

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**CABLE NEWS NETWORK, INC. (“CNN”), ELIZABETH COHEN, and
JOHN BONIFIELD,**
Appellants,

v.

MICHAEL D. BLACK, MD, MBA,
Appellee.

No. 4D2022-1674

[October 18, 2023]

Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard Oftedal, Senior Judge; L.T. Case No. 502016CA001517.

Charles D. Tobin and Paul J. Safier of Ballard Spahr LLP, Washington, DC, and L. Martin Reeder, Jr. of Atherton Galardi Mullen & Reeder PLLC, West Palm Beach, for appellants.

Thomas A. Clare, Elizabeth M. Locke, Joseph R. Oliveri, Dustin A. Pusch, Shannon B. Timmann and Jered T. Ede of Clare Locke LLP, Alexandria, VA, for appellee.

KUNTZ, J.

CNN, Elizabeth Cohen, and John Bonifield (collectively, “CNN”) appeal from the circuit court’s order granting Dr. Michael D. Black’s motion for leave to add a punitive damages claim to his underlying defamation claim. Dr. Black, the former head of the pediatric open-heart surgery program at St. Mary’s Medical Center, based his defamation claim on CNN’s reporting about the pediatric open-heart surgery program. His punitive damages claim is based on a small portion of the reports at issue—the analysis of the surgical program’s mortality rate in comparison to the national average. He alleges CNN’s analysis, although objectively accurate, was misleading because it ignored various risk factors.

In Florida, “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.” § 768.72, Fla. Stat. (2021). And the United States Supreme Court has held that actual malice is required to recover punitive damages on a defamation claim against a media defendant. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Based on the statute and that controlling authority, Dr. Black was required to proffer evidence providing a reasonable basis that CNN published the reports with actual malice—knowledge of falsity or reckless disregard for probable falsity.

Because we conclude Dr. Black failed to support his claim for punitive damages with evidence providing a reasonable basis to conclude that CNN published the reports with actual malice, we reverse the circuit court’s order. We express no opinion on the viability of Dr. Black’s underlying defamation claim.

Background

i. The Initial Report

In June 2015, CNN published a digital article on the St. Mary’s surgical program, titled “Secret Deaths: CNN Uncovers High Surgical Death Rate for Children at a Florida Hospital.” The same day, CNN ran a news report, “The Hospital with a Serious Heart Problem,” on *Anderson Cooper 360*.

The CNN report included phrases like “the shocking numbers,” and assertions that St. Mary’s “keeps its death rate secret.” It also described its own unsuccessful efforts to obtain mortality figures from the hospital. CNN claimed it was “able to calculate [the program’s] death rate for open heart surgeries [from 2011 to 2013] as 12.5%, more than three times the national average of 3.3% cited by the Society for Thoracic Surgeons.” Independently, CNN determined that, in that time, “six infants died, and confirmed the deaths with parents of all six children.” CNN calculated this raw mortality rate by dividing the number of deaths by the number of surgeries.

On the issue of the death rate, the article quoted from St. Mary’s Chief Executive Officer, who wrote that CNN’s raw mortality data “does not give proper context for the complexity and severity of each case, which could potentially lead to providing misleading information to consumers.” St. Mary’s argued CNN should have used a risk-adjusted mortality rate which factored the risk profile of the patients and the complexity of each surgery.

CNN conducted interviews with parents whose children had died, or were severely disabled, after undergoing open-heart surgeries performed by Dr. Black at St. Mary’s. The article included graphic images of those

children undergoing treatment. Several parents claimed they had been misled regarding the surgeries' risks. One parent was quoted as saying, "[t]here is no room for institutions that are lying to families to get them to offer up their babies as sacrificial lambs."

