IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CIVIL PROCEDURE))) Case No. 03-161

COMMENTS IN OPPOSITION TO PROPOSED ADDITION OF FLORIDA RULE OF CIVIL PROCEDURE 1.190(f)

The Florida Civil Procedure Rules Committee has proposed amending Rule 1.190 to add an entirely new section to the rule which will impose unanticipated and unreasonable burdens on claimants seeking to amend complaints to add claims for punitive damages and which will likely result in substantial and unnecessary burdens on the resources of the trial court system.

Proposed Rule 1.190(f) Undermines the Presumption of Liberality in Amendments to Pleadings

The legislature has already addressed the concerns of defendants to avoid being subjected to unnecessary punitive damage claims by creating a limited procedure under section 768.72, Florida Statutes, where a court reviews a claimant's proffer to determine if a reasonable basis exists for asserting a claim for punitive damages. Prior to the enactment of this statute, a claimant had the right to simply plead a claim for punitive damages in the original complaint. The right of a plaintiff to seek punitive damages has long been a part of traditional tort common law. As a statute in derogation of the common law, section 768.72 must be strictly construed. In applying such a statute, it is a fundamental rule of statutory construction that the statute will not be interpreted "to make ***any*** alteration [in the common law] other than was specified

and plainly pronounced." *Dudley v. Harrison, McCready & Co.,* 127 Fla. 687, 173 So. 820 (1937). The current version of Rule 1.190 sets forth the procedure for amendments to pleadings in general. As currently written, the rule stresses liberality in permitting amendments to pleadings. The addition of proposed subsection (f) will unduly restrict this liberal procedure for a particular class of amendments and will conflict with section 768.72, Florida Statutes, which already addresses this issue. Proposed Rule 1.190(f) thus substantially alters the common law and restricts access to the courts by imposing a mandatory procedure for amending complaints to add claims for punitive damages which exceeds the scope of the statutory requirements already in place.

A plaintiff's right to freely plead punitive damages claims remained an integral part of Florida pleading and practice jurisprudence until 1986, when the legislature enacted a tort reform statute which impinged upon and restricted a plaintiff's right to plead and prosecute its common law punitive damages claims. The 1986 Florida Legislature restricted the common law rights of a plaintiff to plead punitive damages claims by the enactment of the Tort Reform And Insurance Act Of 1986, where the legislature announced its intention to address a financial crisis in the liability insurance industry caused by a dramatic increase in the cost of such coverage. *Chapter 86-160, Laws Of Florida* (1986). Among other tort reform initiatives, the legislature enacted section 51, now codified as section 768.72, which created conditions precedent to pleading claims for punitive damages. This section was intended to eliminate unfounded punitive damage claims, and to protect a defendant's financial worth information from intrusive discovery by plaintiffs with frivolous claims.

McGuire, Woods, Battle & Boothe, L.L.P. v. Hollfelder, 771 So.2d 585 (Fla. 1st DCA 2000).

The statute merely requires that before being permitted to amend a complaint such that punitive damages discovery may be sought, a claimant must first demonstrate to the court that evidence in the record would support such an amendment. Section 768.72 provides for the amendment of a complaint either through evidence in the record or "proffered by the claimant." The Legislature determined that the only burden on a claimant is to satisfy the court that a reasonable basis exists for the amendment.

Courts have recognized that the procedure provided by section 768.72 supports liberality in amendments. The United States District Court for the Southern District of Florida, in its analysis of section 768.72, concluded that the statute has its own "…liberal procedure for amendment." *State of Wisconsin Investment Board v. Plantation Square Associates, LTD.,* 761 F. Supp. 1569, 1576 (S.D. Fla. 1991). As the Second District Court of Appeal held, the failure to permit amendment to pleadings to add a claim for punitive damages was "…an abuse of discretion in light of Florida's liberal policy of allowing amendments to pleadings" in light of the evidence proffered to the trial court. *Burr v. Norris*, 667 So. 2d 424, 426 (Fla. 2d DCA 1996). Proposed Rule 1.190(f) will seriously undermine this presumption of liberality.

Proposed Rule 1.190(f) will Transform Simple Preliminary Motions into Time and Resource Consuming, Adversarial "Mini-Trials."

Under the procedures described in section 768.72, no hearing is even required on a motion for leave to amend a complaint for punitive damages, much less an

evidentiary proceeding. In *Strasser v. Yalamanchi*, 677 So.2d 22 (Fla. 4th DCA 1996), the Fourth District stated that "contrary to petitioner's contention, an evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment. Pursuant to section 768.72, a proffer of evidence can support a trial court's determination." In *Solis v. Calvo*, 689 So.2d 366 (Fla. 3d DCA 1997), the Third District held that pursuant to 768.72, "a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute." To the extent a hearing on a motion to amend the complaint is granted, the purpose of such hearing must be merely to determine that the claim is not groundless. The level of proof required at this stage has been discussed by several courts in this state. As stated in *State of Wis. Inv. Bd. v. Plantation Square Assoc.*, 761 F. Supp. 1569, 1580-81 (S.D. Fla. 1991):

> [T]he standard of proof required merely to assert plaintiff's punitive claim **must be lower than that needed to survive a summary adjudication on its merits. As the Florida courts have noted, a § 768.72 challenge more closely resembles a motion to dismiss** that additionally requires an evidentiary proffer and places the burden of persuasion on the plaintiff. In considering a motion to dismiss, factual adjudication is inappropriate as all facts asserted - or here, reasonably established - by the plaintiff are to be taken as true. *Conley v. Gibson*, 355 U.S. 41, at 45-46, 78 S.Ct. 99, at 101-02, 2 L.Ed.2d 80, at 84.

