IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioner,

v.

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

Respondent.

Case No. 85,491

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

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

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT IN RESPONSE

In Globe v. King, 20 Fla. L. Weekly S317 (Fla. July 6, 1995) this court held that appellate courts in this state "have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72, but do not have certiorari jurisdiction to review a decision of a trial judge granting leave to amend a complaint to include a claim for punitive damages when the trial judge has followed the procedural requirements of section 768.72." It is respectfully cubmitted that the issue raised in this appeal has been decided by this court in the Globe case, and that the holding in that case controls the outcome of this matter. Accordingly, the decision of the Second District Court of Appeals reviewing the decision of the trial judge granting leave to amend the complaint in this case should be quashed, and the case remanded to the trial court for further proceeding consistent with the holding of the Globe case.

ARGUMENT IN RESPONSE

In Globe, this court decided that certiorari review of a decision of a trial court judge to permit the amendment of a complaint to add a claim for punitive damages was inappropriate. Respondent requests this court reconsider the Globe decision. Several recent appellate court cases, however, suggest that the policy considerations addressed by this court in Martin-Johnson v. Savage, 509 So.2d 1097 (Fla. 1987), and reiterated in Globe, are sound.

For example, in Guarantee Trust Life Ins. Co. v. Gross, 20 Fla. L. Weekly D1479 (Fla. 2d DCA, June 23, 1995), acting Chief Judge Altenbernd concurred in the denial of a petition for certiorari from an order granting plaintiff permission to amend a complaint to allege punitive damages. Although two panels of the Second District Court had relied on certiorari to review similar issues (including the panel that decided this case), Judge Altenbernd wrote:

> If I were writing on a clean slate, I would dismiss the proceeding without reaching the merits because I do not believe the Florida Constitution gives district courts of appeal certiorari jurisdiction to review the merits of an order that simply grants a plaintiff permission to amend a complaint to allege punitive damages. See Simeon, Inc. v. Cox, 20 Fla. L. Weekly D1105 (Fla. 5th DCA May 5, 1995). Certiorari is an extraordinary writ derived from the common law, but now expressly authorized by article V, section 4(b)(3), of the Florida Constitution. In 1956 when the district courts were created as a constitutional body, in 1968 when the voters ratified the constitution, and in 1972 when article V was revised, there was no dispute that a court had the power to issue a writ of certiorari only to remedy nonjurisdictional errors that (1) were a departure from the essential requirements of the law , (2) would result in material injury throughout the remainder of the proceedings if not corrected through a writ of certiorari, and (3) were irreparable on postjudgement appeal. [citations omitted]. The supreme court in Martin-Johnson, Inc. v. Savage, 509 So.2d 1097, 1100 (Fla. 1987), remained faithful to that definition and rejected any argument that a petitioner's privacy interest required a change in certiorari jurisdiction. Although I agree that the constitutional concept *of* certiorari is sufficiently flexible to accommodate some changes in our society and in our legal system, punitive damages were a recognized concept in 1956 and errors involving those damages were then, and are now, correctable on postjudgement appeal. Neither the district courts nor the legislature is entitled to redefine "certiorari" to eliminate a basic requirement essential to that extraordinary writ.

Id. Accordingly, Judge Altenbernd concurred in the denial of the petition and saw no justification to expand the writ to include a review *of* the decision of the trial court. Similarly, in Simeon, Inc. v. Cox, 20 Fla. L. Weekly D1105 (Fla. 5th DCA May 5, 1995), Judge Griffen, in a specially concurring opinion wrote that "I have finally concluded Martin-Johnson is a sound decision....Although section 768.72 alters the lower court's duty, it does not really affect the principals governing review of interlocutory orders expressed in Martin-Johnson." Id.

