approved a decision of the First District Court of Appeal wherein the district court held that certiorari review does not lie to permit a district court of appeal to review an order by the trial court permitting the plaintiff to plead a claim for punitive damages, so long as the trial court has followed the procedural component of section 768.72, Florida Statutes (1993).[4] In other words, this Court determined in Globe Newspaper Co. that as long as the trial court has conducted a hearing for the purpose of determining whether the plaintiff has made a "reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for the recovery of [punitive] damages," then certiorari is

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4 That statute provides:

> 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.

unavailable to review the trial court's determination that a reasonable basis for the recovery of punitive damages exists.

In his dissent in Globe Newspaper Co. v. King, supra, Judge Anstead reasoned that the majority decision granted defendants a "hollow victory" by permitting certiorari review of orders which deny the procedural requirements of section 768.72, but not of orders which affect the substantive rights afforded by that statute. Judge Anstead stated:

> The heart of section 768.72 is its requirement of a "reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for the recovery of such damages." Without that showing, no "discovery of financial worth shall proceed." The opinion in **Commercial** Carrier Corp. v. Rockhead, 639 So. 2d 660, 661 (Fla. 3d DCA 1994), cogently illustrates the point:
>
> > 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. **See** White Construction Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984). Accordingly, the order under review is quashed.
>
> The legislature has specifically granted the petitioner a substantive right to be free of financial discovery, absent a particularized evidentiary showing. A violation of the statutory provisions obviously cannot be remedied on plenary appeal. As has often been stated, by then "the cat is out of the bag." Consistent with the intent of the legislature in imposing this requirement, and, presumably expecting that it would be enforced by the courts, I would hold that certiorari review is appropriate in such cases.

Id. at S318.

The instant decision graphically demonstrates the fallacy of a rule which would permit review of the denial of the procedural rights granted by section 768.72, but not the substantive rights. It is respectfully submitted that this case proves the wisdom of Judge Anstead's reasoning. Accordingly, this Court is urged to reconsider its decision in Globe Newspaper Co. v. King, supra, and to recognize that certiorari review is available to review decisions of the trial court permitting punitive damage claims to be pled, so long as the defendant can demonstrate that the requirements of certiorari review have been met; i.e., the ruling departs from the essential requirements of law, and the error is one which cannot be remedied on plenary appeal.

The requirements for certiorari review have been met in the instant case because plenary appeal is not adequate to remedy the harm to BEVERLY caused by being improperly subjected to a baseless punitive damages claim, and the trial court's ruling plainly constituted a departure from the essential requirements of law. See Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA), rev. denied, 642 So. 2d 1363 (Fla. 1994); Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991) (en banc).

Substantively, the trial court's error in this case constituted a departure from the essential requirements of law, for the court failed to apply the most basic principles of punitive damages law to the evidence which made up the plaintiff's "proffer." See Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995) (discussing bases for corporate liability for punitive

damages); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981) (discussing vicarious liability for punitive damages); Commodore Cruise Line Ltd. v. Kormendi, 344 So. 2d 896 (Fla. 3d DCA), cert. denied, 352 So. 2d 172 (Fla. 1977) (where intentional act is committed outside course and scope of employment, punitive damages will not lie against employer).

As noted by the district court, the facts proffered by the plaintiff are "totally inadequate to sustain a claim for punitive damages against an employer based on vicarious liability." [A.77] This is not a conclusion which required the district court to weigh or evaluate conflicting testimony: the plaintiff's proffer was devoid of ***any*** evidence of what ***BEVERLY did or did not do.***[5] Accordingly, there was no basis ***whatsoever*** for a finding that BEVERLY's conduct was so egregiously wrong that it would support a claim for punitive damages.[6] **See** American Cyanamid Co. v. Roy, 498 So. 2d 859 (Fla. 1986); Como Oil Co. v. O'Loughlin, 466 So. 2d 1061 (Fla. 1985); White Construction Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984). Yet, despite the fact that the plaintiff's proffer contained absolutely no evidence or indication of what the defendant corporation did or did not do which caused the harm to

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[5] It is noteworthy that the plaintiff has not even attempted to justify the trial court's ruling in this Court.

[6] Indeed, the proffer in this case was so devoid of substance that this case is more properly viewed as a "no proffer" case, than a case where the district court of appeal is called upon to weigh conflicting evidence in a certiorari proceeding. The question whether certiorari will lie to review a trial court's order permitting a punitive damages pleading where the plaintiff's proffer is essentially a sham was not answered by this Court in Globe Newspaper Co. v. King, supra.

the plaintiff's decedent, the trial court found that it provided a reasonable basis for the recovery of punitive damages. The district court disagreed, and held that the order permitting the claim to be pled should be quashed.

The issue before this Court is whether the district court of appeal had the jurisdiction to reach the trial court's obvious and serious error on certiorari review. It is respectfully submitted that it did, and that the district courts of appeal should continue to have sufficient discretion to determine whether the requirements of certiorari review have been met on a case-by-case basis.