The proposed amendment to Rule 1.190(f) will, in effect, require courts to begin conducting evidentiary hearings or "mini-trials" on the issue of whether plaintiffs have proffered a sufficient basis to merely allege a claim for punitive damages. The proposed rule specifically anticipates that defendants will "respond" to the proffer submitted by the claimant. Courts will thus feel compelled to attempt to turn the

motion to amend the pleading into a summary adjudication on the merits of the punitive claim by encouraging the submission and argument of "alternative" or "counter" evidentiary proffers by defendants. Such a result is inapposite to the liberal provisions of the statute, the current rule, and the case law:

> In reaching this finding [that plaintiff could amend the complaint to plead a claim for punitive damages], the court has resisted applying the statute as a summary adjudication, which is what the parties have apparently sought to undertake.
> **The plaintiff's submission of exhibits to substantiate its claim has elicited a barrage of briefs and counter-proffers of evidence by the Defendants seeking to disprove [plaintiff's] claim largely by arguing their own evidence.**
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> **. . . .**
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> **[As all facts reasonable established by the plaintiff are to be taken as true], the court has given recognition only to those assertions of the defendants which would show plaintiff's factual basis to be patently false or irrelevant, and has paid no heed whatsoever to the defendants alternative evidentiary proffers.** *Plantation Square.*

The proposed rule thus canonizes the very procedure condemned by the court in *Plantation Square*.

Proposed Rule 1.190(f) is Inconsistent with the Meeks Opinion.

Although the express purpose of the proposed rule is to clarify pleading requirements pursuant to the *Meeks* opinion, the rule goes far beyond the holding in the *Meeks* case. Where the court in *Meeks* merely stated that notice of the specific evidence to be proffered should be provided to the defendant within a reasonable time prior to a hearing, the proposed rule would require that **both the motion and all evidence to be proffered** be provided at least 20 days before the time fixed for the hearing. This provision is nonsensical, as no hearing can even be set in the absence of a filed motion. The end result of implementation of this provision would be to require plaintiffs to

provide defendants with the particular evidence supporting the amendment well in excess of twenty days prior to a hearing.

Furthermore, the holding of *Meeks* was simply to the effect that the trial judge had complied with the procedural requirements of 768.72, notwithstanding that the defendants did not receive the plaintiff's proffer of evidence until the very day of the hearing. Under Proposed Rule 1.190(f), claimants would not be permitted to proffer at the hearing any evidence not previously disclosed in the twenty days prior to the hearing, even if such evidence was only discovered in the intervening time. Such a limitation is contrary to the provisions of §768.72, which merely require that a plaintiff's evidence be "in the record" or "proffered." If all of the evidence to be submitted must be provided in writing twenty days prior to the hearing, then the language of section 768.72 which permits "proffers" would be superfluous.

Proposed Rule 1.190(f) Places A Greater Burden on Claimants Seeking to Amend Complaints than Rule 1.510 Places on Claimants Moving for Summary Judgment.

In addition, the proposed rule would require that claimants merely attempting to amend their complaints would have to comply with procedural and substantive restrictions very similar to those now governing the procedures applicable to motions for summary judgment. In fact, the proposed rule imposes an even greater burden on claimants than the summary judgment rule. Under Rule 1.510, although a motion for summary judgment must provide the particular grounds for the motion, the rule anticipates that additional support may also be filed, so long as there remains a twenty day period between the hearing date and the last submission of evidence by the proponent. Proposed Rule 1.190(f), however, requires that the motion for leave to

amend not only be served twenty days prior to the hearing, but that it shall also "state with particularity any evidence in the record or any evidence to be proffered by the claimant…"

Further, the Proposed Rule contains no requirements that a defendant provide advance notice to the plaintiff of any counter-proffer material which may be submitted to the court. In this regard, the Proposed Rule is even more onerous to claimants than the Rule 1.510, which at least requires 48 hours advance notice for evidence to be offered in opposition to a motion for summary judgment.

Conclusion

The Constitution of Florida assures access to the courts. Existing Rule 1.190 provides for a liberal procedure in amendments to pleadings. Florida Statute 768.72 further provides a liberal procedure for the amendment of complaints to add claims for punitive damages. Because Proposed Rule 1.190(f) undermines both the constitutional right of access to the courts and the presumption in favor of liberality in amendment of pleadings, the amendment to the rule should not be permitted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine true and correct copies of the above comments have been sent by hand delivery to the **Clerk of the Florida Supreme Court,** Attn: Tom Hall, 500 South Duval Street, Tallahassee, Florida 32399-1927; and that a true and correct copy of the above comments have been sent by federal express overnight delivery to **Dominic McKenzie, Chairman**, Florida Civil Procedure Rules Committee, Attn: Madelon Horwich, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399, this 17th day of March, 2003.

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CERTIFICATE OF COMPLIANCE WITH FONT SIZE

In accordance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, the undersigned certifies that this Comment has been printed using a 14 point Times New Roman Font.

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