IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D24-0056
LT NO. 18-596

SHARON DRESSER,

Appellant,

v.

HAL J. WEBB, HAL J. WEBB, P.A.,
PRUCO LIFE INSURANCE COMPANY,
BILZIN SUMBERG BAENA PRICE & AXELROD, LLP, NEAL SLAFSKY,
CPG CAPITAL, LLC, UNITED CAPITAL FINANCIAL ADVISERS, LLC,

Appellees.

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM AN AMENDED FINAL JUDGMENT
ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION

This appeal stems from a trial that resulted in a jury verdict awarding punitive damages on a defamation counterclaim. The purportedly defamatory statements that formed the basis for the counterclaim were made in a press release and news articles that faithfully reported the allegations in the underlying complaint against Appellees'/Counter-Plaintiffs'. Through a series of erroneous pretrial and trial rulings by two different judges, Appellant/Counter-Defendant was stripped of her ability to present a defense to Appellees' counterclaim.

First, the trial court erroneously granted summary judgment against Appellant on her primary claims, despite the existence of genuine issues of material fact. Then, the court compounded this error by extending the summary judgment on Appellant's primary claims to resolve the falsity element of Appellees' defamation counterclaim, going so far as to strike all but one of Appellant's affirmative defenses to Appellees' counterclaim, despite no summary judgment being leveled against those defenses.

Second, the trial court further tilted the field against Appellant at trial through several reversible errors: it directed verdict on Appellant's remaining affirmative defense, prevented the jury from seeing the full context of the allegedly defamatory publications through excessive redactions, and failed

to instruct the jury on statutorily-mandated punitive damages requirements affecting the damages caps.

The verdict, riddled with errors, would set a dangerous precedent if allowed to stand — effectively weaponizing punitive damages and defamation law against parties who dare speak publicly about their claims. This the Court should not countenance.

Reversal and remand for a new trial — one in which Appellant is afforded her constitutional right to present a full and fair defense of her First Amendment right to comment on pending litigation — is warranted.

STATEMENT OF THE CASE AND FACTS

I. HAL WEBB WAS THE NOMINAL BENEFICIARY OF A "KEYMAN" LIFE INSURANCE POLICY WHEN HIS EX-PARTNER COMMITED SUICIDE.[1]

In 2004, Steven Cantor and Hal Webb formed the Cantor & Webb, P.A. law firm. R:2728. In 2012, the partners executed a Shareholder's Agreement establishing the terms and conditions for their business relationship, including procedures for share redemption and succession planning should one of them resign or pass away. *Id*.

The firm paid for "keyman" insurance policies on each partner's lives, to financially safeguard the firm in the event of either partner's untimely death. R:2729–30. But, to satisfy certain tax considerations, the policies listed each other as beneficiaries, rather than the firm directly. *Id*.

In June 2016, Webb sought to amend the Shareholders' Agreement, allowing him to resign from the firm without facing the financial penalties stipulated in the agreement. R:2734. Webb drafted a proposed amendment that included an express provisions clarifying that if a shareholder left, the

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[1] Appellants challenge the trial court's underlying grant of summary judgment on their Second Amended Complaint and related defenses to the Appellees' counterclaim, which challenge requires this Court to view the facts in the light most favorable to Appellants as the non-moving parties below. *See* *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985) (courts "must draw every possible inference in favor of the party against whom a summary judgment is sought").

"keyman" policies would remain with, and be transferred to, the firm. R:2734–35,10646–47.

Cantor, in response, drafted a version that included additional language about termination "for cause" and sent it back to Webb. R:2734–35. This back-and-forth continued until an agreement was reached on paper (the "Amended Shareholders' Agreement"). R:10647–48.

Shortly thereafter, Webb resigned and joined the firm of Bilzin Sumberg. R:2735. In the weeks leading up to his departure, Webb prepared a "To Do" list for himself and shared it with the chief operating officer of Cantor & Webb, P.A., which list included an item to "[c]hange ownership of life insurance policies" — consistent with his obligations under the Amended Shareholders' Agreement. R:10735–36. Webb also requested the necessary forms from the insurer to change the ownership and beneficiary of the life insurance policy. R:10733 (letter from Prudential to Webb with instructions and forms on changing ownership).

