A34186-7/SHL/vsc/217344

85,984

IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 94-00945

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.
_____/

PETITIONERS' REPLY BRIEF

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ARGUMENT

Each argument advanced by Cox is unsound and should not be allowed to defeat the plain meaning of Section 768.72, the legislative intent underlying this statute, or the public policy behind the statute.

Cox and Arnold argue that they should be able to seek punitive damages in a sworn complaint because it is easier than complying the with the statutory requirement of seeking the Court's permission to amend a pleading. They suggest that use of a simple sworn complaint prevents unwarranted rummaging through a defendant's finances because the Court can review the sufficiency of the compliant through a hearing on a motion to strike. This position is simply wrong. First, a motion to strike is directed to those matters which are "redundant, immaterial, impertinent, or scandalous." Fla. R. Civ. P. 1.140(f); *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762 (Fla. 4th DCA 1972); *cert. denied*, 276 So. 2d 51 (Fla. 1972). Secondly, the case law specifically states that the test for determining legal sufficiency is different than the standard for determining whether a pleading is redundant, immaterial, impertinent, or scandalous. *Chris-Craft Industries, Inc. v. VanValkenberg*, 267 So. 2d 642 (Fla. 1972). Thirdly, a motion to strike pleadings is not favored. *Hulley v. Cape Kennedy Leasing Corp.*, 376 So. 2d 884 (Fla. 5th DCA 1979).

Cox and Arnold next restate the same argument by asserting that nothing can be gained by requiring a plaintiff to follow a two-step process (a complaint followed by a motion to amend which is supported by affidavit or other evidence)

when seeking punitive damages. What this procedure gains is (a) compliance with the clear wording of the statute, the underlying legislative intent, and the long-standing public policy to avoid inappropriate exploration of a defendant's finances, and (b) a recognition that the trial court cannot substantively test a sworn complaint in the same fashion that a motion to amend can be scrutinized to determine if it is sufficiently supported.

The statute plainly states that a plaintiff should not be allowed to pursue a punitive damage claim unless there is a *reasonable showing* to support it because of the grave injustice caused by indiscriminate rummaging through a defendant's financial affairs. The statute thus necessitates giving a defendant a proper forum to test the plaintiff's proffer of evidence. If, for example, there is clear evidence that the wrong individual has been joined as a defendant, or that the totality of the facts do not warrant a punitive damage claim, then the trial court could disallow a punitive damage amendment to the complaint on the grounds that no reasonable basis has been proffered. Such contrary evidence could not be proffered or brought to the trial court's attention when testing the legal sufficiency of allegations in a sworn complaint.

Cox and Arnold next raised the specter of perjury charges under Section 837.02[1] as a means of controlling the contents of a sworn complaint and protecting a defendant from undue financial disclosure. This "threat" is illusory. First, Section 837.02 is facially inapplicable if a plaintiff believes his statements are true. It is easy to envision a situation where a plaintiff is dead wrong in his "belief" (such as in a case of mistaken identity or service of a compliant against a wrong individual with a common name). Secondly, pursuit of a perjury charge could be delayed until long after the "cat is out of the bag" regarding a defendant's financial status, even if one could ultimately prove that the plaintiff knowingly made a false statement. Thirdly, a perjury conviction requires the false statement to be made about a material matter, and this is difficult to establish. Case law requires proof by oaths of two witnesses as to the falsity of the material matters sworn to by the plaintiff. *See, for example, Womack v. State*, 283 So. 2d 573 (Fla. 4th DCA 1973). A perjury charge cannot be proven merely by showing that the individual testified inconsistently at two separate times. *Freeman v. State*, 19 Fla. 552 (Fla. June Term 1882).

Cox and Arnold next argued that they only seek simplicity, not a procedural advantage, by using a sworn complaint in seeking to pursue punitive

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[1]Florida Statute § 837.02, entitled "Perjury In Official Proceedings," states: "(1) whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regard to any material matters shall be guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084. (2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense."

damages. This argument rings hollow. The case law and the Rules of Procedure show that there is a significant advantage to be gained by filing a sworn complaint rather than seeking leave to amend a complaint to pursue punitive damages. On the one hand, the plaintiff is virtually assured of the ability to maintain the punitive damage claim that is stated in a sworn complaint. The Rules of Procedure preclude a defendant from deleting the claim through a motion to strike and the trial court must permit such claim to go forward if minimal factual assertions or "buzz words" are pled (because such assertions must be taken as true). On the other hand, a plaintiff may well be precluded from pursuing a punitive damage claim where he must seek leave of court to amend the complaint upon a proffer of reasonable evidence to support such claim because "reasonable" is determined from all evidence available to the court. Requiring a plaintiff to make a reasonable showing by evidence in the record or by proffer does not amount to a "mini trial". Rather, it provides the appropriate procedural forum for determining whether there is a reasonable basis for recovery of punitive damages.

Unless there is strict compliance with the unequivocal provisions of Section 768.72, no reins are placed on pursuit of a punitive damage claim and a defendant is unnecessarily exposed to highly sensitive discovery of his finances. Public policy clearly supports the minimal safeguards of requiring a plaintiff to seek court approval to amend a complaint upon a showing of reasonable evidence before punitive damages can be sought. Accomplishing this laudable goal is well worth

any minor inconvenience that results from seeking the court's permission to amend a complaint.

No fair reading of Section 768.72 permits a plaintiff to seek punitive damages from the first moment of litigation. Whether the statute is considered in its entirety or on a sentence by sentence basis, the plain wording of the statute expresses the clear legislative intent to prevent any punitive damage claim to go forward until evidence is placed in the record or proffered to the court that establishes a reasonable basis for the trial court to permit such a claim. Cox and Arnold have not been able to satisfactorily explain how a claim that must be "permitted" by leave of court by amendment based upon a liberal construction of the evidence can be filed prior to obtaining such permission.

In the case of *Mayer v. Frank*, 20 Fla. L. Weekly D1972 (Fla. 4th DCA August 20, 1995), the respondents in a petition for certiorari asserted that a motion to strike a punitive damage claim was denied based upon the allegations in, admissions in, and attachments to, the complaint. The district court said that regardless of the basis for the trial court's ruling, a punitive damage demand which is asserted without prior trial court authorization may not go forward. The court said that "it was the intent of the legislature that a plaintiff [sic] not be even exposed to a claim for punitive damages unless a judge had first determined that a factual basis for such damages exists. Permitting a plaintiff to file an initial complaint that contains a punitive damage claim 'would stand the statute on its head. [citation omitted] . . . We can discern no reason for not applying the *Kraft*

[General Foods Inc. v. Rosenblum] reasoning to any instance in which a party seeks punitive damages without first complying with the statute.'" This court went on to state that "we recognize that in many instances enforcement of the statute in this manner places form over substance, considering the likelihood that a court will *subsequently* authorize amendment of the pleadings to claim punitive damages. However, effective enforcement of the statute, which was designed to reduce injuries resulting from insupportable punitive damage claims, mandates such treatment." *Id.* at D1972.

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 exemplary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of December, 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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