In Martin-Johnson, this court expressed concern that "if we permitted review at this stage, appellate courts would be inundated by petitions to review such orders denying motions to dismiss such claims, and trial court proceedings would be unduly interrupted." Id, at 1100. In our initial petition, we had suggested, on page 15, that the number of petitions for review of the substantive decisions of the trial courts in this state might exceed even the number of punitive damages claims in the state. This position was based on the fact that a motion to amend a complaint to add a claim for punitive damages might be denied upon a certain proffer only to be reconsidered after further discovery is undertaken in the case. [1]

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[1] Respondent argues that the contention that review will result in unwarranted disruption of trial proceedings is "self-defeating," apparently arguing that plaintiffs should not prematurely file motions to amend. This position, of course, ignores the practical reality of investigating and preparing a punitive damage claim for presentation to a jury. Our experience has shown that the investigation regarding punitive damages often includes discovery of documents and depositions of personnel of parent corporations located in other states. Financial records must be reviewed by experts and additional discovery must often be taken. Objections to any type of financial discovery are the rule and not the exception, even in those cases where permission has been granted to amend a complaint. Motions for summary judgment and for directed verdicts on such claims are almost always filed. Exhibits for use at trial must

This position was corroborated in Wal-Mart Stores, Inc. v. Kordon, 20 Fla. L. Weekly D1315 (Fla. 2nd DCA June 2, 1995). In that case, the court conducted a review of the decision of the trial court granting leave to amend a complaint to add a claim for punitive damages and concluded that the proffer in support of the claim was insufficient. However, the court went on to say that their ruling was "without prejudice to subsequent amendment of this claim and financial worth discovery if Kordon presents factual allegations and produces new evidence sufficient to sustain a claim of punitive damages." Id. Thus, one appeal has already been taken in that case. Upon the next proffer by plaintiff, another appeal may be expected. And then?

The principals governing review of interlocutory orders of the trial court of punitive damages claims include policy considerations affecting the factors discussed in the Martin-Johnson case, i.e., (1) whether the harm that might result from discovery of a litigants finances is the type of irreparable harm contemplated by certiorari review, (2) whether to permit interlocutory appeals would result in unwarranted interference with trial court proceedings and our system of procedure, (3) whether strong public policy considerations militate against review on certiorari, and **(4)** whether sufficient means exist to protect litigants from irreparable harm due to the release of financial information.

In discussing those factors set forth by this court as pertinent to the discussion at hand, it became clear to the petitioner that the particular facts of

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be prepared and disclosed to defense counsel. Waiting until all of the discovery is taken in a case, which discovery often continues until the beginning of trial, is not only impractical, it would be foolish.

any given case were subsumed by the need to address more fundamental and comprehensive issues affecting the system of procedure in this state. For that reason, Plaintiffs petition considers the overall policy considerations found to be applicable to that discussion by this court in the Martin-Johnson case.

Respondent, however, finds it "noteworthy that plaintiff has not even attempted to justify the trial court's ruling in this court." This is noteworthy only to the extent that petitioners initial brief addresses the actual issue on appeal. However, so that plaintiff's attempt to address the issue before this court is not misconstrued to mean that plaintiff does not believe that the trial court order in this case was correct, that determination is discussed here.

The Claim

Plaintiff's decedent, Ms. Maggiacomo, was a resident of the defendant nursing home. On her left hand, she wore a diamond engagement ring given to her many years earlier by her husband. Apparently other residents of the nursing home also wore, and were permitted to wear, such valuable and meaningful heirlooms. In accepting that residents living in their facility wore these heirlooms, however, the nursing home also accepted the duty to act carefully in selecting employees who would be placed in positions of close contact with their residents.

In this case, the nursing home hired a woman to care for Ms. Maggiacomo and other elderly and infirm residents who, at the time that she was employed,

had outstanding arrest warrants for grand theft, violation of probation for grand theft, violation of probation for soliciting or delivery of cocaine, retail theft, forgery and several other arrests for theft. The nursing home either (1) hired this employee with full knowledge of her criminal background and outstanding warrants for arrest, or (2) did not have any idea as to the criminal background of this employee. In either case, plaintiff contends that the nursing home was negligent.

