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

JOHN DANIEL SMITH
Appellant

CASE NO. 6D2024-3209
consolidated with
CASE NO. 6D2024-3444

LT CASE UCN:
362021CA002949A001CH

v.

KENNETH EDWARD KEMP, II,
ELIZABETH CLAIRE BENTLEY AND
PATRONE KEMP & BENTLEY, P. A.
Appellees

INITIAL BRIEF

Appellant JOHN SMITH ("Appellant"), by and through his undersigned counsel, respectfully submits his Initial Brief.

July 15, 2024

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<u>TABLE OF CONTENTS</u> <u>Page</u>

INDEX OF CITED AUTHORITIES 4-8

BASIS FOR INVOKING JURISDICTION STATEMENT 9

STATEMENT OF FACTS AND PROCEDURAL HISTORY 10-36

STANDARD OF REVIEW 37

ISSUES PRESENTED AND SUMMARY OF ARGUMENT 38

ARGUMENT WITH MEMORANDUM OF LAW 40

<u>First issue</u> 40
Did the trial court err in hearing Appellees' amended motion for leave to add punitive damages when said motion was filed and noticed just two days prior to the same, in violation of Rule 1.190(f), Fla.R.Civ.P.?

<u>Second Issue</u> 42
Did the trial court err in rendering the August 9, 2022 order that granted Appellees' amended motion to add punitive damages without finding a reasonable basis exists for such damages after an insufficient evidentiary submission or proffer was made, in violation of § *768.72(1), Fla. Stat. and Rule 1.190(f), Fla.R.Civ.P.?*

<u>Third Issue</u> 48
Did the trial court fail to meet its gatekeeping duties at trial and thereafter in permitting separate awards of punitive damages for Appellees Bentley and Patrone, Kemp & Bentley, P.A. when clear and convincing evidence in support thereof were wholly absent?

<u>Fourth Issue</u> 52
Did the trial court err in not granting Appellant's timely remittitur regarding the sums of punitive damages awarded when the same are clearly excessive?

Fifth Issue 56

Did the trial court err in submitting jury instructions and a verdict form which as worded likely confused the jury about its role in making determinations for each Appellee independently by repeating claims associated with Appellee Kemp when no evidence of such language in the packaging and video content was presented at trial regarding Appellees Bentley and the corporate Appellee?

Sixth issue 58

Did the trial court violate due process in granting without notice Appellee's motion for contempt on the first day of trial?

CONCLUSION 59

CERTIFICATE OF SERVICE 60

CERTIFICATE OF COMPLIANCE 61

INDEX OF CITED CASES AND OTHER AUTHORITIES Page

Domke v. McNeil, 939 F. Supp. 849 (M.D. Fla.1996)

Lancheros v. Burke, 375 So.3d 927, 929 (Fla. 6th DCA 2023)
4

Bistline v. Roges, 215 So.3d 607, 610 (Fla.4thDCA 2017

Engle v. Liggett Grp., Inc., 945 So.2d 1246, 1263 (Fla.2006)

Cooper Indus., Inc. v. Leatherman Tool Grp.
532 U.S. 424, 436 121 S.Ct. 1678, 149 L.Ed.2d 672 (2001)

Chacon v. Philip Morris USA, Inc.,
254 So.3d 1172, 1175 (Fla. 3d DCA 2018)

Jews for Jesus, Inc. v. Rapp, 997 So.2d 1098, 1106 (Fla. 2008)

Corsi v. Newsmax Media, Inc., 519 F.Supp.3d 1110, 1123-24 (S.D. Fla. 2021)

Lanwood Medical Center, Inc. v. Sadow,
43 So.3d 719, 727 (Fla. 4th DCA 2010)

Wolfson v. Kirk, 273 So. 2d 774, 777 (Fla. 4th DCA 1973)

Warrior Trading, Inc. v. Jaffee, 2019 WL 3248509, *4
(S.D. Fla. 2019)

NITV, L.L.C. v. Baker, 61 So. 3d 1249, 1252 (Fla. 4th DCA 2011)

Woodard v. Sunbeam Television Corp., 616 So. 2d 501, 503 (Fla. 3d DCA 1993)

Federal Insurance Co. v. Perlmutter, 376 So.3d 24, 34
(Fla. 4TH DCA 2023)

Fetlar, LLC v. Suarez, 230 So.3d 897, 99 (Fla. 3d DCA 2017)

INDEX OF CITED CASES AND OTHER AUTHORITIES Page

TRG Desert Inn Venture, Ltd. v. Berezovsky,
194 So.3d 516, 530 n.5 (Fla. 3d DCA 2016)

Varnedore v. Copeland, 210 So. 3d 741, 747-48
(Fla. 5th DCA 2017)

Watt v. Lo, 302 So. 3d 1021, 1024 (Fla. 1st DCA 2020)

Mercer v. Saddle Creek Transportation, Inc., __ So.3d __,
2024 WL 3212265 at *3 (Fla. 6th DCA June 28, 2024)

701 Palafox, LLC v. Scuba Shack, Inc., 367 S.3d 624,
627 (Fla. 1st DCA 2023)

Cook v. Fla. Peninsula Ins. Co., 371 So.3d 948,
961-62 (Fla. 5th DCA 2023)

E. Bay NC, LLC v. Reddish,
306 So.3d 1225, 1227 (Fla. 2d DCA 2020)

Griffin v. State, 344 So. 3d 623, 625 (Fla. 2d DCA 2022)

Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc.
987 So.2d 706, 706 (Fla. 4th DCA 2008)

Walt Disney World Co. v. Noordhoek, 672 So.2d 98, 100
(Fla. 3d DCA 1996)

Cat Cay Yacht Club, Inc. v. Diaz,
264 So.3d 1071, 1075 (Fla. 3d DCA 2019)

Petri Positive Pest Control, Inc. v. CCM Condominium Ass'n,
Ass'n, Inc., 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015)

Tilton v. Wrobel, 198 So. 3d 909, 910–11 (Fla. 4th DCA 2016)

INDEX OF CITED CASES AND OTHER AUTHORITIES Page

701 Palafox, LLC v. Scuba Shack, Inc., 367 So. 3d 624, 628 (Fla. 1st DCA 2023)

Cable News Network, Inc. v. Black, _3d _, 2023 WL 6854487 (Fla. 4th DCA October 18, 2023)

KIS Grp., LLC v. Moquin, 263 So. 3d 63, 65–66 (Fla. 4th DCA 2019)

Wolfson v. Kirk, 273 So.2d 774, 778 (Fla. 4th DCA 1973)

W.R. Grace & Company—Conn. v. Waters, 638 So.2d 502 (Fla. 1994)

Byrd v. Hustler Magazine, 433 So. 2d 593, 595 (Fla. 4th DCA 1983)

R.J. Reynolds Tobacco Co. v. Townsend, 90 So.3d 307, 312-13 (Fla. 1st DCA 2012)

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2661 (2008)

Arab Termite & Pest Control v. Jenkins, 409 So.2d 1039, 1043 (Fla. 1982)

Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1264 (Fla. 2006)

Lanwood Medical Center, Inc. 43 So.3d 72,729 (Fla. 1st DCA 2010)

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)

INDEX OF CITED CASES AND OTHER AUTHORITIES Page

Elyria-Lorain Broadcasting Co. v. National Communications Industries, Inc., 300 So.2d 716, 719 (Fla. 1st DCA 1974)

Lipsig v. Ramlawi, 760 So.2d 170 (Fla. 3d DCA 2000)

Hockensmith v. Waxler, 524 So.2d 714, 715

(Fla. 2d DCA 1988)

Phillips L. Firm, PA. v. Stubbs, 2023 Fla. Cir. LEXIS 2324 (Fla. 14th Cir. Nov. 16, 2023)

Platinum Properties Investor Network, Inc. v. v. Sells, 2023 WL 7144676 (S.D. Fla. September 18, 2023)

Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1266 (11th Cir. 2008)

Smith v. Telophase Nat. Cremation Soc., Inc., 471 So. 163, 170 (Fla. 5th DCA 1985)

Allstate Ins. Co. v. Vanater, 297 So.2d 293, 295 (Fla.1974)

McPhee v. Paul Revere Life Ins. Co., 883 So.2d 364, 368 (Fla. 4th DCA 2004)

Jacobs v. Westgate, 766 So.2d 1185, 1180 (Fla. 3d DCA 2000)

Bresch v. Henderson, 761 So.2d 449, 451 (Fla. 2d DCA 2000)

Humana Health Insurance Co. of Florida v. Chipers, 892 So.2d 492, 495-6 (Fla. 4th DCA 2001)

INDEX OF CITED CASES AND OTHER AUTHORITIES <u>Page</u>

<u>Statutes</u>

§ 768.72, Fla. Stat.

