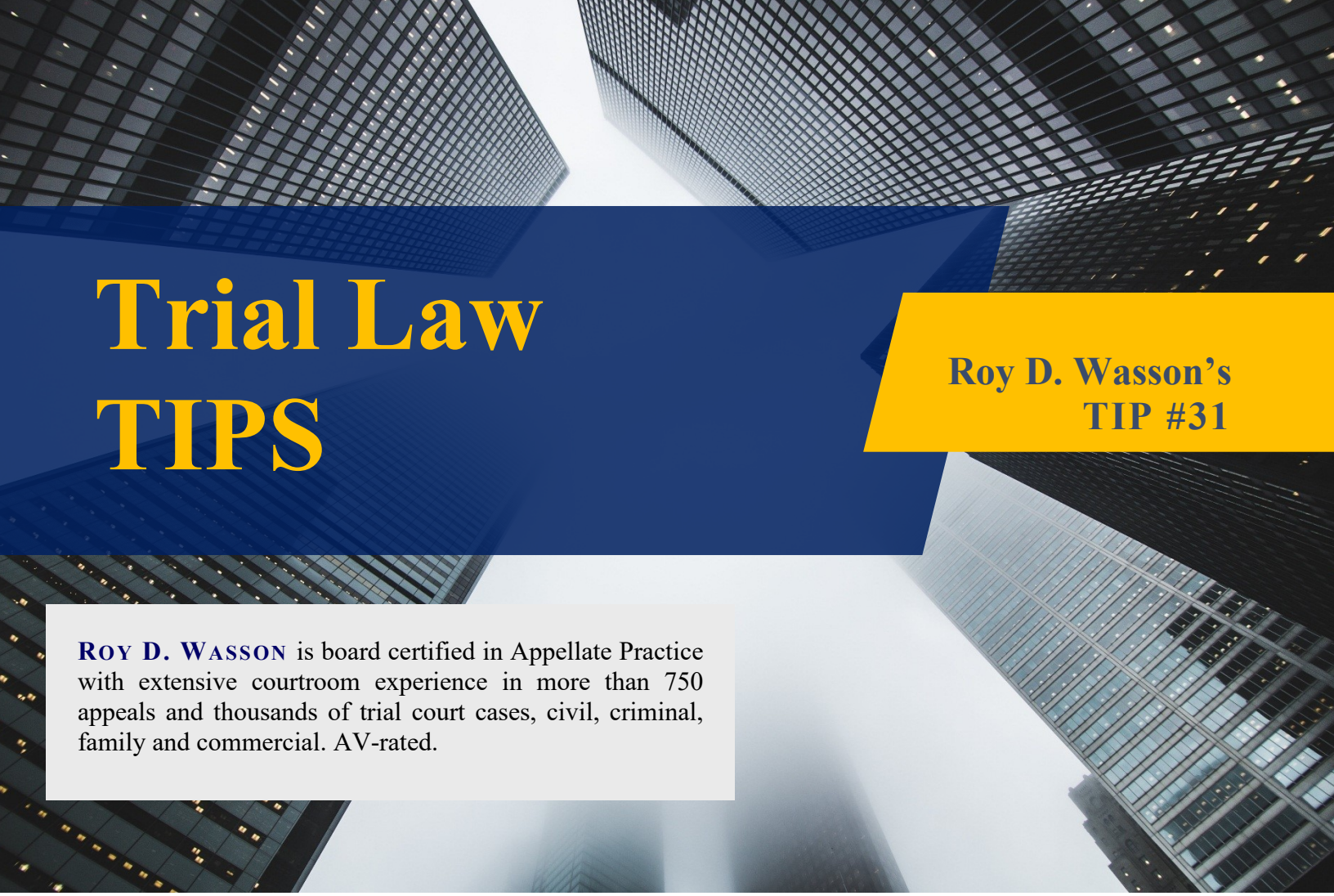

Trial Law TIPS

Roy D. Wasson's TIP #31

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Pleading Claims for Punitive Damages

Introduction

Among the legislative Tort "Deform" repairs of things that were never broken to begin with, was the enactment several years ago of section 768.72, Fla. Stat. That statute was passed to deal with the illusory "problem" of frivolous claims for punitive damages. There was no such problem. Plaintiffs' attorneys were not routinely requesting punies in average tort cases, and the Legislature's action was just another in a series of costly burdens on the underfunded judicial system.