But Webb delayed completing this crucial task on his "To Do" list. Despite leaving Cantor & Webb, P.A., Webb nonetheless remained the nominal beneficiary on Cantor's "keyman" policy that was intended to protect the firm.

In fact, Webb was aware that years prior, after the death of Cantor's mother, Cantor had attempted suicide. T:952.[2] At a conference that both attended (shortly after Webb resigned from the firm), Webb was approached by nearly 20 people who shared their concern about Cantor's mental well-being. T:954–57. Webb withheld these concerns from Cantor's wife, Sharon Dresser, while delaying the transfer of the "keyman" policy. T:958.

Days later, on October 11, 2016, Cantor committed suicide. *See* R:10647.

A mere three days later, Webb sought to expedite Cantor's death certificate by, among other things, pressuring Cantor's funeral home. R:2742–43. Indeed, Webb obtained Cantor's death certificate before Dresser. R:2744–45.

That same day, Webb submitted a claim for death benefits under the "keyman" policy, claiming to be the beneficiary and owner of the policy, as well as Cantor's "Business Associate." R:2743–44. Webb made several requests with the insurer to expedite proceed disbursement. R:2745.

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[2] The trial transcripts were transmitted in a PDF separate from the Record on Appeal. Citations shall be to the PDF pagination of the transcript record document.

II. WEBB NEGOTIATED A SETTLEMENT AGREEMENT WITH CANTOR'S FIRM AND A RELEASE OF INTEREST IN THE "KEYMAN" PROCEEDS.

Webb retained his firm, Bilzin Sumberg, to negotiate a release of the "keyman" proceeds from Dresser and to secure the purchase of the Cantor Group Law, P.A. On October 25, 2016, Webb and Bilzin sent Dresser a draft memorandum of understanding. R:2751.

But in doing so, Webb ***did not disclose to Dresser*** that the Amended Shareholders' Agreement obligated him to transfer ownership of the "keyman" policy to the firm upon his resignation, nor did he disclose that he had failed to comply with this obligation.

Webb's counsel dashed out a settlement agreement and release that contemplated the sale of the entire Cantor Group Law, P.A. to Bilzin Sumberg, and covered the various "keyman" policies. *See* R:2756–58, 2911–13.

This was in November 2016, just weeks after Dresser's husband committed suicide; that is, within just a few weeks of her husband's death, and with sudden costs and responsibilities of winding up her late-husband's affairs mounting, Webb and Dresser executed the settlement agreement. R:2755–56.

III. THE ACTION AGAINST WEBB, HIS FIRM, AND THE INSURER.

In 2018, the Cantor Group Law, P.A. brought suit against Hal Webb, Prudential Financial, Inc., Pruco Life Insurance Company, and The Prudential Insurance Company of America. R:129–65.

The initial complaint alleged that Cantor and Webb had, in fact, entered into an amendment to the Shareholder's Agreement in 2016, which allowed him to leave the firm with no penalty, but obligated Webb to transfer ownership of the "keyman" life insurance policies to the firm. *Id*. The complaint alleged that Webb refused to reimburse the firm for an overdraw, failed to transfer ownership of the "keyman" life insurance policy to the firm, and fraudulently claimed the life insurance proceeds after Cantor's death. *Id*.

Sharon Dresser (along with the Estate of Steven L. Cantor) eventually joined the lawsuit and filed their Second Amended Complaint (the operative complaint). R:2725–95. *See also* R:4450–53 (order granting leave). The Second Amended Complaint pled the following pertinent claims:

- Count I: Reformation (as to Hal J. Webb, Hal J. Webb, P.A.);
- Count VI: Fraud in the Inducement (as to Hal J. Webb and Hal J. Webb, P.A.);

- Count VII: Negligent Misrepresentation (as to Hal J. Webb and Bilzin Sumberg);
- Count VIII: Conversion (as to Hal J. Webb);
- Count XII: Unjust Enrichment (as to Hal J. Webb).

R:2725–95.

As the basis for these claims, the Second Amended Complaint alleged Webb fraudulently concealed his obligations under the Amended Shareholders' Agreement to transfer the "keyman" policy to the firm, as well as his breach in failing to do so. *Id*. The Second Amended Complaint further alleged that Webb obtained the "keyman" proceeds by fraudulently representing to be Cantor's current "Business Associate" and owner of the "keyman" proceeds, despite having left the firm for Bilzin Sumberg — actions he further concealed from Dresser during negotiations over the Settlement Agreement. *Id*.