<u>Rules of procedure</u>

Rule 9.130(b)(1)(A), Fla. R. App. P.
Rule 1.190(f), Fla.R.Civ.P.
Rule 9.045(b) and (e), Fla. R. App. P.

"R" refers to record on appeal index dated 3/28/24

"TT [date] p._ l._" refers to the 2023 trial transcript followed by date of trial, page number and line(s) number(s)
"HT" refers to the August 4, 2022 hearing transcript

"SR" refers to supplemental record dated 6/18/24
SR 3-93 numbers pertain trial transc. citations for TT 6/20/24
SR 94-431 numbers pertain trial transc. citations for TT 6/21/24
SR 432-631 numbers pertain trial transc. citations for TT 6/22/24
SR 632-1197 numbers pertain trial transc. citations for TT 6/23/24

Appellant John D SMITH is "Appellant"
Appellee Kenneth J. Kemp is "Appellee Kemp"
Appellee Elizabth C. Bentley is "Appellee Bentley"
KEDO ENTERPRISES, INC. is the "corporate Defendant"
Appellee Patrone Kemp & Bentley, P.A. is the "corporate Appellee"

BASIS FOR INVOKING JURISDICTION

This appeal of a final judgment following a jury verdict is based on Rule 9.030(a)(3)(A) of the Florida Rules of Appellate Procedure.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

---

1. On May 13, 2021, Appellees' Complaint ("Compl.") sued Appellant and his business for damages based on defamation, defamation *per se*. R 31– 61. The corporate Appellee is a law firm in Fort Myers, Florida that frequently handles probate, trusts and estate matters with Appellees Kemp and Bentleys partners employed therein. R 32, TT 6/20/23 pp. 50-1, inclusive.

2. The complaint alleged that Appellees Kemp and the corporate Appellee represent Appellant's mother in probate litigation commenced by Appellant in Lee County, Florida, in 2018. R 32.

3. Said complaint Appellant created videos of fictional characters for the purpose of insinuating that Appellees aided a client - the mother of Appellant - in committing tax fraud while the client underreported the value of the estate of Appellant's father. In 2018, Appellees were retained by Mary Smith, the mother of Appellant SMITH, to defend her in a trust litigation Appellant filed against her.

4. After a motion [R 110 – 117], an opposition thereto [R 128–34], an answer [R, 138 – 148], two 'Statement of Facts' [R 149–54] were filed, Appellees obtained leave to amend. R488–549, 554-55.

5. Appellees filed a Second Amended Complaint, stating that Appellant acted with malice and requested punitive damages. R 556–614. Appellant answered, raising the affirmative defenses including truth. R 615–31. Appellant denied said defenses. R 632-33.

6. A pretrial uniform pretrial order was entered on May 26, 2023, wherein a motion for contempt was not listed. R 2193-2220.

Order granting punitive damages

7. On March 9, 2022, Appellees moved to submit a Third Amended Complaint and to Add Punitive Damages. R 488-549. The motion attached numerous documents in support of the same.

8. On May 2, 2022, a notice of hearing was filed for said motion to be heard on August 4, 2022, which is missing from the index.

9. On August 2, 2022, Appellees filed an amended motion for leave to add punitive damages. R 643-743. Again the motion contained documents that were attached to the March 8, 2022 motion as well as documents not previously attached.

10. On August 2, 2022, Appellees filed an amended notice of hearing for August 4, 2022 which is also missing from the index.

11. At the August 4, 2022, hearing, counsel for Appellees noted that

he filed an amended motion and was prepared to argue that motion. *See* hearing transcript, R 2639, HT 8/04/22 hearing, p. 3 l.12-25.

12. Appellees supplied the court with a three binder containing letters and videos said to have been made by Appellant. Counsel for Appellees read several statements from the video. Trial counsel for Appellant objected about the characterization of the statements.

13. Then the trial court stated it would accept the materials provided as a proffer "for punitive damages for various things such as tax evasion concerning the 706 tax filing, a tax avoidance scheme, a criminal conspiracy, attorney-client conspiracy, estate from 30 million to 8 mill. HT 8/04.22 hearing, p. 11 (p 32) l. 4-25. R 745–46.

14. On August 9, 2023, the following order states in its entirety:

THIS CAUSE having before the Court for hearing on Thursday, August 4, 2022 on Plaintiffs' Amended Motion for Leave to Amend Complaint to Asset Claim for Punitive Damages, filed on August 2, 2022 (hereinafter referred to as "Plaintiffs' Motion") in the above-styled cause and the Court, having reviewed the pleadings and being otherwise fully advised in the premises, does hereby

ORDER AND ADJUDGE that:

1. Plaintiffs' Motion is hereby GRANTED.

2. Plaintiffs' KENNETH J. KEMP, ELIZABETH BENTLEY and PATRRONE KEMP & BENTLEY, P.A. shall have ten (10) days following entry of this order to file their Verified Third Amended Complaint. R 746.

15. Appellants filed their Third Amended Complaint which contains 6 counts of defamation by implication – each of the three Appellees against each of the two defendants - two defamation *per se* claims by Appellee Kemp against Appellant and his business, and two counts for injunctive relief. R 750–808. Appellant's answer asserted the affirmative defenses of truth, opinion, and among others, and demand the claims be disaggregated. R 809–24. Specifically, Appellant pled truth to all statements were to appear in the instruction and final judgment.

Pretrial sanctions order regarding discovery violations

16. On January 27, 2023, Appellees filed a motion for contempt and sanctions alleging noncompliance with discovery requests pertaining to financial worth. R 1381–1433. On March 16, 2023, Appellees filed a supplementation thereto. R 1952-2049. A hearing was conducted on May 10, 2023. TT 5/10/23 hearing trans. 2245–2320.

17. On May 16, 2023, the trial court entered an order sanctioning Appellant and stated that if the documents and information are not produced within ten days, "Plaintiffs shall be entitled to a jury instruction advising the jury the Defendants have affirmatively

concealed their net worth, and the Defendants shall be prohibited from producing evidence at trial and/or arguing "low net worth" defense to a claim of punitive damages." R 2155.

18. On June 7, 2023, Appellees filed a motion to contempt alleging Appellant produced only partially complied with the May 16, 2023 order. R 2239-44. The motion requested the following jury instruction:

If you determine that punitive damages are appropriate against either or both Defendants, I am directing you to assume that both John D. Smith, individually, and Keddo Enterprises, LLC, have sufficient financial resources to satisfy any amount you believe in your discretion should be assessed as a punishment against them and as a deterrent to others. I am instructing you to make this assumption based upon both John D. Smith, and Keddo Enterprises, LLC, wrongfully concealing their net worth from this Court.

19. Appellant filed certificates of compliance regarding this production of documents required by said order. R 2240. On the first day of trial, June 20, 2023, the Court heard Appellees' January 27, 2023 motion and granted Appellees' June 7, 2023 motion for contempt. R court minutes 2558.

20. On June 6, 2024, Appellant filed a motion to bifurcate the proceedings [R 2232-34] but the next day the trial court denied the same as untimely. R 2474.

Trial and evidence entered

21. On June 20, 2023, a four-day jury trial commenced on the above noted pleadings with Appellant defending *pro se.* R 2559–61. Appellees admitted 15 items including three videos: a DVD video, its packaging, two YouTube videos. R 2564–65 trial exhibits 4, 10, 12. Appellant admitted 5 items, including three postcards as a composite. R 2563.