The statute provides in pertinent part as follows:

> In any civil action, 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

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> reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

Those two sentences have necessitated an extra hearing in every case involving punitive damages, led to dozens of reported appellate decisions, and generated some confusion among the bench and bar of Florida. This article summarizes the highlights (or low-lights) of this body of law.

Pretrial Hearing Required Unless Waived By Defendant

The trial court does not have the discretion to dispense with the necessity of a ***pretrial*** hearing at which the plaintiff must proffer—or show evidence in the record—sufficient to support a claim for punitive damages. *See Strasser v. Yalamanchi,* 677 So. 2d 22, 23 (Fla. 4th DCA 1996)("the trial court erred when it allowed the amendment but deferred its decision as to whether there was 'a reasonable basis for recovery' of punitive damages until trial).

An occasional plaintiff has pled a claim for punitive damages without leave of court, and the defense has not raised any issue about the lack of a pretrial hearing until after the trial was underway or already over. In such cases the objection to compliance with the statute has been held to be waived. *See Fostock v. Lampasone*, 711 So. 2d 1154 (Fla. 4th DCA 1998). But the risks of waiting to seek leave of court exceed the benefit, so you should file a motion and seek a ruling on the issue well before trial.

Plaintiff Must Make Proffer *or* Show Record Evidence at Hearing

It is customary to support a motion for leave to plead punitive damages with copies of depositions or other written materials containing the evidence upon which the motion is based. However, such filings are not required. Section 768.72 requires either one of two forms of showing to support a punitive damages claim: "a reasonable showing by evidence in the record ***or proffered*** by the claimant which will provide a reasonable basis for recovery of such damages." (Emphasis added).

The emphasized language of the statute makes it clear that the proffer may be based on information known to plaintiff's counsel that is not part of the formal discovery in the case, and not just items in the court file like deposition transcripts or answers to interrogatories. "No rule requires that the 'reasonable showing' be filed in writing or that it be filed like an affidavit in support of summary judgment." *Beverly Health & Rehab. Svcs, Inc. v. Meeks*, 778 So. 2d 322, 325 (Fla. 2d DCA 2000). While it may make your presentation more effective to cite chapter and verse to pages from depositions and other discovery, you can and should also proffer facts which your investigation has revealed, even if they are not part of the record.

The defense will likely try to stall the hearing (and bill their client for a second hearing) by arguing that you did not disclose your proffered evidence far enough in advance to permit them to respond. Of course your response should include the argument that the hearing is not a contested evidentiary hearing (see next section of this TIP), so there was no need for prior disclosure. But a portion of the *Meeks* case, above, should be kept in mind before you wait until the hearing to disclose your proffer.

In Meeks "the plaintiff filed a bare bones motion for leave to amend the complaint to add a claim for punitive damages," which did not summarize the evidence which would be proffered at the hearing. Thereafter, the defense sought discovery of the evidence which would be proffered, and the plaintiff objected and failed to produce that evidence.

At the hearing, the trial court chastised the plaintiff for "gamesmanship" and adopted an order which would require disclosure of proffered evidence in future cases but granted leave to amend in that case. On appeal the Second District affirmed the grant of leave to plead punitive damages but expressed disapproval of the tactic of blindsiding the defense at the hearing. No sense tempting fate if you are asked for your proffer in advance of the hearing.

Defense May Not Refute Your Proffered Evidence

The defense usually will try to introduce evidence at the hearing to impeach or contradict your proffer in an attempt to

persuade the trial judge that your evidence to support punitive damages should not be believed. Such efforts to transform the hearing into a mini trial before the real trial should not be permitted. The judge need not and should not pass on the weight to be given to the evidence supporting punitive damages. *See Strasser v. Yalamanchi,* 677 So. 2d 22, 23 (Fla. 4th DCA 1996), in which the court held: "Contrary to petitioners' (defendants) contention, an evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment." *Accord, Solis v. Calvo*, 689 So. 2d 366, 369 n. 2 (Fla. 3d DCA 1997).