CNN also reported that a well-respected pediatric heart doctor had submitted a letter to the Florida Department of Health detailing his concerns about St. Mary's surgical program. CNN discussed the findings of a report on the program prepared by the Cardiac Technical Advisory Panel (CTAP) for Florida's Children's Medical Services. CTAP concluded that St. Mary's had lacked the resources to perform vital tests and services for pediatric heart patients. One CTAP panel member also concluded the program was performing too few surgeries to develop the requisite level of competence and expertise. CTAP therefore recommended the hospital stop performing complex surgeries on children.

ii. St. Mary's Response

About a week after CNN's report, St. Mary's announced it would conduct a "comprehensive review" of the program and challenged CNN's "flawed analysis" which "mischaracterizes program performance." St. Mary's explained, "[t]o correct [CNN's] inaccurate and misleading claim about our program," the surgical program's risk-adjusted mortality rate "[f]or the four year period ending on June 30, 2014," was 5.3%. The hospital claimed that "there is no statistically significant difference in our program's [risk-adjusted] mortality rate from the national average"

The next day, CNN reported on St. Mary's press release in a digital story entitled "Hospital suspends elective heart surgeries on children after CNN investigation." The article noted that "St. Mary's continued to criticize the CNN report, saying that the mortality rate CNN calculated was 'exaggerated' and 'inaccurate'" because it was not "risk-adjusted." Additionally, on July 1, 2015, CNN published a follow-up report, detailing the difference between raw and risk-adjusted mortality rates and evaluating risk-adjusted mortality data which St. Mary's had released.

iii. The Lawsuit and Motion to Amend to Assert a Punitive Damages Claim

Dr. Black brought a defamation claim against CNN, and its reporters Elizabeth Cohen and John Bonifield. Later, he moved to amend his complaint to assert a claim for punitive damages under section 768.72, Florida Statutes (2021). The circuit court allowed Dr. Black to assert his punitive damages claim, presenting the only issue before this court.

Dr. Black's punitive damages claim is solely premised on CNN's statement in the article that it was "able to calculate the [surgical program's] death rate for open heart surgeries [from 2011 to 2013] as 12.5%, more than three times the national average of 3.3% cited by the Society for Thoracic Surgeons." CNN's calculated "death rate" for the St. Mary's surgical program, and the national average rate to which CNN compared St. Mary's rate, represent "raw mortality rates," which are calculated by dividing the number of deaths by the number of surgeries performed over a period. On the other hand, a "risk-adjusted mortality rate" is calculated by using algorithms that factor in the patients' risk profiles and the surgical procedures' complexity.

Dr. Black does not contest the objective accuracy of CNN's raw mortality rate calculation. Instead, he alleged CNN:

- "Knew and were repeatedly warned" that raw mortality rates are not a proper measure of a surgical program's performance. A program can properly be assessed only with risk-adjusted data;
- Deliberately disregarded substantial evidence that the surgical program's risk-adjusted mortality rate was "as expected";
- Intentionally avoided receiving further information confirming that the program's risk-adjusted mortality rate was not an outlier; and
- Intentionally omitted 2014 data to falsely inflate that figure.

Dr. Black alleged CNN excluded this information from its reporting to support a false claim that the surgical program's mortality figures were "shocking" or "alarming," and to falsely portray him "as a callous, incompetent, and dishonest surgeon responsible for the preventable deaths of many of his patients." In doing so, Dr. Black alleged that CNN

knowingly disregarded journalistic ethics to publish their “sensational” story in pursuit of financial gain and journalistic awards.

Dr. Black claimed that CNN knowingly used raw mortality rates instead of risk adjusted rates—despite having made the same mistake in a prior report two years earlier about the pediatric cardiac surgery program at the University of Kentucky. In the story about the Kentucky surgical program, CNN wrote that the program went “to great lengths to keep their pediatric heart surgery mortality rates a secret.” The Kentucky program later provided CNN with data showing that its raw mortality rate, from 2008 to 2012, was 5.8%. But when researching a follow-up story on the Kentucky program, an independent expert informed CNN that:

The mixture of operations performed at various pediatric cardiac surgery programs can vary substantially. Consequently, programmatic performance cannot be properly assessed by comparison of overall unadjusted rates of mortality.

The quality of care of a given program is best assessed by benchmarking specific risk adjusted outcomes to national aggregate data. Only then is it possible to truly assess the quality of care of a given program.

In an email about the Kentucky program, the independent expert wrote that “overall programmatic mortality without adjustment for case mix is essentially meaningless.”

Similarly, Dr. Black also presented evidence about another expert whom CNN had contacted a year before the St. Mary’s story. This expert explained:

There are a variety of things that can impact the data and whether the numbers are telling us if a certain hospital is truly a high or low performer. . . . [T]hose factors include the . . . [source of the data], case-mix, . . . [characteristics the patient brings into the operation, and, finally,] the correct statistics need to be performed to take into account the sample size or number of operations.