The police report states that the nursing home hired this woman on 12/22/92. On January 2, 1993, Ms. Maggiacomo's husband went to visit his wife at the nursing home and discovered that her hand was badly swollen and discolored, and that her diamond engagement ring was gone. That ring had been so firmly embedded on Ms. Maggiacomo's hand that hospital personnel had been unable to cut it off the week before. Nevertheless, it was missing. The nursing home staff told Mr. Maggiacomo that thefts had recently occurred at the facility involving resident's rings and jewelry.

For vicarious liability for punitive damages to attach, it is not necessary to show that the employer acted with a malicious, wanton, or willful disregard of the rights of others. Under Florida law it is only necessary to show that the employee acted in such a way as to warrant a punitive damage claim against the employee and that the employer was guilty of **"somefault"** which foreseeable contributed to the plaintiffs injury. Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). Respondent does not deny that assault, battery and

theft are acts which show a malicious, wanton, or willful disregard of the rights of others. Id. Accordingly, the only remaining issue is whether the nursing home was guilty of some fault.

Petitioner is of the opinion, and has so alleged, that hiring felons with outstanding warrants for arrest and giving those persons unsupervised access to the living quarters of nursing home residents is an outrageous, if not criminal, act. Plaintiff presented to the trial court the theory that defendant had some fault in this matter when it either (1) hired this employee with full knowledge of her criminal background and outstanding warrants for arrest, or (2) failed to conduct a reasonable background investigation of the employee. The fault of the nursing home permitted this employee to enter the private living quarters of their residents clothed with the privileges of such an employee, alone and without supervision, which led to this assault, battery and theft.

The duty to investigate the background of a potential employee increases with the degree to which the employee will be in contact with others. Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986). An employee with the authority to enter into living quarters would require at least contacting the employee's prior employers and references. 492 So. 2d at 441. Here, the employee was not only allowed into the living quarters of another person, she was permitted to enter into the living quarters of elderly and infirm residents of defendant's premises through the authority vested in her by the defendant.

In Tallahassee Furniture Co., Inc. v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991), *review denied*, 595 So. 2d 558 (Fla. 1992), the court held that when "the facts are sufficient to show the existence of a legal duty [to investigate an employee's background], the reasonableness of an employer's efforts to inquire into the prospective employee's background, and the reasonableness of the subsequent decision to allow the employee to enter a customer's home, are jury questions." 583 So. 2d at 750 (citing to *Garcia*). In Tallahassee Furniture, the employer hired a deliveryman who only had a prior charge of grand theft and that he had driven a truck without a valid driver's license. This was sufficient, according to a plaintiff's expert and the First District, to put the employer on notice to inquire further. Further inquiry in that case would have show a history of psychiatric problems and might have predicted the heavy intravenous drug use the employee indulged in on the job after he was hired. Failure to discover the preliminary facts that would have put the employer on notice in Tallahassee Furniture was actionable. Failure to discover the **convictions** which not only would have put the nursing home on notice but would have been grounds to refuse to hire, or to discharge, are certainly actionable in this case.

It is inconceivable, based on the facts alleged and the facts proffered at the hearing below, that a cause of action has not been stated regarding negligent hiring or negligent supervision, raising fact questions which must be resolved by a jury. There is no question that the acts of the employee in committing a battery and theft permit a claim for punitive damages. There can

also be no question that the plaintiff provided a reasonable basis for the award of punitive damages against the employer by providing evidence that the "employer had some fault which foreseeable contributed to the plaintiffs injury to make him vicariously liable for punitive damages." Schropp v. Crown Eurocars Inc., 20 Fla. L. Weekly S128 (Fla., March 16, 1995).

Plaintiff also asserts that the actions of the defendant in this case in and of themselves will support a direct claim for punitive damages against the employer. Certainly, a complete failure to investigate the background of a person hired to care for the most basic needs of the frail and helpless in a nursing home would suggest at least a reckless disregard for human life, since such a person could easily assault, rape, injure or kill a resident in just such an act as forcibly assaulting a resident. The respondent does not claim that it was justified in knowingly or recklessly placing a convicted and fugitive felon in intimate contact with its residents. The question of whether the at fault on the part of the employer rose to the level of wantonness or recklessness sufficient to support punitive damages in and of itself is, likewise, a question of fact for a jury. Tallahassee Furniture.

