

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D19-2994

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ERIC DUNCAN WATT,

Petitioner,

v.

JORDAN LO,

Respondent.

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Petition for Writ of Certiorari—Original Jurisdiction.

August 19, 2020

ROWE, J.

Eric Duncan Watt seeks certiorari review of an order granting Jordan Lo's motion to amend his complaint to add a claim for punitive damages. Watt argues that the order should be quashed because the trial court did not make express findings when it determined that Lo could assert the punitive damages claim. We deny the petition.

Watt was intoxicated and impaired from alcohol and marijuana when he drove his car into Lo and seven other pedestrians. Lo sued Watt for negligence. While the civil case was pending, Watt pleaded guilty in the related criminal case to two counts of DUI with serious bodily injury and two counts of DUI with damage to a person without serious bodily injury. After

Watt's guilty plea, Lo moved to amend his complaint to assert a claim for punitive damages.

The trial court held a hearing on Lo's motion. The parties discussed the court's gatekeeping role in determining whether a punitive damages claim may proceed:

MS SPAIN: Judge, this is telling you what's required to give punitive damages. As Mr. Daniel told you early on, you are the gatekeeper, and you must decide whether there's clear and convincing evidence of all the elements before you can allow punitive damages before the Court.

THE COURT: Is that what the statute says?

MS SPAIN: Clear and convincing evidence that they're entitled to punitive.

....

THE COURT: I remember the—speaking of the burdens. Where is that found? Is that case law?

MS SPAIN: No, sir. It also shows—or I'll also provide you a copy of Rule 1.190(f), that the plaintiff must prove the elements necessary to justify punitive damages.

....

THE COURT: Let me ask you before I go back to the plaintiff, tell me where the gatekeeping function is and tell me the burden they have. Is it clear and convincing—is that what the standard is?

MS SPAIN: Well, yes, your Honor, that was the standard that was read to you by Mr. Daniel. The Court has to prove—I can provide you the case that talks about the gatekeeping function if you'd like.

THE COURT: All right. Does it talk about the burden in here?

MS SPAIN: It may not discuss the burden, but it does describe the gatekeeping function and the need for the Court to review the evidence. The case I provided is the Varnedore versus Copeland case. It's a 5th DCA case. This particular case talks about the gatekeeping function of the court. It does not involve a DUI case.

THE COURT: This is just a punitive damage gatekeeping?

MS SPAIN: Correct. It talked about the Court needing to review the proffer to make sure it's sufficient before it gets to the jury and why it's important for the Court to make sure the plaintiffs meet their burden of proof. And then the rule that I provided to the Court, the rule of procedure indicates that the plaintiffs, according to the Rule 1.190, they shall make a reasonable showing by the evidence in the record or evidence to be proffered by the claimant that provides a reasonable basis for recovery of punitive damages. And then the statute which was read to you by Mr. Daniel was the one that provided the clear and convincing evidence standard.

At the end of the hearing, the trial court announced its ruling, granting Lo's motion. The court followed that ruling with a written order. This timely petition follows.

### *Analysis*

Certiorari relief is available when a trial court fails to comply with the procedural requirements of the punitive damages statute. *Tallahassee Mem'l Healthcare, Inc. v. Dukes*, 272 So. 3d 824, 825 (Fla. 1st DCA 2019). We review de novo whether the trial court followed those procedural requirements. *Id.*

To obtain certiorari relief, the petitioner must show "(1) a departure from the essential requirements of the law, (2) resulting

in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.” *Citizens Prop. Ins. Corp. v. San Perdido Ass’n*, 104 So. 3d 344, 351 (Fla. 2012) (citations omitted). Our analysis focuses on the first prong—whether the trial court departed from the essential requirements of the law. A departure from the essential requirements of the law is “a violation of a clearly established principle of law.” *State v. Belvin*, 986 So. 2d 516, 525–26 (Fla. 2008) (quoting *Belvin v. State*, 922 So. 2d 1046, 1048 (Fla. 4th DCA 2006)).

Watt argues that in determining whether to permit Lo to assert a punitive damages claim, the trial court had to make affirmative or express findings that Lo made the required evidentiary showing under section 768.72(1), Florida Statutes (2019).<sup>1</sup> Watt argues that the trial court’s verbal ruling and written order were insufficient. The flaw in Watt’s argument is that there is no statutory requirement for the trial court to make express or affirmative findings when determining whether a claimant has made the required showing to permit a punitive damages claim to proceed.