And a third expert wrote to CNN to explain that “[a]ccording to most knowledgeable experts, including the Society of Thoracic Surgeons, raw mortality data is misleading and inappropriate to report. Only statistically valid risk-adjusted data is appropriate.”

Dr. Black also relied on a letter from St. Mary's CEO to CNN that noted:

The Society of Thoracic Surgeons evaluates programs with a zero to three star ranking, where three stars is the top level. Only five percent of all programs received three stars; the Pediatric Cardiothoracic Surgery Program at St. Mary's received a two-star rating, along with nearly two-thirds of similar programs in the United States.

CNN did not include the Society of Thoracic Surgeons star rating in its report.¹

Finally, CNN acknowledged that, before publishing the article, it had obtained St. Mary's "volume data for 2014" from the State of Florida. And St. Mary's emailed CNN, claiming St. Mary's had experienced only one fatality in 2014. Emails sent within CNN show the CNN reporter asked CNN leadership whether the raw mortality rate should be changed to include the 2014 data. The reporter wrote:

We have a question for you: currently the story has the death rate for 2011-2013. Should we include 2014? Including 2014 would give a 10.6% death rate for the hospital rather than the 12.5% one for 2011-2013 . . .

The downside of including 2014 is we're not really sure there was only one death that year – St. Mary's says there was only one death, but they didn't answer our question about how they were defining death, which is crucial.

The upside of including 2014 is that it gives us more current data, and Tenet can't criticize us for ignoring 2014, when they had a better success rate.

¹ Dr. Black submitted a video recording of the CNN reporter and an unidentified individual. The CNN reporter refers to journalistic ethics as "all the nice cutesy ethics that used to get talked about in journalism school . . ." He also opines that journalism is "a business" and that news networks "gotta do what they've gotta do to make their money." The reporter is also shown discussing other topics such as his opinion about the Republican nominee for President of the United States. But the reporter does not appear to be discussing CNN's report about St. Mary's, so we do not believe the video to be relevant to this specific case.

CNN leadership responded, “I do NOT think we should change the denominator since the hospital has not been forthcoming and we don’t have the full data.”

iv. CNN’s Response in Opposition²

CNN’s response noted that a representative from St. Mary’s parent corporation declined to provide information before CNN published the report. CNN also cited the deposition of two Miami Children’s Hospital surgeons. One testified that, in his opinion, raw mortality data is “cleaner, it’s more accurate and it’s more honest than a manipulated dataset, which is what you have when you come up with adjustments by expected mortality.” The other testified that “if I’m looking at a . . . specific program’s mortality, I want to look at their raw mortality. It completely eliminates the possibility of a finger on the scale.”

Those two surgeons also testified about the two-star rating given to St. Mary’s by the Society of Thoracic Surgeons. One testified that “every cardiac surgeon in the state of Florida practicing at that time would have felt that the two-star rating presented an incomplete picture of the pediatric cardiac program at St. Mary’s” That surgeon also noted the Society of Thoracic Surgeons had discontinued its star-rating system in January 2020, after “concerns were raised by a number of congenital heart surgeons that the star rating alone was not an accurate and adequate indicator of programmatic quality”

v. The Circuit Court’s Order Allowing Dr. Black to Assert a Claim for Punitive Damages

After a hearing, the circuit court entered a detailed fifteen-page order allowing Dr. Black to amend his complaint to assert a claim for punitive damages against CNN.

This appeal followed.

² CNN’s response in opposition included evidence which the circuit court declined to consider. We find it unnecessary to consider whether the circuit court erred in that decision, but note CNN preserved its argument that the circuit court erred. We also note our recent decision concluding a circuit court may consider a defendant’s evidentiary submission. *Fed. Ins. Co. v. Perlmutter*, 4D2022-1558, 2023 WL 6278887, at *6 (Fla. 4th DCA Sept. 27, 2023) (citations omitted).

Appellate Analysis

There is only one legal issue in this appeal: whether the circuit court erred in allowing Dr. Black to amend his complaint to assert a punitive damages claim.