In White v. Burger King Corp., 433 So. 2d 540 (Fla. 4th DCA 1983), a security guard battered a customer at a Burger King with a billy club in a dispute over use of the restroom. There, the court held:

> In our view the evidence presented as to the corporate employer's hiring, training, supervision and equipping of the security guard, including evidence of the prior incident involving the use of a billy club, is sufficient to support the submission of the punitive damages issue to the jury. On remand the appellant should be given an opportunity to amend his pleadings against *both* [the security

company which provided the guard] and Burger King Corporation to conform to the requirements of *Mercury Motors.*

433 So. 2d at 541-42.

Accordingly, it is the position of the petitioner that she has satisfied the requirements of section 768.72 by providing a proffer establishing a reasonable basis to plead punitive damages in this matter. Petitioner believes that the proffer is not only sufficient to support the pleading of punitive damages, but that the proffer is enough to survive summary adjudication or a directed verdict. Certainly, however, the standard of proof required merely to assert a claim for punitive damages must be lower than that needed to survive summary adjudication on its merits. Accordingly, the trial court properly granted plaintiffs motion to amend the complaint in this matter.

What the Trial Court Was Called On to Decide

In applying the standard for review of a request to plead a claim for punitive damages, plaintiff agrees with respondent that the purpose of section 768.72 was to eliminate the *in terrorem* effects of baseless or frivolous punitive damages claims. The statute requires the court to review these claims before financial worth discovery may be had. The trial court did so in this case, however, respondent claims that the trial court made an improper decision. In order to determine whether the decision of the trial court is correct it is necessary to determine first what the trial court was called on to decide.

The decision as to whether to permit a plaintiff to plead punitive damages during the course of litigation is dispositive of the claim for punitive damages, for there may be no recovery of such damages generally, unless the plaintiff is permitted to plead such a claim. The statute itself is silent as to the level of review to be applied by the trial court. It is not unreasonable, therefore, to consider the level of review applied in other pre-trial dispositive motions, such as those to dismiss a complaint, to strike a complaint, for summary judgment or for a directed verdict. See, e.g., Will v. Systems Engineering Consultants, 554 So.2d 591, 592 (Fla. 3 DCA 1989)(similar to motion to dismiss).

This conclusion is shared by the court in State of Wis. Bd. v. Plantation Square Assoc., 761 F.Supp. 1569 (S.D. Fla. 1991). In that case, the federal district court for the southern district of Florida, was faced with a claim for punitive damages and a hearing held pursuant to section 768.72. The court discussed both the level of review to be applied in hearings of this nature and the role of the parties during the course of that hearing. Because the opinion in that case succinctly summarizes the appropriate level of review to be applied in hearings of this nature, the following language of that case is presented.

After finding that the plaintiff was entitled to plead a claim for punitive damages, the court said:

> Though the burden is on the [Plaintiff] to survive a challenge of insufficiency, see Will v. Svstems Engineering Consultants, 554 So.2d 591, 592 (Fla. App. 3 DCA 1989), **the standard of proof required merely to assert Plaintiffs punitive claim must be lower than that needed to survive a summary adjudication on its merits. As the Florida courts have noted, a § 768.72 challenge more closely resembles a motion to dismiss that additionally requires an**

> **evidentiary proffer and places the burden of persuasion on the plaintiff. Id. In considering a motion to dismiss, factual adjudication is inappropriate as all facts asserted - or here, reasonably established - by the plaintiff are to be taken as true.** Conley v. Gibson, 355 U.S. 41, at 45-46, 78 S.Ct. 99, at 101-02, 2 L.Ed.2d 80, at 84. As such, the court has given recognition only to those assertions of the defendants which would show Plaintiff's factual bases to be patently false or irrelevant, and has paid no heed whatsoever to the defendants' alternative evidentiary proffers.