22. The DVD video made and narrated by Appellant was played twice R 3020-22 trial exh. 4. In it, Appellant states that his mother must have substantially underreported to the Internal Revenue Service ("IRS") the value of her late husband (and Appellant's father)'s estate to evade estate taxes because she could not have he acquired several real properties and pay for an "expensive legal team." TT 6/21/23, p.109, l.19-24 (R 3019 trial exh. 3); p.190, l.1-4. Photographs of the individual Appellees, among with six other professional, are identified by pseudonyms. R 3019 trial exh. 3). The narrator states that viewer will learn of a "correlation between the high legal fees they charge" and the underreported value of his father's estate, the actual reporting of which being the "work product of a Naples law firm" (not Appellees' firm). TT 6/21/23 pp. 186, l.

23. Appellant narrates that his "birth mother" spent more than $10 million after being the sole beneficiary of a $8 million estate and she has "at least committed perjury" by declaring in the Form 706 Estate Tax Return filed with the IRS for his father's estate and "at the most" committed tax evasion "by not paying the estimated multimillions in estate taxes that would be due on an estate valued at $30 million." TT 6/21/23 p.190 l.5-18 (R 3028 trial exh. 10). It also states "[t]here simply isn't enough money to pay for all ten very expensive attorneys." TT 6/21/23 p.189 l.15-17 (R 3028 trial exh. 10).

24. The jacket of the DVD is entitled "Getting Away with IRS Tax Evasion" on the front cover with back cover listing the pseudonyms of the nine attorneys and their photographs without attribution. R 3020-22 trial exh. 4. The only attorney described as doing anything is Christoper Marsala. Id. The jacket states that

> "[l]earn about the link between the extravagant lifestyles of the widow's 10 Attorneys and the high legal fees they charge. However, there isn't enough money in the wife's $8,033,511 estate to afford such talent. Thus, the Estate had to have much large than $8,033,511 which would mean that Tax Evasion has been committed by the rich widow against the IRS."

25. In the first YouTube video played for the jury, Appellant states that there is a "direct link between living in a multimillion-dollar

house, having a 300 or $350, 000 boat or a yacht and changing high legal fees." TT 6/21/23 p. 179 l.4-9 (R 3028 trial exh. 10). Photographs of large homes are shown with a disclaimer that these homes are not actual homes of the attorneys described. TT 6/23/23 p. 524, l. 21-25; p. 525 l.1-7.

26. A second YouTube video played for the jury sees Appellant stating that it is 'March of 2021" "eight months after the seven-year statute of limitations had expired" and that "criminals, they are really smart, and so even if there was money for me in my father's trust, that money was for me back in 2013, long ago." TT 6/21/23 p. 192 l. 7-13 (R 3030 trial exh. 12).

27. Appellees also introduced two identical letters dated December 1, 2021 that were received by two non-party, unrelated witnesses. TT 6/21/23; R 3034-41, 3042-55 trial exh. 14, 15.

28. Appellant introduced three postcards. TT 6/23/23 p. l.10-25; R 310308 (trial exh. 86).

Likenesses of individual Appellees

29. In all videos Appellee Kemp is labeled "Mel Practiss," with this photograph appearing multiple times. In a YouTube video, "Mel" is

described as a "fee-churning attorney" who has "a Ph.D. in delays and obfuscation." TT 6/21/23 pp.161 l. 7-8. Mel is said to own a 'small Fort Myers Florida law firm' that has represented Appellant's mother since 2014. TT, 6/21/23 p.109 l. 4-8 (trial exh. 3), p.143 l.24-25; TT 6/22/23 p.126 l.1-2; TT 6/21/23 p. 182, l. 1-4 (trial exh.10). The name of the corporate Appellee is not mentioned in any of the videos. The video claims public records reveal Mel as the owner of a $1.3 million home, a half a million-dollar office condo, a $250, 000' speed boat' that is 'parked' at a 'private yacht club.' TT 6/21/23, p. 109 l. 9-25.

30. As for Appellee Bentley, the first two videos presented at trial describe an "attorney numbered eight" - "Clair Elizabeth of Florida" - who is "a partner in the firm that has represented my birth mother since 2014" and who lives in "a modest $552,000 Fort Myers, Florida home." TT 6/21/23 p.101 l. 19-23 (trial exh. 3); p. 181 l. 13-19. (trial exh. 10); p. 181 l. 21-24, exhibit 10. Photographs of her are included therein without attribution to her real name. TT 6/23/23 p. 527 l. 2-4. No other mention is made of "Clair" in either video, apart from a reference about "Lizzie" joining a convent (TT 6/21/23 p.184 l. 21). No mention of her occurs in the third video.

31. Neither the individual Appellees nor the corporate Appellee are mentioned in the DVD jacket. R 3020 (trial exh. 4).

32. None of the three videos played during the trial nor any of the packaging exhibits admitted show or bear the name of the corporate Appellee. R 3020, 3031-41, 3042-55videos trial exh. 4, 10, 12; trial exh. 2 (DVD Case); R 3016–18 trial exh.3 (envelope); R 3019 trial exh. 4 (DVD Case); R 3020–22 trial exh.5 (envelope); R 3023 trial exh. 9 (YouTube screenshots); R 3026-7 trial exh.11 (YouTube screenshots); R 3029.

33. In terms of written materials, Appellees introduced two identical letters attributed to Appellant. R 3031-41, 3042-55 (trial.exh. 14, 15).

34. Appellee Kemp is directly named the December 1, 2021 letter as follows:

Appellant's mother "participated in a conspiracy with dishonest Fort Myers attorney Kenneth Kemp to steal Mr. Smith's $24 million estate and underreport its value to the IRS as $8,033,511."

R 3031-41 trial exh. 14.

35. A photograph of Appellee Kemp with his Florida Bar number appear on an accompanying pamphlet. TT 6/21/23 p. 208 l.3-5.

36. Two witnesses testified that each had received said letters. TT 6/21/23 (R 3031-41, trial exh. 14); p. 286 inclusive (R 3042-55 trial

exh. 15).

37. As for the postcards, a photograph of Attorney Kemp, among others, appears thereon but neither a photograph of Appellee Bentley nor her name appears thereon. R 3103-08, TT 6/23/23 p. 544 l.18-25, pp. 545-6 inclusive.

Statements about taxes, disclosures and Appellees' conduct

38. The DVD video states that another attorney named "Sammy Marsupial") "from Naples" is said to have, while Appellant's father was on his deathbed and sixteen days before he died, 'tricked,' his father into significantly changing his 1998 trust to the sole benefit of his mother at the exclusion of all of his father's children including Appellant.

39. Appellee Kemp testified that 'Sammy,' who he identified as attorney Chris Marsala, never worked for the corporate Appellee. TT 6/21/23 p. 196 l. 25; p. 197 l. 5-7. He testified that a photograph of him is shown on a YouTube video being next to a photograph of 'Sammy.' TT 6/21/23 p. 194 l. 2-6; p.198 l.1-5.

40. In terms of conduct described in the DVD video, 'Mel' is said to have deliberately kept Appellant unaware of the significant changes

to the trust of Appellant's father by failing to provide a copy of the 1998 trust until the limitations period expired where he had timely furnished the same to Appellant's sisters within 60 days of his father's death. TT 6/21/23 p. 122, l. 18-23; p. 87 l.7-11.

41. 'Mel' is also said to have in 2020 'flat out lied to the Judge' in a hearing in the trust litigation by (i) denying that he had a copy of the original 1998 trust of Appellant's father; (ii) "falsely" claiming the original trust was "destroyed;" (iii) 'trying' to claim that said trust was with another attorney unrelated to his firm, and (iv) maintaining that said trust was never funded. TT 6/21/23 p.123 l.6-9; pp.155 l. 13-19; 124, p. l. 2-7; p.127, l.12-25; p.160 l. 12-15.

42. At trial Appellee Kemp testified that he had nothing to do with the preparation of the IRS 706 Form submitted by Appellant's mother (TT 6/21/23 p. 166 l. 9-19), was not involved in any manner in the 2013 amending of the trust of Appellant's father (TT 6/21/23 p. 167 l. 1-5) and did not know where Appellant's mother obtained the monies used to acquire real estate after her husband's death. TT 6/21/23 p.168 l.2-9.

