A34186-7/SHL/vsc/192554

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

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.
_____/

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL FIFTH DISTRICT OF FLORIDA
PETITIONERS' JURISDICTIONAL BRIEF

SHELLEY H. LEINICKE
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, LANE & FORD, P.A.
Attorneys for Petitioners
One East Broward Blvd., Fifth Floor
P.O. Box 14460
Ft. Lauderdale, FL 33302
305/467-6405

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STATEMENT OF CASE AND FACTS*

This case presents the same issue currently under review by this Court on a certified conflict: whether certiorari is available to review an order of the trial court which denies a motion to strike a claim for punitive damages. *Globe Newspaper Co. v. King*, 653 So.2d 676 (Fla. 1st DCA 1994), *rev. granted*, 651 So.2d 1193 (Fla. 1995). (A. 12)

The instant case involves a suit by two employees of Mega Movies against both their employer and its vice president, Traub. The complaint, which contains 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 this initial complaint. 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 prayer and a petition for writ of common law certiorari was filed. On appeal, the district court declined to grant certiorari based upon case law preceding the enactment of Section 768.72, Florida

*The symbol "A" refers to Petitioners' Appendix.

Statutes. The district court said that it was bound to follow the case of *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987), which said that irreparable harm does not result from permitting inquiry into a defendant's finances and therefore held that certiorari is not available to review an order which permits a punitive damage claim to stand. The district court's opinions states that it is "bound by *Martin-Johnson* unless it has been superseded by Section 768.72, Florida Statutes." The district court acknowledged that a contrary result was reached by the Fourth District in the case of *Kraft General Foods, Inc. v. Rosenblum*, 635 So.2d 106 (Fla. 4th DCA) *rev. denied*, 642 So.2d 1363 (Fla. 1994). (A. 15-17) A dissenting opinion noted that "three district courts have addressed the question of certiorari review subsequent to *Martin-Johnson* and the enactment of Section 768.72" and are split on the propriety of such review. *Globe Newspaper Co. v. King, supra*, (certiorari review is not available) *Commercial Carrier Corp. v. Rockhead*, 639 So.2d 660 (Fla. 3d DCA 1994); (A. 11) (certiorari review is proper) *Kraft General Foods, Inc. v. Rosenblum, supra*; *Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991) (A. 13-14) (certiorari review is available).

A motion for rehearing and/or certification was filed requesting the district court to certify that the instant decision conflicts with these other cases. This motion was denied and this appeal follows.

ISSUE

WHETHER THE DECISION OF THE DISTRICT COURT CREATES A CONFLICT BY HOLDING THAT CERTIORARI IS INAPPROPRIATE TO REVIEW AN ORDER WHICH PERMITS A PUNITIVE DAMAGE CLAIM TO STAND.

ARGUMENT SUMMARY

This case presents the same issue as an appeal which is currently pending in this court on a certified conflict. Jurisdiction in the instant cause should be accepted and the case should be controlled by the decision this court reaches in the case of *Globe Newspaper Co. v. King*, 643 So.2d 676 (Fla. 1st DCA 1994), *rev. granted*, 651 So.2d 1193 (Fla. 1995).

ARGUMENT

THE DECISION OF THE DISTRICT COURT CREATES A CONFLICT BY HOLDING THAT CERTIORARI IS INAPPROPRIATE TO REVIEW AN ORDER WHICH PERMITS A PUNITIVE DAMAGE CLAIM TO STAND.

This court has recently accepted jurisdiction to determine whether certiorari is available to review orders relating to the filing of a punitive damage claim after the passage of Section 768.72, Florida Statutes. *Globe Newspaper Co. v. King*, 643 So.2d 676 (Fla. 1st DCA 1994), *rev. granted*, 651 So.2d 1193 (Fla. 1995). This district courts of appeal have split on this issue. The instant case holds that certiorari is not available to review an order denying a motion to strike a punitive damage claim despite the legislative dictates of Section 768.72. The First District has ruled similarly. *Globe, supra.* The Third and Fourth Districts have reached a contrary decision. *Commercial Carrier Corp. v. Rockhead*, 639 So.2d 660 (Fla. 3d DCA 1994) (order denying motion to strike punitive claim under §768.72 may be reviewed by certiorari); *Kraft General Foods, Inc. v. Rosenblum*, 635 So.2d 106 (Fla. 4th DCA) *rev. denied*, 642 So.2d 1363 (Fla. 1994) (certiorari is available to review the denial of a motion to strike where a claim for punitive damages is filed without prior leave of court); *see also, Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991) (certiorari lies to review a financial discovery order where the trial court did not consider any evidentiary basis for a punitive damage claim).

The instant case should be accepted by this court and decided in accordance with the rule which will be announced in the *Globe* case, *supra*, in

order to resolve the conflict among the appellate divisions of this state. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981).

CONCLUSION

The district court's decision creates a conflict in the law which vests jurisdiction in this Court. This Court is urged to accept jurisdiction and review this case on its merits in connection with review of the case of *Globe Newspaper Co. v. King*, 643 So.2d 676 (Fla. 1st DCA 1994), *rev. granted*, 651 So.2d 1193 (Fla. 1995) to resolve the conflict presented.

Respectfully submitted,

SHELLEY H. LEINICKE, ESQUIRE
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, LANE & FORD, P.A.
Attorneys for Petitioners
One East Broward Blvd., Fifth Floor
P.O. Box 14460
Ft. Lauderdale, FL 33302
305/467-6405

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 27th day of June, 1995, to: Susan K. Erlenbach, Esquire, Erlenbach & Erlenbach, P.A., 503 South Palm Avenue, Titusville, FL 32796, Attorneys for Plaintiffs/Respondents.

WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, LANE & FORD, P.A.
Attorneys for Petitioners
One East Broward Blvd., Fifth Floor
P.O. Box 14460
Ft. Lauderdale, FL 33302
305/467-6405

By: _____
SHELLEY H. LEINICKE
Florida Bar No. 230170

A34186-7/SHL/vsc/193216

IN THE SUPREME COURT OF FLORIDA
CASE NO.

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.
_____/

APPENDIX
TO
PETITIONERS' JURISDICTIONAL BRIEF

SHELLEY H. LEINICKE, ESQUIRE
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, LANE & FORD, P.A.
Attorneys for Petitioners
5th Floor, Barnett Bank Plaza
One East Broward Boulevard
Ft. Lauderdale, FL 33301
(305) 467-6405

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

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

Petitioners,

v. **CASE NO. 94-945**

DONNA COX and MICHAEL COX, Husband and Wife, and JUANITA ARNOLD and MATTHEW ARNOLD, Husband and Wife,

Respondents.

Opinion filed May 5, 1995

Petition for Certiorari Review of Order from the Circuit Court for Brevard County, Lawrence V. Johnston, Judge.

Shelley H. Leinicke of Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Lane, P.A., Fort Lauderdale, for Petitioners

Kurt Erlenbach of Erlenbach & Erlenbach, P.A., Titusville, for Respondents

HARRIS, C. J.

Petitioner Simeon, Inc., the defendant below, seeks a writ of certiorari. Respondents' complaint included a claim for punitive damages, and Simeon contends that the trial court departed from the essential requirements of law in failing either to dismiss the complaint or to strike the claim for punitive damages. We deny the writ.

