

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ALLAN E. KEEN, THE KEEWIN REAL
PROPERTY COMPANY, LLC AND
PHOENIX/POLK VENTURES, LLC,

Petitioners,

v.

Case No. 5D21-769

DEAN K. JENNINGS AND JENNINGS
VENTURES, LLC,

Respondents.

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Opinion filed September 10, 2021

Petition for Certiorari Review of Order
from the Circuit Court for Orange County,
John E. Jordan, Judge.

David H. Simmons, of de Beaubien,
Simmons, Knight, Mantzaris & Neal,
LLP, Orlando, and Brett J. Miller, of
de Beaubien, Simmons, Knight,
Mantzaris & Neal, LLP, Melbourne,
for Petitioners.

Raymond A. Haas, and Michael
Perotti, of HD Law Partners, Tampa,
for Respondents.

LAMBERT, C.J.

Petitioners, Allan E. Keen, The Keewin Real Property Company, LLC (“Keewin”), and Phoenix/Polk Ventures, LLC, who are the defendants in the litigation below, seek certiorari relief from the trial court’s order granting Respondents, Dean K. Jennings and Jennings Ventures, LLC, leave to amend their complaint to plead a claim for punitive damages. We have jurisdiction. See *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1076 (Fla. 3d DCA 2019) (“The prospect of intrusive financial discovery following a trial court’s authorization for an amendment to add a claim for punitive damages is the irremediable injury . . . required for this Court’s exercise of its certiorari jurisdiction.”). Concluding that Respondents have presently failed to plead a legally sufficient claim for punitive damages, we grant the petition and quash the order.

BACKGROUND—

Respondent, Dean Jennings, was employed by Petitioners, Keen and Keewin, as a real estate broker and agent. Pertinent to the instant proceeding is a 2008 agreement between Respondents¹ and two of the Petitioners, Keen and Keewin, under which Respondents claimed that they

¹ The co-respondent, Jennings Ventures, LLC, is a Florida limited liability company duly formed by Jennings.

were entitled to monetary distributions regarding specific existing real estate projects involving the parties, including a project referred to in the agreement as “The Meadows.”

Keen and Keewin denied that Respondents were owed any further monies. As a result, Respondents filed suit, initially asserting two causes of action for breach of this 2008 agreement. Without going into detail about the subsequent procedural course of the litigation, Respondents eventually moved for leave to file a proposed Fourth Amended Complaint to assert a claim for punitive damages. This proposed complaint contained the following six causes of action: (1) breach of contract; (2) breach of fiduciary duty; (3) unjust enrichment against the third Petitioner (defendant Phoenix/Polk Ventures, LLC); (4) constructive fraud; (5) accounting; and (6) a stand-alone claim or cause of action titled Punitive Damages. Petitioners filed written opposition to Respondents’ motion to amend.

ASSERTING A CLAIM FOR PUNITIVE DAMAGES—

Parties seeking to assert a claim for punitive damages, such as Respondents, must meet the requirements of section 768.72(1), Florida Statutes (2016). This statute provides, in pertinent part:

- (1) 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 allowed by the rules of civil procedure.

Id.

As previously indicated, Respondents did move to amend their complaint to assert a claim for punitive damage, and a hearing was held on their motion. Before the court at the time of the hearing was Respondents' aforementioned Fourth Amended Complaint, together with their timely written proffers of the evidence that Respondents contended would support an award of punitive damages against the petitioners. See § 768.72(2), Fla. Stat. ("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 trial court granted Respondents leave to amend their complaint. The written order entered contained a succinct, singular finding by the court that, from the evidence proffered, a reasonable basis for the recovery of punitive damages had been shown under section 768.72. It is from this order that Petitioners seek certiorari relief.