Id. (Emphasis added). This interpretation of the statute is consistent with other recorded decisions in this state. For example, several cases in this state have held that a verified complaint, or a complaint with an attached affidavit, are sufficient to satisfy the proffer requirement of section 768.72 where the facts sufficient to support the proffer are within the knowledge of the moving party. See, e.g., Simeon, Inc. v. Cox, *et al.*, 20 Fla. L. Weekly D1105 (Fla. 5th DCA, May 5, 1995)(verified complaint); DiBernardo vs. Waste Management, Inc. of Florida, 838 F.Supp. 567 (M.D. of Fla., 1993)(affidavit attached to complaint); Zweil v. KHI Corp., 3 Fla. L. Weekly Supp. 274 (Fla. 6th Judicial Circuit, June 1, 1995)(verified complaint). In none of these cases did the trial court find facts See, also, Will, supra (resembles a motion to dismiss that additionally requires an evidentiary proffer).

Accordingly, the appropriate procedure to be used by the court in motions to amend complaints pursuant to section 768.72 begins with the claimant's the burden of persuasion to establish a prima facia basis to plead a claim for punitive damages. Simeon, Inc. v. Cox, supra. The plaintiff makes a proffer to the court regarding the claim for punitive damages, and all facts and inferences

established in the proffer must be taken as true by the court. State of Wis. Bd. V. Plantation Square Assoc., supra. The trial court does not weigh the evidence or determine the credibility of the evidence or witnesses proffered by the plaintiff. Id.

The defendant may challenge the plaintiffs proffer either with evidence that the information contained in the proffer is patently false, or by way of legal argument accepting the facts as proffered by the plaintiff to be true. As stated in the Plantation Square case, the standard required merely to assert Plaintiff's punitive claim must be lower than that needed to survive a summary adjudication on its merits. However, even if the standard of review is not less than that required to survive a summary adjudication on its merits, the function of the court is, at most, "to determine whether the appropriate record presented in support of [the motion to amend] conclusively shows that the plaintiff cannot prove the claim alleged as a matter of law." Hervey v. Alfonso, 20 Fla. L. Weekly, D326 (Fla. 2d DCA 1995).

It has been argued that the statute requires the trial court to determine the credibility of testimony and to find facts. It has even been argued that the trial court should interpret all reasonable inferences in favor of the party opposing the amendment of the complaint. Under this scenario, the trial court replaces the jury as the finder of fact on the punitive damages claim after hearing all of the evidence and determining the credibility of witnesses. All of this, of course, is undertaken before the claimant is even permitted to allege the claim.

In determining which approach to take, it is helpful to remember that the statute concerns *only* punitive damages *pleading* and *discovery*. The statute does not change the basis required to support a claim for punitive damages, limit the type of financial discovery available or remove the issue of liability for punitive damages from the jury. It is reasonable to assume, therefore, that the legislature did not intend for the trial court to invade the province of the jury in regard to claims for punitive damages. Certainly the language of the statute does not authorize the court to find facts, or to remove the issue from the jury's determination.

If the legislature had wanted the trial court to replace the jury, they could have simply said so. If they had envisioned a level of review by the court which has never been applied in any other pre-trial hearing existing in the state, they certainly would have stated so. In the absence of such language the only reasonable conclusion is that the legislature was aware of the rules applied by the courts of this state in hearings on pre-trial dispositive motions and believed that those rules of construction would apply to this statute. Certainly, those rules are sufficient to ensure that frivolous claims for punitive damages are not brought and that the right of access to the courts is not infringed upon.

CONCLUSION

In this case, the trial court properly determined that plaintiff had established a reasonable basis for plaintiffs punitive damage claim and, therefore, granted leave for plaintiff to amend the complaint. As the procedural requirements of section 768.72 were satisfied in this case, the outcome of this petition is controlled by this courts recent decision in the Globe case. Accordingly, the decision of the Second District Court of Appeals reviewing the decision of the trial court judge granting leave to amend the complaint in this case should be quashed , and the case remanded to the trial court for further proceedings consistent with the holding of the Globe case.

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 28th day of August, 1995.

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