This court took the position in *Sunrise Old-Toyota, Inc. v. Monroe*, 476 So. 2d 240 (Fla. 5th DCA 1985), and *Jaimot v. Media Leasing Corp.*, 457 So. 2d 529 (Fla. 5th DCA 1984), that since it is improper to expose a defendant to the discovery of his financial worth, an otherwise private matter, before the plaintiff has properly pled or otherwise established a basis for punitive damages, it is a departure from the essential requirements of law when the trial court fails to strike or dismiss an unfounded claim for such damages. We held that certiorari was a proper vehicle to put the trial judge on the correct path before the defendant was improperly required to expose his private financial status because, if the court subsequently held the punitive damages claim insufficient, the defendant's private matters already would have become public information.

The supreme court rejected our position in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987), in which the court held:

> [W]e do not believe the harm that may result from discovery of litigant's finances is the type of "irreparable harm" contemplated by the standard of review for certiorari.

We therefore are bound by *Martin-Johnson* unless it has been superseded by section 768.72, Florida Statutes. The Fourth District in *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA), *rev. denied*, 642 So. 2d 1363 (Fla. 1994), held that to be the case.[1] We, too, are tempted by the *Kraft* siren song:

> On the other hand, a right not to be exposed to a mere claim for such extraordinary damages, without a judge first determining that

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[1]Without considering this issue, we held in *Harley Hotels, Inc. v. Doe*, 614 So. 2d 1133 (Fla. 5th DCA 1993):

> We are constrained to deny certiorari review of an order permitting a claim for punitive damages. *Martin-James, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987).

> a factual basis exists to allow the claim to be pleaded, would not be much of a right if one had to wait until the end of the case to take a final appeal to review the trial court's failure to strike an unauthorized pleading for such damages. Like some kinds of discovery, this cat would effectively be out of the bag before the bag was supposed to be opened . . . . Thus our refusal to grant extraordinary review of this class of orders would render this particular statutory right, in effect, mythical. [Emphasis theirs].

Kraft, 635 So. 2d at 109.

This justification for certiorari is so enticing that we are saved from the rocky shoals only by the persistent whisper echoing through the surf: "What about the phrase, 'or proffered by the claimant' which appears in section 768.72?" *Kraft* holds that under section 768.72 it is improper for a plaintiff in his original complaint ever to plead a claim for punitive damages. Under *Kraft*, the plaintiff must first establish facts in the record and present them at a special hearing before the court and, if the court finds the proffered evidence sufficiently convincing, the court will grant the plaintiff leave to amend his or her pleadings in order to assert a punitive damage claim. This interpretation is arrived at by focusing on the words "no claim for punitive damages shall be permitted," and applying the statutory provision for liberal amendment and the statutory delay of financial discovery until "the pleading concerning punitive damages is permitted."

Certainly this is a logical interpretation. But what about the additional language: ". . . or proffered by the claimant which would provide a reasonable basis for recovery of such damages"? We must give meaning, if possible, to all parts of the statute. *Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982). Focusing on this language, the statute reads: "In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence . . . proffered by the claimant which would

provide a reasonable basis for recovery of such damages. . . ." In other words, general allegations in a complaint are insufficient. Also, if the plaintiff must rely on the testimony of others or documents not within his or her control, then such evidence must be established "in the record" before a claim for punitive damages is permissible. But what if sufficient evidence to support a claim for punitive damages is within the personal knowledge of the plaintiff? 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?

In our case, the plaintiff alleged under oath that she is entitled to punitive damages based on the repeated assaults on her which occurred when the defendant threw bar stools, staplers, movie videotapes, etc. at her. She urges that punitive damages should be awarded based on the defendant's intentional infliction of emotional distress in that he (among other allegations) constantly, in the presence of customers and coemployees, referred to her as "an idiotic bitch," "thief," "stupid fucking bitch" and "continually falsely accused [her] of stealing money." She further claims punitive damages based on malicious prosecution in that the defendant filed a "false and malicious criminal complaint" in which he alleged that the plaintiff had stolen merchandise from her employer. Although no charges were actually brought, it was because the defendant subsequently filed an affidavit of non-prosecution after the plaintiff had been confronted by a uniformed police officer who read the allegation to her in the presence of her children and others.

Why do these allegations contained in a sworn complaint not satisfy the statutory requirement of a "proffer"? Although section 768.72 requires that the court "permit" a

pleading for punitive damages, it does not specify that the permission can only be sought in a hearing on a motion to amend. The defense moved to strike the claim for punitive damages and the court, after considering the sworn allegations in the complaint, refused to do so. Did not the court, therefore, meet its obligation to review the record and, in this case, "permit the pleading concerning punitive damages"?

We may disagree with the trial court that the allegations in the complaint sufficiently justify a claim for punitive damages. But are we willing to intervene by certiorari anytime a judge decides that the claim for punitive damages is sufficient? *Martin-Johnson* simply does not permit us to do so.

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 facie entitlement to such damages to the satisfaction of the trial court. Because section 768.72 did not dramatically change the prior law, it has not superseded *Martin-Johnson*.

The writ is DENIED.

GRIFFIN, J., concurs and concurs specially, with opinion.
PETERSON, J., dissents, with opinion.

GRIFFIN, J., concurring and concurring specially. 94-945

In *Martin-Johnson*, the Supreme Court of Florida explicitly held that orders denying motions to strike claims for punitive damages are not reviewable by *certiorari*. The attempt to sound the death knell of *Martin-Johnson* on the basis that the supreme court's July 1, 1987 decision arose out of a case that predated the July 1, 1986 effective date of the tort reform act does not persuade. As I understand the argument, because the enactment in 1986 of section 768.72, Florida Statutes, established conditions precedent to the maintenance of a claim for punitive damages, orders of the lower court that ostensibly do not protect the rights conferred by this statute should be reviewed by *certiorari*. *See Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106, 110 (Fla. 4th DCA), *review denied*, 642 So. 2d 1363 (Fla. 1994).[1]

As a member of the panel in this court's *Harley Hotels* decision, I can testify that it is counter-instinctual for an appellate judge to refrain from reviewing a marginal punitive damage claim or an order compelling discovery into the financial affairs of the defendant flowing from the lower court's (unreviewable) decision to allow such a claim. Nevertheless, although decided in a close vote on a difficult issue, I have finally concluded *Martin-Johnson* is a sound decision. And when *Martin-Johnson* was issued in July 1987, the supreme court plainly was aware that the legislature had entered the field of pleading

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[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 damage claim. Thus, if the trial court *denies* a plaintiff's punitive damage 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?

requirements for punitive damages. Some six weeks earlier, they had expressly held this provision to be constitutional. *Smith v. Department of Insurance*, 507 So. 2d 1080, 1092 (Fla. 1987). Although section 768.72 alters the lower court's duty, it does not really affect the principles governing review of interlocutory orders expressed in *Martin-Johnson*.

I am also dubious about the wisdom of embarking on this "statutory rights" course.[2] 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, 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.

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[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).

PETERSON, J., dissenting.

