

Free CLE Webinar:

Punitive damages: An update of recent cases and the strategy to avoid the current intra-district conflict with Fla. Stat. §768.72's pleading standard

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**Evidentiary standards for pleading of punitive damages by Florida district court (pending the Florida Supreme Court's decision in *Perlmutter v. Federal Insurance Co.*, Case No. SC2024-0058)**

District Court	Evidentiary Standard – what is a reasonable showing that provides a reasonable basis to recover PD?	Citation	Additional Comments
First District	<p>Plaintiff must show a legal basis for the recovery of punitive damages <i>by any interpretation of the evidence favorable to the plaintiff.</i></p> <p>Implicitly does not require a preliminary determination that a reasonable jury could find by clear and convincing evidence that punitive damages are warranted.</p>	<p><i>701 Palafox, LLC v. Scuba Shack, Inc.</i> 367 So. 3d 624 (Fla. 1st DCA 2023) (citing <i>Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.</i>, 16 So. 3d 1006, 1009 (Fla. 1st DCA 2009)).</p>	<p>Has not addressed whether Defendant may file an evidentiary counter-proffer to refute Plaintiff's proffer</p>
Second District	<p>"It is the Plaintiff's burden to submit evidence and make a reasonable showing that establishes a reasonable basis for recovering punitive damages." (<i>Deaterly</i>)</p> <p>"A 'reasonable basis for recovery' is a showing that defendant was 'personally guilty of intentional misconduct or gross negligence.'" (<i>Wiendl</i>)</p> <p>Expressly holds that a claimant is <i>not</i> required to prove entitlement to punitive damages by clear and convincing evidence at the pleading stage (concluding that "such a result would circumvent the statute and impair a claimant's ability to plead punitive damages"). (<i>Deaterly</i>)</p>	<p><i>Deaterly v. Jacobson</i>, 313 So. 3d 798 (Fla. 2d DCA 2021)</p> <p><i>Wiendl v. Wiendl</i>, 371 So. 3d 964 (Fla. 2d DCA 2023) (citing <i>Deaterly</i>)</p>	<p>Implicitly does not allow a counterproffer</p> <p>(Perlmutter's juris-dictional brief filed with Florida Supreme Court states "neither Deaterly nor Wendl allow for the nonmovant to present a counterproffer of evidence to refute the movant's proffer," but I did not see any explicit language prohibiting a counterproffer in those cases)</p> <p>Judge Warner's dissent in <i>Perlmutter</i> "gleans" from the Second and Fifth DCA cases that they "assess plaintiff's proffer of evidence, not that of defendants, construing it liberally in favor of the amendment."</p>

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Third District	<p>Plaintiff must show a reasonable evidentiary basis for the recovery of punitive damages with the record/proffered evidence being viewed in a light most favorable to plaintiff and with said evidence being accepted as true (<i>Gattorno citing Est. of Blakely by and through Wilson v. Stetson Univ., Inc.</i>, 355 So. 3d 476, 481 (Fla. 5th DCA 2022))</p> <p>However, “the trial court must weigh both parties’ showings” when determining whether the evidence or proffer sufficiently establishes a reasonable evidentiary basis to recover punitive damages. (<i>Manheimer citing Marder v. Mueller</i>, 358 So. 3d 1242, 1246 n.1 (Fla. 4th DCA 2023))</p> <ul style="list-style-type: none"> <li>- The requirement to weigh both parties’ proffers is at odds with accepting Plaintiff’s record or proffered evidence as true</li> </ul> <p>“A trial court’s inquiry under section 768.72 is more intensive than at summary judgment because the statute ‘necessarily requires the court to weigh the evidence and act as a fact finder.’” (<i>Manheimer citing Napleton’s N. Palm Auto Park, Inc. v. Agosto</i>, 364 So. 3d 1103, 1105 (Fla. 4th DCA 2023))</p> <p>Expressly holds that a claimant is <i>not</i> required to prove entitlement to punitive damages by clear and convincing evidence at the pleading stage (concluding that “such a result would circumvent the statute and impair a claimant’s ability to plead punitive damages”). (<i>Gattorno citing Deaterly</i>)</p>	<p><i>Gattorno v. Souto</i>, No. 3D23-0639 (Fla. 3d DCA Mar. 27, 2024) (not final)</p> <p><i>Manheimer v. Fla. Power &amp; Light Co.</i>, 48 Fla. L. Weekly D 1495, No. 3D22-1534 (Aug. 2, 2023)</p>	<p>Counterproffers are permitted</p> <p>Proffer of evidence (i.e. a representation of evidence as opposed to the actual evidence) is permitted</p> <p>Inadmissible evidence may be considered and weighed by the trial court</p> <p>“While the trial court can certainly consider this aspect (testimony that includes inadmissible hearsay) in weighing the parties’ proffer in support of their respective positions, a proffer of evidence supporting a punitive damages claim “is merely a representation of what evidence the [party] proposes to present and is not actual evidence.” (<i>Gattorno</i> n2 citing <i>Est. of Despain v. Avante Grp., Inc.</i>, 900 So. 2d 637, 644 (Fla. 5th DCA 2005) (quotation omitted)).</p> <p>“By allowing a punitive damages claimant to satisfy his initial burden by means of a proffer, section 768.72 contemplates that a claimant might obtain admissible evidence or cure existing admissibility issues through subsequent discovery.” (<i>Gattorno</i> citing <i>Cook v. Florida Peninsula Ins. Co.</i>, 371</p>

