FLORIDA DEFENSE LAWYERS ASSOCIATION

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April 6, 2021

VIA E-FILING PORTAL
Florida Supreme Court
500 South Duval St
Tallahassee, FL 32399

Re: Comment in support of In re: Amendment to Fla. R. App. Pro. 9.130, SC21-129.

Dear Justices of the Florida Supreme Court,

The Florida Defense Lawyers Association (FDLA) is a statewide organization of civil defense attorneys formed in 1967, and it has over 1,000 members. The goal of the FDLA is to "bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties." The FDLA actively participates in amicus briefing before this Court in cases with statewide impact on tort, insurance, litigation, and the fair administration of justice. It also submits comments on various jury instruction and rule change proposals.

The FDLA writes to comment in support of the amendment to Florida Rule of Appellate 9.130 to authorize the appeal of orders that grant or deny a motion for leave to amend to assert a claim for punitive damages. This rule change will help protect defendants from invasive discovery into their personal and/or corporate finances where a claim for punitive damages should have never been allowed.

I. FINANCIAL INFORMATION IS PROTECTED UNDER FLORIDA CONSTITUTION'S RIGHT OF PRIVACY.

Article I, section 23 of the Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Art. I, § 23, Fla. Const. "This right to privacy protects Florida's citizens from the government's uninvited observation of or interference in those areas that fall within the ambit of the zone of privacy afforded under this provision." City of N. Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995). It is much broader and stronger than the U.S. Constitution. Rasmussen v. S. Florida Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987). See also Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998) ("The state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart."). "Unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental

one. . . ." City of N. Miami, 653 So. 2d at 1027; accord Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985).

Financial information and documentation wholly falls within this fundamental right of privacy as there is a legitimate expectation of privacy. Winfield, 477 So. 2d at 548; Rappaport v. Mercantile Bank, 17 So. 3d 902, 908 (Fla. 2d DCA 2009) ("To the extent that the circuit court's order requires Mrs. Rappaport to disclose her personal financial information, it undeniably violates her right to privacy."); Mogul v. Mogul, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999).

> [F]inances are among those private matters kept secret by most people. Disclosure of income and personal investments is often not made even to siblings and others within the immediate family, much less to strangers. Private financial worth information is thus usually withheld from the world at large unless the courts compel such disclosure. Even then, disclosure is made only so far as necessary.

Woodward v. Berkery, 714 So. 2d 1027, 1035 (Fla. 4th DCA 1998) (citation omitted).

"Requiring a defendant to reveal his financial resources may have far reaching effects out of all proportion to any benefit it may provide in the case." Solodky v. Wilson, 474 So. 2d 1231, 1233 (Fla. 5th DCA 1985). "If plaintiffs were allowed unlimited discovery of defendants' financial resources in cases where there is no actual factual basis for an award of punitive damages, the personal and private financial affairs of defendants would be unnecessarily exposed and, in some cases, the threat of such exposure might be used by unscrupulous plaintiffs to coerce settlements from innocent defendants." Tennant v. Charlton, 377 So. 2d 1169, 1170 (Fla. 1979). See also Pearce v. Doral Mobile Home Villas, Inc., 521 So. 2d 282, 285 (Fla. 2d DCA 1988); Bradenton Mall Assoc. v. Hill, 508 So. 2d 538, 539 (Fla. 2d DCA 1987). This financial information could even be used outside of the litigation and shared with others.

II. CURRENT LAW PREVENTS A DEFENDANT FROM TESTING THE SUFFICIENCY AND TRUTHFULNESS OF THE PUNITIVE DAMAGES PROFFER.

Under section 768.72, Florida Statutes, a plaintiff is required to make "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages" before asserting a claim for punitive damages. § 768.72(1), Fla. Stat. However, the statute allows this showing to be done in a simple proffer. Id. "Proffered evidence is merely a representation of what evidence the [plaintiff] proposes to present and is not actual evidence." Grim v. State, 841 So. 2d 455, 462 (Fla. 2003).

Courts many times permit this showing without an evidentiary hearing. See Surrey Place of Ocala v. Goodwin, 861 So. 2d 1291 (Fla. 5th DCA 2004) (holding that a hearing on a motion to amend to allege punitive damages is not necessary); Solis v. Calvo, 689 So. 2d 366, 369 n. 2 (Fla. 3d DCA 1997) ("Pursuant to Florida Statute section 768.72 (1995), a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute.") (citation omitted); Strasser v. Yalamanchi, 677 So. 2d 22, 23 (Fla. 4th DCA 1996) ("[A]n evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment. Pursuant to section 768.72(1), a proffer of evidence can support a trial court's determination."). But see Spry v. Prof'l Employer Plans, 985 So. 2d 1187, 1188 (Fla. 1st DCA 2008) ("The relevance of financial information should be determined only after an evidentiary hearing. . . .").

Pursuant to this Court's precedent, if the statutory procedure is followed, a defendant is left with no immediate means to test the sufficiency or truthfulness of the evidence or proffer submitted by the plaintiff. See Globe Newspaper Co. v. King, 658 So. 2d 518, 519 (Fla. 1995) ("Certiorari is not available to review a determination that 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."); Carnival Corp. v. Iscoa, 922 So. 2d 359, 360 (Fla. 3d DCA 2006) ("While we have grave misgivings about both Iscoa's entitlement to advance this claim under maritime law and his ability to sustain a punitive damage award on final review, we deny the petition."). Yet, the statutory scheme plainly states that a punitive damages claim is not permitted without a reasonable showing by evidence or proffer.