The simple issue in this case involves the review of an order refusing to dismiss or strike a claim for punitive damages when the plaintiff has not first moved to include the claim. The Florida legislature placed that burden on a plaintiff when it enacted section 768.72, Florida Statutes (1993) as part of the Tort Reform and Insurance Act of 1986. Ch. 86-160, § 51, Laws of Fla. The language selected by the legislature is plain and compliance is neither complicated nor overly burdensome to a plaintiff. The majority now permits allegations of punitive damages in an initial complaint in derogation of the statute, and allows the plaintiff to escape the duty to move for an order allowing a claim for punitive damages. The majority relies upon *Martin-Johnson, Inc. v. Savage,* 509 So. 2d 1097 (Fla. 1987) for its decision, a case in which the factual matters considered arose prior to the July 1, 1986 effective date of the statute.

Martin-Johnson did not consider or mention section 768.72 and should not be extensively relied upon to defeat the legislative dictates of section 768.72. Three district courts have addressed the question of certiorari review subsequent to *Martin-Johnson* and the enactment of section 768.72. *Globe Newspaper Co. v. King,* 643 So 2d 676 (Fla 1st DCA 1994) (not appropriate to review by certiorari an order granting a motion to add a claim for punitive

damages, certifying conflict with decisions of the third and fourth districts), *rev. granted,* _____ So. 2d _____ (Fla. 1995); *Commercial Carrier Corp. v. Rockhead,* 639 So. 2d 660 (Fla. 3d DCA 1994) (order denying a motion to strike a punitive damages claim as unjustified under section 768.72, Florida Statutes (1991) is reviewable by certiorari); *Kraft General Foods, Inc. v. Rosenblum,* 635 So. 2d 106 (Fla. 4th DCA), *rev. denied,* 642 So. 2d 1363 (Fla. 1994) (certiorari appropriate to review denial of motion to strike where claim for punitive damages was filed without prior leave of court); *see also Henn v. Sandler,* 589 So. 2d 1334 (Fla. 4th DCA 1991) (certiorari appropriate to review financial discovery order when trial court had never considered evidentiary basis for punitive damages claim). The first district's *Globe* opinion does not indicate whether the defendant's reason for the petition was the failure of the trial court to consider evidence supporting a reasonable basis for punitive damages. The *Commercial* opinion reflects the third district's inclination to grant certiorari and review the sufficiency of the evidence considered by a trial court rather than to review by certiorari only the question whether the trial court considered evidence before allowing a plaintiff to proceed with a punitive damage claim.

I agree with the fourth district, based on the reasoning set forth in *Kraft,* that it is appropriate to review by certiorari the denial of a motion to strike a punitive damages claim where the plaintiff has not obtained prior leave of the court to make the claim. The issue in this petition for certiorari does not and

should not involve review of the trial court's determination that the plaintiff's proffer of evidence to support a claim for punitive damages was sufficient. That issue was presented in *Harley Hotels, Inc. v. Dole*, 614 So. 2d 1133 (Fla. 5th DCA) *rev. denied*, 626 So. 2d 205 (Fla. 1993), in which we denied certiorari. The opinion in *Kraft* points out that leave to incorporate a claim for punitive damages must be obtained from the court before it can be asserted. *Id.* at 109. In the instant case the record does not reflect any effort by the respondents to request leave to assert a punitive damages claim and I cannot glean from the record that the trial court ever made a determination whether there was a reasonable basis for a punitive damages claim.

I would grant Simeon's petition and quash the order denying its motion to dismiss and alternative motion to strike. The action should be remanded to the trial court for further proceedings without prejudice to the petitioners to follow the adequate and reasonable procedure required by section 768.72 and explained in *Kraft*. There should be no need for this court to amend section 768.72.

it to be untrue.... The testimony of a single witness, even if uncorroborated and contradicted ..., is sufficient to sustain a conviction.

I.R. v. State, 385 So.2d 686, 687–688 (Fla. 3d DCA 1980) (citations omitted).

[4] Defendant argues that the trial court erred in seating a juror where defense counsel had exercised a peremptory challenge to that juror. Defense counsel exercised a peremptory challenge against juror Stephens and the state attorney raised a *Neil*[7] objection. The trial court requested a race neutral reason and defense counsel responded "I have here that he works for the Montessori School, and the wife also works there. That gives me some impression that they may be sympathetic in favor of the prosecution." The trial court noted that juror Stephens was black and that defense counsel had challenged every black venire person. The trial court found the challenge to juror Stephens to have been racially motivated and seated him on the panel.

[5–7] There is a presumption that peremptory challenges will be exercised in a nondiscriminatory manner. *See State v. Neil*, 457 So.2d 481 (Fla.1984); *Parrish v. State*, 540 So.2d 870 (Fla. 3d DCA 1989). One objecting to the use of a peremptory challenge has the burden of demonstrating that the venire person challenged is a member of a distinct racial, ethnic, religious or gender group and that there is a strong likelihood that the peremptory challenge is solely based upon membership in that distinct group. *See Abshire v. State*, 642 So.2d 542 (Fla.1994); *Neil; Joseph v. State*, 636 So.2d 777 (Fla. 3d DCA 1994); *Wimberly v. State*, 599 So.2d 715 (Fla. 3d DCA 1992). Where all members of a cognizable group are challenged resulting in not a single member of that group being represented on the panel a presumption of discrimination arises and the burden of justifying the peremptory challenge shifts back to the party making the challenge. *See Blackshear v. State*, 521 So.2d 1083 (Fla.1988); *Parrish; Floyd v. State*, 511 So.2d 762 (Fla. 3d DCA 1987). The party making the peremptory challenge must then demonstrate that the reasons given for the challenge are not pretextual. *See State v. Slappy*, 522 So.2d 18 (Fla.1988), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); *Reeves v. State*, 632 So.2d 702 (Fla. 1st DCA 1994); *House v. State*, 614 So.2d 647 (Fla. 2d DCA 1993).

The trial court did not err in seating juror Stephens. The state properly objected to defense counsel's challenge of juror Stephens, noting that he was black and that all black members of the venire had been challenged. The trial court properly shifted the burden to defendant. Defendant could cite to no record evidence that juror Stephens was in some way biased, of a liberal nature, or in any other way sympathetic to the prosecution. Defense counsel failed to ask juror Stephens a single question during voir dire and thus failed to develop, for the record, the alleged bias, liberalism or sympathy necessary to support the challenge. Absent the required showing defense counsel's reasons for challenging juror Stephens were pretextual, thus the trial court properly seated juror Stephens on the panel.

For the forgoing reasons the order of the trial court is in all respects affirmed.

Affirmed.

7. *State v. Neil*, 457 So.2d 481 (Fla.1984).

COMMERCIAL CARRIER CORP., Petitioner,

v.

Cheryl ROCKHEAD, as personal representative of the estate of Mark Adrian Rockhead, deceased, Respondent.

No. 94–862.

District Court of Appeal of Florida, Third District.

July 5, 1994.

In action arising from motor vehicle accident, the District Court, Dade County, Harold Solomon, J., entered order denying motion to strike punitive damages claim. On certiorari review, the District Court of Appeal, Schwartz, C.J., held that: (1) order denying motion to strike punitive damages claim as unjustified under statute is reviewable by certiorari, and (2) circumstances fell far short of those required to support action for punitive damages.