That plenary appeal is not adequate to remedy the harm caused by a violation of section **768.72,** Florida Statutes **(1993),** was recognized by this Court in Globe Newspaper Co. v. King, **supra** at **S317:**

> The plain meaning of section **768.72** now requires a plaintiff to provide the court with a reasonable evidentiary basis for punitive damages before the court may allow a claim for punitive damages to be included in the plaintiff's complaint. To allow punitive damage claims to proceed as before would render section **768.72** meaningless. Furthermore, a plenary appeal cannot restore a defendant's statutory right to be free of punitive damage allegations in a complaint untii there is a reasonable showing by evidence in the record or proffered by the claimant.

This reasoning applies with equal force to both the denial of the substantive and the procedural protections afforded by section **768.72.** Neither species of error can be remedied on plenary appeal. In this particular context, post-trial review is patently inadequate to remedy the denial of a pre-trial substantive right; i.e., the right to be free from the invocation of the powerful

remedy of a punitive damages claim, absent a factual and legal basis.[7]

In determining whether error results in a "departure from the essential requirements of law," it is respectfully submitted that the availability of certiorari review of an order allowing a punitive damages pleading under section 768.72 should not depend upon the nature of the error; i.e., whether it is procedural or substantive. In an analogous context, this Court held:

> . .[T]he phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983). Although Combs dealt with the jurisdiction of the district courts of appeal to review orders from a circuit court acting in its appellate capacity, the above-quoted reasoning is equally applicable in this context. As long as the trial court's error is serious, the

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[7] Cf. Pearlstein v. Malunnev, 500 So. 2d 585, 587 (Fla. 2d DCA 1986), rev. denied, 511 So. 2d 299 (Fla. 1987) ("[F]or petitioners to receive the benefits conferred upon them . . . by the [presuit screening] statute, it is necessary and appropriate for us to intervene at this juncture.")

availability of certiorari jurisdiction should not depend upon whether the error is procedural or substantive in nature.

In the context of section 768.72, Florida Statutes (1993), this view accounts for the extent to which the procedural and substantive aspects of the statute are intertwined. In Smith v. Department of Insurance, 507 So. 2d 1080, 1092 n.10 (Fla. 1987), this Court noted that section 768.72 created substantive rights, and that the procedural aspects of the statute were "intimately related" to this definition of substantive rights. See also Henn v. Sandler, supra; Wolper Ross Ingham & Co. v. Liedman, 544 So. 2d 307, 308 n.1 (Fla. 3d DCA 1989).

The decision in Kev West Convalescent Center. Inc. v. Doherty, supra, represents a classic example of how substance and procedure are intertwined in a section 768.72 analysis. In that case, the plaintiff contended, and the trial court agreed, that punitive damages were properly recoverable under section 400.023, Florida Statutes (1991), on the basis of a showing of a violation of a nursing home resident's rights.

The Third District Court of Appeal rejected the plaintiff's position, finding the proffer of a mere violation of the nursing home resident's rights insufficient to support a claim for punitive damages, and holding that the common law ctandard for the recovery of punitive damages applied to claims brought under section 400.023, Florida Statutes (1993). Thus, the error brought up on certiorari review in Kev West Convalescent Center, Inc., was a ***mixed*** error involving substance and procedure.

Section **768.72** obviously contemplates more than going through the motion of filing a "proffer." It provides for a substantive review of the proposed pleading and the evidence proffered to ascertain whether, in fact, there exists a reasonable basis for the recovery of punitive damages. **See** Henn v. Sandler, **supra** at **1336** (legal sufficiency of punitive damages pleading at issue in certiorari review of order permitting punitive damage discovery). The substantive right to be free from baseless claims for punitive damages embodied in section **768.72** would be meaningless if it could be circumvented merely by going through the mechanics of making an evidentiary proffer, no matter how meager. Declining to enforce the substantive rights afforded by section **768.72** strips the protections afforded by the statute from their substantive moorings, effectively eviscerating the legislative intent.[8]

Contrary to the arguments of the plaintiff in this court, there is more at stake when a punitive damage claim is permitted to proceed than the prospect of financial discovery. The invocation of a punitive damage claim has adverse effects on a defendant apart from opening the door to financial discovery, and section **768.72** affords protection from those consequences as well. Specifically, by virtue of section **768.72,** a defendant has a substantive right to

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[8] **As** noted by Judge Peterson in his dissenting opinion in Jim Peacock Dodge, Inc. **v.** Russell, **656** So. 2d **247** (Fla. 5th DCA 1995):

> 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 protectionc the statute was intended to afford them..

be free from the in terrorem effect of punitive damage claims lacking a legal or factual basis. See Kraft General Foods, Inc. v. Rosenblum, supra.

Prior to the enactment of section 768.72, any plaintiff could invoke a punitive damage claim without restriction, and it was often difficult, if not impossible, for a defendant to free itself from the effects of a baseless claim. Frequently, a defendant faced with a punitive damage claim -- even a baseless one -- will decide that it is more prudent to settle such a lawsuit for an amount greater than the value of the claim, rather than risk exposing its assets to the uncertainties of a jury trial. The resulting extortionate settlements do not advance the legitimate interests of the state in permitting punitive damage claims, and are devastating to defendants and the business community.

