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IN THE SUPREME COURT OF FLORIDA  
CASE NO. 85,984

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By *[Signature]*  
Chief Deputy Clerk

SIMEON, INC., d/b/a MEGA MOVIES; and  
MARTIN TRAUB,

Petitioners,

vs.

DONNA COX and MICHAEL COX, husband and  
wife; and JUANITA ARNOLD and MATTHEW  
ARNOLD, husband and wife,

Respondents.

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**PETITIONERS' INITIAL BRIEF ON THE MERITS**

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## STATEMENT OF CASE AND FACTS\*

This case focuses on whether a plaintiff can pursue a punitive damage claim -- without an evidentiary hearing and prior leave of court -- by filing a sworn complaint.

The instant case involves a suit by two employees of Simeon, Inc., d/b/a Mega Movies, against both their employer and its vice president, Traub. (A. 3-17) The complaint, which contains the notarized signatures of both plaintiffs, alleges assault, intentional infliction of emotional distress, and malicious prosecution. Despite the absence of any discovery or record evidence to support these allegations, the complaint also includes prayers for punitive damages in the first five counts.

Mega Movies and Traub moved to dismiss and strike the punitive damage claims contained in the initial complaint. (A. 18-20, 21-22, 25-28, 29-30) The motions asserted that the plaintiffs' claims were wholly unsupported by any evidence of record, other than the bare assertions of the plaintiffs and, further, that the plaintiffs' pleading failed to comply with the requirements of Florida Statute Section 768.72. The trial court denied the motion to dismiss and/or strike the punitive damage prayers and a petition for writ of common law certiorari was filed. (A. 1-2) On appeal, the Fifth District declined to grant certiorari, relying on the case of *Martin Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987), which held

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\*The symbol "A" refers to Petitioners' Appendix attached hereto.

that certiorari is not available to review an order which permits a punitive damage claim to stand.

The district court noted, however, that Florida Statute Section 768.72, which was enacted after *Martin Johnson*, provides in part that "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 decision acknowledged that at least one opinion<sup>1</sup> held that this statute precludes a plaintiff from ever pleading a punitive damages claim in the original complaint because the statute requires the plaintiff to first establish facts in the record and present them at a special hearing before the court. Nevertheless, the district court focused on a phrase of the statute which permits a *proffer* of evidence as support for a punitive damage claim. The district court posed a question as to why a "proffer" could not be accomplished by a sworn complaint rather than through a plaintiff's deposition and/or answers to interrogatories which are subject to cross-examination and exposure of any inconsistencies in the assertions. The district court apparently did not consider the fact that the allegations of a complaint (whether the pleading is verified or not) must be taken as true when ruling on a motion to dismiss or strike, whereas a motion for leave to amend a complaint (especially here, where section 768.72 requires an evidentiary hearing) focuses on whether good cause is shown.

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<sup>1</sup>*Kraft General Foods, Inc. v. Rosenblum*, 635 So.2d 106 (Fla. 4th DCA); *rev. denied*, 642 So.2d 1363 (Fla. 1994).

The district court then opined, in a split decision, that punitive damages may be sought *ab initio* in a sworn complaint because such verification meets the statutory requirement to "proffer" evidence in support of the claim. This appeal follows.

ISSUE

WHETHER THE PROCEDURAL REQUIREMENTS OF SECTION 768.72 ARE UNDERMINED AND CIRCUMVENTED WHEN A PUNITIVE DAMAGE CLAIM IS INCLUDED IN A SWORN COMPLAINT FILED WITHOUT LEAVE OF COURT AND WITHOUT EXAMINATION OF EITHER RECORD OR PROFFERED EVIDENCE TO SUPPORT SUCH CLAIM.

### ARGUMENT SUMMARY

Florida Statute Section 768.72 bars any punitive damage claim in an initial pleading. The statute provides that punitive damages may be sought only upon leave of court after the trial court has the opportunity to review proffered or record evidence. The statute was enacted in recognition of the importance of a defendant's financial confidentiality. The filing of a sworn complaint cannot and does not comply with the statutory requirements and improperly restricts the trial court's focus in determining whether good cause is shown to permit a punitive damage claim. The statute is vitiated if a plaintiff can seek punitive damages in an initial sworn complaint.



## ARGUMENT

THE PROCEDURAL REQUIREMENTS OF SECTION 768.72 ARE UNDERMINED AND CIRCUMVENTED WHEN A PUNITIVE DAMAGE CLAIM IS INCLUDED IN A SWORN COMPLAINT FILED WITHOUT LEAVE OF COURT AND WITHOUT EXAMINATION OF EITHER RECORD OR PROFFERED EVIDENCE TO SUPPORT SUCH CLAIM.

The Florida legislature enacted section 768.72 in an effort to eliminate the harassment and expense of frivolous claims for punitive damages which, prior to this statute, could be plead without any showing whatsoever. The legislature plainly voiced its intention to strictly limit the pursuit of punitive damages to those situations where leave of court was sought following development and presentation of evidence showing a reasonable basis for such claim. *Globe Newspaper Co. v. King*, 658 So.2d 578 (Fla. 1995). The statute provides:

### **Pleading in Civil Actions: Claims for Punitive Damages. --**

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 claim 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.

In the case of *Globe Newspaper Co. v. King, supra*, this Court stated that: "We read Section 768.72 to create a substantive legal right not to be subject to a punitive damage claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages." *Globe Newspaper Co. v. King*, at 519. This court further agreed that "the procedure mandated by Section 768.72 must be followed, and failure to adhere to that procedure departs from the essential requirements of the law. 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 a plaintiff's complaint. To allow punitive damages claims to proceed as before would render section 768.72 meaningless." *Globe Newspaper Co. v. King*, at 520.