Certiorari granted.

Nesbitt, J., filed dissenting opinion.

1. Certiorari ⇐17

Order denying motion to strike punitive damages claim as unjustified under statute is reviewable by certiorari. West's F.S.A. § 768.72.

2. Damages ⇐91(3)

Circumstances of case arising from motor vehicle accident fell far short of those required to support action for punitive damages; there was evidence of little, if anything, more than simply negligent driving by either or both of parties involved. West's F.S.A. § 768.72.

John S. Freud and Michael J. Schwartz, Miami,* for petitioner.

Philip M. Gerson and Edward S. Schwartz, Miami,* for respondent.

Before SCHWARTZ, C.J., and NESBITT and LEVY, JJ.

SCHWARTZ,* Chief Judge.

[1] As we have previously indicated in *Key West Convalescent Center, Inc. v. Doherty*, 619 So.2d 367 (Fla. 3d DCA 1993), we follow *Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991) (en banc) in concluding—notwithstanding *Martin–Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987), which did not consider the statute—that an order denying a motion to strike a punitive damages claim as unjustified under section 768.72, Florida Statutes (1991) is reviewable by certiorari. Accord *Kraft Gen. Foods, Inc. v. Rosenblum*, 635 So.2d 106 (Fla. 4th DCA 1994); *Torcise v. Homestead Properties*, 622 So.2d 637 (Fla. 3d DCA 1993), review denied, 634 So.2d 624 (Fla.1994); see *Will v. Systems Eng'g Consultants, Inc.*, 554 So.2d 591 (Fla. 3d DCA 1989); *Wolper Ross Ingham & Co. v. Liedman*, 544 So.2d 307 (Fla. 3d DCA 1989). Contra *Chrysler Corp. v. Pumphrey*, 622 So.2d 1164 (Fla. 1st DCA 1993); *Harley Hotels, Inc. v. Doe*, 614 So.2d 1133 (Fla. 5th DCA 1993), review denied, 626 So.2d 205 (Fla.1993).

[2] 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 Constr. Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984). Accordingly, the order under review is quashed.

Certiorari granted.

LEVY, J., concurs.

NESBITT, Judge, dissenting:

I respectfully dissent for the reasons expressed in and on authority of *Martin–Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987) (district court does not have jurisdiction by common law certiorari to review the denial of a motion to strike punitive damage claim).

Eileen C. GEORGE and Larry George, her husband, Appellants,

v.

HITEK COMMUNITY CONTROL CORPORATION and State of Florida, Department of Corrections, Appellees.

No. 93–1557.

District Court of Appeal of Florida, Fourth District.

July 6, 1994.

Victim and her husband filed negligence action against Department of Corrections

* Like a pride of lions, and an exaltation of larks, this case involves an intelligence of (unrelated) Schwartzes.

1

GLOBE NEWSPAPER COMPANY, Appellant,

v.

Matthew J. KING, Appellee.

No. 94–1108.

District Court of Appeal of Florida, First District.

Oct. 11, 1994.

An Appeal from petition for writ of certiorari.

Steven A. Werber and Marcia Morales Howard, Jacksonville, for appellant.

Christopher A. White, Jacksonville, for appellee.

PER CURIAM.

Globe Newspaper Company petitions this court for writ of certiorari to review an order granting the plaintiff's motion to amend his complaint to include a claim for punitive damages. This court has held in a similar case that certiorari is inappropriate for review of orders relating to discovery on punitive damages claims. *Chrysler Corporation v. Pumphrey*, 622 So.2d 1164 (Fla. 1st DCA 1993). Accordingly, we deny the petition for writ of certiorari.

However, we certify conflict with the Fourth District Court of Appeal in *Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991), and *Kraft General Foods, Inc. v. Rosenblum*, 635 So.2d 106 (Fla. 4th DCA 1994), *rev. denied*, 642 So.2d 1363 (1994); and with the Third District Court of Appeal in *Commercial Carrier Corp. v. Rockhead*, 639 So.2d 660 (Fla. 3d DCA 1994).

JOANOS, WOLF and BENTON, JJ., concur.

2

Thomas Clyde KENNEDY, Appellant,

v.

STATE of Florida, Appellee.

No. 93–1164.

District Court of Appeal of Florida, First District.

Oct. 11, 1994.

Defendant was convicted in Circuit Court, Duval County, Alban Brooke, J., of sale or delivery of cocaine and possession of cocaine with intent to sell. Defendant appealed. The District Court of Appeal held that trial court precluded defendant from asserting his right to represent himself by ruling that defendant could represent himself only if court discharged public defender, "which [the court was] not going to do."

Reversed and remanded.

1. Criminal Law ⇐641.4(4), 641.10(2)

Trial court precluded defendant from asserting his right to represent himself by ruling that defendant could represent himself only if court discharged public defender, "which [the court was] not going to do." U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.4(2), 641.10(2)

Accused's right to represent himself does not hinge on court's willingness to discharge appointed counsel. U.S.C.A. Const. Amend. 6.

Nancy A. Daniels, Public Defender, Phil Patterson, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Wendy S. Morris, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Thomas Clyde Kennedy appeals his convictions and sentences for sale or delivery of cocaine and possession of cocaine with intent to sell. Kennedy contends that the trial court, in response to Kennedy's assertion that he desired to discharge the public defender, misinformed him with respect to a criminal defendant's right to self-representation. We agree and reverse.

On March 4, 1993, Kennedy appeared for trial. Before the jury was sworn, Kennedy informed the court that he wished to discharge the assistant public defender. After inquiring into Kennedy's reasons, the trial court stated:

> Now I am not going to discharge Mr. Soberay. Mr. Soberay is an excellent attorney. He has considerable trial experience. Even if I were to discharge him, which I would not, I would not appoint somebody else. I've appointed the Public Defender. He is one of possibly 48 Public Defenders. The Public Defender, Mr. Lou Frost, has assigned him to your case. If I discharge the Public Defender, which I'm not going to do, but if I did, that would not mean I would appoint someone else to represent you. You would then have the option of proceeding on your own.

This is an inaccurate statement of the law concerning a criminal defendant's right of self-representation. *See Nelson v. State*, 274 So.2d 256, 258–59 (Fla. 4th DCA 1973), *approved, Hardwick v. State*, 521 So.2d 1071, 1074–75 (Fla.1988).

We recently ordered a new trial in *Douglass v. State*, 634 So.2d 693 (Fla. 1st DCA 1994), where Douglass, prior to trial, requested that the public defender be discharged and that the court appoint a private attorney to represent him. The trial court conducted a hearing and found that Douglass' complaints concerning the public defender were groundless, but failed to inform Douglass that, while he could discharge appointed counsel, the state would not thereafter be required to provide alternative representation; the trial court also failed to inform Douglass that he could represent himself if he was found competent to do so. *Id.* at 694.

[1, 2] Here the trial court ruled out the possibility of Kennedy's representing himself by informing him that "the option of proceeding on your own" was not available to him. Kennedy argues, we think correctly, that the trial court precluded his asserting his right to represent himself by ruling that he could represent himself only if the court discharged the public defender, "which [the court was] not going to do." An accused's right to represent himself does not hinge on the court's willingness "to discharge" appointed counsel. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Accordingly, Kennedy's convictions and sentences are reversed, and the cause is remanded for a new trial.