The Second Amended Complaint sought alternative remedies including rescission of the Settlement Agreement and Release. R:2767. Accordingly, the Second Amended Complaint alleged that Dresser had "offered to restore any benefits which [she] ha[d] received from the Agreement and Release." R:2767.

IV. THE PUBLIC COMMENTS ABOUT THE LAWSUIT AGAINST WEBB.

Robert Zarco, then-attorney in the litigation, issued a press release detailing the claims and allegations against Webb as stated in the initial complaint. *See* R:5951-57.

To be clear, attorney Zarco's firm handled the drafting and distribution of the press release. *See* R:10883–85, 13833–37. Dresser neither participated in the drafting nor otherwise even commented on the press release. T:543–44; 739–44. Rather, attorney Zarco contracted with Jennifer Clarin of Boardroom Communications, with whom he had a longstanding working relationship, and together they prepared the Press Release. *Id*. *See also* R:5955, 13833–37; T:546 (Clarin testifying she never spoke with Dresser).

Attorney Zarco and Boardroom Communications issued the Press Release the day after the initial complaint was filed. R:5951–54. The Press Release summarized the **allegations in the complaint**, as follows:

> MIAMI, FLA. (January 09, 2018) - Steven Cantor, Prominent Tax Lawyer who committed suicide by leaping off an office tower and who left his widow Sharon Dresser mentally and emotionally distressed, must be turning over in his grave. One month after the suicide in late 2016, the widow found herself pressured to sign $2 million in life insurance policies over to Cantor's undeserving former law partner Hal J. Webb. Cantor's Law Firm has now sued the partner for civil theft and the insurance

> companies for negligence, among other claims, to get it all back. In the suit filed on behalf of the Firm, Cantor's widow, Sharon Dresser, claims attorney Hal J. Webb schemed to remove her and her husband's law firm as Keyman policy beneficiaries following Steven Cantor's death.

R:5951. The Press Release listed the causes of action against Webb, and detailed additional allegations **from the initial complaint**, including that Webb and Cantor amended the Shareholder's Agreement in 2016:

> By 2016, and realizing that, pursuant to the Shareholder's Agreement, he would be financially penalized if he chose to leave the firm, Webb proposed to change the shareholder agreement to allow him to leave the firm with no penalty or responsibility. On March 13, 2016, he sent an email to Cantor seeking to have "a departing shareholder who owns any life insurance policies insuring the life of any other shareholder transfer at settlement the ownership of such policies back to the other remaining shareholder." Cantor agreed to this new language.

R:5951–52.

The Press Release included a copy of the as-filed initial complaint. *See* R:5955–94. In addition to providing the complaint and recounting the factual allegations therein, the Press Release contained a number of sensationalist quotes directly from attorney Zarco (and his law partner, Robert Einhorn, who was then-attorney Zarco's co-counsel). **But Dresser was not quoted**.

The press release was sent to various media outlets, including the *Miami Herald* and *Daily Business Review*, as coordinated by attorney Zarco

and the media relations vendor, Boardroom Communications. As a result, several news articles were published about the lawsuit.

V. WEBB'S COUNTERCLAIM FOR DEFAMATION.

A. Webb's Defamation Counterclaim.

In response to Press Release and news articles about the litigation, contemporaneously with his affirmative defenses, Hal Webb and Hal J. Webb, P.A. (collectively, "Webb") lodged a defamation counterclaim against the Cantor Group Law, P.A., Sharon Dresser, and Sharon Dresser as Personal Representative of the Estate of Steven L. Cantor (the "Dresser Parties"). R:5324–333 (the "Counterclaim").

Webb's defamation Counterclaim was based entirely on the press release and resulting news articles reporting on the ongoing litigation.[3] The Counterclaim alleged that Dresser "caused the defamatory statements to be made on her behalf" when her then-attorney, Zarco, hired the media-relations company. R:5329. The Counterclaim alleged that the January 9, 2018, Press Release, and resulting news articles, amounted to defamation per se.

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[3] Tellingly, Webb did not bring defamation claims against any of the news outlets that carried forward the press release's statements, or attorney Zarco.