“Punitive damage amendments are different than traditional amendments in that section 768.72 has created a substantive legal right not to be subject to a punitive damage claim until the trial court rules that there is a reasonable evidentiary basis for punitive damages.” *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005) (citing *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995)). On appeal, we must determine whether Dr. Black made a reasonable showing that he is entitled to recover punitive damages under section 762.72, Florida Statutes (2021). *Id.* Our review of the circuit court’s order to that effect is de novo. *Id.*

To determine whether Dr. Black made a reasonable showing that he is entitled to recover punitive damages, we must first “understand the specific claim proposed by the plaintiff that may justify an award of punitive damages.” *Varnedore v. Copeland*, 210 So. 3d 741, 745 (Fla. 5th DCA 2017). The specific claim is Dr. Black’s defamation claim against CNN. In Florida, a prima facie defamation claim “has the following five elements: (1) publication; (2) falsity; (3) actor must act . . . 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).

But the issue in this appeal is limited to Dr. Black’s punitive damages claim. Under Florida common law, to recover punitive damages a defamation plaintiff must prove “express malice” or “common law malice”—that the defendant acted with a primary motive to injure the plaintiff personally. *See Lawnwood Med. Ctr., Inc. v. Sadow*, 43 So. 3d 710, 727 (Fla. 4th DCA 2010). Additionally, the United States Supreme Court has held that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” *Gertz*, 418 U.S. at 349. In other words, to recover punitive damages, the defamation plaintiff must also show actual malice. *Rabren v. Straigis*, 498 So. 2d 1362, 1363 (Fla. 2d DCA 1986) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

The dissent states that “malice was implied in law.” *See slip op.* at 14. But Dr. Black acknowledges in his brief that he had the burden to

establish actual malice, and that “[u]nder settled Florida law, a defamation-plaintiff is entitled to amend his complaint to assert punitive damages claims if he can [show the defamation-defendant] published their defamatory statements with actual malice.” For purposes of this appeal, we accept Dr. Black’s statement.³

So, at a minimum, to proceed with his punitive damages claim, Dr. Black had to proffer a reasonable evidentiary basis to establish actual malice. *Carroll v. TheStreet.com, Inc.*, 11-CV-81173, 2012 WL 13134547, at *4 (S.D. Fla. May 25, 2012) (“It is well-established that, regardless of the status of the plaintiff, presumed and punitive damages in a defamation action are recoverable only if liability is based on proof of actual malice, i.e. knowledge of falsity or reckless disregard for the truth.” (citing *Gertz*, 418 U.S. at 349)). If Dr. Black failed to proffer a reasonable evidentiary basis to establish actual malice, his recovery would remain limited to compensatory damages for his actual injury. *Gertz*, 418 U.S. at 350.

Dr. Black states that the “[St. Mary’s] surgical mortality rate was the *same* as the national average and that of all other Florida hospitals, according to [both] the State of Florida and the Society of Thoracic

³ The actual malice requirement in a defamation case was created by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, the Supreme Court imposed a requirement that public figures must establish actual malice to prevail on a defamation claim against a media company. See also *Dershowitz v. Cable News Network, Inc.*, 20-61872-CIV, 2023 WL 4851704, at *6 (S.D. Fla. Apr. 4, 2023) (discussing *New York Times*).

Ten years after *New York Times v. Sullivan*, the Court held that a lesser standard applies to defamation claims brought by private persons. *Gertz*, 418 U.S. at 343. But the Court still “restricted the situations in which private figures could recover for defamation against media defendants.” *McKee v. Cosby*, 139 S. Ct. 675, 677 (2019) (Thomas, J., dissenting). Specifically, the Court “held that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16 (1990) (citing *Gertz*, 418 U.S. at 350).

This appeal does not involve a public figure, and our review is limited to whether Dr. Black made a sufficient showing to recover punitive damages. On that point, in *Gertz*, the Court held that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” *Gertz*, 418 U.S. at 349-50.

The parties in this case do not challenge *Gertz*. Even if they did, we are powerless to change it.

Surgeons, . . . which . . . CNN . . . admit[s] is the ‘gold standard’ authority on [pediatric cardiac surgery] mortality rates [and program evaluation].”

Dr. Black claims that, before CNN published the article, CNN knew its claim that St. Mary’s “had a surgical mortality rate that was ‘more than three times the national average’—[was] false.”