Ruling on Sufficiency of Proffer Not Immediately Reviewable

Once a pretrial hearing is conducted in which the trial court determines whether your proffer is adequate to permit pleading punitive damages, the ruling that you will (or will not) be permitted to seek punies cannot be immediately reviewed by way of a nonfinal appeal or petition for certiorari. As held by the court in *Delta Health Group, Inc. v. Jackson,* 798 So. 2d 857 (Fla. 5th DCA 2001):

> An appellate court has certiorari jurisdiction to review only whether the trial court has conformed with the procedural requirements of section 768.72, Florida Statutes (2001), in allowing a punitive damages claim; ***the court does not have certiorari jurisdiction to determine whether there is sufficient evidence to allow a punitive claim***. *See Munroe Regional Health Systems, Inc., et al. v. The Estate of Gusti J. Gonzales*, 795 So. 2d 1133, 2001 Fla. App. LEXIS 13880, 2001 WL 1174300 (Fla. 5th DCA 2001). *See also, Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995). *Compare Stephanos v. Paine*, 727 So. 2d 1075 (Fla. 4th DCA 1999) (trial court departed from essential requirements of law by failing to dismiss amended complaint claiming punitive damages filed without first obtaining leave of court).

Id. at 857-58 (emphasis added). If you lose the hearing, file another motion later in the case when your evidence is stronger. If you win and the other side appeals, you should have nothing to worry about.

Federal Claims and State Claims in Federal Court

This area is in disarray. If you are in federal court, there is no need to obtain leave of court to plead punies, even if your case is based on the state law of Florida. The Eleventh Circuit has held that "Florida Statute § 768.72 conflicts with and must yield to the 'short and plain statement' rule contained in Federal Rule of Civil Procedure 8(a)(3), and as a result a Florida plaintiff in federal court because of diversity jurisdiction ***need not obtain leave of court before pleading a request for punitive damages***." *Cohen v. Office Depot, Inc.,* 204 F.3d 1069, 1072 (11th Cir.1999)(emphasis added).

So it stands to reason that, if your claim is based on federal law, you would not need to obtain leave of court to plead a claim for punitive damages, right? Not so fast, *Erie*-breath. If you are in state court, you must jump through the hoops of a pretrial hearing and obtaining leave of court to seek a punitive award, even if your case is a based on a federal claim! *See Norwegian Cruise Lines, Ltd. v. Zareno*, 712 So. 2d 791 (Fla. 3d DCA 1998)(applying federal maritime law and ordering trial court to strike claim for punitive damages due to lack of proffer under § 768.72). You figure it out!

When you are removed to federal court after the defense has filed an answer, you still should file a motion to amend your complaint to plead punitive damages (even though no proffer of evidence is required under *Cohen*), unless you included such an unauthorized request for punies in your initial complaint because you knew that removal would be a virtual certainty (hint, hint). If the case is removed before the answer is filed, you can amend once without a motion to amend and include your request for punitive damages, if you did not already include one knowing that removal was inevitable. See Fed. R. Civ. P. 15(a). You need not obtain leave of court to amend if the defense has not answered, even if a motion to dismiss has been filed, because that motion to dismiss is not a "responsive pleading" within the meaning of Rule 15(a)).

Intentional Tort Cases

The defendant was convicted of attempted murder of your client for attacking her with a machete after stalking her for days, and you have sued for intentional torts including the obvious assault and battery. It does not make a lick of sense that you have to take the time to go down to a hearing to proffer evidence in a case like that but be careful. You still need to have the pretrial hearing.

Some cases correctly have held that a proffer of evidence sufficient to establish entitlement to a compensatory damage award is all you need to satisfy the test for a punitive award in an intentional tort case. *E.g., Solis v. Calvo*, 689 So. 2d 366, 369 n. 3 (Fla. 3d DCA 1997), citing *Perlman v. Prudential Ins. Co. of America, Inc.*, 686 So. 2d 1378(Fla. 3d DCA 1997) and *Cruise v. Graham*, 622 So. 2d 37 (Fla. 4th DCA 1993) for the holding that "[a] fraud claim that is sufficient to support a compensatory damage award is sufficient to support an award for punitive damages."