Section 768.72(1), Florida Statutes (2019), provides:

(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. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall

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<sup>1</sup> Watt does not challenge the sufficiency of the evidence proffered by Lo to support his punitive damage claim. And if he had, this Court would lack jurisdiction to review that claim here. *Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996).

proceed until after the pleading concerning punitive damages is permitted.

Florida Rule of Civil Procedure 1.190(f) tracks the language of the statute and 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 statute and the rule require a claimant to make an evidentiary showing that provides a reasonable basis to support a claim for punitive damages. § 768.72(1), Fla. Stat.; Fla. R. Civ. P. 1.190(f). The Florida Supreme Court in *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995), has construed the statute “to create a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages.”

The question presented here is whether the trial court must make express or affirmative findings when making that determination. Other district courts have held that express or affirmative findings are required. The Third District Court has held that the trial court must make “findings identifying the evidence it considered sufficient to provide a statutory ‘reasonable basis’ for granting the motion to amend.” *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019). The Fifth District has held that a trial court must “make an affirmative finding that [the] plaintiff has made a reasonable showing by evidence which would provide a reasonable evidentiary basis for recovering [punitive] damages.” *Varnedore v. Copeland*, 210 So. 3d 741, 747–48 (Fla. 5th DCA 2017) (citations and quotations omitted). Similarly, the Fourth District in *Petri Positive Pest Control, Inc. v. CCM Condominium Ass’n, Inc.*, 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015), held that a party may not assert a punitive damages claim until the trial court has made “affirmative findings” that there is a reasonable evidentiary basis for the punitive damages claim.

We disagree with the Third, Fourth, and Fifth Districts because nothing in the plain language of section 768.72(1) requires a trial court to make express or affirmative findings when determining whether to permit a claimant to assert a punitive damages claim.<sup>2</sup> All that is required is that the claimant make the necessary showing based on evidence in the record or proffered by the claimant. § 768.72, Fla. Stat. Then, as stated in *Globe Newspaper*, the trial court must make a “determination” that the claimant made the necessary evidentiary showing.

Here, the trial court made the determination required by the statute, the rule, and *Globe Newspaper* when it ruled on Lo’s motion. The court held a hearing on the motion. The court considered Lo’s proposed amended complaint and the evidence submitted by Lo. That evidence included a copy of the criminal information filed against Watt in the DUI case, a copy of the sentence recommendation, a copy of the sentencing hearing worksheet, and a report and deposition from the officer who responded to the scene. The parties addressed at length the trial court’s gatekeeping function under section 768.72(1) and the evidentiary showing required of the claimant.

At the end of the hearing, the trial court ruled on Lo’s motion, stating, “Based on everything I’ve seen here and what I’ve read, I’m going to go ahead and grant the motion to amend.” The trial court followed its oral ruling with a written order granting the

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<sup>2</sup> We acknowledge that this Court in *Allstate Ins. Co. v. American Southern Home Insurance Co.*, 680 So. 2d 1114, 1117 (Fla. 1st DCA 1996) stated that under *Globe Newspaper* a trial court is required “to make an affirmative finding that there is a reasonable evidentiary basis for punitive damages before that claim can go to the jury.” But the Court misstated the holding in *Globe Newspaper*, which requires only “a determination,” not “an affirmative finding.” In any event, that statement in the *Allstate* opinion is not binding. Because that case did not involve the punitive damages statute, the Court’s passing reference to *Globe Newspaper* is dictum. See *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) (observing that “[a]ny statement of law in a judicial opinion that is not a holding is dictum”).

motion after having “reviewed the court file, reviewed the filings of the parties, [and] heard argument of counsel.” The trial court did not make an express or affirmative finding that Lo met his evidentiary burden under section 768.72(1). But the record shows that the trial court heard the evidence offered by Lo, understood its gatekeeping function, and, in ruling on Lo’s motion, made the determination required by the statute, the rule, and *Globe Newspaper*. In so doing, the trial court complied with the procedural requirements of section 768.72(1).

For these reasons, we deny Watt’s petition. Because our decision conflicts with the Third District’s decision in *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019), the Fourth District’s decision in *Petri Positive Pest Control, Inc. v. CCM Condominium Association, Inc.*, 174 So. 3d 1122 (Fla. 4th DCA 2015), and the Fifth District’s decision in *Varnedore v. Copeland*, 210 So. 3d 741, 748 (Fla. 5th DCA 2017), we certify conflict with those decisions.

DENIED; CONFLICT CERTIFIED.

RAY, C.J., and TANENBAUM, J., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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