43. On direct examination, Appellee Kemp testified the trust of Appellant's father was never funded. TT 6/22/23 p. 355 l. 18-25.

44. Further, Appellee Kemp said he never lied to a court. TT 6/21/23 p. 172 l. 21-24. When asked to explain his response to the trust litigation judge's answers about whether he had a copy of the 1998 trust of Appellant's father to produce to Appellant, he answered that at that time he was not in possession of the "original" document, that being the 'wet' document bearing a signature in "blue ink." TT 6/21/23 p. 169 l. 10-24.

45. On cross-examination, Appellee Kemp admitted that at the time of the death of Appellant's father said trust had been funded by more than $1.5 million. TT 6/22/23 p. 356, l.1-11.

46. Appellant attempted to confront Appellee Kemp about what said attorney to the judge in the trust litigation case with Appellant has with his mother but the trial court ruled that such statements are "collateral issues." During cross-examination, Appellant attempted to question Appellee Kemp's testimony made in a trust case where is representing Appellant's mother who Appellant sued to recover his father's original trust created in 1998. TT 6/22/23 p. 468 l.16-21. After a long colloquy the trial court sustained the objection the hearing transcript from the other case based on it being "an improper collateral attack of this witness." TT 6/21/23 p. 327, l.1-5.

Publication and damages to Appellees

47. During Appellees' case, Appellant testified that the videos were mailed to numerous person but that the YouTube had 31 views. Appellee Kemp testified that he did not know who received the video. TT 6/21/23 p. 300, l.17-20; p. 301, l. 19-24; p. 302, l. 6-17.

48. No documentary evidence regarding damages for any Appellee was admitted.

49. Appellee Kemp testified that he did not lose income as a result of the video. TT 6/22/23 p. 432 l. 23-25. When asked on direct whether his business has been damaged by "the movie or the letter," Appellee Kemp testified that he did not know but that he wanted Appellant to "stop and cease" and for $500, 000 judgment on behalf of the videos that have been put on there and a $500, 000 judgment on the letter that was sent to Ms. Glatz" TT 6/22/23 p. 207 l. 2-14, p. 208 l. 7-11.

50. Appellee Bentley testified that she wanted the removal of the videos from YouTube and "wanted him to stop sending the DVD to anyone else." TT 6/23/23 p. 518, l. 2-7. Postcards were received but Appellee Bently failed to describe their content or submit one into evidence. TT 6/23/23 p. 519 l. 17-25. She testified that she thought

her reputation "has been damaged" and that she suffered financially. (TT 6/23/23 p. 519 l. 10-16) but denied having lost any clients or money due to the videos. TT 6/23/23 p. l.

51. On cross-examination, Appellee Bentley could not reference in the video where Appellant 'broadcasted' her residential address. TT 6/23/23 p. 519 l. 1-15. She clarified that her financial damage involved a 'lost week of work' and attorney's fees. TT 6/23/23 p. 527 l.13-21. No lost business could be identified by Appellee Bentley. TT 6/23/23 p. 551 l. 15-25.

52. On re-direct, Appellee Bentley said she was seeking $500, 000 in punitive damages. TT 6/23/23 p. 595 l. 1-15.

53. As for corporate Appellee, no testimony established its damages.

54. In closing argument, Appellees requested nominal damages of $1 per claim. TT 6/23/23 p. 711 l. 14-25.

Evidence of Appellant's financial worth

55. In the second YouTube video that was played before the jury, Appellant states that he pays "around $20, 000 in income taxes" (TT 6/21/23 p.192 l. 18-19) while "this rich widow has gotten away with not paying any estate taxes." TT 6/21/23 p. 193 l. 4-5.

56. At the end of the trial, Appellant chose to provide a narration wherein a few statements pertaining to his ability to pay punitive damages survived numerous sustained objections. SR 632-1197 TT 6/23/23 p. 616-53 inclusive.

Motion for directed verdict

57. Appellant argued for an *ore tenus* motion for directed verdict based on a want of compensatory damages for defamation by implication and defamation *per se.* TT 6/23/23 p. 666 l. 24-25 pp. 667-69 inclusive, p. 669 l. 1-4. Appellant also moved for a directed verdict regarding punitive damages, citing Mayfield v. Beverly Enterprises 1995 and Domke v. McNeil, 939 F. Supp. 849 (M.D. Fla.1996). The motion was denied. TT 6/23/23 p. 672 l.1-19.

Jury instructions and verdict

58. The jury instruction labeled “Issues on Claim against Smith” informs the jury that they must decide “whether Mr. Smith made the statements concerning the Plaintiffs as the Plaintiffs claim,” “whether the statements tended to expose the Plaintiffs to hatred, ridicule or contempt; or tended to injure the Plaintiffs in their business,

reputation or occupation or charged that the Plaintiffs committed a crime.” R 2566-78.

59. The instructions to pertaining to Appellant’s affirmative defenses were limited to “truth and good motives and the defense of privilege,” with truth being defined “[a] statement is substantially true if tits substance or gist conveys essentially the same meaning that the truth would have conveyed.” The jury was instructed to ‘consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement.” Id.

However, if the greater weight of the evidence supports Plaintiffs' claim on these issues, then you shall consider the defense of truth and good motives, and the defense of privilege raised by Mr. Smith. On the defense the issue for your determination is whether the statement made by Mr. Smith was substantially true and was made by Mr. Smith with good motives. A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed.

TT 6/23/23 p. 681 l. 18-25, p. 682 l. 1-4.

60. Instructions pertaining to punitive damages were discussed during trial (TT 6/21/23, p. 211, l. 17-25; p. 212-15, inclusive) and at its conclusion. TT 6/23/23, p. 211, l. 738-25; p. 212-15,

61. The jury instruction stated "Plaintiffs claim that punitive damages should be awarded against each of the Defendants for publishing the movie and related packaging to third parties, which they content made false statements about each of them implying that they committed crimes. TT 6/23/23 p. 684 l. 12-17. The court instructed the jury that such damages "are warranted against John D. Smith if you find by clear and convincing evidence that John D. Smith was guilty of international misconduct or gross negligence which was a substantial cause of damage to the Plaintiffs." R 2566-78.

62. The jury was given a special instruction labeled "Net Worth and Ability to Pay" where it states that Appellant and his business "wrongfully concealed their net worth" and the jury consider this determination in "determining the issues in this case." R 2566-78.

63. Counsel for Appellees acknowledged in his closing statement that compensatory damages were not proved. TT 6/23/23 p. 711 l. 19-20. He added, however, that "[a]ll of the things that apply to the video they apply to Ms. Bentley. Ms. Bentley, I submit to you, was damaged in the same that Mr. Kemp was damaged." TT 6/23/23 p. 715 l. 10-20.

64. Defendant argued in his closing statement that the interrogatories and verdict form were "confusing." TT 6/23/23 p. 731 l. 4-6.

65. The trial court read the verdict form to the jury. TT 6/23/23 p. 742 l. 12-25. For each set of verdict questions posed for each Appellee, the wording was preceded as follows: "[n]umber one, as to the following statements made in the film and its related packaging entitled "Getting Away with IRS Tax Evasion, a Florida Family's $30 Millon Secret:"

"On Monday, August 5th, 2013, a loving Florida woman and her four daughters snuck a Naples, Florida attorney into her dying husband's condo and tricked him into signing away his $30 million fortune to her. Sixteen days later he died. Shortly thereafter, and despite the unlimited marital deduction a legal estate tax shelter, the widow submitted a 706 Tax Return declaring to the IRS this man's estate was $8 million. Over the next few years the widow then spent a miraculous$10-plus-million. You will learn how estate tax evasion is a very common crime as there is neither enforcement by the IRS, nor the Florida courts for violators. Produced by this man's only son, the series shows how to do online real estate research, how to get relatives' tax returns from the IRS and a lot more available info."

And, the statements,

"Shortly before my father passed away on August 21st, 2013, my birth mother and four sisters manipulated him so they could steal dad's $30 million estate, and in the process commit tax evasion against the IRS, and all of your fellow Americans, by not paying an estimated seven to $10 million in estate taxes."

