

October 2005

**PLEADING PUNITIVE DAMAGES**

By Ted Babbitt

Two recent cases provide guidelines for what is necessary to plead punitive damages in Florida. In Holmes v. Bridgestone/Firestone, Inc., 891 So. 2d 1188 (Fla. 4<sup>th</sup> DCA 2005), plaintiffs sued Firestone Tire Co. for an allegedly defective tire that caused a rollover. The complaint adding punitive damages was based upon a proffer regarding the tire company's knowledge of the defect which had been gleaned from the internet. The Court held that the standard of review in the appellate court was de novo and the test for determining the adequacy of the proffer to plead punitive damages was similar to the test for a motion to dismiss a complaint.

At Page 1191, the Court stated:

“When a trial court is determining if a plaintiff has made a “reasonable showing” under section 768.72 for a recovery of punitive damages, it is similar to determining whether a complaint states a cause of action, or the record supports a summary judgment, both of which are reviewed de novo. *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297 (Fla. 1<sup>st</sup> DCA 1999) (complaint); *Walsingham v. Dockery*, 671 So. 2d 166 (Fla. 1<sup>st</sup> DCA 1996) (summary judgment). In addition, where a trial court's ruling is based entirely on written evidence, the appellate court is in the same position as the trial court in weighing the evidence. *W. Shore Rest. Corp. v. Turk*, 101 So. 2d 123 (Fla. 1958). We therefore conclude that this a question of law.”

In Despain v. Avante Group, Inc., 900 So. 2d 637 (Fla. 5<sup>th</sup> DCA 2005) the Court was faced with a similar issue. Plaintiff's decedent was the resident of a

nursing home and sought to amend her complaint to claim punitive damages. The trial court twice refused the proffer and the case went to trial resulting in a judgment for compensatory damages. On appeal, the Fifth District reviewed the standard necessary to plead punitive damages for a corporation and the standard of review of an appellate court in reviewing the trial court.

The landmark cases on punitive damages with respect to a corporate employer are Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995) and Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). Schropp holds that a corporation can be liable for punitive damages where there is willful and wanton misconduct on the part of a managing agent or primary owner on the basis of direct corporate liability.

A corporation can also be liable for punitive damages under Mercury Motors, supra, on the basis of vicarious responsibility. Liability for punitive damages under the vicarious theory under Mercury Motors requires an employee's conduct to rise to the level of willful and wanton misconduct and also requires some ordinary fault on the part of the corporation itself.

Florida Statute 768.72 was amended in 1999 as part of the 1999 Tort Reform Act to include a new subsection which adopts a different standard for punitive damages. That standard became effective on October 1, 1999.

The 1999 amendment to § 768.72 does not appear to have changed the common law standard for determining who is a managing agent under Schropp, supra. In Schropp, the Court held that "If that person is managing agent or holds a policy-making position, liability for punitive damages is available." See also

Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 550, 533 (Fla. 1995)

(imposing direct liability for punitive damages in a “managing agent or primary owner of the corporation”); Kent Ins. Co. v. Schroeder, 469 So. 2d 209, 210 (Fla. 5<sup>th</sup> DCA 1985) (imposing direct liability based on the actions of the “president and managing agent”).

The 1999 amendment to Fla. Stat. 768.72(2) did change the level of conduct necessary on the part of a managing agent to hold the corporation liable for punitive damages. Under Mercury Motors Express, Inc. v Smith, *supra*, only ordinary negligence had to be shown. Under paragraph 2(b) of the above-quoted statute, the standard is now that “the officers, directors or managers of the ... corporation ... knowingly condoned, ratified or consented to such conduct” or (c) the corporation “engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.”

Under Florida Statute 768.72(1) there must be a reasonable showing either by evidence in the record or by proffer which provides a “reasonable basis” for recovery of punitive damages. Record evidence can be supplied in the usual fashion by depositions, interrogatories and requests for admissions. A proffer, on the other hand, involves something that the plaintiff plans to prove rather than what is proved. The Court in Despain, *supra*, at Page 642 described a proffer as:

“a ‘proffer’ according to traditional notions of the term, connotes merely an ‘offer’ of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions.’ Therefore, a proffer ‘is merely

a representation of what evidence the defendant proposes to present and is not actual evidence.” (Citing cases.)

In Despain, the Court made it clear that an evidentiary hearing is not necessary in order to establish a proffer. Like the Fourth District, the Court in Despain concluded that since the trial court is not observing evidence, as it would in a trial, the standard of review in the appellate court is de novo rather than based upon an abuse of discretion. Also like Holmes, the Fifth District concluded in Despain that the standard to be applied both by the trial court and the appellate court is the same as that which applies with reference to whether a complaint states a cause of action. The Court explained that, just as in determining a motion to dismiss, the trial court must view the evidence with respect to a proffer in the light most favorable to the plaintiff. At Page 644 the Court holds:

“We are of the view that the standard that applies to determine whether a reasonable basis has been shown to plead a claim for punitive damages should be similar to the standard that is applied to determine whether a complaint states a cause of action. See *Holmes* (holding that the analysis to determine whether a claimant has established a reasonable basis to plead a claim for punitive damages is similar to the analysis applied to determine whether the allegations of a complaint are sufficient to state a cause of action). Within the framework of this standard, we will view the record evidence and the proffer in the light most favorable to Despain and accept it as true. *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204 (Fla. 5<sup>th</sup> DCA 2003).

These two cases make it clear that a proffer need not be based upon record evidence. The proffer must be viewed in the light most favorable to the plaintiff in determining whether there is any reasonable basis upon which punitive damages can be pled.