At most, these facts show that CNN knew its mortality-rate analysis was subject to expert disagreement. Dr. Black failed to proffer reasonable evidence that CNN believed, or strongly suspected, its overall message was false.

The Eleventh Circuit’s opinion in *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1999), is instructive. But, before we consider *Levan*, we note that the plaintiff in *Levan* was deemed to be a public figure. *Id.* at 1238. As a result, the plaintiff in *Levan* was required to prove actual malice as an element of the defamation claim. *Id.* at 1239.

The *Levan* plaintiffs brought a defamation action against ABC based on a television segment which the plaintiffs claimed had falsely portrayed them “as unfairly taking advantage of investors in real estate limited partnerships.” *Id.* at 1232. They alleged ABC “falsely implied that Levan had refused any contact with ABC, and, therefore, that he had something to hide” and had “manipulated interviews and other footage to create the false impression that Levan had deliberately set out to defraud his investors.” *Id.* at 1238.

The Eleventh Circuit reversed the jury verdict for the plaintiffs, finding that ABC was “entitled to judgment as a matter of law” because “[t]he evidence, taken as a whole, was insufficient to establish . . . that [ABC] broadcast the story with actual malice.” *Id.* at 1232. The *Levan* court noted that, under Florida law:

[A] statement is not defamatory unless the “gist” or “sting” of the statement is defamatory. *See Smith v. Cuban Am. Nat’l Found.*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999). The gist of any statement within a publication or broadcast is found only by reference to the entire context. *See Byrd v. Hustler Mag[.], Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *See Masson v. New Yorker Mag[.], Inc.*, 501 U.S. 496, 517 (1991).

Id. at 1240.

So the *Levan* court decided it first needed to determine the “gist” of the story. *Id.* The court determined the “gist of the ABC report,” when viewed “as a whole,” was that “the limited partners got a raw deal, one so bad that a viewer would believe *Levan* must have known that the deal was unfair . . .” *Id.*

Even though the *Levan* court determined the “gist of the ABC report” was that the partners got a raw deal, the court concluded the plaintiffs had failed to establish actual malice because “the proof was insufficient to show that ABC ‘entertained serious doubts’ that the underlying thrust of the broadcast was true.” *Id.* at 1241.

Here, the circuit court apparently determined that the gist or sting of CNN’s publications was that St. Mary’s surgical program was “problematic due to poor surgical outcomes with Dr. Black as the lead surgeon.” *See id.* In the circuit court’s view, Dr. Black provided reasonable evidence that CNN either knew, or entertained serious doubt, that this overall message was false.

But as the *Levan* court held, “the gist” of the story “as a whole” must be determined. As CNN noted, its reporting did not consist only of its analysis of the St. Mary’s program’s mortality data. Instead, the record shows CNN consulted several additional sources before publishing the reports at issue, such as state reports, independent medical experts, parents of children who had been operated upon, and other sources, and CNN included data and opinions from these sources in its publications. These sources suggested the St. Mary’s surgical program lacked the resources to perform vital tests and services for pediatric heart patients; was performing too few surgeries to develop the requisite level of competence; and multiple pediatric cardiac surgeons had expressed serious concerns about babies having complex pediatric cardiac surgery at St. Mary’s. Furthermore, CNN included in its reporting the statement from St. Mary’s CEO that CNN’s raw mortality data was potentially misleading and did not give proper context for each case.

Dr. Black’s proffer focuses solely on CNN’s mortality rate analysis. He does not challenge CNN’s reliance on any other source in its reporting. And even limited to the use of the raw mortality rate, at most, CNN knew experts disagreed about the rate’s significance. For these reasons, Dr. Black’s proffer does not reflect facts from which a fact finder could find

that CNN had published its reports with actual malice or had entertained serious doubt that its reports' overall message was false.⁴

Here, Dr. Black did not proffer a reasonable evidentiary basis to establish actual malice. As a result, he is limited to recovery for actual injury. *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 360 (11th Cir. 1987) (“A private figure can obtain compensatory damages absent a showing of actual malice.”) (citing *Gertz*, 418 U.S. at 347)); *see also Miami Herald Publ’g Co. v. Ane*, 458 So. 2d 239, 241 (Fla. 1984) (“[T]here can be no recovery by a private defamation plaintiff of . . . punitive damages in the absence of a showing of [actual] malice.”). So the circuit court erred when it allowed him to amend his complaint to assert a claim for punitive damages.