And, the next statement,

"By describing my birthmother's ten attorneys and showing how many of them live extravagant personal lives, I want you to understand the correlation between the high legal fees they charge, and the fact that my father's estate value as submitted to the IRS by my birth mother, under penalty of perjury by the way, was $8 million; that's what my birth mother stated to the IRS on Dad's Estate Tax Form 706, that the estate was valued at slightly over $8 million."

And, next statement,

"So with the knowledge that I'm providing, you should be able to question how my father's $8 million stated estate value could pay for such an expensive legal team. There simply isn't enough money to pay for all ten very expensive attorneys. Gee, I think possibly my birth mother would have stolen approximately$30 million to afford all these individuals. Plus, when you think about my calculations of what has already been spent, which I detail in the upcoming episode, along with my estimations as to other expenses, such as legal fees to ten very expensive attorneys, given over half of them live in multimillion dollar mansions in Naples and Fort Myers, Florida, you should easily understand the assertion that my father's estate is valued at just $8 million has to be tax evasion."

TT 6/23/23 p. 742, l. 19-25, p. 743 inclusive, p. 744 l. 1-22.

66. The next question, for each Appellee, involves whether "these statements were made or published by Mr. Smith" "These statements were about Mr. Smith,' "These statements create a false impression that about Mr. Smith," "The juxtaposition of these statements has a defamatory implication about Mr. Smith," "Due to the circumstances surrounding the publication of these statements, it conveyed a

defamatory implication to someone who saw it other than Mr. Smith," and "There was negligence on the part of Mr. Smith in making these statements which was the legal cause of damage to Mr. Smith." Id.

67. As to Appellee Bentley and the corporate Appellee, the verdict form repeats the same language to the instructions and questions.

68. On June 26, 2023, the jury returned a completed verdict in favor of each Appellee and against each defendant, answering in the affirmative all questions pertaining to liability and applicability of punitive damages. R 2566–78.

69. The jury awarded each Appellee a single dollar for compensatory or nominal damages. R 2566–78.

70. For defamation by video, the jury awarded Appellee Kemp $500, 000 in punitive damages against each defendant, and $250, 000 for such damages on the defamation via the December 1, 2021 letter. R 2566–78.

71. As to Appellees Bentley for defamation by video, awarded $500, 000 against each defendant. R 2566–78.

72. As to Appellee the law firm Patrone, Kemp & Bentley for defamation by video, the jury awarded $50, 000, against each defendant.

Post trial motions

73. On July 6, 2023, Appellant filed a *pro se* motion for a new trial and remittitur, mostly alleging judicial bias including but not limited to the trial court's granting Appellees' motion to contempt on the first day of trial without "the right to refute," in granting numerous evidentiary objections by Appellees during trial and that he was unable to cross exam Appellee Kemp about matters he said under direct examination. R 2603–2619. The motion also complained about the confusing jury instructions. R 2616 ¶¶59-60.

74. Said motion was denied the next day without elaboration and a Partial Final Judgment was entered. R 2620 and 2621–23.

75. Appellant timely appealed the August 4, 2023 partial final judgment. R 2665-69. Said notice resulted in this Court assigning case number 6D23-3209.

76. On August 9, 2023, a Final Judgment containing damages awards and injunctive relief. R 2670–76. That judgment repeats the "Statements" listed in the verdict that were said about each Appellee with those statements "stat[ing] or imply[ing]" each Appellee:

a. Assisted third parties in committing felonious tax fraud;
b. Participated in a felonious tax fraud conspiracy;
c. Facilitated and enjoyed the fruits of a theft penetrated against Smith's father's estate by third parties;
d. Facilitated and assisted third parties in the crime of making false representations to the Internal Revenue Service; and
e. Failed to maintain candor before the tribunal.

R 2672-73.

77. On September 5, 2023, Appellant filed a notice of appeal regarding the August 9, 2023 Final Judgment. Said notice resulted in this Court assigning case number 6D23-3444.

78. The two appellate cases were consolidated.

STANDARD OF REVIEW

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79. Denial of a motion for a directed verdict is *de novo*. Lancheros v. Burke, 375 So.3d 927, 929 (Fla. 6th DCA 2023).

80. The standard of review regarding a trial court's decision to afford a party the right to plead punitive damages based on a "reasonable showing" is *de novo*. Bistline v. Rogers, 215 So. 3d 607, 610 (Fla. 4th DCA 2017) (*de novo* review for order granting motion to add punitive damages).

81. Review of "a trial court's determination as to whether a punitive damage award exceeds the boundaries of due process [is] … *de novo*." Engle v. Liggett Grp., Inc., 945 So.2d 1246, 1263 (Fla.2006) (citing Cooper Indus., Inc. v. Leatherman Tool Grp., 532 U.S. 424, 436 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)).

82. Lastly, review of jury instructions pertaining to pure questions of law are subject to *de novo* review. Chacon v. Philip Morris USA, Inc., 254 So. 3d 1172, 1175 (Fla. 3d DCA 2018).

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

83. Appellant presents six questions:

First issue

Did the trial court err in hearing Appellees' amended motion for leave to add punitive damages when said motion was filed and noticed just two days prior to the same, in violation of Rule 1.190(f), Fla.R.Civ.P.?

Second Issue

Did the trial court err in rendering the August 9, 2022 order that granted Appellees' amended motion to add punitive damages without finding a reasonable basis exists for such damages based on their pleading after an insufficient evidentiary submission or proffer was made, in violation of § 768.72(1), Fla. Stat. and Rule 1.190(f), Fla.R.Civ.P.?

Third Issue

Did the trial court fail to meet its gatekeeping duties at trial and thereafter in permitting separate awards of punitive damages for Appellees Bentley and Patrone, Kemp & Bentley, P.A. when clear and convincing evidence in support thereof were wholly absent?

Fourth Issue

Did the trial court err in not granting Appellant's timely remittitur regarding the sums of punitive damages awarded when the same are clearly excessive?

Fifth Issue

Did the trial court err in submitting jury instructions and a verdict form which as worded likely confused the jury about its role in making determinations for each Appellee independently by repeating claims associated with Appellee Kemp when no evidence of such language in the packaging and video content was presented at trial regarding Appellees Bentley and the corporate Appellee?

Sixth issue

Did the trial court violate due process in granting without notice Appellee's motion for contempt on the first day of trial?

84. Appellees Bentley and the corporate Appellee were to prove by a preponderance of evidence that the DVD video made statements, depictions and or innuendos that display a defamatory implication about him. As such, said Appellees cannot to prove their punitive damages claims by clear and convincing evidence.

85. Appellees together failed to meet their evidentiary burden to assert punitive damages; the order obtained failed to satisfy the requirements by § 728.11(1), Fla. Stat. and Rule 1.190(f), Fla.R.Civ.P.

86. Thereafter, the jury instructions and verdict form used confused the jury as to how evaluate each Appellee's claim which likely conflated the robust evidence existing for Appellee Kemp to be used by Appellee Bentley and the corporate Appellee for their claims.

87. The sums of punitive damages awarded are excessive.

88. Those sums arose because the trial court failed to meet its gate functions concerning evidence and evidentiary burden.

89. These mistakes are compounded denial of Appellant's pretrial motion to bifurcate entitlement to punitive damages, motion for directed verdict during trial and his post-trial motion for remitter while granting Appellees' motion to contempt without advance notice on the first day of trial.

90. Each Appellee sued Appellant for damages based on defamation by implication with Appellee Kemp also suing him for defamation *per se*. Appellees claim that Appellant's videos and letters painted a false impression of their relationship with Appellant mother to whom he claims committed tax evasion. Appellee Kemp claimed that Appellant falsely impugned his honesty as an attorney.

91. From his opening statement and through trial, Appellant stated that the videos will show the sums of attorneys' fees his mother spent after the death of her husband (Appellant's father) coupled numerous cash purchases of real estate suggests that his father's estate was worth far more than what his mother declared it to be to the IRS.

Defamation by implication

92. A claim for defamation toward a private individual requires five elements: "(1) publication; (2) falsity; (3) [the] actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official or public figure (actual malice), *or at least negligently on a matter concerning a private person;* (4) actual

damages; and (5) [the] statement must be defamatory." Jews for Jesus, Inc. v. Rapp, 997 So.2d 1098, 1106 (Fla. 2008).