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			So. 3d 958, 961 (Fla. 5th DCA 2023))
Fourth District	<p>“To support the motion to amend, the movant’s pretrial evidentiary showing (<b><i>sworn statements and authenticated records</i></b>) must ‘provide the court with a reasonable evidentiary basis for punitive damages.’” <i>Perlmutter</i>, 376 at 33. (emphasis supplied).</p> <p>“[A] ‘reasonable showing by evidence’ of ‘a reasonable basis for punitive damages’ means the movant must demonstrate the movant will be able to produce competent substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent conduct that was outrageous and reprehensible enough to merit punishment.”</p> <p>Trial court is further required to “make a preliminary determination of whether a reasonable jury, when viewing the totality of proffered evidence in the light most favorable to the movant, <b><i>could find by clear and convincing evidence</i></b> that punitive damages are warranted. (<i>Perlmutter</i>, 376 So. 3d at 34)</p> <p>Trial court must consider the evidence presented by all parties and give the movant the benefit of all reasonable inferences while disallowing the movant to stack inferences. (<i>Perlmutter</i>, 376 So. 3d at 34 citing <i>Varnedore v. Copeland</i>, 210 So. 3d 741, 747 (Fla. 5th DCA 2017)) (noting movant’s counsel is free to argue inferences that may be drawn from the timely filed evidence and proffers).</p> <p>Trial court may not weigh evidence or witness credibility (<i>Perlmutter</i>, 376 So. 3d at 34) (earlier Fourth District</p>	<p><i>Fed. Ins. Co. v. Perlmutter</i>, 376 So. 3d 24 (Fla. 4th DCA 2023) (<i>en banc</i>)</p>	<p>Clear and convincing evidence is credible, distinctly remembered, precise and explicit, lacking in confusion, and produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth.</p> <p><i>Westinghouse Electric Corp. v. Shuler Bros., Inc.</i>, 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (“Clear and convincing evidence requires that the evidence must be found to be <b><i>credible</i></b>; the facts to which the witnesses testify must be <b><i>distinctly remembered</i></b>; the testimony must be <b><i>precise and explicit</i></b> and the witnesses must be <b><i>lacking in confusion</i></b> as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a <b><i>firm belief or conviction, without hesitancy, as to the truth</i></b> of the allegations sought to be established).</p> <p>Even without the clear and convincing evidence requirement, <i>Perlmutter</i> requires “competent substantial evidence” (<b><i>the evidentiary standard to survive directed verdict</i></b>) in the form of sworn statements and authenticated records to</p>

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	<p>opinions required weighing of evidence).</p> <p>“The clear and convincing evidence standard can be met when evidence is inconsistent or conflicting, but the standard cannot be met when the evidence is ambiguous.” <i>Perlmutter</i>, n7. “The opposing party's ability to present evidence that inferentially conflicts with the movant's evidence is not sufficient to defeat a motion to amend. However, an opposing party's evidence may demonstrate that the movant's inferences from the evidence are ambiguous or erroneous.” <i>Perlmutter</i>, n8.</p>		<p>justify leave to assert a punitive damages claim.</p> <p>“The term 'proffer' for purposes of rule 1.190(f) refers only to timely filed documents and ex-cludes oral representations of additional evidence made during the hearing.” <i>Perlmutter</i>, n. 6 (citing <i>Varnedore</i>; <i>WG Evergreen Woods SH, LLC v. Fares</i>, 207 So. 3d 993, 996 (Fla. 5th DCA 2016) (<b>noting the similarity between rules 1.190(f) and 1.510(c)</b>).</p> <p>By limiting the definition of “proffer” to documents timely filed in the record, the <i>Perlmutter</i> majority has essentially written the phrase “evidence ... proffered by claimant” out of Fla. Stat. §768.72 because trial courts are only allowed to consider “evidence in the record.”</p> <p>One final note: If the movant is pursuing punitive damages based upon gross negligence, <i>Perlmutter</i> appears to require evidence showing that the defendant “specifically intended to engage in ... grossly negligent conduct.” However, Florida law is well-settled that grossly negligent defendants act without intent, so I believe <i>Perlmutter</i> meant to require evidence that defendant</p>

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			“knowingly” engaged in grossly negligent conduct.
Fifth District	<p>“When deciding if the plaintiff has made the required "reasonable showing" of a "reasonable basis" for recovering punitive damages, the trial court makes a legal determination that is "similar to the standard that is applied to determine whether a complaint states a cause of action.” (<i>Werner Enters.</i>, 362 So. 3d at 282)</p> <p>The court asks "whether a reasonable jury could infer" from the proffer that the defendant's conduct satisfies the statutory criteria for punitive damages.” (<i>Id.</i> citing <i>Varnedore</i>, 210 So. 3d 741 at, 747. “When completing this task, the court views the proffer in a light most favorable to the plaintiff.” <i>Id.</i></p> <p>“At the leave to amend stage, it is not for us to definitively forecast which view [of the evidence] a jury will take, but only to determine if there is a reasonable view of the evidence that supports the plaintiff's position.” <i>Id.</i> at 284.</p> <p>“Trial court is required to view the record evidence and the proffer in a light most favorable to [movant] and accept it as true.” <i>Cook</i>, 371 So. 3d at 964.</p>	<p><i>Werner Enters. v. Mendez</i>, 362 So. 3d 378 (Fla. 5th DCA 2023)</p> <p><i>Cook v. Florida Peninsula Ins. Co.</i>, 371 So. 3d 958, 961 (Fla. 5th DCA 2023)</p>	<p>“Proffer of evidence” (i.e. what evidence the party proposes to present) and not actual evidence is sufficient to meet the movant's initial burden (“By allowing a punitive damages claimant to satisfy his initial burden by means of a proffer, §768.72 contemplates that a claimant might obtain admissible evidence or cure existing admissibility issues through subsequent discovery.”) (<i>Cook v. Florida Peninsula Ins. Co.</i>, 371 So. 3d 958, 961 (Fla. 5th DCA 2023))</p>
Sixth District	Not yet addressed		