

Where Are We Now? Punitive Damages Claims in Fla. 2 Years Post-Interlocutory Review Rule Change

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Florida trial courts have long been tasked as gatekeepers for deciding whether to allow claims for punitive damages to proceed to a jury. Two years ago, the Florida Rules of Appellate Procedure changed to allow district courts of appeal to review orders granting or denying leave to amend to add a claim for punitive damages by interlocutory appeal. Now the appellate courts are serving as well-needed checkpoints to ensure the trial courts are performing their gatekeeper duties, and a call has been sounded for the Florida Supreme Court to address conflicts that have surfaced in the different district courts of appeal.

Procedural Rules and Requirements for Bringing a Punitive Damages Claim

To pursue a claim for punitive damages, litigants must comply with the pleading requirements set forth in Florida Rule of Civil Procedure 1.190(a) and (f) and Section 768.72, Florida Statutes. Rule 1.190(a) requires litigants to obtain court approval before amending a claim to request punitive damages.

Rule 1.090(f) provides that a motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing.

Section 768.72(1) provides that 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. Subsection 2 further provides that a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.

The Evolution of Appellate Review of Punitive Damages Amendment Orders

Before April 1, 2022, when the rule amendment became effective, appellate review of orders granting leave to amend to add punitive damages claims was limited to *certiorari* review. 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. In other words, did the trial court misapply the rule and statute, and was the cat-out-of-the-bag discovery going to cause harm that could not be reversed?

Now, plaintiffs can appeal orders denying motions for leave to amend to add punitive damages just as easily as defendants can appeal orders granting the amendments. When the rule change became effective, most questioned whether this modification would truly flood the appellate courts with review of punitive damage amendment orders.

A Look at the Appellate Decisions Post-Rule Change

Since the rule change two years ago, there have been approximately 29 appellate decisions involving punitive damage amendment orders. Of those 29, 24 appeals involved orders granting leave to amend, whereas five appeals involved orders denying the amendment. Importantly, there were 22 reversals of orders granting leave to add punitive damages and three reversals of orders denying leave to add punitive damages claims. The district courts affirmed one order granting leave to amend and two orders denying leave to add punitive damage claims. Lastly, the district courts affirmed in part and reversed

in part one order granting leave to add punitive damages claim.

At first blush, it may seem like these numbers are not very significant. However, a close review of the cases reveals that practitioners are still pursuing punitive damages claims, whether meritorious or not. Trial courts are still confused as to how to apply all of the procedural rules. And, appellate courts are left having to clean up the mess.

To avoid a reversal when pursuing motions for leave to add claims for punitive damages, it is extremely important to ensure that the claims pled in the proposed amended complaint sufficiently allege the intentional or grossly negligent misconduct on behalf of the other party. The trial court must understand the specific claim proposed by the plaintiff that may justify an award of punitive damages. Trial courts, as gatekeepers, are required to scrutinize the pleadings carefully to ensure the allegations alone (although they should deem them as true), pled the requisite allegations before it looks at the reasonable basis proffered in evidence.

For example, if the proposed amended complaint seeks to add a claim for punitive damages for vicarious liability, evidence must be proffered showing the officers, directors, or managers knowingly participated in or condoned, ratified, or consented to the employee's conduct, or that the defendant company engaged in gross negligence. Evidence of an employee's misconduct does not rise to the level to impute punitive damages for vicarious liability. If the pleading and proof is insufficient, then the motion should be denied. *See HBR Tax Group v. Florida Investigation Bureau*, 360 So. 3d 1159 (Fla. 4th DCA 2023).

As for the reasonable basis in evidence, the cases seem to indicate that practitioners opposing motions for leave to add claims for punitive damages should proffer counter-evidence. This was not the case before the rule change.

A Point of Conflict Arises When It Comes to the Court’s Treatment of the Evidentiary Basis for Punitive Damage Claims

Moreover, when it comes to the evidentiary analysis, the Fourth District has attempted to clarify the trial court’s role at the amendment stage. In *Federal Insurance v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023), on a motion for certification and *sua sponte* rehearing *en banc*, the court interpreted section 768.72 to require the movant to demonstrate it is capable of producing competent, substantial evidence at trial upon which a rational trier of fact could find the defendant engaged in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment.

In addition, the court concluded that Section 768.72(1) and (2), when read together, required the trial court to make a preliminary determination of whether a reasonable jury, viewing the totality of the proffered evidence in the light most favorable to the moving party, could find by clear and convincing evidence that punitive damages are warranted. If the proffer of evidence does not meet that standard, punitive damages cannot stand. In addition, the preliminary determination must be made without weighing evidence or witness credibility. The Fourth District believes the trial court must be “gatekeepers” since punitive damages should only be warranted, or for that matter, even

claimed, for the most egregious circumstances.

In reaching its conclusion, the Fourth District certified conflict with the Second District’s and the Fifth District’s opinions in the following cases: *Deaterly v. Jacobson*, 313 So. 3d 798 (Fla. 2d DCA 2021); *Wiendl v. Wiendl*, 371 So.3d 964 (Fla. 2d DCA 2023); *Estate of Despain v. Avante Group*, 900 So. 2d 637, 642 (Fla. 5th DCA 2005); *Werner Enterprises v. Mendez*, 362 So. 3d 278 (Fla. 5th DCA 2023); and *Cook v. Florida Peninsula Insurance*, 371 So. 3d 958 (Fla. 5th DCA 2023). The court certified the following question to the Florida Supreme Court as a question of great public importance:

On a motion to amend to add a punitive damages claim, does Section 768.72(1) and (2), Florida Statutes, when read in *pari materia*, require a trial court to make a preliminary determination of whether a reasonable jury, viewing the totality of evidence identified in support of or opposition to the motion, and in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted?

The case is pending in the Florida Supreme Court.

Until the Supreme Court weighs in, attorneys should be prepared to present authenticated admissible evidence to make a reasonable showing that punitive damages are warranted or unwarranted. It is also important to ensure the evidence matches the allegations.

Where Are We Now?

In sum, appellate courts are overwhelmingly reversing orders granting leave to amend to add punitive damages claims. Recent decisions reveal a conflict among the district courts. Given the conflict and the question of great public importance that stems from these issues, it is critical for the Florida Supreme Court to address the question posed by the Fourth District in *Perlmutter*. Attorneys and trial judges alike need clear standards as to what constitutes a reasonable showing of evidence and whether or not the trial court can make that preliminary determination at the pleading stage. A decision on that will help provide consistency and

predictability for litigants pursuing and defending punitive damages claims and ensure that they are left for only the most egregious circumstances.



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