93. Defamation by implication "arises not from what is stated, but from what is implied when a defendant [1] juxtaposes a series of facts so as to imply a defamatory connection between them, or [2] creates a defamatory implication by omitting facts." Corsi v. Newsmax Media, Inc., 519 F.Supp.3d 1110, 1123-24 (S.D. Fla. 2021). The gravamen of such a claim is that “false suggestions, impressions and implications arising from otherwise truthful statements” damaged the claimant. Id. at 1124.

Defamation Per Se

94. Florida has "singled out defamation *per se* for special rules in civil tort litigation." Lanwood Medical Center, Inc. v. Sadow, 43 So. 3d 710, 727 (Fla. 4th DCA 2010). Generally, if a statement is determined to be defamation *per se,* such a statement is "presumed harmful as a matter of law." Id.

95. "The significance of the classification of a communication as actionable *per se* lies in the fact that its victim need not plead or prove malice (except where a privilege is involved) or special damage

because malice and the occurrence [sic] of damage are both *presumed* from the nature of the defamation." Wolfson v. Kirk, 273 So. 2d 774, 777 (Fla. 4th DCA 1973)

96. All elements for such a claim must be proven while defamation per se enjoys a presumption of injury. Warrior Trading, Inc. v. Jaffee, 2019 WL 3248509, *4 (S.D. Fla. 2019).

97. All defamation claims are subject to the defenses of truth, opinion and privilege. Truth is a defense to all forms of defamation. Jews for Jesus, 997 So.2d at 1108.

98. An evidentiary basis for each claim must be made, along with evidence refuting any absolute defense. Every defamation plaintiff must show that false statements about him, her or it were published by the defendant third parties and that said falsity caused injury to the plaintiff. NITV, L.L.C. v. Baker, 61 So. 3d 1249, 1252 (Fla. 4th DCA 2011).

99. During the trial several statements were made by Appellant about Appellee Kemp to which a jury could interpret as having a defamatory meaning. That material is not challenged here.

100. Instead, it is the absence of any statements about the other Appellees which could be interpreted by the listener or reader which

would lead to a different effect than what the truth would foster. Woodard v. Sunbeam Television Corp., 616 So. 2d 501, 503 (Fla. 3d DCA 1993).

101. Appellant submits that the DVD and YouTube videos cannot be considered defamatory to Appellee Bentley or the corporate Appellee because no juxtaposition exists that gives rise to any adverse implication being placed on either or both of them. The overarching theme of the videos, their titles and packaging is that tax evasion can be inferred given lavish spending coupled with the hiring of numerous expensive attorneys by Appellant's mother after her husband's death could not have otherwise been sustained unless she underreported the value of the trust estate she received. The video ponders how she could have afforded her acquisitions and expensive attorneys exceeded $10 to $13 million if her husband's estate, as she declared, was only worth $8 million.

102. For punitive damages to be asserted for defamation, Section 768.72(1) requires a showing of actual malice directed toward each party seeking punitive damages. Lawnwood Medical Center, Inc. v. Sadow, 43 So. 3d 710, 727 (Fla. 4th DCA 2010).

First issue

Did the trial court err in hearing Appellees' amended motion for leave to add punitive damages when said motion was filed and noticed just two days prior to the same, in violation of Rule 1.190(f), Fla.R.Civ.P.?

103. A movant seeking leave to add punitive damages must satisfy the requirements of § 768.72(1), Fla. Stat., as well as the procedural steps outlined in Rule 1.190(f), Fla.R.Civ.P. Successful resort to this process requires the movant to make a reasonable showing, through record evidence or via a sufficient proffer, that an evidentiary basis exists for such damages to be imposed vis-a-vis the claims pressed.

104. Section 768.72 states:

(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.

105. Similarly, Rule 1.190(f) states in its entirety:

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.

106. Reading the statute and procedural rule together, due notice regarding the evidence and pleadings involved is mandatory. “Rule 1.190(f) provides a clear line of demarcation: a trial court may not conduct a hearing on a claimant's motion for leave to file an amended complaint seeking punitive damages within twenty days of a claimant's filing of evidence or proffer of evidence in support of the motion.” Federal Insurance Co. v. Perlmutter, 376 So.3d 24, 34 (Fla. 4TH DCA 2023). Strict compliance with the rule is mandatory. Fetlar, LLC v. Suarez, 230 So.3d 897, 99 (Fla. 3d DCA 2017).

107. Here, the hearing transcript makes clear that Appellees amended their motion just two days prior to the hearing, unilaterally noticed the amended motion for hearing and proceeded without a stipulation. HT 8/04/22 p. 1. Because the amended pleading was not served timely per Rule 1.190(f), the trial court reversibly erred in allowing the hearing to proceed on August 4, 2022.

108. Because the August 4, 2022 hearing violated due process, the order arising therefrom must be vacated.

<u>Second Issue</u>

Did the trial court err in rendering the August 9, 2022 order that granted Appellees' amended motion to add punitive damages without finding a reasonable basis exists for such damages after an insufficient evidentiary submission or proffer was made, in violation of § 768.72(1), Fla. Stat. and Rule 1.190(f), Fla.R.Civ.P.?

109. Because the mere claim for punitive damages during a jury trial is highly suggestive of wrongdoing before deliberations begin, the movant must satisfy pleading and evidentiary thresholds. <u>TRG Desert Inn Venture, Ltd. v. Berezovsky</u>, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016). As noted above, under both § 768.72(1) and Rule 1.190(f), the movant must make a showing of evidence, or a proffer thereto, evincing a reasonable basis exists in the record for such damages to be recovered under the claims asserted. <u>Varnedore v. Copeland</u>, 210 So. 3d 741, 747-48 (Fla. 5th DCA 2017). Upon submission, the focus shifts to the court's preliminary determination of the sufficiency of that showing.

110. Presently two conflicts among the appellate circuits exist regarding (i) the extent to which a preliminary determination must expound on the evidence presented and (ii) the level of proof such findings must bear so as to justify the decision to permit amendment. As to the former, the question is whether the preliminary

determination requires the trial court to "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" or in contrast, whether a trial court's mere statement that such a showing has been made is sufficient. *Compare* Varnedore v. Copeland, 210 So.3d 741, 747–48 (Fla. 5th DCA 2017) with Watt v. Lo, 302 So. 3d 1021, 1024 (Fla. 1st DCA 2020).

111. As to the second conflict, this Court, less than a month ago, reversed a non-final order granting leave to add punitive damages for failure to make the evidentiary threshold under any standard. *See* Mercer v. Saddle Creek Transportation, Inc., __ So.3d __, 2024 WL 3212265 at *3 (Fla. 6th DCA June 28, 2024). Specifically, this Court recognized an inter-circuit conflict on the "quantum of proof a plaintiff must offer to amend its pleading to add punitive damages." Id. at *3, fn.1. Regarding the level of proof necessary for a favorable preliminary determination, the more deferential 'light most favorable to the movant' standard has been articulated in Federal Insurance Co. v. Perlmutter, 376 So.3d 24, 34 (Fla. 4TH DCA 2023) (*en banc*) and 701 Palafox, LLC v. Scuba Shack, Inc., 367 S.3d 624, 627 (Fla. 1st DCA 2023) while the trial standard of clear and convincing evidence

is said to be appropriate in Cook v. Fla. Peninsula Ins. Co., 371 So.3d 948, 961-62 (Fla. 5th DCA 2023) and supported by E. Bay NC, LLC v. Reddish, 306 So. 3d 1225, 1227 (Fla. 2d DCA 2020).

112. The Florida Supreme Court has not resolved the conflicts.

113. Significant for present purposes is that, as with the movant in *Mercer*, Appellees failed to furnish the required evidentiary basis. This failure was then followed by the trial court's own failure to make any recognizable evidentiary determination.

II.A. *Proffer*

114. Unlike the original motion, Appellees' Augst 2, 2022 amended motion concretely identified the evidence they intend to relied on in establishing the elements of defamation by implication and defamation *per se*.