The alleged defamatory statements were as follows:

SOURCE	QUOTE	RECORD
Email from Robert Zarco to PR-Agent.	“Partner absconds with $2 Million [i]n insurance money.”	R:5325
Miami Herald, *DBR*, and *Law.com* articles, quoting Robert Zarco.	"'Ms. Dresser became a widow at 53 and was left penniless by a scheming former law partner.'"	R:5327–28
Jan. 9, 2018, Press Release.	"Dresser, on behalf of herself and The Cantor Group, received nothing from [the Settlement] [A]greement."	R:5326
Jan. 9, 2018, press release.	"'Suicide by Lawyer' Plot Enriched Hal. J. Webb, while leaving Widow and Former Firm to Suffer."	R:5326
Jan. 9, 2018, press release (quoting Robert Zarco).	"'This is suicide by lawyer.' When you connect the dots, it becomes clear that Mr. Webb devised a scheme to enrich himself from the death of his long-time partner."	R:5326
Jan. 9, 2018, Press Release.	"Webb knew that should Cantor die in the near future, Webb stood to financially benefit from his death. Webb purposely delayed and avoided transferring the Keyman Policy to The Cantor Group with this morbid aspiration in mind."	R:5326

Webb alleged that he did not scheme to defraud anyone, that he did not engage in fraudulent conduct, nor did he abscond with any

money — essentially denying the allegations of the Second Amended Complaint. R:5324–29. And, crucially, Webb's allegations of falsity hinged on his defenses to the Second Amended Complaint that he was the legitimate owner and beneficiary of the "keyman" insurance policy, that he acted properly in receiving the insurance proceeds, and that the characterizations of his actions as fraudulent or scheming were untrue.

B. Webb Moved for Leave to Add Claims for Punitive Damages, which the Trial Court Granted.

Webb's Counterclaim did not seek compensatory damages, only nominal. But Webb moved for leave to amend his defamation Counterclaim to add a claim for punitive damages against the Dresser Parties, (R:5892–910), which the trial court granted. R:7698–701.

C. The Affirmative Defenses to Webb's Amended Defamation Counterclaim.

Dresser filed her operative affirmative defenses to Webb's Counterclaim (Amended Counterclaim Defenses). R:11212–19. *See also* R:11266–67 (agreed order granting leave to amend affirmative defenses). Dresser alleged three affirmative defenses to the defamation Counterclaim:

- **First Affirmative Defense**: the "substantial truth" doctrine (R:11212–13),

- **Second Affirmative Defense**: the statements were pure opinion (R:11213–14),
- **Third Affirmative Defense**: the fair reporting qualified immunity defense as statements related to pending litigation. R:11214–15.

VI. THE TRIAL COURT STRUCK DRESSER'S AFFIRMATIVE DEFENSES TO THE DEFAMATION COUNTERCLAIM.

A. The Predicate Summary Judgment on Dresser's Second Amended Complaint.

(1) Webb's Motion for Summary Judgment on Dresser's Second Amended Complaint.

Shortly before the scheduled trial, Webb moved for summary judgment on the Second Amended Complaint. R:10060–96.

Webb argued that he was entitled to summary judgment on his affirmative defense that Dresser settled and released all claims in November 2016 when she executed the Settlement Agreement and Release, and then continued to accept the financial benefits of the Settlement Agreement.

As for Dresser's claims that the Amended Shareholders' Agreement terminated Webb's ownership of the "keyman" policy benefits when he resigned, Webb argued the Amended Shareholders' Agreement was never completed and binding, and thus Webb was never required to transfer ownership of the $2 million life insurance policy. *Id*.

That is, the crux of Webb's motion was that the Settlement Agreement and Sharon's acceptance of the benefits thereunder barred all claims, there was no binding agreement to transfer the insurance policy, and thus he continuously owned the "keyman" policy.

(2) Dresser's Response to the Motion for Summary Judgment.

In response to Webb's motion for summary judgment on the Second Amended Complaint, Dresser maintained that her claims for fraudulent inducement and negligent misrepresentation were not barred by the Settlement Agreement, and that the Dresser Parties should be permitted to rescind the Settlement Agreement entirely. R:10652–53.

