

Trial Law TIPS

Roy D. Wasson's
TIP #60

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.

Proffers of Evidence Supporting Amendments to Plead Punitive Damages

Introduction

Are you tired of appearing at hearings on motions for leave to amend to plead claims for punitive damages, where the defense attorney shows up with his or her “trial suit” on and attempts to negate your proffer by cross-examining and impeaching your proffered depositions, affidavits, and other evidence? It is time for trial lawyers everywhere to start educating the trial courts that the purpose of such a hearing is not to establish factually the plaintiff’s entitlement to punitive damages, merely to show that there is some reasonable basis in the record for such a claim. Defense attorneys are not permitted to call opposing witnesses, read contradictory portions of depositions into the record or otherwise attempt to

impeach or contradict the plaintiff's proffered evidence of intentional misconduct or reckless behavior.

Now that it has been twenty years since plaintiffs first were forbidden to plead punitive damages in the initial complaint filed in a case, most everyone practicing trial law is aware that there is a requirement that leave of court be obtained before including in the pleadings a claim for punitive damages. Section 768.72(1), Fla. Stat., 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 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 required by the Rules of Civil Procedure."

In 2003 an amendment to the Rules of Civil Procedure added some flesh to the skeleton requirement under the statute to guide litigants and trial courts in determining whether the plaintiff had complied with section 768.72(1). Three years ago, subdivision (f) was added to Fla. R. Civ. P. 1.190, the rule concerning amended pleadings. That subsection provides as follows:

(f) Claims for Punitive Damages. 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 of 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.

That amendment was adopted largely to deal with the problem of plaintiff's attorneys appearing at the hearing on their motion to amend to plead punitive damages, having not yet provided defense counsel with any clue concerning the evidence that would be presented or proffered at the hearing. *See Beverly Health and Rehab. Svcs., Inc. v. Meeks*, 778 So. 2d 322 (Fla. 2d DCA 2000)(noting that "most trial courts apparently are not conducting evidentiary hearings on these motions, but are relying on a 'proffer by the claimant,'" and approving of "the trial court's

announced intention to require written proffers to be filed a reasonable time prior to future hearings”).

Even with the new rule, however, the nature of the proceedings on such a motion to amend has been largely undefined and subject to the particular practices of local judges. More and more, after trial lawyers proffer the punitive damages evidence by reading selected portions of depositions, providing affidavits from witnesses, and summarizing the contents of other discovery materials at the hearing, defense counsel have attempted to discredit such proffers by presenting other matters uncovered in discovery. In essence, defense attorneys have been attempting to persuade the trial courts that the evidence will not support a punitive damage claim at the time of trial, and on that basis opposing amendment of the pleadings to allege a claim for punitive damages. Such a procedure is improper and should not be permitted by trial courts.

In *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637 (Fla. 5th DCA 2005), the Fifth District cited and summarized several cases from Florida state and federal courts that deal with the scope of the proffer and any attacks thereon by opposing counsel, as follows:

In discussing the requirements of section 768.72(1), the court in *State of Wisconsin Investment Board v. Plantation Square Associates, Ltd.*, 761 F. Supp. 1569, 1581 n.21 (S.D. Fla. 1991), stated that “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.” *Grim v. State*, 841 So. 2d 455, 462 (Fla.) (citation omitted), cert. denied, 540 U.S. 892, 157 L. Ed. 2d 166 (2003); *LaMarca v. State*, 785 So. 2d 1209, 1216 (Fla.), cert. denied, 534 U.S. 925, 151 L. Ed. 2d 207 (2001). A reasonable showing by evidence in the record would typically include

depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, ***an evidentiary hearing*** where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, ***is neither contemplated nor mandated by the statute*** in order to determine whether a reasonable basis has been established to plead punitive damages. See *Surrey Place of Ocala v. Goodwin*, 861 So. 2d 1291 (Fla. 5th DCA 2004)(holding that a hearing on a motion to amend to allege punitive damages is not necessary); *Solis v. Calvo*, 689 So. 2d 366, 369 n.2 (Fla. 3d DCA 1997) (“Pursuant to Florida Statute section 768.72 (1995), a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute.”) (citation omitted); *Strasser v. Yalamanchi*, 677 So. 2d 22, 23 (Fla. 4th DCA 1996) (“An evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment. Pursuant to section 768.72(1), a proffer of evidence can support a trial court’s determination.”); *Will v. Systems Eng’g Consultants, Inc.*, 554 So. 2d 591 (Fla. 3d DCA 1989); see also *Porter v. Ogden, Newell & Welch*, 241 F.3d 1334 (11th Cir. 2001).

Id. at 642 (emphasis added).

Thus, your proffer cannot be impeached or contradicted by defense counsel and the trial court needs to consider only on your version of the facts. Perhaps when armed with this TIP, you will more readily obtain leave of court to plead a claim for punitive damages in an appropriate case. If you still have trouble convincing trial judges to allow such amendments, don’t give up

Keep Tryin!

Roy