In enacting section 768.72 as a component of the 1986 Tort Reform and Insurance Act,[9] the legislature wisely determined that baseless claims for punitive damages should not be used to give the plaintiff an in terrorem weapon in settlement negotiations. The legislature obviously sought to discourage the use of such claims for the sole purpose of increasing the settlement value of a lawsuit.

The need to enforce the substantive protection afforded by the statute by certiorari is therefore peculiarly tied to the unique implications of the right granted: a defendant forced to choose between risking its assets in litigating an apparently baseless

[9] Ch. 86-160, Laws of Fla.

punitive damage claim, or settling the lawsuit at an inflated value, can find little comfort in a plenary appeal at the end of the litigation.

The plaintiff's argument in this Court totally ignores this important aspect of the substantive protection afforded by section 768.72, and the legislature's appropriate concern for minimizing the in *terrorem* use of punitive damage claims. It is further submitted that this aspect of the substantive protection affirmatively granted by the legislature serves to distinguish this Court's decision in Martin-Johnson, Inc. v. Savaue, 509 So. 2d 1097 (Fla. 1987), for it adds another consideration which shifts the balance of the factors weighed in that decision.

The plaintiff's judicial economy arguments are self-defeating in this context. Punitive damages are not intended to be awarded in routine cases, to redress routine wrongs. Rather, their imposition is to be reserved for rare and extreme cases. American Cyanamid Co. v. Roy, supra; Inuram v. Pettit, 340 So. 2d 922 (Fla. 1976). If the appellate courts are truly "inundated" with challenges to unauthorized punitive damage claims, then it is obvious that punitive damage claims are not being reserved for rare and extreme cases, and that section 768.72 is not being appropriately implemented. This circumstance speaks to the need for more supervision of trial courts, not less.

If, on the other hand, section 768.72 were to be utilized and enforced as the legislature intended, and the use of punitive damage claims were to be limited to truly rare and extreme cases,

the concerns for judicial economy would soon resolve themselves, for fewer baseless motions would be filed and granted. Without judicial enforcement of the provisions of section 768.72, however, that circumstance is not likely to occur.

Plaintiff's contention that permitting certiorari review will result in an unwarranted disruption of trial proceedings is likewise self-defeating. This is a matter predominantly within the control of the plaintiff's counsel. If counsel prematurely files a motion to plead a claim for punitive damages without the required evidentiary **support**[10], he or she has invited the resulting disruption if the defendant challenges the order permitting a baseless claim to go forward. As stated earlier, if section 768.72 is enforced in the manner intended by the legislature, such concerns for judicial administration can and should resolve themselves.

Finally, it can be no more readily presumed that defendants **will** file unwarranted petitions for certiorari than that plaintiffs will file baseless claims for punitive damages. Of the two "evils," only the defendant's right to be free from a baseless claim for punitive damages enjoys legal protection, by virtue of section 768.72. A plaintiff, on the other hand, does not have a right to recover punitive damages. St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983). See also Fisher v. City of Miami,

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[10] This case serves as a good example. The motion for leave to amend was filed and granted before **any** discovery had been conducted.

172 So. 2d 455 (Fla. 1965); Gordon v. State, 585 So. 2d 1033 (Fla. 3d DCA 1991), approved, 608 So. 2d 800 (Fla. 1992).

In light of these considerations, it is respectfully submitted that continued adherence to Martin-Johnson, Inc. v. Savage, supra, is inconsistent with the legislative intent behind section 768.72. In her dissenting opinion in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 42, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), Justice O'Conner stated:

> punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.

Section 768.72 represents the legislature's initial effort to deal with the concern of punitive damages that have "run wild." Id. at 18. Appropriately implemented and enforced by the courts, the statute has the potential to ensure that punitive damages claims will be used to further legitimate state interests, and not for improper purposes. Absent judicial enforcement, however, the statute ensures no more than a meaningless procedural exercise, as evidenced by the "proffer" in this case.

CONCLUSION

Based upon the foregoing arguments and authorities, this Court is respectfully requested to revisit its recent decision in Globe Newspaper Co. v. King, supra, and recognize the availability of certiorari to review decisions of the trial court permitting punitive damage claims to be pled, so long as the defendant can demonstrate that the requirements for certiorari are otherwise satisfied. This Court is respectfully requested to approve the decision under review.

Respectfully submitted,

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Gail Leverett Parenti

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CERTIFICATE OF CE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of August, 1995 to: EDWARD J. LYONS, ESQUIRE, Wilkec and McHugh, Tampa Commons, Suite 601, One North Dale Mabry Highway, Tampa, FL 33609; and BENNIE LAZARRA, ESQUIRE, 606 E. Madison Street, Suite 2001, Tampa, FL 33602

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