It would seem that if you have enough evidence that an intentional tort occurred to defeat a summary judgment motion on the compensatory claim, that evidence would be enough to support a claim for punitive damages. But some courts have disagreed with that analysis, so be careful about relying just on the fact that you beat a summary judgment to support your punitive damages claim.

> *See* Judge Gross' dissenting opinion on this issue in *Hudson Hotels Corp. v. Seagate Beach Quarters, Inc.*, 696 So. 2d 867, 868 (Fla. 4th DCA 1997), as follows: A holding that a defendant has failed to establish the absence of any material fact on a plaintiff's tortious interference claim is not the equivalent of the plaintiff establishing a reasonable evidentiary basis for punitive damages. ***Record evidence to support an intentional tort does not automatically support an award of punitive damages***. See Potter v. S.A.K. Dev. Corp., 678 So. 2d 472, 473 (Fla. 5th DCA 1996); Genesis Publications, Inc. v. Goss, 437 So. 2d 169, 170 (Fla. 3d DCA 1983), review denied, 449 So. 2d 264 (Fla. 1984). The elements of tortious interference may be

> proved without the evidence necessary to justify an award of punitive damages. See Designs for Vision, Inc. v. Amedas, Inc., 632 So. 2d 614 (Fla. 2d DCA), appeal dismissed, review denied, 639 So. 2d 975 (Fla. 1994); Porter v. Wilson, Walch, Fortner, Robinson & Besse, M.D.'s P.A., 384 So. 2d 190 (Fla. 2d DCA), review denied, 392 So. 2d 1378 (Fla. 1980).

Id. at 868 (emphasis added).

Part of the problem is that section 768.72—in addition to adding the requirement of seeking leave of court and proffering evidence—ostensibly raised the bar for proving entitlement to punitive damages on the merits. That statute defines the sorts of conduct for which punitive damages may be recovered somewhat differently than the definitions for common law torts which previously supported a punitive award, as follows:

> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Section 768.72, Fla. Stat.

Thus, while a defendant who intentionally punches someone in the nose is guilty of the intentional tort of battery even without any subjective awareness "that injury or damage to the claimant would result," a complaint seeking punitive damages should (to be safe) include this heightened language in addition to the elements of the tort. I suggest that you go ahead and allege these sorts of facts in your initial complaint, and just leave out the words "punitive damages" from your request for relief, so when leave to

amend is granted you do not need to allege any additional factual elements, only a couple of words. That may also help you with the problem addressed in the next section.

Losing your Trial Date By Amendment

Once you have jumped through the hoops of amending to claim punies, the defense will move to strike your trial date on the asserted ground that your case is no longer "at issue." Trial lawyers are rightly concerned about the risk of losing a trial date versus the agony of trying a lawsuit only to have it reversed if the appellate court should agree with the defense that it was not at issue. There is no case directly on point on the question whether such an amendment requires striking a case from the trial calendar and renoticing for trial.

Of course, not all amendments to pleadings render cases no longer "at issue," or there would be no such things as amendments performed at trial to conform to the evidence. Imagine if the effect of such an amendment would be a mistrial. All I can suggest is that you make your motion early in the case whenever possible.

When your motion to plead punies must wait until after a trial date has been set, you should try to handle the question of the effect of the amendment at the hearing when your proffer is made. Sometimes I see plaintiffs not even filing a formal amended complaint, and instead asking the judge to sign an order deeming the prior complaint amended to include the punitive claim. That may be easier to do if you already have alleged the facts which would support punitive damages (see previous section) under the statute, and just need to add two words to insert the new element of relief.

Maybe it will help to offer to stipulate that the defense need not file a formal answer to your amended pleading, and that all denials and defenses of the previous answer remain in effect. This is somewhat uncharted territory, so proceed with caution.

Conclusion

It will cost you $100 in aggravation for every nickel in punitive damages you collect (if you are lucky), but we owe it to

the system to continue our efforts at punishing wrongdoers in order to vindicate the system and to deter future misconduct. Follow the formula of the cases cited in this TIP and your award should stand up on appeal.

Keep Tryin!

Roy

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