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APP reg.

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

SEP 13 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

GEORGE KORDON, ET UX.,

Petitioners,

v.

WAL-MART STORES, INC.,

Respondent.

CASE NO. 85,922

District Court of Appeal,
2nd District - No. 94-03943

PETITIONERS' INITIAL BRIEF

An Appeal from an Order of the
Second District Court of Appeal, State of Florida

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PREFACE

For purposes of this appeal, the relevant portions of the record are reproduced in the Appendix attached to Petitioners' Jurisdictional Brief previously filed in this appeal.

STATEMENT OF FACTS AND CASE

For purposes of this appeal, the Petitioners adopt the Statement of the Case and Facts as set forth in their Brief on Jurisdiction and the Appendix attached thereto previously filed in this appeal with the following additions.

On June 14, 1995, the Petitioners timely filed their Notice To Invoke Discretionary Jurisdiction with the Second District Court of Appeal. On June 14, 1995, the Respondents timely filed their Jurisdictional Brief with this court. On August 7, 1995, the trial court entered an order striking the claim for punitive damages and quashing the order on production of net worth consistent with the mandate of the Second District Court of Appeal. On August 24, 1995, this Court accepted jurisdiction and scheduled the filing of briefs.

SUMMARY OF ARGUMENT

The Petitioners filed an appropriate motion in the trial court under §768.72, Fla. Stat. (1993) to amend their complaint to allege punitive damages. After examining the record and the evidence proffered by the Petitioners, the trial court found that there was a “reasonable basis” to support an amendment to the pleadings to allege punitive damages. As the trial court followed the exact procedure for considering an amendment to allege punitive damages under §768.72, Fla. Stat. (1993), the Second District Court of Appeal did not have jurisdiction to issue a Writ of Certiorari quashing the trial court's decision. While Certiorari jurisdiction does lie to examine decisions by the trial court to allow an amendment to plead punitive damages in cases where the procedural dictates of §768.72, Fla. Stat. (1993) are not followed, jurisdiction is not available to review the factual findings of the trial court. Therefore, the Second District Court of Appeal erred in accepting jurisdiction and issuing the writ of certiorari quashing the decision of the trial court.

ARGUMENT

I. **WHETHER THE DISTRICT COURT HAS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO REVIEW A TRIAL COURT'S ORDER DENYING A MOTION TO STRIKE A CLAIM FOR PUNITIVE DAMAGES UNDER §768.72 FLORIDA STATUTES (1993):**

Under §768.72, Fla. Stat. (1993), a claimant must apply to the court for leave to assert a claim for punitive damages. Upon application, the court must conduct a hearing to consider the evidence in the record or proffered by the movant to determine whether or not there is a "reasonable basis" to support an award of punitive damages. Only after this determination is made can a plaintiff ask a jury to consider and award punitive damages. Id.

If a plaintiff includes in a pleading a claim for punitive damages, a motion to strike or dismiss for failure to comply with §768.72, Fla. Stat. (1993) is appropriate. Will v. Systems Engineering Consultants, 554 So. 2d 591 (Fla. 3d DCA 1989). Common law certiorari lies to redress an unauthorized pleading for punitive damages. Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994). However, according to decisions of this Court as well as several district courts of appeal, common law certiorari is not available to review an authorized pleading for punitive damages pursuant to §768.72, Fla. Stat. (1993).

This Court addressed this issue almost a decade ago in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987). This Court held that common law certiorari was not a proper vehicle for reviewing the denial of a motion to strike a claim for punitive damages. In Martin-Johnson this Court was concerned with the practical effects of creating a new category of non-final orders reviewable on interlocutory appeal. This Court was unwilling to create such a category concluding that appellate courts may not review such orders by certiorari. Id. at 1098. There were three reasons for this Court's decision. First, the type of harm which would result from discovery of a litigant's finances was not the type of "irreparable harm" contemplated by the standard of review for certiorari. Id. at 1099. Second, to permit interlocutory appeals such as this would result in unwarranted harm to the system of procedure. Id. at 1100. Finally, there are other

procedural rules available to litigants to restrict the scope and manner of discovery orders short of appellate review by certiorari. Id.

Recently, in Globe Newspaper Company v. Matthew J. King Fla. L. Weekly S317 (Fla. July 6, 1995), this Court was called upon to address the conflict within the districts as to whether or not it is appropriate for an appellate court to grant certiorari to review an order of a trial court permitting a plaintiff to amend a complaint to include punitive damages under §768.72, Fla. Stat. (1993). Id. This Court determined that §768.72 Florida Statutes created a substantive legal right not to be subject to a punitive damage claim and ensuing financial worth discovery until a trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages. Id. Thus, when a pleading contains a prayer for punitive damages without approval from the trial court and the necessary findings under §768.72, Fla. Stat. (1993), appellate courts should grant certiorari to review the decision as being a departure from essential requirements of the law. Id. While appearing to be in conflict with Martin-Johnson, this Court reconciled Globe Newspaper as being a logical extension of that case in light of the substantive rights created under §768.72 Florida Statutes. Id.

However, this Court was not willing to accept an invitation to proceed one step further and hold that certiorari could be granted to review the sufficiency of the evidence considered by a trial judge in a §768.72, Fla. Stat. (1993) determination. Id. This court reaffirmed and applied the rationale of Martin-Johnson to Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994)¹ and concluded that the district court erred in holding certiorari was available for such a review.² Id.

As applied to the instant case, Martin-Johnson and Globe Newspaper are directly on point. The Petitioners moved the trial court for an order permitting an amendment to

¹ The Respondent relied in the District Court on Commercial Carrier as its primary authority to reverse the trial court's order.

² This Court disapproved Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994), specifically agreed with the reasoning of Sports Products, Inc. v. Estate of Inalien, 20 Fla. L. Weekly D13 (Fla. 4th DCA 1994), review dismissed, No. 84,988 (Fla. June 7, 1995) (certiorari review is appropriate to determine whether a court has conducted the evidentiary inquiry required by §768.72 Florida Statutes but not so broad as to encompass review of the sufficiency of the evidence consider in that inquiry), and approved of Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA), review denied, 642 So. 2d 1362 (Fla. 1994) and Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991).

the pleadings to allege punitive damages. The motion was brought pursuant to §768.72, Fla. Stat. (1993). A hearing was held on the motion wherein the Petitioners presented evidence in the record and by proffer to establish the existence of a “reasonable basis” for the recovery of punitive damages. After the reviewing the record and hearing the arguments of counsel, the trial court granted the motion to amend.

The challenge by the Respondent to the trial court’s order does not include allegations that the trial court erred by not following the procedural dictates of §768.72, Fla. Stat. (1993). Rather, Respondent argues that the trial court erred because the evidence in the record was insufficient to establish a reasonable basis for the recovery of punitive damages. It is precisely this issue which this Court has recently determined cannot be reviewed by certiorari. Therefore, the decision of the district court of appeal in this case is in direct conflict with this Court’s decision in Globe Newspaper and should therefore be reversed.

CONCLUSION

The decision of the Second District Court of Appeal granting the writ of certiorari should be reversed and the trial court ordered to reinstate the claim for punitive damages against the Respondent.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Initial Brief has been furnished to Vincent M. D'Assaro, Esq. and Hunter A. Hall, Esq., 15 West Church Street, Orlando, Florida 32801 by regular U.S. Mail this 12th day of September, 1995.

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