**IN THE SUPREME COURT OF FLORIDA**

Case No.: SC2024-0058
L.T. Case Nos.: 4D22-1558; 4D22-1560; and 4D22-1562

ISAAC ("IKE") PERLMUTTER and LAURA PERLMUTTER,

*Petitioners*,

v.

FEDERAL INSURANCE COMPANY, HAROLD PEERENBOOM, and WILLIAM DOUBERLEY,

*Respondents*.

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# AMICUS BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND AMERICAN TORT REFORM ASSOCIATION

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## IDENTITIES AND INTERESTS OF AMICI CURIAE

The Florida Justice Reform Institute ("FJRI") is a non-profit organization dedicated to reform of Florida's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in that system.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has many members that are either based in Florida or conduct substantial business here. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have

pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over three decades, ATRA has filed amicus briefs in cases that have addressed important liability issues.

Amici's[1] interest in this case is narrow, and is limited to advocating for this Court to adopt the standard announced by the Fourth District. Amici take no position on how that standard ought to apply to the very unique facts of this case. Instead, as explained in more detail below, Amici urge this Court to adopt the *Perlmutter* Court's interpretation of section 768.72, Florida Statutes, and further request that rule 1.190(f) be amended.

## SUMMARY OF THE ARGUMENT

The Fourth District correctly interpreted section 768.72 in *Federal Insurance Company v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023). This Court's approval of the analysis used in *Perlmutter* would bring stability and clarity to the law on an important aspect of civil litigation throughout the state. Amici urge this Court to go further, however, by amending Florida Rule of Civil Procedure

[1] FJRI, the Chamber, and ATRA will be collectively referred to as "Amici."

1.190(f) to codify the holding in *Perlmutter*. If nothing else, rule 1.190(f) should be amended to reflect the two most important components of the *Perlmutter* holding: (1) that at the pleading stage, the "clear and convincing" evidence standard must be taken into account, and (2) that *any* record evidence identified by the parties, including evidence submitted by the defendant, must be considered by the trial court as it decides whether to permit amendment of a complaint to include a request for punitive damages.

## ARGUMENT

Section 768.72, Florida Statutes, provides the following regarding the procedure for pleading a claim for punitive damages:

> (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 proceed until after the pleading concerning punitive damages is permitted.
>
> (2) 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.

§ 768.72(1)-(2), Fla. Stat.

Florida Rule of Civil Procedure 1.190 also contains language regarding the standard for pleading punitive damage claims:

> 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 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.

Fla. R. Civ. P. 1.190(f).

In *Perlmutter*, the Fourth District assessed the language of section 768.72 and rule 1.190, as well as the varied holdings from Florida appellate courts regarding the substantive and procedural requirements for pleading a punitive damages claim. The Court emphasized the trial court's " 'gatekeeping' role to preclude a punitive damages claim where no reasonable evidentiary basis for recovery exists." *Perlmutter,* 376 So. 3d at 31-32. According to the *Perlmutter* majority, the gatekeeping function required by section 768.72 entails two main lines of inquiry.

First, the Fourth District held that when evaluating both parties' evidence, trial courts must take into account the "clear and convincing" evidence standard described in section 768.72(2). According to the *Perlmutter* majority, this requirement does not mean trial courts should decide at the pleading stage whether a claimant has shown clear and convincing evidence of entitlement to punitive damages. Instead, it requires trial courts to determine at the pleading stage whether a "reasonable jury" could find "by clear and convincing evidence that punitive damages are warranted." *Id.* at 34.

Second, trial courts must do "more than simply assum[e] all of the movant's allegations in the amended complaint are true—the standard when ruling on a motion to dismiss for failure to state a cause of action." *Id.* at n.9. Rather, the Fourth District found, the requirement in section 768.72(1) that trial courts consider the "evidence in the record" or the evidence "proffered by the claimant" means that trial courts must consider "the evidentiary showing *by all parties*," not just the claimant's evidence, when deciding whether to allow amendment to add a punitive damages claim. *Id.* at 33. (emphasis in original).

