

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO FLORIDA
RULE OF CIVIL PROCEDURE 1.280

NO. SC21-929

**COMMENT OPPOSING ADOPTION OF RULE 1.280(h)
AS IT CONTRAVENES PUNITIVE DAMAGES STATUTES**

Rule 1.280(h) runs counter to at least three statutes governing the precise matter the rule addresses.

When a plaintiff seeks discovery to support a punitive damages claim and the question is whether officers, directors, or managers knowingly condoned, ratified, or consented to conduct that provides a basis for seeking punitive damages, Florida statutory law controls.

The statute governing punitive damages claims, Section 768.72 (3), Florida Statutes (2020), requires that:

- (a) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and: ...
- (b) **The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct....**

(Emphasis added.)

RECEIVED, 11/09/2021 10:24:20 PM, Clerk, Supreme Court

Because “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 legislature has expressly approved liberal discovery of evidence to support amending a complaint to seek punitive damages:

“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.”

Section 768.72 (1), Florida Statutes (2020).

When Section 768.72 (1) was enacted, it was challenged as encroaching on the constitutional powers of the judiciary. The Supreme Court rejected the challenge, stating:

We find that all these sections [including Section 51 that became Section 768.72 (1)] are directly related to the substantive statutory scheme and conclude that these provisions do not violate the separation of powers clause of the Florida Constitution.

Smith v. Department of Insurance, 507 So. 2d 1080, 1092 (Fla. 1987).

In announcing its decision, the Supreme Court quoted and approved the rationale set out by the trial court:

Section 51 is clearly substantive because it sets the standard for establishing a claim for punitive damages. The legislature, which has the authority to abolish punitive damages can surely set the standard for establishing such claims. The Court is of the view th at both sections create substantive rights and

further that any procedural provisions of these sections are intimately related to the definition of those substantive rights.

Smith, 507 So. 2d at 1092, n. 10.

Newly announced Rule 1.280(h) collides with statutes other than Section 768.72 (1). Statutes enacted to protect the health and welfare of those in nursing homes and related health care facilities and assisted care communities also mandate liberal discovery to identify evidence to support amendments to seek punitive damages in the corporate setting. Section 400.0237, Florida Statutes (2020); Section 429.297, Florida Statutes (2020).

The recently adopted, across-the-board, apex doctrine rule runs directly counter to the clear statutory mandate integral to the functioning of the legislatively created scheme that allows properly supported punitive damages claims and governs the discovery of evidence necessary to assert such claims.

This is one specific reason why this Court should reconsider and withdraw Rule 1.280(h) and, instead, as the federal courts and other states have done, the Court should rely on the informed judgment of trial judges to apply existing rules, particularly the provisions of Rule 1.280(c) when appropriate. Absent that, the Court should amend Rule 1.280(h) in line with the statutory directives identified above.

Respectfully Submitted,



John Wayne Hogan

Florida Bar No. 142460

Terrell Hogan Yegelwel, P.A.

233 E. Bay Street, Suite #804

Jacksonville, FL 32202

hogan@terrellhogan.com

Telephone: 904-632-2424

Facsimile: 904-353-4418