III. THE PROPOSED AMENDMENT IS NECESSARY TO PROTECT DEFENDANTS' RIGHTS TO BE FREE FROM FINANCIAL INFORMATION DISCOVERY.

Currently and in contravention of a doubly protected right, a defendant must wait until plenary appeal to test the sufficiency of purported punitive damages evidence. Estate of Despain v. Avante Group, Inc., 900 So. 2d 637, 639 (Fla. 5th DCA 2005). At that point, the defendant's fundamental right to privacy has already been invaded and ultimately destroyed. See Jenkins v. Milliken, 498 So. 2d 495, 496 (Fla. 2d DCA 1986) ("An order which requires the disclosure of financial information in support of a claim for punitive damages provides a proper predicate for certiorari jurisdiction. If Brandywine is correct that it cannot be held liable for punitive damages, an appeal from the final judgment would come too late because Brandywine would have already disclosed the requested data."); see also § 768.72, Fla. Stat.

Notably, the cases interpreting section 768.72, Florida Statutes, do not analyze or even mention a person's fundamental right to privacy of their personal financial information and no compelling state interest is articulated. See, e.g., Globe Newspaper Co., 658 So. 2d at 520; Simeon, Inc. v. Cox, 671 So. 2d 158, 160 (Fla. 1996). This Court can make a much

needed correction to its jurisprudence. Some of the District Courts of Appeal, like this Court has done through its request to the Appellate Court Rules Committee, have indicated that the correction is necessary. See, e.g., Life Care Ctrs. of Am., Inc. v. Croft, 299 So. 3d 588, 591-92 (Fla. 2d DCA 2020) (expressing the impracticality and ineffectiveness of certiorari review of orders permitting punitive damages claims to be added to pleadings); E.R. Truck & Equip. Corp. v. Gomont, 300 So. 3d 1230, 1231 (Fla. 3d DCA 2020) (Scales, J., concurring and Gordo, J., concurring specially); The Event Depot Corp. v. Frank, 269 So. 3d 559, 563-64 (Fla. 4th DCA 2019) (Kuntz, J., concurring); Levin v. Pritchard, 258 So. 3d 545, 548 n.4 (Fla. 3d DCA 2018); TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016) (urging the Florida Bar's Appellate Court Rules Committee to review rule 9.130(a)(3) of the Florida Rules of Appellate Procedure to consider whether to include in the rule's catalogue of appealable, nonfinal orders a trial court's order granting a motion for leave to add a punitive damages claim); Sapp v. Olivares, 288 So. 3d 714, 716 n.1 (Fla. 4th DCA 2020) (noting that several appellate courts and individual judges have questioned the continued efficacy of Globe in modern litigation).

While at least one of the District Courts of Appeal will grant certiorari where a plaintiff simply presents "a 'whole box' of documents" and the trial court does not tie that evidence to the asserted claim for punitive damages, see, e.g., Cat Cay Yacht Club, Inc. v. Diaz, 264 So. 3d 1071, 1074 (Fla. 3d DCA 2019), that court and others require the trial court to make affirmative findings of a plaintiff's reasonable showing by evidence which provides the reasonable evidentiary basis for punitive damages. Id. at 1075 (holding "that the trial court must make "findings identifying the evidence it considered sufficient to provide a statutory 'reasonable basis' for granting the motion to amend"); Varnedore v. Copeland, 210 So. 3d 741, 747-48 (Fla. 5th DCA 2017) (hold that the trial court must "make an affirmative finding that [the] plaintiff has made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering [punitive] damages"); Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, Inc., 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015) (holding that a party may not assert a punitive damages claim until the trial court has made "affirmative findings" that there is a reasonable evidentiary basis for the punitive damages claim). Nevertheless, another refuses to do so. Watt v. Lo, 302 So. 3d 1021, 1024 (Fla. 1st DCA 2020) ("[N]othing in the plain language of section 768.72(1) requires a trial court to make express or affirmative findings when determining whether to permit a claimant to assert a punitive damages claim. All that is required is that the claimant make the necessary showing based on evidence in the record or proffered by the claimant").

Even so, the appellate courts currently cannot look at the evidence or proffer on certiorari review to determine whether it supports the punitive damages claim before the invasive financial information discovery occurs. Defendants' rights to be free from that discovery should not take a back seat to a plaintiff's entitlement to plead a claim for punitive

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damages. It should similarly not take a back seat in an effort to simply "speed up" the litigation.

IV. CONCLUSION

Leave to amend to assert a claim for punitive damages truly is a "game changer" in litigation. TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016). The value of the claim drastically increases and it allows a new level of discovery.

FDLA therefore urges the Court to adopt the proposed amendment to Florida Rule of Appellate Procedure 9.130 as it appears in the Report of the Appellate Court Rules Committee's submission. This will allow a defendant to seek immediate review of an order granting amendment and will help ensure that defendants are not improperly subject to invasive financial discovery. This will help preserve the constitutional rights of those defendants. Non-final appeals under 9.130 are shorter in nature than plenary appeals, and therefore, the Courts will be able to address them promptly.

Thank you for consideration of this comment.

Sincerely,

Kansas R. Gooden
On Behalf of the Florida Defense Lawyers Association