Conclusion

Dr. Black’s evidentiary submission did not reflect facts from which a fact finder could find that CNN entertained a serious doubt that the overall message of its reporting was false. As a result, the circuit court’s order allowing Dr. Black to file an amended complaint asserting a punitive damages claim is reversed. The case is remanded for further proceedings.

Reversed and remanded.

CIKLIN, J., concurs.

WARNER, J., dissents with opinion.

WARNER, J., dissenting.

I dissent. I believe that the sole issue in this case involves proper pleading, not whether a jury will ultimately find whether the defendants are liable for punitive damages.

Section 768.72(1), Florida Statutes (2021), provides the requirements to plead punitive damages in this state:

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**

⁴ Based on our conclusion that Dr. Black failed to proffer a reasonable evidentiary basis to establish actual malice, we need not determine whether he proffered a reasonable evidentiary basis to establish express malice.

provide a reasonable basis for recovery of such damages. . . .

Id. (emphasis supplied). Section 768.72(2), Florida Statutes (2021), provides what must be proved to a jury to secure a punitive damage award:

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. As used in this section, the term:

(a) “Intentional misconduct” means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) “Gross negligence” means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

§ 768.72(2), Fla. Stat. (2021).

The Fifth District recently explained the standard imposed by the statute to amend a complaint to allege punitive damages:

“Punitive damage amendments are different than traditional amendments in that section 768.72 has created a substantive legal right not to be subject to a punitive damage claim until the trial court rules that there is a reasonable evidentiary basis for punitive damages.” *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005) (citation omitted). “[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.” *Est. of Despain [v. Avante Grp., Inc.]*, 900 So. 2d [637, 644–45 (Fla. 5th DCA 2005)]. “Within the framework of this standard, we will view the record evidence and the proffer in the light most favorable to [complainant] and accept it as true.” *Id.*

Cook v. Fla. Peninsula Ins. Co., --- So. 3d ---, 2023 WL 5156375, at *2 (Fla. 5th DCA Aug. 11, 2023) (first alteration in original).

Thus, to amend a complaint to add a punitive damages claim, the plaintiff must make a reasonable showing in the record that the defendant's conduct amounts to intentional misconduct or gross negligence, i.e., actual knowledge of the conduct's wrongfulness or conduct so reckless that it constitutes a conscious disregard for the rights of persons exposed to the conduct.

Instead of following the statute, the majority opines that to recover punitive damages in a defamation action, the plaintiff must prove actual or express malice, meaning ill-will against the plaintiff to recover punitive damages. But the requirements for a defamation plaintiff simply to plead, not prove, a cause of action for punitive damages in section 768.72 are consistent with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the United States Supreme Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

Even if the majority is correct and section 768.72 requires a showing of actual malice to state a claim for punitive damages, malice is implied where the publication is slanderous per se as in this case. The majority cites to *Lawnwood Medical Center, Inc. v. Sadow*, 43 So. 3d 710, 727 (Fla. 4th DCA 2010). But, like this case, *Lawnwood* was a case of defamation per se, thus malice was implied in law:

The wrongdoing here is slander per se. In *Miami Herald Publishing Company v. Ane*, 458 So. 2d 239, 241 (Fla. 1984), the court pointed out that "Florida's concern for individual reputation is reflected in article I, section 4, of the Florida Constitution." Florida has thus singled out defamation per se for special rules in civil tort litigation. In *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211, 217 (1887), the court held that statements defamatory per se are presumed harmful as a matter of law. In *Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591, 592 (1906), the court held that with defamation per se "the law presumes malice in their utterance" making it unnecessary to prove express malice. In *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 239 (1933), the court pointed out that the law's condemnation of defamation per se "has been affirmed from earliest times," explaining that "the injurious character" of defamation per se "is a *fact of such common*

notoriety established by the general consent of men, that the courts must of necessity take judicial notice of its harmful effect.” [e.s.] 146 So. at 236. *Layne* went on to hold:

“Malice . . . becomes therefore the gist of every actionable libel. Without malice, either express or implied by law, no tort could result from the publication of a defamatory statement concerning another, however untrue it might be. But the law always *conclusively implied* malice and damage when false and defamatory statements were deliberately published without excuse.” [e.s., c.o.]