JOANOS, WOLF and BENTON, JJ., concur.

Dexter GUNN, Appellant,

v.

STATE of Florida, Appellee.

No. 93–2254.

District Court of Appeal of Florida, Fourth District.

Oct. 12, 1994.

Defendant filed postconviction motion. The Circuit Court, Broward County, Sheldon M. Schapiro, J., denied motion, and defendant appealed. The District Court of Appeal, 612 So.2d 643, reversed and remanded. On remand, the Circuit Court, granted defendant's request to file belated appeal, and defendant appealed. The District Court of Appeal, Stevenson, J., held that, as matter of fundamental due process, defendant was improperly cut off from attempting to argue his motion to withdraw pleas, as trial court promptly stated "motion denied" and proceeded to sentencing as soon as defendant said he wished to make motion, thus elimi-

Joseph HENN, Petitioner,

v.

Julie SANDLER and Iris Sandler, Respondents.

No. 91-1091.

District Court of Appeal of Florida, Fourth District.

July 24, 1991.

On Motion for Rehearing En Banc Nov. 20, 1991.

Fraud defendants moved for protective order after being served with discovery requests which sought financial worth information. Defendant's motion was denied by the Circuit Court, Seventeenth Judicial Circuit, Broward County, Lawrence J. Korda, J. Defendant petitioned for writ of certiorari. The District Court of Appeal, En Banc, adopting the panel opinion of Farmer, J., held that: (1) defendant could not be subjected to financial worth discovery until affirmative finding had been made that there was reasonable evidentiary basis for punitive damages claim, and (2) writ of certiorari was appropriate vehicle to obtain review of issue.

Order quashed and remanded.

Stone, J., dissented and filed opinion in which Letts, Hersey, and Gunther, JJ., joined.

1. Pretrial Procedure ⇐36

Statute which requires factual showing before claim for punitive damages are allowed in civil actions creates positive legal right in party not to be subjected to financial worth discovery until trial court has first made affirmative finding that there is reasonable evidentiary basis for punitive damages claim to go to jury. West's F.S.A. § 768.72.

2. Pretrial Procedure ⇐36

Statute which requires factual showing before claim for punitive damages are allowed in civil actions, requires determination of legal sufficiency of punitive damage pleading. Wests's F.S.A. § 768.72.

3. Certiorari ⇐5(2)

Writ of certiorari could be used to review order for discovery of personal financial worth which was made before legal sufficiency of punitive damages pleading had been determined; right to object to financial worth disclosure would be meaningless if party had to obey order compelling response to discovery requests subject only to appeal after final judgment. West's F.S.A. § 768.72.

H.T. Maloney, of Patterson, Maloney & Gardiner, Ft. Lauderdale, for petitioner.

Wayne Kaplan, of Kaplan & Gaylord, P.A., Boca Raton, for respondents.

I RMER, Judge.

In *Martin-Johnson Inc. v. Savage*, 509 So.2d 1097 (Fla.1987), the court held that common law certiorari could not be used to review discovery orders in cases involving punitive damages claims. The court held that discovery of the financial information relevant to a punitive damages claim was not so personal or private, or otherwise the kind of important right, that the extraordinary writ should be used in place of plenary review at the end of the case. Most especially, the court held that the discovery of financial worth could not be used as a predicate for pretrial certiorari review of the sufficiency of the pleadings to support such a claim.

Not considered by the *Martin-Johnson* court, however, because it had not been adopted when the lower courts considered the issue and did not apply to the parties or their claims in that case, was section 768.72, Florida Statutes (1989), which provides as follows:

768.72 Pleading in civil actions; claim 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 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.

This case presents the question how that statute might have changed the *Martin-Johnson* holding.

Respondents sued petitioner in a multi-count complaint. Apparently count II alleged fraud, while count IV sought replevin of certain described property. In November 1990, petitioner moved to dismiss the replevin claim on the grounds that it failed to show any basis for possession. That motion was denied. The court did not then consider the sufficiency of any other claim.

In February 1991 respondents served petitioner with discovery requests (interrogatories and a request to produce) seeking financial worth information. Within 30 days petitioner moved for a protective order arguing that the requests were the forms for financial information in dissolution of marriage cases and were thus irrelevant to any issue. At a hearing on March 14th, respondent argued that the discovery was authorized by their claim for punitive damages in the fraud claim. Petitioner countered that "you just can't put in punitive damages. You must have a reason for punitive damages. That's the law today." To this respondents replied that the sufficiency of the fraud claim *had* been determined at the November hearing. The trial judge, who was a successor judge, relied on that statement. On March 14th the court entered an order denying the motion for a protective order.

Within 10 days of that denial, petitioner moved for reconsideration and supplied the judge with a transcript of the November hearing showing that only the replevin count had been considered. Petitioner expanded on his protective order argument by contending that respondents could not have financial worth discovery until they had first made a showing under section 768.72 of evidence in the record or by proffer that some reasonable basis exists for the recovery of punitive damages. In a separate motion he also asked the judge to strike the claim for punitive damages because of non-compliance with that statute. The court denied both motions on April 4th, and on April 23rd the petition for certiorari was filed.

We first confront the timeliness issue. Obviously the petition was filed within 30 days of the latter, or April 4th, order but was more than 30 days after the March 14th order which initially denied the protective order. On the other hand, the motion to strike the punitive damages claim was first presented March 19th and determined only on April 4th. Moreover, the motion for protective order did not specifically refer to section 768.72, merely to the fact that the discovery requests were irrelevant because they were family law forms. In contrast, the section 768.72 issue was first squarely presented only by the March 19th motion.

Moreover, even if the ruling at the March 14th hearing on the motion for protective order could properly be understood as a section 768.72 determination, we should be quite reluctant to treat it as the final order on the subject because respondents had misled the trial judge with their argument that the November hearing on the replevin count had also considered and determined the sufficiency of the claim for punitive damages. We do not suggest that the misleading was intentional, but the effect is undeniable. Hence we find that the statutory issue has been timely brought to us.

[1, 2] Turning to the critical issue, we read section 768.72 as creating a positive legal right in a party not to be subjected to financial worth discovery until the trial court has first made an affirmative finding that there is a reasonable evidentiary basis for the punitive damages claim to go to the jury. That finding necessarily includes a legal determination that the kind of claim

in suit is one which allows for punitive damages under our law. Thus, to that extent, the legal sufficiency of the punitive damage pleading is also in issue in the section 768.72 setting. Because the supreme court itself has held that section 768.72 creates substantive legal rights and that its procedures are intimately tied to those substantive rights, *see Smith v. Department of Insurance*, 507 So.2d 1080, 1092 n. 10 (Fla.1987), we find it difficult to understand how *Martin-Johnson* can any longer control this issue.