115. Appellees' counsel discussed documents received by two of the Appellees and third parties. It is unclear when the three binder was provided to the court or counsel for Appellant, but nothing suggests that it was more than 20 days from the hearing. Varnedore v. Copeland, 210 So. 3d 741, 747-48 (Fla. 5th DCA 2017) ("We conclude that the term "proffer" for purposes of Rule 1.90(f) refers only to

timely filed documents and excludes oral representations of additional evidence made during the hearing. Thus, the trial court cannot properly consider plaintiff's counsel's oral or other proffers of evidence which are first presented during the hearing.”).

116. A formal proffer was not made at the hearing, although counsel for Appellee generally referred to the documents as meeting the elements of defamation. Some of the remarks made by trial counsel for Appellees are clearly inadmissible. Griffin v. State, 344 So. 3d 623, 625 (Fla. 2d DCA 2022) (“Unsworn statements made by counsel cannot be considered as evidence.”). The record submitted did not affirmatively show how Appellant’s conduct defamed each Appellee save Appellee Kemp. Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc., 987 So. 2d 706, 706 (Fla. 4th DCA 2008).

117. Nevertheless, Appellees argument was accepted by the Court as a § 768.72 evidentiary proffer without specific allegations of the proposed complaint being identified and linked to the evidence proffered.

II.B. *August 9, 2022 Order*

118. When granting a motion to add punitive damages, trial court must articulate that an identifiable factual basis exists in the record

or has been proffered in order for that decision to survive the challenge of *de novo* review. Walt Disney World Co. v. Noordhoek, 672 So. 2d 98, 100 (Fla. 3d DCA 1996). At a minimum, 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). Without such findings, *de novo* review is frustrated.

119. In its August 9, 2022 order, the trial court only stated that motion is granted, nothing more. Such a ruling deprives a reviewing court insight into whether the trial court weighed the evidence presented according to the standard that the subject claims demand.

120. That is, under either a deferential or more exacting standard for the quantum of evidence, the preliminary determination must identify admissible evidence proffered by the plaintiff and/or articulate on the record how the evidence supports a reasonable basis to believe that recovery of punitive damages is warranted. Petri Positive Pest Control, Inc. v. CCM Condominium Ass'n, Inc., 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015) (trial court must make "affirmative findings" showing a reasonable evidentiary basis exists in record before punitive damages permitted).

121. The complete absence of specificity in the subject order compels a conclusion that the required analysis regarding pleading and evidentiary showing was not made. Bistline, 215 So. 3d at 609–10 (reversing order granting motion to add punitive damages because "it was clear from the order as a whole that the court had improperly accepted the plaintiff's allegations as true and granted the motion on that basis."); Tilton v. Wrobel, 198 So. 3d 909, 910–11 (Fla. 4th DCA 2016) (reversing order granting motion to add punitive damages because trial court apparently concluded that the complaint's allegations of defamation ensured entitlement as a matter of law).

II.C. Reversal required

122. Recent cases involving reversals show that the August 9, 2023 order and the final judgment deserve the same fate. 701 Palafox, LLC v. Scuba Shack, Inc., 367 So. 3d 624, 628 (Fla. 1st DCA 2023) (movant's failure "to meet its burden to make the reasonable showing necessary to entitle it to assert a claim for punitive damages under section 768.72" required reversal of order granting motion); Cable News Network, Inc. v. Black, _3d _, 2023 WL 6854487 (Fla. 4th DCA October 18, 2023) (in a defamation case, movant's failure "to

proffer a reasonable basis to establish actual malice" limits recovery to "actual injury" and order granting leave to add punitive damages reversed); KIS Grp., LLC v. Moquin, 263 So. 3d 63, 65–66 (Fla. 4th DCA 2019) (patient's proffered evidence provided deemed insufficient as a reasonable basis for recovery of punitive damages).

Third Issue

Did the trial court fail to meet its gatekeeping duties at trial and thereafter in permitting separate awards of punitive damages for Appellees Bentley and Patrone, Kemp & Bentley, P.A. when clear and convincing evidence in support thereof were wholly absent?

123. Apart from the fact the final judgment awarding punitive damages arose from obvious failures in the statutory pretrial procedure, numerous errorsduring thereafter lead to the same result.

124. Entitlement to such damages must be proved by clear and convincing evidence must exist the record in order to withstand the challenge of de novo review. *See* § 768.725. Failure in record support is fatal.

125. The trial court's gatekeeping function requires elimination of matters to which the evidentiary standard has not been met. Wolfson v. Kirk, 273 So.2d 774, 778 (Fla. 4th DCA 1973) ("Where the court finds that a communication could not possibly have a defamatory or harmful effect, the court is justified in either dismissing the

complaint for failure to state a cause of action or in granting a directed verdict at the proof stage."

126. Here, a defending party is entitled to bifurcate the trial and to defer presentation of evidence relating to the amount of punitive damages until after the jury determines entitlement W.R. Grace & Company—Conn. v. Waters, 638 So. 2d 502 (Fla. 1994). While filing such a motion near trial date is ill-advised, its immediate denial suggests that did not weigh the issue regarding Appellant's document compliance, some of which Appellees acknowledged.

127. A thorough review of the trial record reveals no evidence exists that "a defamatory effect" could be seen based on scant references to and nothing about the corporate Appellee. The court should have granted a direct verdict. Byrd v. Hustler Magazine, 433 So. 2d 593, 595 (Fla. 4th DCA 1983).

128. Unlike the myriads of evidence admitted with respect to references to, depictions of and statements about Appellee Kemp, the record is completely devoid of competent substantial evidence, much less clear and convincing evidence, in support of any of the listed "Statements" to which are said been drawn against Appellee Bentley and the corporate Appellee. Nor did any witness connect the Appellee

Kemp and Bentley in any manner which could be said that one or both adopted the statements and actions of the other.

129. By the verdict itself, the film and its packaging were the items the jury was asked to assess the defamation by implication claims made by Appellee Bentley and the corporate Appellee.

130. The name of the corporate Appellee is not heard in any of the videos or its name depicted. Similarly, only the pseudonym for Appellee Bentley is mentioned in the DVD and her photograph appears without attribution in its jacket. Nothing about the photograph of Appellee Bentley implies she did anything.

131. Her trial testimony failed to show how she is linked by implication to tax evasion when only her photograph and the description of the value of home are mentioned. No conduct is ascribed to her. Her likeness, pseudonym or photograph do not appear on the postcards, nor do they appear within the December 1, 2021 letter or any of its accompanying materials save a her name in a table of attorneys and their law firms having been paid by Appellant's mother. The only time the word "Patrone" is found anywhere in the evidence is that obscure table.

132. Having no evidence statements that Appellee Bentley 'assisted

third parties in committing felonious tax fraud,' 'participated in a felonious tax fraud conspiracy,' 'facilitated and enjoyed the fruits of a theft of any estate,' 'facilitated and assisted third parties in the crime of making false representations to the IRS' and failed to maintain candor before a tribunal,' her claims lack competent substantial evidence, without which she cannot show the required malice. Concomitantly, the heightened evidentiary threshold for punitive damages was not met.

133. Likewise, no testimony or documentary evidence exists as to any aspect of the corporate Appellee's defamation claims, given its name is never spoken and thus no basis exists for its claim of punitive damages. with the record being devoid that the corporate Appellee is even identified sufficiently to be considered to suffer a negative implication by omission of facts or juxtaposition of true facts shaped against adverse conduct, under no view of the record could the threshold of clear and convincing evidence be said to have been met.

134. For these claims, a directed verdict should have been entered.

135. Reversal is required here as to said awards.

<u>Fourth Issue</u>

Did the trial court err in not granting Appellant's timely remittitur regarding the sums of punitive damages awarded when the same are clearly excessive?

136. Appellees asked the jury to resolve Appellees' separate damages as nominal at $1 each and instead award each $500, 000 in punitive damages. The former type of damages do not have caps while the latter do under § 768.73(1)(a)2, which is $500, 000. Because neither the jury instructions nor the verdict requested that the jury to determine whether Appellant's ill will in making the videos, letter and postcards in fact harmed any of the appellees, the suspension of said caps under § 768.73(1)(c) was not triggered.