The district court's opinion queries "Does section 768.72 really contemplate that the plaintiff's 'proffer' must be in response to a deposition, in answers to interrogatories, or in a filed affidavit? Why can't such a proffer be made in a sworn complaint?" *Simeon, Inc. v. Cox*, 655 So.2d 156, 157 (Fla. 5th DCA 1995). The answers are a resounding "yes" that the proffer must be in the form of evidence following the initial complaint, and that fundamental fairness and compliance with evidentiary rules precludes a "proffer" in a sworn complaint for multiple reasons.

First, the plain wording of Section 768.72 bars any punitive damage claim in an initial pleading. As the court stated in *Kraft General Foods, Inc. v.*

*Rosenblum*, 635 So.2d 106, 107 (Fla. 4th DCA 1994), *rev. denied*, 642 So.2d 363 (Fla. 1994), a pleader cannot include a claim for punitive damages in an initial pleading. The court concluded that "punitive damages claims can be asserted, if at all, only with prior leave of court." *Kraft General Foods*, at 107. The court explained that when there is a proper focus on the words "no claims for punitive damages shall be permitted" in light of the remainder of the statute, it is clear that someone must "permit" such claim. *Id.* at 109. Such permission cannot come from the claimant and must necessarily come from the court. As the *Kraft* court noted, "if an unauthorized pleading of such damages could be permitted to stand. . . while the pleader looks for evidence to support his claim, there would be little reason to require the amendment of pleadings to make such a claim and the liberal use of the discovery rules to search for evidence to do so." *Id.* at 110. The mere action of a claimant's verification that the contents of the initial complaint are correct "to the best of her knowledge and belief" cannot circumvent the statutory requirement that a plaintiff must first present reasonable evidence to a trial court before obtaining leave to pursue a punitive damage claim.

Secondly, the statute prohibits a plaintiff from pursuing a punitive damage claim prior to the time there is a reasonable evidentiary showing to support such claim. This contemplates a showing of evidence as a condition precedent to seeking leave to pursue punitive damages; it does not envision a simultaneous "proffer" of a plaintiff's "belief" and prayer for punitive damages.

Thirdly, if a plaintiff may pursue a punitive damage claim merely by the expedient of swearing to the complaint, the statute and legislative intent is wholly eviscerated. When reviewing a motion to dismiss, the trial court is required to view the allegations of the complaint as true and cannot look beyond the four corners of the complaint. A defendant cannot challenge the plaintiff's assertions in a sworn complaint because the defendant is barred from introducing evidence to contradict the foundation and veracity of the plaintiff's "beliefs", and therefore cannot refute the plaintiff's "reasonable showing." As the *Kraft* court noted, the legislature clearly intended to prevent any claim for punitive damages until such time as evidence can be developed through normal discovery channels which, when viewed by the trial court, reasonably shows a basis for such recovery. If, when the evidence is viewed as a whole, it appears that the plaintiff's testimony -- whether by deposition or affidavit -- is unreasonable in light of other evidence that is in the record and/or proffered, then the trial court can and should deny a plaintiff's request for leave to pursue a punitive damage claim.

Preventing a plaintiff from using a sworn complaint to make an "end run" around section 768.72 does not conflict with this Court's decision in *Globe Newspaper Co. v. King, supra*. Rather, this result is logically required to comply with the directive of both the statute and this Court that a trial court must conduct an evidentiary inquiry before permitting a claim for punitive damages.

In the instant case, Cox and Arnold have been permitted to wholly eviscerate both the literal requirements of the statute and its underlying public

policy by the simple expedient of filing a sworn complaint. The defendants were forced to have the sufficiency of the punitive damage claim considered in the posture of a motion to dismiss rather than as a plaintiff's motion for leave to amend. For purposes of considering a motion to dismiss, the trial court was already bound to take the allegations of the complaint as true; the verification added nothing to the evidentiary hearing process. Instead, the plaintiffs should have been required to proffer or reference evidence in the record to support a motion to leave to assert the claim. Merely swearing that the conclusory allegations of the complaint are correct "to the best of her knowledge and belief" does not constitute compliance with the procedural mandates of Section 768.72. The plaintiffs' actions have rendered the statute meaningless because punitive damages have been permitted in advance of any court review of the "evidence".

When punitive damages are claimed, a plaintiff may conduct sensitive and otherwise protected financial discovery from a defendant. Section 768.72 establishes essential safeguards in an effort to protect a defendant from an improper punitive damage claim. Financial confidentiality is important because "the success or failure of a business can sometimes be affected by the disclosure of financial information which is normally vigorously protected." *Jim Peacock Dodge, Inc. v. Russell*, 656 So.2d 247 (Fla. 5th DCA 1995). Permitting a plaintiff to plead punitive damages in derogation of the statute, "irreparably harms defendants by stripping them of the protections the statute was intended to afford to them." *Id.* at 247. It is imperative to rigidly interpret and enforce these provisions so that a

defendant's right to defend on the merits is not compromised by pressure to make financial disclosure where there is an unfounded punitive damage claim.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court disapprove and reverse the decision of the Fifth District Court of Appeal. It is respectfully suggested that this Court should hold that punitive damages cannot be claimed in an initial, sworn complaint and can proceed only after leave of court is sought to amend a complaint upon record or proffered evidence that a reasonable basis exists for recovery of such damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 30th day of October, 1995, to: Susan K. Erlenbach, Esquire, Erlenbach & Erlenbach, P.A., 503 South Palm Avenue, Titusville, FL 32796, Attorneys for Plaintiffs/Respondents.

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**APPENDIX  
TO  
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