[3] We are not alone in enforcing section 768.72's substantive rights by requiring a factual inquiry into whether the necessary statutory predicate for punitive damages exists before a party can be forced to disclose personal financial worth discovery. In *Wolper Ross Ingham & Co. Inc. v. Liedman*, 544 So.2d 307 (Fla. 3rd DCA 1989), and *Will v. Systems Engineering Consultants Inc.*, 554 So.2d 591 (Fla. 3rd DCA 1989), the court reached the same conclusion. In *Wolper Ross* the court reviewed an order compelling discovery. In *Will* the trial court had directed that the issue be presented by a motion for partial summary judgment, which was then presented by the party opposing the punitive damage claim and later denied. Both of these decisions, of course, were long after *Martin-Johnson*, but concededly did not mention or refer to that case.

Will suggested that motions to strike are the proper vehicle to bring the issue before the trial court. It found the motion for summary judgment inadequate because of the particularized showing required for that motion. In this case, it is important to note that petitioner raised the issue by a motion to strike and specifically cited both *Wolper Ross* and *Will* as authority. That motion was not filed until March 19th and was not decided until April 4th, a fact which we again emphasize to show timeliness under the unusual circumstances here.

There was not much discussion of jurisdiction in either of the third district cases, but in both decisions that court expressly approved the use of certiorari to review the issue. The reasons for such extraordinary review are manifest. If the party had to obey an order compelling a response to the discovery requests and could raise the subject only on an appeal after final judgment, the right would be meaningless. The very circumstance which the legislature sought to eradicate in section 768.72 would be allowed to occur. This is precisely the kind of situation for which certiorari is designed.

We therefore quash the trial court's orders and remand for proceedings consistent with this opinion.

WARNER, J., concurs.

STONE, J., dissents with opinion.

STONE, Judge, dissenting.

I would deny certiorari on the authority of *Martin-Johnson v. Savage*. *See also, Hartford Accident & Indem. Co. v. U.S.C.P. Co.*, 515 So.2d 998 (Fla. 4th DCA 1987) (en banc). There is no reason to conclude that the supreme court was not aware of section 768.72, Florida Statutes, when deciding *Martin-Johnson*. There also is no reason to assume that the statute represents a change in the law.

Additionally, the petition is untimely filed as to the denial of the protective order. The unauthorized motion for rehearing does not postpone rendition of the discovery order or toll the time for seeking relief from this court.

ON MOTION FOR REHEARING EN BANC

PER CURIAM.

We grant respondents' motion for rehearing en banc. Upon consideration by the entire court, we adopt the panel decision as the en banc decision. In all other respects, the pending motions for rehearing are hereby denied. We therefore quash the trial court's orders and remand for proceedings consistent with the panel opinion.

GLICKSTEIN, C.J., and DOWNEY, ANSTEAD, DELL, WARNER, POLEN, GARRETT and FARMER, JJ., concur.

STONE, J., dissents with opinion, with which LETTS, HERSEY and GUNTHER, JJ., concur.

STONE, Judge, dissenting.

I dissent for the reasons expressed in my dissent to the initial panel decision in this appeal.

Joseph HENN, Petitioner,

v.

Julie SANDLER and Iris Sandler, Respondents.

No. 91-1634.

District Court of Appeal of Florida, Fourth District.

Dec. 27, 1991.

Petition for writ of certiorari to the Circuit Court for Broward County; Lawrence L. Korda, Judge.

H.T. Maloney of Patterson, Maloney & Gardiner, Fort Lauderdale, for petitioner.

Wayne Kaplan of Kaplan & Gaylord, P.A., Boca Raton, for respondents.

PER CURIAM.

We grant the petition for certiorari and quash the trial court's order of May 24, 1991. *See Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991) (on motion for rehearing en banc).

GLICKSTEIN, C.J., and LETTS and GUNTHER, JJ., concur.

* Editor's Note: The original opinion of August 6, 1991 is withdrawn from bound volume publication because it is superseded by the opinion on rehearing.

Milton S. JENNINGS, Appellant,

v.

DADE COUNTY and Larry Schatzman, Appellees.

Nos. 88-1324, 88-1325.

District Court of Appeal of Florida, Third District.

Aug. 6, 1991.*

On Rehearing Granted Dec. 17, 1991.

Landowner petitioned for writ of certiorari to challenge trial court order which dismissed landowner's count alleging due process violation as result of ex parte communication between adjacent landowner's lobbyist and county commissioners before vote approving use variance for adjacent landowner, which gave to landowner leave to amend complaint only against county, and which denied motion to dismiss count alleging nuisance as result of permitted use. The District Court of Appeal, Nesbitt, J., held on rehearing that: (1) landowner's timely petition activated common-law certiorari jurisdiction; (2) lobbyist's ex parte communication could violate due process despite landowner's actual and constructive knowledge of ex parte communication; and (3) landowner's prima facie case of ex parte contacts would give rise to presumption of prejudice and shift burden to adjacent landowner and county to rebut the presumption.

Quashed and remanded.

Ferguson, J., filed concurring opinion upon grant of rehearing.

1. Zoning and Planning ⇐741

Landowner's timely petition activated common-law certiorari jurisdiction to review trial court order which dismissed count alleging ex parte communication between adjacent landowner's lobbyist and county commissioners prior to approval of

1

James HOUSTON, Appellant,

v.

STATE of Florida, Appellee.

No. 94-0432.

District Court of Appeal of Florida, Fourth District.

March 30, 1994.

Appeal of order denying rule 3.800 motion from the Circuit Court for Broward County; Robert B. Carney, Judge.

James Houston, pro se.

Robert A. Butterworth, Atty. Gen., Tallahassee and Don M. Rogers, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

We reverse and remand with directions that the trial court either conduct an evidentiary hearing or provide attachments to any order of denial demonstrating that appellant's claim is without merit. *See Haggerty v. State*, 632 So.2d 668 (Fla. 4th DCA 1994).

ANSTEAD, GUNTHER and STONE, JJ., concur.

2

David NICKERSON, Appellant,

v.

STATE of Florida, Appellee.

No. 93-0934.

District Court of Appeal of Florida, Fourth District.

April 6, 1994.

Clarification or Certification Denied May 11, 1994.

Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge.

Richard L. Jorandby, Public Defender, and Paul L. Petillo, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Patricia Ann Ash, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

We affirm but again certify the same question of great public importance certified in our opinion in *Herrington v. State*, 622 So.2d 1339 (Fla. 4th DCA 1993), *review granted*, 632 So.2d 1026 (Fla.1994).

ANSTEAD, HERSEY and FARMER, JJ., concur.

Rev Den - 642 So2d 1363 (Fla 1994)

3

KRAFT GENERAL FOODS, INC., a Delaware Corporation, Petitioner,

v.

Lester ROSENBLUM, Respondent.

No. 93-0813.

District Court of Appeal of Florida, Fourth District.

April 6, 1994.

Rehearing En Banc, Rehearing and/or Clarification Denied May 11, 1994.

Consumer sued food company for misleading advertising, seeking both compensatory and punitive damages in his initial pleading. Food company moved to dismiss, and the Circuit Court, Broward County, Leonard L. Stafford, J., denied motion without prejudice. Food company petitioned for certiorari. The District Court of Appeal, Farmer, J., granted certiorari, and held that: (1) punitive damages claim could be asserted, if at all, only with prior leave of court; (2) unauthorized punitive damages claims had to be stricken or dismissed; and (3) common-law certiorari could be used to redress unauthorized pleading for punitive damages.