137. Consequently, any award granted under § 768.73(1)(a) is subject to review for excessiveness, pursuant to the Due Process Clause under Fourteenth Amendment of the U.S. Constitution, which prohibits "grossly excessive" punishment in civil cases. <u>R.J. Reynolds Tobacco Co. v. Townsend</u>, 90 So.3d 307, 312–13 (Fla. 1st DCA 2012). Such review occurs even if the trial court as here instructed the jury not to consider Appellant's net worth in awarding punitive damages.

138. While the purpose of punitive damages bears both retribution and deterrence goals, an award of punitive damages that bankrupts

or financially devastates the defendant is unconstitutionally excessive. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2661 (2008); Arab Termite & Pest Control v. Jenkins, 409 So.2d 1039, 1043 (Fla. 1982) ("Punitive damages should be painful enough to provide some retribution and deterrence but should not be allowed to destroy the defendant.").

139. A three-part analysis is employed in evaluating such awards:

(1) the degree of reprehensibility of the defendant's misconduct;
(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
(3) the difference between the punitive damage awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1264 (Fla. 2006).

140. Defamation *per se* sees reprehensibility "at its highest." Lanwood Medical Center, Inc. 43 So.3d 72,729 (Fla. 1st DCA 2010). This factor favors Appellees.

141. Next, the disparity between losses sustained versus the sums awarded clearly weighs in favor of Appellant, given that Appellees each requested and received nominal damages in the sum of $1 while two punitive damages awards of $500, 000 plus the single awards of $250, 000 and $50, 000 were leveled against Appellant. These awards grossly dwarf the 'actual harm done' to any of the appellees. TXO

Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

142. Thirdly, a comparison of similar cases favors Appellant. As long as fifty years ago, 500:1 proportionality was deemed excessive in a defamation case, wherein a sister court wrote in reversing the judgment:

When we consider, under the factual situation of this case, however, the relationship of the $5,000 punitive damages awarded to the $1 nominal damages, ... we come to the inescapable conclusion that the $5,000 award of punitive damages against the employer is so grossly excessive as to shock the judicial conscience and indicates that the jury was unduly influenced by passion or prejudice or labored under a misconception of the law.

Elyria-Lorain Broadcasting Co. v. National Communications Industries, Inc., 300 So.2d 716, 719 (Fla. 1st DCA 1974).

143. Other awards in defamation cases indicate the amounts are incontrovertibly outliers. Lipsig v. Ramlawi, 760 So.2d 170 (Fla. 3d DCA 2000) ($525, 000 in punitive damages deemed excessive relative to $175, 00 in actual damages); Hockensmith v. Waxler, 524 So.2d 714, 715 (Fla. 2d DCA 1988) (award of $250, 000 in punitive damages deemed excessive relative to $67, 400 net worth of defendant); *see also* Phillips L. Firm, PA. v. Stubbs, 2023 Fla. Cir. LEXIS 2324 (Fla.

14th Cir. November 16, 2023) (law firm awarded $3, 500 in punitive damages relative to nominal damages).

144. The trial court failed to engage in any evaluation of the exorbitant sums awarded and abused its discretion in refusing Appellant's timely remittitur. Remittitur "is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence." Platinum Properties Investor Network, Inc. v. v. Sells, 2023 WL 7144676 (S.D. Fla. September 18, 2023), quoting Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1266 (11th Cir. 2008).

145. Should this court deem that August 9, 2022 order valid, then under the circumstances presented a remittitur on punitive damages. Smith v. Telophase Nat. Cremation Soc., Inc., 471 So. 163, 170 (Fla. 5th DCA 1985) (remittitur on punitive damages where only was that "the jury's award was excessive.").

Fifth Issue

Did the trial court err in submitting jury instructions and a verdict form which as worded likely confused the jury about its role in making determinations for each Appellee independently by repeating claims associated with Appellee Kemp when no evidence of such language in the packaging and video content was presented at trial regarding Appellees Bentley and the corporate Appellee?

146. Jury instructions and or verdict forms which are suggestive of an answer render final judgments built thereon subject to fatal collapse. Allstate Ins. Co. v. Vanater, 297 So.2d 293, 295 (Fla.1974).

147. In closing argument, counsel for Appellees said Appellee Bentley suffered the same as Appellee Bentley.

148. The jury instruction "issues on claim against Smith" lumped the claims of the Plaintiffs as well as the statements as to the Plaintiffs." As such, any statement made against Appellee Kemp was treated as against all. Appellant stated an affirmative defense against such allegations but the same was not formulated into an instruction.

149. As to Appellee Bentely and the corporate defendant, the jury instructions and verdict form ask the jury to determine whether *the film's* questioned juxtaposition links each of these Appellees to the alleged tax evasion of Appellant's mother including the videos, the packaging of the DVD, the December 1, 2021 letter and postcards, all of which contain several direct accusations about Appellee Kemp

which correspond with what can be implied about tax evasion: obfuscation and deception.

150. However, no such accusations or even statements of conduct of any kind are directed toward or can be inferred about Appellees Bently and the law firm. Yet, the uniformity of the verdict form allowed the jury to assume all of the evidence was applicable to each claimant.

151. As a result, the jury found Appellant both negligent and malicious as to all Appellees, which speaks of confusion. As noted above, no evidence existed that Appellee Bentley made any statements, was involved in anything have to do with the estate of Appellant's parents. McPhee v. Paul Revere Life Ins. Co., 883 So.2d 364, 368 (Fla. 4th DCA 2004) ("[T]he test for reversible error arising from an erroneous jury instruction is not whether the instruction misled, but only whether it reasonably might have misled the jury.").

152. By not conforming the verdict form to the issue of defamation by implication as to only evidence pertaining to each claimant, the trial court erred in so instructing the jury. Jacobs v. Westgate, 766 So.2d 1175, 1180 (Fla. 3d DCA 2000) (instructions tending to

confuse rather than enlighten is cause for reversal decision reached may not resulted).

Sixth issue

Did the trial court violate due process in granting without notice Appellee's motion for contempt on the first day of trial?

153. On the first day of trial, Appellees' motion for contempt was heard without notice and was granted, which afforded Appellees' requested jury instruction blocking consideration of Appellant's net worth due to discovery noncompliance. Bresch v. Henderson, 761 So.2d 449, 451 (Fla. 2d DCA 2000) (noting civil contempt hearing requires due process). Given that Appellant had submitted certificates of compliance and Appellees' acknowledgement of partial compliance in their own motion, granting said motion during those circumstances is indicating of an improvident decision.

154. The instruction awarded assured that the jury would dismiss any of Appellant's arguments as it described Appellant's conduct as "wrongfully concealed." Humana Health Insurance Co. of Florida v. Chipers, 892 So.2d 492, 495-6 (Fla. 4th DCA 2001) ("the jury instructions invaded the province of the jury by characterizing the

conduct of the defendants.”). An alternative instruction could have simply said that the jury is not consider Appellant’s ability to pay punitive damages without stating that Appellant “wrongfully concealed” information.

CONCLUSION

The final judgment awarding punitive damages must be reversed for (i) failing to meet the procedural and substantive requirements of § 768.78 and Rule 1.190(f), (ii) excessiveness in their amounts under the Due Process Clause of the 14th Amendment, (iv) want of clear and convincing evidence regarding Appellees Bentley and the corporate defendant, (v) the trial court grant motions to bifurcate, direct verdicts and remitter and (vi) submitting t the jury instructions and a verdict form that were confusing and conflated the evidence for Appellee Kemp to be improperly used in support of the claims of Appellee Bentley and the corporate Appellee.

July 15, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief will be furnished by Florida Courts E-Filing Portal System which will send notice of Electronic Filing and, pursuant to Supreme Court of Florida Administrative Order No.: AOSC13-49, will complete service of the foregoing as required by Rule 2.516 of the Florida Rules of General Practice and Judicial Administration on this 15th day of July, 2024 to:

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I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief comports with the font requirements (Bookman Old Style 14-pt)and does not exceeds the word count and page limit requirements of Rule 9.045(b) and (e) of the Florida Rules of Appellate Procedure.

July 15, 2024

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