Additionally, Dresser argued that summary judgment on Webb's affirmative defense of waiver and ratification based on acceptance of the benefits was improper because there was a genuine dispute over when Dresser learned key facts about Webb's actions in procuring an expedited disbursement of the "keyman" proceeds, as well as facts about the Amended Shareholders' Agreement, such that the Settlement Agreement's purported ratification could not be resolved on summary judgment. R:10657–59.

More specifically, during negotiations, Webb represented to Dresser that the "keyman" policy was owned by him outright. R:10653–54. Webb

failed to disclose that he and Cantor had agreed to amend the Shareholder Agreement to require Webb to change the policy's ownership to Cantor upon his resignation from the firm. R:10654. Evidence of Webb's course of conduct in the weeks after those negotiations, argued Dresser, showed that the parties had, in fact, reached an agreement on the insurance policy. That is, Webb requested "the necessary insurance forms to change the ownership and the beneficiary of the $2 million keyman policy," and "created a 'To Do' list prior to his departure … that specifically included the completion of these forms to change the ownership." R:10654. Webb hid the amendment from Dresser, she argued, which was fraud and/or misrepresentation that allowed rescission of the Settlement Agreement.

Based on these disputed facts, including the existence of an amendment to the Shareholder's Agreement covering the "keyman" policy ownership, Dresser argued summary judgment was precluded.

(3) The Order Granting Summary Judgment on the Second Amended Complaint.

On February 23, 2021, the trial court (the judge initially presiding in the complex division) entered its Order Granting Webb Defendants' Motion for Summary Judgment as to all Claims in Plaintiffs Second Amended Complaint against Hal J. Webb and Hal J. Webb P.A. (the "Predicate

Summary Judgment"). R:11270–92. The trial court agreed with Webb that Dresser's ratification of the Settlement Agreement through acceptance of the benefits precluded all her claims.

Specifically, the trial court ruled that Dresser's fraudulent inducement and negligent misrepresentation claims failed because Webb, in fact, owned the "keyman" policy and thus did not misrepresent his ownership. R:11279–82. The trial court ruled that Webb did not have an obligation to transfer ownership of the policy when he resigned, because the amendment to the Shareholders' Agreement was never effectuated. *Id*. That is, the trial court found that Cantor made a counteroffer that Webb did not accept (Webb's subsequent course of conduct notwithstanding).

As for Dresser's claims for rescission, the trial court ruled that she waived her rights and ratified the Settlement Agreement by continuing to accept the benefits of the Settlement Agreement — notwithstanding the factual disputes surrounding the scope and timing of her knowledge regarding the degree of Webb's fraud. R:11284-87.

B. Webb Used the Predicate Summary Judgment on Dresser's Claims to Establish the Falsity Element of his Counterclaim, and Thereon to Prevail on the Trial Court to Strike Dresser's Affirmative Defenses.

(1) February 26, 2021, Pretrial Conference.

Webb Argued the Predicate Summary Judgment on Dresser's Claims Established the Falsity Element of His Counterclaim. Just a few days after the trial court entered its Predicate Summary Judgment on Dresser's Second Amended Complaint, (R:11583-608), at the first pretrial conference on Webb's defamation Counterclaim, Webb argued that the Predicate Summary Judgment established as undisputed (and therefore not subject to consideration by the jury) the facts necessary for his defamation Counterclaim. R:11590.

Specifically, Webb contended that the Predicate Summary Judgment established the facts that he was the owner and beneficiary of Cantor's "keyman" policy and had no obligation under the Shareholders' Agreement to change or transfer it upon his resignation. *Id*. As these facts were already established by the Predicate Summary Judgment, Webb argued, Dresser was barred from re-litigating them or presenting evidence contradicting them. *Id*. Webb thus requested that the trial court instruct the jury that falsity had already been established by the trial court. R:11591–92.

***Dresser's Counterarguments*.** Dresser responded that the trial court's factual findings from just a few days prior did not evidence her state of mind when she authorized the Press Release about the initial complaint accusing Webb of taking insurance proceeds to which she thought — at that time, three years earlier — she had a claim. R:11591–92, 11606. The temporal focus of defamation was January of 2018, Dresser contended, not three years later when the court had already determined issues that reflect on the truth of the statements. R:11590, 11606.

(2) March 11, 2021, Pretrial Conference.

At the continued pretrial conference on March 11, 2021 (R:11633–772), Webb reiterated his position that the Predicate Summary Judgment precluded Dresser from contesting the falsity element of his defamation claim. R:11659–62, 11672–73.