Certiorari granted; order quashed; and remanded with directions.

1. Consumer Protection ⇐40

Punitive damages claims can be asserted, in misleading advertising action, if at all, only with prior leave of court. West's F.S.A. §§ 768.72, 817.41.

2. Consumer Protection ⇐38
Damages ⇐151

Unauthorized claims for punitive damages must be dismissed or stricken. West's F.S.A. § 768.72.

3. Certiorari ⇐15

Common-law certiorari lies to redress unauthorized pleading for punitive damages. West's F.S.A. § 768.72.

Daniel S. Pearson and Lenore C. Smith, Holland & Knight, Miami, for petitioner.

Donald Feldman, Weiss & Handler, P.A., Boca Raton, for respondent.

FARMER, Judge.

[1] In *Henn v. Sandler*, 589 So.2d 1334 (Fla. 4th DCA 1991), we concluded en banc that common law certiorari is properly available to reverse an order allowing discovery of financial worth information without a prior hearing to determine whether plaintiff can show sufficient evidence to allow a claim for punitive damages to be pleaded. Today we consider a petition for certiorari or mandamus posing a separate but related question arising under the identical statute we construed in *Henn:* viz., whether under section 768.72, Florida Statutes (1993), a pleader can include a claim for punitive damages in an initial pleading without prior leave of court. We conclude that punitive damages claims can be asserted, if at all, only with prior leave of court. We therefore grant certiorari to quash the order of the trial court refusing to strike such an unauthorized claim.

Section 768.72, Florida Statutes (1993), provides as follows:

> **768.72 Pleading in civil actions; claim 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 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.

It was the last sentence in the statute that we construed in *Henn*. We now focus our attention on the first three sentences.

Claimant sued Kraft for damages and other relief. He alleges that in making a purchase of ice tea mix he succumbed to an enticement on the label, which read:

> "Save up to $2.00 on your next purchase ... see details on inside of label."

The inside of the label instructed him that he could obtain a $1.00 coupon with 8 foil seals or two $1.00 coupons with 12 foil seals. The package, however, contained but six seals. Thus he concluded that he could not possibly save the money promised. He alleged that Kraft had deliberately misled him.

He filed his action against Kraft in the circuit court in Broward County. In his initial complaint commencing the action, he included a claim seeking relief for misleading advertising under section 817.41, Florida Statutes (1991),[1] and a claim for relief under

1. The pertinent parts of section 817.41 are as follows:

> "(1) It shall be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlaw-

section 501.204 of Florida's "Little FTC Act".[2] His demand for judgment under section 817.41 prayed:

> "WHEREFORE, Plaintiff prays that this Court enter a Final Judgment awarding damages in the sum of $3.50, incidental and consequential damages, as well as punitive damages for misleading Plaintiff and the general public pursuant to § 817.41(5), Florida Statutes, together with costs and attorney's fees pursuant to § 817.41(6), Florida Statutes."

Similarly, his demand for judgment under section 501.204 sought punitive damages, but he later conceded that that statute does not itself provide for punitive damages. It is important to note that claimant neither sought nor was granted any prior authorization for pleading a punitive damages claim.

Kraft answered the complaint after first seeking to dismiss the action on jurisdictional grounds. Later Kraft moved to strike the punitive damages claims, arguing that claimant had not complied with section 768.72. In the order we review today, the trial court denied the motion "without prejudice," adding that claimant shall schedule a further hearing within 90 days for the purpose of making the statutory showing, but meanwhile barring financial worth discovery. Kraft's petition for certiorari or mandamus timely reached us.[3]

Kraft argues that there is but one possible reading of section 768.72: "That reading is plain from all of its provisions, read separately or together: the statute is designed to keep punitive damage claims out of pleadings until an evidentiary showing is made." It argues that the legislature desired to remove the unauthorized use of punitive damage claims, as here, for *in terrorem* effect. Such claims, it contends, give the claimant undue settlement leverage and force insurance companies to devote resources to claims in spite of their intrinsic lack of merit. Hence, the legislature created in section 768.72 a positive legal right not to be exposed to punitive damages until a court first determines that there is evidence enough for such a claim to be pleaded. This right of nonexposure is irreparably undone, says Kraft, if a trial court refuses to strike a claim that was not previously authorized by the court.

Our claimant responds in two general ways. First, he contends that Kraft has simply misread the statute. It really does not mean that a pleader may not include such a claim in its initial pleading without prior leave of court; rather, he argues, the court may as here allow it to stand while the claimant searches for evidence to support it. Moreover, section 768.72 is in conflict with section 817.41(6), which expressly authorizes punitive damages for misleading advertising violations; and thus he contends that the requirements of section 768.72 were intended to give way to section 817.41(6).

Second, claimant asks "What is the harm?" As the real purpose of the statute is to deter financial worth discovery until punitive damages are determined to be available, he argues, there is no harm when the trial court defers such discovery until when and if such claims are allowed to stand. Hence he suggests that Kraft has suffered no harm, and certainly not the kind of irremediable harm that common law certiorari requires.

To determine whether Kraft has made the kind of extraordinary showing demanded, we begin by analyzing the statutes. It is true that section 817.41 plainly authorizes awards of punitive damages for violations of its terms. It is equally true, however, that the subject of *pleading* punitive damages is covered only in section 768.72. In other words, while section 817.41 creates an entitlement to punitive damages, it says nothing about how that entitlement shall be pleaded. As to the subject of pleading the entitlement, section 817.41 thus impliedly defers to section 768.72, which allows the pleading only after a judge has determined that the claimant can offer sufficient evidence to allow the claim for punitive damages to be pleaded.

Claimant argues that "the legislature intended punitive damages to be an integral and important part of the remedy of 817.41." He continues that section 817.41 is a "public protection statute for consumers transactions," many of which are likely to involve small sums of money. From this premise, he argues that the restrictions of Chapter 768, Part II, "will make redress for 'private violations' * * * ineffective and prohibitive." Consequently, he urges, the legislature could not possibly have meant for section 768.72 to be a restriction on pleading punitive damages remedies for section 817.41 violations.[4]

We are unable to square claimant's conclusions with the language employed in the statutory text. Apart from the legislative directive that, where conflicting, other statutes take precedence over section 768.72, claimant can point to nothing in either of the statutes to support his conclusions. He does not explain, for example, how the fact that section 817.41 may be a consumer protection statute yields the conclusion that prior authorization of punitive damage claims will render it "ineffective and prohibitive." Nor does he explain how the mere fact that a claimant must first be given leave of court to plead for punitive damages creates any conflict at all with section 817.41.

On the other hand, Kraft calls our attention to section 760.11(5), Florida Statutes (1993), in which—while authorizing punitive damages in employment discrimination cases—the legislature has also expressly stated that "The provisions of ss. 768.72 and 768.73 do not apply to this section." We agree with Kraft that, as section 760.11(5) betrays, when the legislature intends to waive the "no-punitive-damage-claim-without-leave-of-court" requirement, it obviously knows how to say so in unmistakable language. It follows that the presence of the quoted text in section 760.11(5), coupled with the absence of such an expression in the text of section 817.41, must be taken as an intent that the pleading limitation requirement be enforced as to any other statute granting a right for punitive damages unless the granting statute says otherwise.