## I. Section 768.72 deliberately altered the common law to raise the evidentiary burden for recovering punitive damages.

Before the Legislature enacted section 768.72, "in all cases of claims for punitive or exemplary damages," the role of the court was to "decide at the *close* of the evidence, as a matter of law, the preliminary question whether or not there is any legal basis for recovery of such damages." *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 222 (Fla. 1936) (emphasis added). Moreover, the court's "preliminary" determination was to rest upon an "interpretation of the evidence favorable to the plaintiff." *Id.*

Section 768.72 supersedes this common-law approach. Enacted in 1986, section 768.72(1) provides that "no claim for punitive damages shall be permitted unless" the plaintiff makes "a reasonable showing . . . which would provide a reasonable basis for recovery of [punitive] damages." This language altered the common law in two significant ways: *First*, by providing that "no claim for punitive damages shall be permitted unless" the plaintiff makes the required showing, section 768.72(1) shifted forward the timing of the court's "preliminary" determination from "the close of the evidence," *Archer*, 171 So. at 222, to the pleading stage. *Second*,

section 768.72(1) raised the required showing from the fairly lenient standard of "*any* legal basis" for recovery of punitive damages, *id.*, to the more demanding standard of a "*reasonable* basis" for recovery, § 768.72(1), Fla. Stat. (emphasis added). This Court then reiterated these statutory requirements by adopting Florida Rule of Civil Procedure 1.190, which provides that a motion for leave to add a claim for punitive damages "shall make a reasonable showing" that provides "a reasonable basis for recovery" of punitive damages.

Section 768.72(1) was not "simply a minor adjustment to the state's procedural rules concerning pleading and discovery," but rather, "a means of achieving a substantive legislative goal." *Neill v. Gulf Stream Coach, Inc.*, 966 F. Supp. 1149, 1154-55 (M.D. Fla. 1997). Indeed, the Legislature enacted section 768.72 as "part of a substantive tort reform package" designed to remedy the "commercial liability insurance crisis caused, at least in part, by the then existing tort system." *See id.*; ch. 86-160, § 51, Laws of Fla. As this Court later explained, section 768.72(1) created a "substantive legal right" to be free from "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." *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995).

## II. Courts must apply the clear and convincing evidence standard and weigh evidence at the gatekeeping phase.

### A. The statutory scheme compels this standard.

Section 768.72(2) leaves no doubt that the clear and convincing evidence standard applies to claims for punitive damages at trial. And, as the Fourth District held, the same standard logically *must* also apply at the gatekeeping phase, where the judge's task is to determine whether the movant's evidentiary showing is "reasonable." § 768.72(1), Fla. Stat. Reasonableness cannot be determined in a vacuum. Rather, the reasonableness of the movant's proffer must be determined by the standard that movant must ultimately satisfy in order to recover—the clear and convincing evidence standard. § 768.72(2), Fla. Stat. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("[T]he meaning of a statutory word or phrase is affected by other provisions of the same statute."); *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (internal citations and

quotations omitted) ("[J]udges must exhaust all the textual and structural clues that bear on the meaning of a disputed text.").

Clear and convincing evidence is the only standard the statutory scheme contemplates, and thus the only standard courts can extrapolate from the text. Conversely, if this requirement were read to be standardless, the movant's ability to plead punitive damages would be dependent upon a judge's arbitrary determination as to what makes a plaintiff's proffer "reasonable." This goes beyond the scope of the court's review contemplated by the statute.

Instead, the court is constrained to consider the standard for recovery at trial and evaluate the proffer in light of the measurement by which the jury awards punitive damages. Thus, in making its preliminary determination, the trial court must ask whether a reasonable jury could infer from the proffer that the defendant's conduct meets the statutorily required clear and convincing evidence standard for punitive damages. *See Perlmutter*, 376 So. 3d at 34; *E.R. Truck & Equip. Corp. v. Gomont*, 300 So. 3d 1230, 1231 (Fla. 3d DCA 2020) (Scales, J., concurring) (citing § 768.72(1)-(2), Fla. Stat.) ("In order to state a claim for punitive

damages, the plaintiff must make a reasonable showing, with proffered or record evidence, that a trier of fact, based on clear and convincing evidence, could find the defendant guilty of 'intentional misconduct' or 'gross negligence.' ").