ANALYSIS—

In undertaking our review, we first acknowledge that, as an appellate court, we lack the authority to review a trial court’s determination that there has been a reasonable showing by evidence in the record or proffered by the claimant that would provide a reasonable basis for recovery of punitive damages. See *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995).² Instead, our certiorari review is limited to addressing whether the trial court complied with all applicable requirements and analysis under section 768.72 in granting leave to assert a punitive damages claim. See *Varnedore v. Copeland*, 210 So. 3d 741, 744 (Fla. 5th DCA 2017) (“Accordingly, certiorari review is available to determine whether the trial court complied with all applicable requirements and analysis before granting a motion to amend pleadings to assert claims for punitive damages.”). This type of review requires an analysis of both the pleading component and the evidentiary component of the motion. *Id.*; see also *Henn v. Sandler*, 589 So. 2d 1334, 1335–36 (Fla. 4th DCA 1991) (concluding that because section

² We separately note that the Florida Supreme Court has very recently held oral argument to address whether to amend Florida Rule of Appellate Procedure 9.130 to add subdivision (a)(3)(G) to the rule to allow for interlocutory appeals of nonfinal orders granting or denying leave to amend a complaint to assert a claim for punitive damages. See *In re: Amend. to Fla. Rule of Appellate Proc. 9.130*, No. SC21-129. The court presently has the matter under advisement.

768.72 creates “a positive legal right in a party not to be subjected to financial worth discovery,” the requirement that the trial court must make an affirmative finding that there is a reasonable evidentiary basis for punitive damages necessarily includes a determination as to the legal sufficiency of the punitive damages pleading).

Petitioners raise two arguments here for relief. They first contend that the trial court failed to comply with the procedural requirements of section 768.72 because it did not determine whether the proposed Fourth Amended Complaint sufficiently pleaded a claim for punitive damages. In *Varnedore*, we had explained that before a trial court addresses whether a party’s motion to amend and proffer of evidence have shown a reasonable evidentiary basis for the recovery of punitive damages, it must first analyze whether the proposed amended complaint seeking punitive damages contains sufficient allegations to support such a claim. 210 So. 3d at 745 (“Absent sufficient allegations, there would be neither a reason nor a framework for analyzing the proffered evidentiary basis for a punitive damages claim.”). For the following reasons, we find that Respondents did not plead a facially sufficient claim for punitive damages.³

³ As a result, we find it unnecessary to address Petitioners’ second argument that the trial court erred in not specifically identifying in its order

We first note that the only cause of action in Respondents' proposed Fourth Amended Complaint that actually requested or sought an award of punitive damages was the stand-alone count VI titled "Punitive Damages." There is, however, no separate and distinct cause of action for punitive damages. *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016). "[R]ather it is auxiliary to, and dependent upon, the existence of an underlying claim." *Id.*

Second, none of the other five causes of action pleaded in the Fourth Amended Complaint actually sought an award of punitive damages. Third, none of the allegations contained in the one count upon which Respondents based their claim for a punitive damages award were incorporated into any of the first five causes of action. Lastly, the sole cause of action containing the allegations ostensibly justifying an award of punitive damages related to a project referred to as the "Dittmer Project," which had nothing to do with the claims raised in the other five causes of action that sought damages regarding "The Meadows" project. Simply stated, the Fourth Amended Complaint for punitive damages was facially deficient.

the record evidence or proffer that provided the "reasonable basis" for the recovery of punitive damages.

While an order that erroneously declines to dismiss a facially insufficient complaint is typically not reviewable by certiorari, see *Beverly Enters.-Fla., Inc. v. Lane*, 855 So. 2d 1172, 1172–73 (Fla. 5th DCA 2003), we conclude that this general rule should not apply in the instant setting. A facially insufficient pleading for punitive damages that is nevertheless authorized or allowed to proceed forward by the trial court will lead to the intrusive financial discovery that would be otherwise impermissible. Certiorari relief to prevent this irremediable, “cat out of the bag” harm is appropriate. See *Cat Cay Yacht*, 264 So. 3d at 1076.

Accordingly, we grant the petition for writ of certiorari and quash the order under review.⁴

PETITION GRANTED; ORDER QUASHED.

WALLIS and WOZNIAK, JJ., concur.

⁴ We acknowledge that following the trial court’s entry of the subject order, Respondents filed a Fourth Amended Complaint that differed somewhat from the complaint seeking punitive damages that was before the trial court at the time of the hearing. To be clear, we have specifically not considered this separate Fourth Amended Complaint filed by Respondents after the hearing because this belated filing did not comply with the procedural requirements of section 768.72. See *Varnedore*, 210 So. 3d at 745 (requiring that the amended pleading seeking punitive damages must be attached to the motion to amend). Whether Respondents, upon later motion, should be granted leave below to amend their complaint to pursue a punitive damages claim under this subsequent pleading is not now before us.