Dresser countered that Webb had not affirmatively moved for summary judgment on his defamation Counterclaim, and, therefore, the findings from the ruling on Webb's ***defensive*** motion for summary judgment on Dresser's Second Amended Complaint could not be applied to establish elements of Webb's ***affirmative*** claim for defamation. R:11662–667. Such a preclusive application, Dresser argued, would violate her due process as she was not

given notice or opportunity to contest summary judgment on Webb's Counterclaim. *Id*.

The trial court ultimately ruled that its prior findings in the Predicate Summary Judgment on the Second Amended Complaint were binding on all parties for purposes of the upcoming defamation Counterclaim trial. R:11667–668. The trial court reasoned that it could not allow the jury to determine the factual question of whether the allegedly defamatory statements were false, because ***the court*** had already made those factual findings, and it did not want a jury disagreeing with it. R:11673–74.

(3) Webb's Motion to Strike.

Based on the trial court's pronouncements at the March 11, 2021, pretrial hearing, Webb moved to strike Dresser affirmative defenses to the defamation Counterclaims. R:11547–51.

Webb argued that the trial court "already determined that the defamatory statements were false" in its Predicate Summary Judgment on the Dresser Parties' Second Amended Complaint, which, according to Webb, established as fact that the Dresser Parties had no claim to the "keyman" policy benefits, and Webb was the rightful owner. R:11550. Webb argued that these factual findings in the Predicate Summary Judgment

resolved Dresser's (i) pure opinion and (ii) substantial truth affirmative defenses, and thus they should be stricken as nullities. R:11548–51.

(4) Dresser's Response to the Motion to Strike.

Dresser responded to Webb's Motion to Strike her affirmative defenses, which defenses raised factual questions requiring resolution by the jury. R:11552–61.

Substantial Truth Defense. Dresser argued that even if her underlying fraudulent inducement action had been disposed, the substantial truth defense still applied because the question was whether the Press Release was a substantially true report ***of the complaint's allegations***, and not whether the claims themselves, as alleged, were ultimately determined to be meritorious. In other words, the response argued, the fact that the court granted summary judgment on the Second Amended Complaint years later was irrelevant to whether the Press Release was a substantially true report of the original complaint ***when it was filed***.

Pure Opinion Defense. Dresser also contended that the Press Release statements constituted inactionable pure opinion.

Preclusion by Summary Judgment Order. As to Webb's argument that the court's Predicate Summary Judgment order established his prima

facie case for defamation and precluded Dresser from defending, Dresser contended the summary judgment had adjudicated separate claims with different elements than the defamation counterclaim. Webb had not moved for summary judgment on his Counterclaim under Rule 1.510(a) and (d), and, therefore, he still had to prove all elements of his prima facie case at trial and overcome Dresser's affirmative defenses.

(5) The Order Striking the Dresser Parties' Defenses.

The trial court granted Webb's motion and struck Dresser's pure opinion defense (as well as the fair reporting defense), but denied the motion to strike as to the substantial truth doctrine. R:12272–73 (the "Order Striking Defamation Defenses").

VII. THE DEFAMATION TRIAL.

A. The Trial Court Heavily Redacted the Allegedly Defamatory Press Release and News Articles.

The defamation trial proceeded before the successor judge.

Critically, based solely on the predecessor judge's rulings, the successor judge allowed Webb to present to the jury the allegedly defamatory documents — the Press Release and news articles — in a heavily redacted form. *See* R:13838–840.

At the March 11, 2021 pre-trial hearing, Webb argued it was improper for the jury to review the entire allegedly defamatory publications, including the press release, the January 8 complaint that formed the basis of the press release (and which had been distributed to the press along with the press release), and the news articles. R:11744–50.

The trial court overruled Dresser's objections to the redactions (R:11750–52, 11754), allowing Webb to present to the jury an incomplete version of the allegedly defamatory publications. *See* R:11754–55. *See also* R:12138–39.