At the very least, section 768.72 "obligates the trial court to do more than just accept allegations as true"—the approach taken when courts assess whether a party has stated a cause of action. *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1076 (Fla. 3d DCA 2019) (citations omitted). All the District Courts of Appeal, other than the Fifth District, agree on this point. *Compare 701 Palafox, LLC v. Scuba Shack, Inc.*, 367 So. 3d 624, 627 (Fla. 1st DCA 2023) ("[W]e need not take [Plaintiff's] allegations of gross negligence at face value."); *White v. Boire*, 320 So. 3d 814, 817 (Fla. 2d DCA 2021) (quashing motion for leave to amend where court improperly accepted plaintiff's allegations as true); *Bistline v. Rogers*, 215 So. 3d 607, 610–11 (Fla. 4th DCA 2017) ("[A]n evaluation of the evidentiary showing required by section 768.72 does not contemplate the trial court simply accepting the allegations in a complaint or motion to amend as true.") *with Est. of Despain v. Avante Grp., Inc.*, 900 So. 2d 637, 644 (Fla. 5th DCA

2005) (citing *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188 (Fla. 4th DCA 2005)) ("[T]he 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.").

**B. The gatekeeping function ensures litigation fairness.**

The Fourth District's interpretation of section 768.72 and rule 1.190 preserves the court's important "gatekeeping" role in precluding punitive damage claims "where there is no reasonable evidentiary basis for recovery." *Bistline*, 215 So. 3d at 611; *Globe Newspaper,* 658 So. 2d at 519. It respects the quasi-criminal nature of punitive damages, "reserved for truly 'culpable conduct' " and for which the requisite level of negligence is "equivalent to the conduct involved in criminal manslaughter." *Cleveland Clinic Florida Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 706 (Fla. 4th DCA 2023) (quoting *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1, 11 (Fla. 2016)). And it reduces the "expense of litigating cases in which 'throw away' punitive damages claims are made as an added inducement to settle before the pleader has developed any evidentiary basis for the assertion." *Neill*, 966 F. Supp. at 1155.

Moreover, "from a practical perspective, the granting of a motion for leave to amend a complaint to add a punitive damages claim can be a 'game changer' in litigation." *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 (Fla. 3d DCA 2016). Permitting a plaintiff to "proceed with a punitive damages claim subjects the defendant to financial discovery that would otherwise be off limits and potentially subjects the defendant to uninsured losses." *Id.* (citations omitted). Approval of the standard announced in *Perlmutter* affords protection from the expense of litigating meritless punitive damage claims, ensures appropriate financial worth discovery, and guards against "the concomitant increase in the settlement value of a case once a claim for punitive damages is added." *Neill*, 966 F. Supp. at 1156.

These concerns are especially pertinent in Florida. Florida produced significantly more verdicts in excess of $10 million per capita than any other State between 2013 and 2022, and awarded punitive damages in these so-called "nuclear verdict" cases at a higher rate than other States. U.S. Chamber Institute for Legal

Reform, Nuclear Verdicts 17, 21 (May 2024).[2] Accordingly, a 2024 study found that Florida had the second-highest tort system costs as a percentage of its state gross domestic product (just under 3.4 percent)—over double the percentage of the states with the lowest tort costs. U.S. Chamber Institute for Legal Reform, Tort Costs in America 23 (Nov. 2024).[3] The high rate at which Florida courts award punitive damages is a substantial driver of these tort costs that may contribute to making Florida a more difficult place for businesses to grow and create jobs and opportunity. The Legislature's action to ensure that claims for punitive damages satisfy pretrial scrutiny—validated by the Fourth District's correct application of section 768.72 here—was a beneficial step toward alleviating these costs.

