IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-161

IN RE: AMENDMENTS TO
FLORIDA RULES OF CIVIL
PROCEDURE
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COMMENT RE PROPOSED AMENDMENT TO FLA.R.CIV.P. 1.190(f)

In the Biennial Report of the Florida Civil Procedure Rules Committee, there is a proposal to amend Fla.R.Civ.P. 1.190 to add a subsection (f) addressing the procedure for motions to assert a claim for punitive damages. The Academy of Florida Trial Lawyers has two concerns regarding the proposed amendment which it will address herein.

The proposed Fla.R.Civ.P. Rule 1.190(f) is designed to provide the procedural means for implementing §768.72, Fla. Stat., which states:

> 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 proposed amendment to Rule 1.190 provides as follows:

> (f) To Assert Claim for Punitive Damages. A motion for leave to amend a pleading to assert a claim for punitive damages shall state with particularity any evidence in the record or any evidence to be proffered by the claimant that provides a reasonable basis for recovery

> of such damages. Any proffer in support of the motion shall contain sufficient detail to permit an opposing party to respond to the proffer and to permit the court to rule on the motion. The motion to amend and any supporting evidence or proffer shall be served on all parties at least 20 days before the time fixed for the hearing.

The Academy's concerns involve whether the language of the proposed amendment may be construed as authorizing an adversarial evidentiary hearing, which is neither required by §768.72, nor necessary to implement the legislative intent. Additionally, the strict burden of specificity imposed on the movant by the proposal is not justified by the language of the statute, and could engender unnecessary practical problems that could impede the efficient resolution of such motions, and thereby place a heavier burden on the resources of the trial court.

The Florida District Court decisions which have ruled on the implementation of §768.72 have unanimously concluded that it does not require an evidentiary hearing, Strasser v. Yalamanchi, 677 So.2d 22 (Fla. 4th DCA 1996); Solis v. Calvo, 689 So.2d 366 (Fla. 3d DCA 1997); see also Beverly Health and Rehabilitation Services, Inc. v. Meeks, 778 So.2d 322, 325 (Fla. 2d DCA 2000). One federal district court has also reached that conclusion, and characterized the defendant's opposition to the motion as resembling "a motion to dismiss that additionally requires an evidentiary proffer and places the burden of persuasion on the plaintiff."

State of Wisconsin Investment Board v. Plantation Square Associates, 761 F.Supp. 1569, 1580 (S.D. Fla. 1991).[1]

The rationale of those decisions is sound, especially since this Court has determined that the statute only creates a substantive legal right "not to be subject to a punitive damages 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 Company v. King, 658 So.2d 518, 519 (Fla. 1995). The statute is not designed to require a definitive factual finding by the trial court, but rather simply a determination that there is an adequate factual basis to support an allegation of a claim for punitive damages. This standard is also consistent with Florida's liberal policy of allowing amendments to pleadings, which has been deemed applicable in the context of motions filed pursuant to §768.72, Fla. Stat., see Burr v. Norris, 667 So.2d 424, 426 (Fla. 2d DCA 1996).

The proposed amendment to Fla.R.Civ.P. 1.190 could be construed as requiring an evidentiary hearing, because it imposes a more onerous burden of specificity than is even applicable in a summary judgment context. Also, it requires the proffer "to contain sufficient detail to permit an opposing party to respond to

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[1]/Subsequent to the District Court's decision in State of Wisconsin Investment Board v. Plantation Square, supra, the Eleventh Circuit ruled that §768.72, Fla. Stat. is inapplicable in Federal Court, Cohen v. Office Depot, Inc., 184 F.3d 1292, 1299 (11th Cir. 1999), vacated in part on other grounds, 204 F.3d 1069 (11th Cir. 2000), cert. denied, 531 U.S. 957 (2000).

the proffer." The use of the term "respond" is sufficiently ambiguous that it may be construed as authorizing a defendant to present evidence in opposition to the motion. As exemplified by the experience of the Federal District Court in State of Wisconsin Investment Board v. Plantation Square, supra, 761 F.Supp. at 1580, such a procedure can result in "a barrage of briefs and counter-proffers of evidence by the defendants seeking to disprove [plaintiffs] claim largely by arguing their own evidence." As noted above, a full evidentiary hearing is not required or even appropriate under §768.72, Fla. Stat., and any possibility that such a procedure would be authorized by the proposed amendment could create difficulties for the trial court in implementing the legislative intent. For that reason, the Academy would suggest that the word "respond" in the second sentence of the proposal be replaced by the term "address," which would eliminate any argument that an evidentiary response is appropriate.

Additionally, the first sentence of the proposed amendment requires that the motion "state with particularity any evidence in the record or any evidence to be proffered." That imposes a stricter burden on the movant than that which is required in a summary judgment context, which is not necessary to implement legislative intent nor to ensure adequate notice to the defendant. Fla.R.Civ.P. 1.150(c) only requires that a party moving for summary judgment state with particularity the "grounds upon which it [the motion] is based and the substantial

matters of law to be argued." That language has enabled the courts to ensure that the nonmovant has sufficient notice to respond to the motion, see Locke v. State Farm Fire and Casualty Co., 509 So.2d 1375 (Fla. 1st DCA 1987); Finn v. Lee County, 479 So.2d 246 (Fla. 2d DCA 1985); City of Cooper City v. Sunshine Wireless Co., Inc., 654 So.2d 283 (Fla. 4th DCA 1995). That level of specificity has been deemed sufficient in the summary judgment context, even though the resulting ruling can be case dispositive, which is not the situation with motions seeking to assert a claim for punitive damages. There appears to be no reason for imposing a stricter burden in the context of amending a complaint than there is for seeking a summary judgment.

The degree of specificity required by the proposal will create practical problems as well. It will likely engender disputes regarding the sufficiency of the motion, which would not necessarily involve the adequacy of notice to the Defendant. As noted in Beverly Health and Rehabilitation v. Meeks, supra, a case in which the motion provided no explication of the evidence relied upon, defense counsel was still able to respond at the hearing and was not deemed to have been prejudiced. Quite simply, litigation attorneys are quite skilled and experienced at evaluating discovery for purposes of determining exposure to punitive damages.

Also, by requiring such a degree of specificity in the motion, the proposed amendment would create another practical problem. If the movant needs to address evidence not specified in the motion in order to respond to a defendant's argument against the motion, it will be unable to do so without seeking leave to amend the motion. Since the only purpose of the specificity requirement is to provide sufficient notice to a defendant to enable it to oppose the motion, there appears to be no justification for imposing such a degree of specificity that it could result in procedural wrangling and a need to amend a motion, even when there is no issue of adequate notice to the defendant.

An additional practical problem will arise because motions to add claims for punitive damages are not usually made at the close of discovery, since if they are granted they create an additional issue on which discovery is needed, i.e. the financial status of the defendant. As a result, discovery is usually ongoing. Under the proposed amendment, if evidence is discovered subsequent to the filing of the motion it could not be considered without an amendment to the motion. This will require an additional motion and hearing, thereby rendering the procedure inefficient and a burden on the court. While certainly some advance notice prior to the hearing is appropriate regarding evidence that was discovered after the motion was filed, there should not be a strict 20-day time period; the primary consideration should be whether the defendant was prejudiced by the late disclosure.

Therefore, for these reasons, it is respectfully submitted that the amendment should be changed to impose no greater burden of specificity on the movant than that which is required for a motion for summary judgment pursuant to Fla.R.Civ.P. 1.510(c); and the term “respond” should be replaced by the word “address” in the second sentence of the proposal.

Respectfully submitted,

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