

Punitive Damage Amendments Soon Subject to Immediate Interlocutory Appeal

On Jan. 6, 2022, the Florida Supreme Court amended Florida Rule of Appellate Procedure 9.130 to allow for interlocutory review of nonfinal orders granting or denying leave to amend to add claims for punitive damages. The short opinion left many with questions as to how this new rule would change the landscape of Florida's appellate law.

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In Florida, litigants have long enjoyed a constitutional right to privacy. Financial information and documentation falls within the fundamental right of privacy as there is a legitimate expectation of privacy. Thus, in order to obtain such information, there are certain rules and procedures parties must follow.

Section 768.72, Florida Statutes, 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." Allowing plaintiffs to obtain unlimited discovery of a defendant's financial resources when there is no actual basis for an award of punitive damages unnecessarily exposes the personal and financial affairs of defendants.

The value of the claim significantly increases, and defendants may be subject to the potential for uninsured losses. A new level of discovery complicates litigation. In some

cases, unscrupulous plaintiffs use that information to coerce settlements from innocent defendants.

The Florida courts have recognized that granting leave to amend to assert a claim for punitive damages truly is a "game changer" in civil litigation. For years, several district court judges have urged the Florida Appellate Rules Committee to change the rules to allow for interlocutory review as the appellate courts were handcuffed when reviewing these orders.

Before the rule change, review of nonfinal orders on motions for leave to amend to add punitive damages claims could only be reviewed via a petition for writ of certiorari. To get the appellate court to quash an order, the petitioner had to prove the trial court had departed from the essential requirements of the law and that there was irreparable harm that could not be remedied in a post-judgment appeal.

The latter part was easier to prove since financial discovery was akin to “cat out of the bag” discovery, which would cause irreparable harm to the defendant. However, for the first part of the test, litigants could only attack the procedural requirements of the rule and argue that the trial court did not comply with the rule and the case law (i.e., review an evidentiary proffer, hold a hearing, make an affirmative finding, etc.). Litigants could not attack the substance of the evidence and could not argue that the evidence was insufficient to support the amendment.

This is, and was, a tough standard. For example, recently, in *Kovacs v. Williams*, 2021 WL 5855760 (Fla. 5th DCA Dec. 10, 2021), the Fifth District quashed an order allowing a punitive damages amendment where the trial court failed to make an affirmative finding on the record as to the reasonableness of the evidentiary proffer. In seeking review, the petitioner could not focus on attacking the sufficiency of the evidence, but merely on the trial court’s failure to follow the rule and the authorities governing these types of motions.

However, soon the “game changer” might result in “game over.” This is because parties will be able to seek immediate interlocutory review of nonfinal orders granting or denying leave to amend to add claims for punitive damages. Defendants will not have to respond to intrusive discovery and wait until the end of the case to attack the sufficiency of the evidence. The new rule takes effect on April 1, 2022, at 12:01 a.m.

Unlike in the recent rules opinion adopting the federal summary judgment standard, where the Florida Supreme Court addressed how the new rule would apply to pending cases, this opinion was silent on the issue. Thus, litigants have to analyze whether the

new rule will apply to any orders issued before April 1, 2022.

If the courts consider the rule amendment procedural, then it may be presumed to apply retroactively. Procedural law concerns the means and methods to apply and enforce those duties and rights. On the other hand, if the courts consider it substantive, then it will not apply retroactively. Substantive measures either create or impose a new obligation or duty or impair or destroy existing rights.

At first glance, this amendment seems innocuous as it applies to both defendants and plaintiffs equally. Courts may consider it a procedural amendment as it applies to the method of review of a type of nonfinal order. It does not impair or destroy existing rights. To the contrary, it gives both sides the ability to appeal. And, it dramatically changes appellate review of these orders and will likely be seen as a relief for defendants and, hopefully, a deterrent for plaintiffs.

A recent decision from the Second District might provide some insight into how appellate courts will treat this small group of cases. In *Sarasota County Public Hospital District v. Venice HMA*, 325 So. 3d 334, 339, n. 4 (Fla. 2d DCA 2021), the court noted it was constrained to review the challenge before it through an extraordinary writ because the version of rule 9.130(a)(3) in effect when the circuit court entered the subject order did not authorize appeals of nonfinal orders that determined, as a matter of law, a party is not entitled to sovereign immunity.

The dicta in *Sarasota County* is inconsistent with the “pipeline” rule. That rule provides that an appellate court will dispose of the case in accord with the law in effect at the time of its decision rather than the law in

effect at the time the judgment appealed was rendered. *See Larocca v. State*, 289 So. 3d 492 (Fla. 4th DCA 2020); *Perez v. Bell South Telecommunications*, 138 So. 3d 492 (Fla. 3d DCA 2014). Both the Third and Fourth Districts have applied the pipeline rule to retroactively apply *Daubert* even though *Frye* was the relevant standard at trial.

It will be interesting to see how the appellate courts apply this rule change to orders entered between Jan. 6, 2022, and April 1, 2022. For those orders where the trial court departed from the essential requirements of the law, litigants may still be able to take a petition for writ of certiorari while later requesting the appellate court to apply the pipeline rule and dispose of the case in accord with the new rule.

Regardless, after April 1, 2022, with interlocutory review of these orders allowed, the stringent certiorari standard will no longer apply. Instead, the question of whether the plaintiff made a “reasonable showing” to allege punitive damages in an amended complaint will be considered a question of law to be reviewed de novo. A trial court’s determination will be reviewed using the same standard the appellate court employs in determining whether a complaint states a cause of action or the record supports a summary judgment. The de novo standard allows the appellate court to review the evidence anew while also looking to see if the trial court complied with the procedural requirements in granting or denying the motion.

Although the majority of the court approved the rule amendment, Justice Jorge Labarga

did not. In his dissent, he expressed concern that by classifying such orders as nonfinal, the ability to immediately file an interlocutory appeal could discourage meritorious punitive damages claims due to the lengthy delays caused by appeals. His dissent also pointed to confidentiality orders purportedly protecting defendants’ financial information during punitive damages discovery.

What appellate courts once characterized as a “game changer” in civil litigation may now end the game playing when it comes to punitive damages. The amendment requires additional consideration for plaintiffs’ counsel prior to moving to include a claim for punitive damages in their complaints. It ensures that claims for punitive damages are rare and will be raised only when circumstances truly warrant them.

While it is still too soon to tell, overall, this is a beneficial and welcome change to the Florida Rules of Appellate Procedure. Most importantly, it allows for immediate review of such orders with a more favorable standard of appellate review, where the appellate court has the opportunity to review the substantive and procedural basis for the trial court’s decision.



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