Finally, any fears that approval of the Fourth District's articulation of the statutory procedure for pleading punitive damages would "impair a claimant's ability to plead punitive

[2] https://instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf.
[3] https://instituteforlegalreform.com/wp-content/uploads/2024/11/2024_ILR_USTorts-CostStudy-FINAL.pdf.

damages" are unfounded. *Deaterly v. Jacobson*, 313 So. 3d 798, 801 (Fla. 2d DCA 2021). First, a claimant is able to "satisfy his initial burden by means of a proffer," which is "merely a representation of what evidence the party proposes to present and is not actual evidence." *Cook v. Florida Peninsula Ins. Co.*, 371 So. 3d 958, 961 (Fla. 5th DCA 2023) (quoting *Est. of Despain*, 900 So. 2d at 644). Thus, "section 768.72 contemplates that a claimant might obtain admissible evidence or cure existing admissibility issues through subsequent discovery." *Id.* (quoting *Est. of Despain*, 900 So. 2d at 644). Second, section 768.72(1) expressly provides that "[t]he 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." § 768.72(1), Fla. Stat. In addition, the trial court is to view the record and proffered evidence in a light favorable to the plaintiff. *Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So. 2d 867, 873 (Fla. 5th DCA 1995) (citing *Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla. 1978)). These qualifications provide sufficient safeguards to the rights of

claimants seeking to plead punitive damages—just as section 768.72 provides safeguards to defendants.

### C. Section 768.72 requires weighing of evidence identified by both parties.

This Court should also clarify that, in making section 768.72's required preliminary determination, the court may consider the proffered evidence and the "evidence in the record." § 768.72(1). Evidence in the record, "being non-specific as to the record evidence's source, plainly permits the source of that evidence to be both the claimant and any opponent." *Perlmutter*, 376 So. 3d at 33. Further, "section 768.72 *necessarily requires* the court to weigh the evidence and act as a factfinder." *KIS Group, LLC v. Moquin*, 263 So. 3d 63, 66 (Fla. 4th DCA 2019) (emphasis added). Otherwise, the court no longer plays a "gatekeeping" role and defendants lose the substantive right that section 768.72 creates—freedom from meritless punitive damage claims. *See Globe Newspaper,* 658 So. 2d at 519.

In the decision under review, Judge Warner dissented, arguing that section 768.72(1) does not permit the court to consider "*both* parties' evidence," because "this necessitates weighing of the

evidence." *Id.* at 40, (Warner, J., dissenting). But none of the listed conflict cases in *Perlmutter* actually prohibit courts from considering the record evidence identified by the non-moving party. *See Deaterly*, 313 So. 3d 798; *Wiendl v. Wiendl*, 371 So.3d 964 (Fla. 2d DCA 2023); *Estate of Despain*, 900 So. 2d at 642; *Werner Enterprises, Inc. v. Mendez*, 362 So. 3d 278 (Fla. 5th DCA 2023); and *Cook*, 371 So. 3d 958.

Further, rule 1.190(f) appears drawn in anticipation of an adversary evidentiary proceeding at the gatekeeping phase. The rule's requirement that the motion and supporting evidence be filed 20 days in advance of the hearing contemplates that the defendant will have an opportunity to respond and rely upon the record evidence. Moreover, when this Court adopted rule 1.190(f), it referred to *Beverly Health and Rehabilitation Services, Inc. v. Meeks*, 778 So. 2d 322 (Fla. 2d DCA 2000). *See Amends. to the Fla. R. of Civ. P. (Two Year Cycle)*, 858 So. 2d 1013, 1014 (Fla. 2003). In *Meeks*, the court pointed out the lack of procedure surrounding punitive damage proffers and declared that the Second District's practice would be to require plaintiff's evidentiary proffer "be filed and served in advance of the hearing so that the Defendant has a

reasonable opportunity to respond." *Meeks*, 778 So. 2d at 324-25. The Second District reasoned that requiring "written proffers to be filed a reasonable time prior to future hearings" was "a reasonable method to assure that such hearings do satisfy the spirit of [section 768.72] and the requirements of due process." *Id.* at 325. Thus, to dispense with the requirement that trial courts weigh evidence would be to render these procedural protections for defendants superfluous.