Lawnwood, 43 So. 3d at 727 (quoting *Layne*, 146 So. 238–39).

Dr. Black’s evidentiary proffer met section 768.72’s requirements, as the proffer showed a reasonable basis for recovery of punitive damages. Despite CNN being told by *all* the experts whom it had consulted that the raw data death rate was not appropriate and was misleading, CNN used the raw data calculation and continually made that the centerpiece of their reporting. This was *not* a case where there was simply an expert disagreement about methodology. Although, as the majority has noted, two doctors who were deposed in this case opined that raw data death rate was useful, the record does not contain any evidence that CNN had consulted those two doctors before its reporting. Moreover, CNN offered their testimony as contrary evidence on the subject of punitive damages when section 768.72 does not provide for the presentation of contrary evidence in a mini trial of the punitive damage issue. Section 768.72 merely requires *the plaintiff* to make a showing of a reasonable basis to recover punitive damages.⁵

A review of the CNN articles shows that the “shocking” death rate was the main theme of their reporting. Thus, I also disagree with the majority as to the gist of the report. The report claimed that St. Mary’s statistical death rate was abnormally high, leading to the conclusion that Dr. Black was a bad or incompetent doctor. Dr. Black’s proffer supports the trial court’s conclusion on this aspect:

⁵ In this respect, I disagree with the recent opinion in *Federal Insurance Co. v. Perlmutter*, --- So. 3d ---, 2023 WL 6278887, at *6 (Fla. 4th DCA Sept. 27, 2023). Consideration of the defendant’s evidence opposing punitive damages goes to the merits of the punitive damage issue, not whether there is sufficient evidence to support the plaintiff’s allegations in its pleading.

In sum, [CNN's] publications painted [St. Mary's] program as problematic due to poor surgical outcomes with Dr. Black as the lead surgeon. Dr. Black has provided reasonable evidence showing that CNN's picture was painted using an improper comparison and without complete data.

CNN's reporting gave a false picture of Dr. Black's record, because the risk adjusted data showed that his program's death rate was in line with most other similar programs. This fact was known to CNN, both from its experts and from its prior reporting on another hospital. Nevertheless, CNN persisted in reporting the raw data death rate, even when confronted with that data's unreliability as a measure of the program's efficacy.

I also take issue with the majority's reliance on *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1999). That case did not involve a pleading issue, but an appellate review of all the evidence after a jury verdict. *Id.* at 1232. The *Levan* court concluded that the evidence was insufficient to prove actual malice on the part of the ABC producer in the defamation action filed by Levan. *Id.* at 1244. Moreover, ABC had consulted numerous experts and interviewed knowledgeable sources, all of whom *uniformly* expressed the opinion that the transactions at issue in the case were unfair to the limited partners. *Id.* at 1241. Contrast *Levan* to Dr. Black's proffer in this case, which showed that the experts whom CNN had consulted *uniformly* stated that the raw data death rate was misleading.

The majority cites to other parts of CNN's reporting which included other surgeons' concerns, claims that St. Mary's program performed too few surgeries to be competent, and the program did not have the resources to conduct proper tests. But none of this information would have made a difference without CNN having included the "shocking" raw death rate calculation which led every article. In other words, if Dr. Black had performed only one surgery a year, but the surgery had been successful, then the fact that he did not do more or did not have the resources to do other testing would not lead to the charges which CNN made in its article. The death rate led CNN—and its readers—to the conclusion that Dr. Black's program was seriously deficient even though CNN's reporting was based on the raw data death rate, which CNN knew, based upon its prior reporting and consultation with experts, was misleading and inappropriate.

Considered in the light most favorable to the plaintiff as we must, *see Cook*, 2023 WL 5156375, at *2, I agree with the trial court's analysis and would affirm the order granting Dr. Black's motion to assert a punitive

damages claim. The punitive damages claim may not survive summary judgment, or it may be rejected by the jury based upon the totality of the evidence. However, at this stage of the proceedings, I agree with the trial court that Dr. Black satisfied the requirements of section 768.72 by proffering evidence which provided a reasonable basis for punitive damages.

* * *

Not final until disposition of timely filed motion for rehearing.