We next confront the precise meaning of section 768.72. The first sentence says:

> "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."

Focusing on the words "no claim for punitive damages shall be permitted" in light of the remainder of the statute, it is apparent that someone must "permit" such a claim. We do not often see legislative pleading provisions that require the *claimant* (or, for that matter, the opposing party) to grant his own prior permission merely to plead something. The claimant could be expected always to grant such permission; the opposing party always to refuse it. In neither case would justice be served. No one could reasonably suggest that the perimeter is anyone other than the judge.

The next two sentences say:

> "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

ful, designed and intended for obtaining money or property under false pretenses.

* * * * * *

"(6) Any person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages proven. This provision is in addition to any other remedies prescribed by law."

Section 817.40(5), Florida Statutes (1991), defines "misleading advertising" as follows:

"(5) The phrase 'misleading advertising' includes any statements made, or disseminated, in oral, written or printed form or otherwise, to or before the public, or any portion thereof, which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading, and which are or were so made or disseminated with the intent or purpose, either directly or indirectly, of selling or disposing of real or personal property, services of any nature whatever, professional or otherwise, or to induce the public to enter into any obligation relating to such property or services."

2. *See* Ch. 501, Part II, Fla.Stat. (1993) ("Florida Deceptive and Unfair Trade Practices Act").

3. Because we have considered the petition to seek review by common law certiorari and granted that relief, we expressly disavow any holding on the alternative remedy of mandamus.

4. We, of course, express no conclusion on what factual showing would be necessary to allow a claimant to plead a punitive damages claim under section 817.41. That determination should be made by the trial judge in the first instance.

the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages."

If an unauthorized pleading of such damages could be permitted to stand, as claimant argues, 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.

[2] It would stand the statute on its head to allow the pleading while a claimant seeks out the evidence to justify it. Indeed, that is the very situation that obtained before the statute was adopted in the first place: i.e. a pleader could first plead punitive damages and only then begin to look for sufficient evidence to support the claim. In short, we think that the first three sentences of this statute read together quite plainly require the dismissal or striking of unauthorized punitive damages claims.

[3] The last inquiry is whether common law certiorari lies to redress an unauthorized pleading for punitive damages. The answer to that question is found in the nature of the right that the legislature has created. We have no doubt that, if the right were merely not to be *liable* for exemplary damages until a jury had determined the issue, certiorari would not be available to test a trial court's pretrial decision to allow a claim to be pleaded. *Martin–Johnson Inc. v. Savage*, 509 So.2d 1097 (Fla.1987).

On the other hand, a right not to be *exposed* to a mere *claim* for such extraordinary damages, without a judge first determining that a factual basis exists to allow the claim to be pleaded, would not be much of a right if one had to wait until the end of the case to take a final appeal to review the trial court's failure to strike an unauthorized pleading for such damages. Like some kinds of discovery, this cat would effectively be out of the bag before the bag was supposed to be opened. *Martin–Johnson*, 509 So.2d at 1100. Claimant has offered no explanation as to how we could possibly remedy this unauthorized pleading violation on final appeal after a trial. Thus our refusal to grant extraordinary review of this class of orders would render this particular statutory right, in effect, mythical.

Accordingly, we grant certiorari and quash the trial court's order. All claims for punitive damages shall be stricken, and the trial court is directed not to permit such a pleading until the court has first determined whether a factual basis exists to support a claim for punitive damages.

CERTIORARI GRANTED; ORDER QUASHED; REMANDED WITH DIRECTIONS.

POLEN and PARIENTE, JJ., concur.

Billie J. MASSIE, Appellant,

v.

STATE of Florida, Appellee.

No. 92–03564.

District Court of Appeal of Florida, Second District.

April 6, 1994.

Defendant was convicted of grand theft and required to pay $6,000 in restitution, in the Circuit Court, Pinellas County, Robert E. Beach, J. Defendant appealed. The District Court of Appeal held that restitution order was required to be reversed, as state had presented no evidence regarding amount of victim's loss.

Reversed and remanded.

1. Criminal Law ⇐1208.4(2)

Restitution award, in grand theft case, would be required to be reversed; no evidence had been introduced regarding amount of victim's loss. West's F.S.A. § 775.089(7).

2. Criminal Law ⇐1192

During restitution hearing, occurring on remand after original restitution order was reversed due to failure to present evidence of victim's losses, defendant would not be allowed to claim that his financial situation precluded payment of restitution; during original trial defendant had entered into a plea agreement which had included an undertaking to pay restitution. West's F.S.A. § 775.089(7).

James Marion Moorman, Public Defender, and D.P. Chance, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ron Napolitano, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

[1, 2] The appellant challenges a $6,000 restitution award resulting from his grand theft conviction. As the appellant contends, and the state concedes, the state failed to put on evidence regarding the amount of the victim's loss. Thus, we reverse the restitution award and remand for a new restitution hearing. *See* § 775.089(7), Fla.Stat. (Supp. 1992); *Winborn v. State*, 625 So.2d 977 (Fla. 2d DCA 1993). At the hearing on remand, however, the appellant is not entitled to present evidence as to his ability to pay because he agreed to pay restitution as part of his plea agreement and he did not seek to present evidence at the original restitution hearing regarding an inability to pay. *See Blasco v. State*, 601 So.2d 1264 (Fla. 3d DCA 1992). Of course, in any subsequent enforcement proceeding based on the appellant's failure to comply with the restitution provisions of probation, the appellant may defend based on his financial inability to pay. *See* § 948.06(4), Fla.Stat. (1991).

Reversed and remanded.

THREADGILL, A.C.J., and PATTERSON and FULMER, JJ., concur.

W. Grady HUIE, Frank A. Valdini, and S. Sanford Schlitt, Appellants,

v.

DENT & COOK, P.A., f/k/a Culverhouse & Dent, P.A., Robert J. Polzak, individually, and John C. Dent, Jr., individually, Appellees.

No. 93–00487.

District Court of Appeal of Florida, Second District.

April 8, 1994.

Lenders brought breach of contract and fraud claim against law firm and two shareholders who negotiated loan for borrowers. The Circuit Court, Sarasota County, Andrew D. Owens, Jr., J., awarded attorney fees to defendants for fees incurred from date contract claim was satisfied until conclusion of case. Appeal was taken. The District Court of Appeal, Altenbernd, J., held that: (1) suit was not frivolous at its inception, as needed to justify award of attorney fees as sanctions, and (2) maintaining fraud claim after contract disputes were settled was not frivolous.

Reversed in part and affirmed in part.

Hall, Acting C.J., concurred and filed opinion.

1. Costs ⇐194.44

Award of attorney fees against plaintiff is not generally authorized unless plaintiff's action was frivolous at its inception. West's F.S.A. § 57.105.

2. Costs ⇐2, 194.44

Even if portion of lawsuit is frivolous, award of attorney fees is not appropriate as sanction against plaintiffs as long as complaint alleges some judicial issue. West's F.S.A. § 57.105.

3. Costs ⇐194.44

Maintaining fraud claims against law firm which misrepresented borrowers' finan-