## III. This Court should amend rule 1.190(f) to codify the standard for amending a claim to assert punitive damages.

Amici encourage this Court to amend rule 1.190(f) to reflect the two most important components of the Fourth District's decision in *Perlmutter*. To wit, the language of rule 1.190(f) should reflect (1) the trial court's statutory obligation to take into account the clear and convincing standard at the pleading stage, and (2) that evidence identified by both plaintiff and defendant must be considered by the trial court when it decides whether to permit amendment of a complaint to include a request for punitive damages.

Most recently, this Court, "on its own motion," has amended rules 1.280 and 1.510 of the Florida Rules of Civil Procedure, and rule 9.130 of the Florida Rules of Appellate Procedure. *See In re Amendments to Florida Rule of Appellate Procedure 9.130*, 289 So. 3d 866 (Fla. 2020); *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020); *In re Amendment to Florida Rule of Civil Procedure 1.280*, 324 So. 3d 459, 464 (Fla. 2021). In amending rule 9.130 to "expand the availability of appellate review of nonfinal orders denying sovereign immunity," this Court reasoned that the previous rule "insufficiently protect[ed] the public and governmental interests served by sovereign immunity," and left "too great a risk that erroneous denials of sovereign immunity will go unreviewed until it is too late." *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1186 (Fla. 2020). In amending rule 1.510 to adopt the federal summary judgment standard, this Court stressed its goal to "improve the fairness and efficiency of Florida's civil justice system," and "to relieve parties from the expense and burdens of meritless litigation." *In re Amendments*, 309 So. 3d at 194. And this Court amended rule 1.280 to not only codify, but also "define and explain the apex

doctrine as clearly as possible." *In re Amendment*, 324 So. 3d at 461.

For the same reasons, this Court should similarly amend rule 1.190(f). In its current form, the rule insufficiently protects the interests served by the statutorily imposed heightened pleading standard for punitive damages. Amending the rule would "improve the fairness and efficiency of Florida's civil justice system," and "relieve parties from the expense and burdens of meritless litigation." *See, e.g.*, *In re Amendments*, 309 So. 3d at 194. It would fulfill the Legislature's objective in enacting section 768.72. And it would allow this Court to define and explain the standard as clearly as possible.

Finally, this Court does not need to "seek input from others before exercising [its] exclusive rulemaking authority." *In re Amendments to Florida Evidence Code*, 278 So. 3d 551, 556 (Fla. 2019) (Lawson, J., concurring). This Court's "internal operating rules expressly recognize [its] inherent constitutional authority to amend [its] own rules, on [its] own motion, at any time." *Id.* at 555 (citing Fla. S. Ct. Internal Op. Proc. II(G)(1)). On numerous occasions, this Court has adopted or amended rules on its own

motion "without following the general procedure outlined in rule 2.140," which "sets forth the procedure 'followed for consideration of rule amendments *generally*.' " *Id.* (quoting Fla. R. Jud. Admin. 2.140(a)) (compiling cases). It should do the same here, and amend rule 1.190(f) to codify the standards explained in *Perlmutter* for adding a claim to assert punitive damages.

## CONCLUSION

This Court should uphold the Fourth District's interpretation of sections 768.72(1) and (2), Florida Statutes, in *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023), and amend rule 1.190(f) accordingly.

Respectfully submitted on March 20, 2025.

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I HEREBY CERTIFY that on March 20, 2025, a copy of the foregoing amicus brief was filed using the Florida Courts E-Filing Portal, and a copy of the foregoing will be served via electronic mail to all parties listed on the below service list.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the applicable font and word count limit requirements of Rules 9.045 and 9.370(b) of the Florida Rules of Appellate Procedure.

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