The redactions omitted crucial context for assessing the defamatory nature of the cherry-picked statements; primarily descriptions of the initial complaint's causes of action and Dresser's reasons to believe the truth of the allegedly defamatory statements. More than half of the Press Release was redacted, removing from the jury's consideration crucial context surrounding Dresser's state of mind at the relevant time. That redacted context was as follows:

> The 13-count complaint, filed in Miami-Dade County Circuit Court, accuses attorney Hal J. Webb of breach of fiduciary duty, asset misappropriation, unjust enrichment, negligent misrepresentation, estoppel, violation of the Florida civil theft statute and business corporation act, conversion, rescission, and reformation; and Prudential Financial, Inc., Pruco Life Insurance Company, and Prudential Insurance Company of America for

> reformation, negligence, and wrongful distribution of policy proceeds.

R:5961.

> The two later decided to purchase $2 million in Keyman insurance policies on each other *in order to facilitate business continuity and compensate the firm for financial losses that would arise from the death or extended incapacity of the other. Webb's keyman insurance policy on the life of Cantor was issued by Pruco Life Insurance Company. Each was intended to be the other's beneficiary, while they remained partners*.

R:5951 (redaction in italics).

> By 2016 and realizing that, pursuant to the Shareholder's Agreement, he would be financially penalized if he chose to leave the firm, Webb proposed to change the shareholder agreement to allow him to leave the firm with no penalty or responsibility. On March 13, 2016, he sent an email to Cantor seeking to have "a departing shareholder who owns any life insurance policies insuring the life of any other shareholder transfer at settlement the ownership of such policies back to the other remaining shareholder." Cantor agreed to this new language.
>
> Meanwhile, the firm was in increasing financial distress. In December of 2015, the firm mistakenly over-distributed in year-end draws to Cantor and Webb. Upon learning of the overdistributions, both agreed to return their respective draws from the year-end distributions to the firm and use the money as working capital for the firm, the suit alleges. Cantor in April 2016 issued a personal check to the firm in the amount of $287,500, with the memo stating, "SLC Portion - Return of Working Capital."
>
> Webb's corresponding share of the 2015 year-end draw amounted to $212,500. However, according to the complaint, instead of reimbursing the firm, Webb schemed to prematurely leave the firm without paying his share. The suit alleges Webb's refusal to pay his share was a means to create leverage to financially pressure Cantor and extort changes in the

shareholder's agreement to facilitate his planned departure without penalty.

As expected, Webb's refusal to reimburse the firm for his overdraw put additional and severe financial pressure on Cantor. Sensing Cantor's emotional and financial distress, his longstanding battle with depression, and previous suicide attempts, on October 5, 2016, Webb sent an email to the firm Chief Operating Officer Grace Lopez noting that "Cantor might not be in the right state of mind," according to the complaint.

R:5951–52.

On October 11, 2016, Cantor committed suicide by jumping from his high-rise office building. Dresser became a 53 years-old widow and emotionally disturbed from the graphic scene she witnessed.

Her problems, however, were only beginning. Though the paperwork had been started to transfer the Keyman policies back to the Firm, as of the date of Cantor's death, Webb delayed on his agreement to sign the transfer and no additional documentation was ever provided by Webb to Prudential to complete the transfer. Prudential never followed up on the policy transfer it knew was required. Unbeknownst to the widow or the Cantor Group, within a week of Cantor's death, Webb immediately secured and sent to Prudential a copy of Cantor's death certificate. He requested a pay out of the insurance proceeds from the Keyman Policy. Prudential failed to conduct any due diligence with respect to the proper owner and beneficiary of the Keyman Policy, despite having received a request from Webb to change the ownership and beneficiary arrangement on the Keyman Policy only four months prior. Instead, Prudential promptly but negligently, improperly paid the proceeds of the Keyman Policy to Webb.

Immediately following Cantor's death, Webb resumed his discussions pertaining to a settlement with Dresser, Cantor's widow and personal representative of his estate. At the same time, Webb and his new law firm, Bilzin Sumberg, began discussions with Dresser regarding purchasing the assets of The

> Cantor Group. Webb's superior knowledge created a strong bargaining position. Given little time or access to documents, Dresser and her attorney Brian Goodkind, with the law firm of Goodkind & Florio, P.A., could not effectively refute Webb's fraudulent claims at negotiation as to the compensation due to him and as to his right to receive the all of the Keyman life insurance policies. The complaint asserts that Bilzin bought the Cantor Firm's assets at way below without cause and previously discussed price.
>
> Little over a week later, Dresser was Baker Acted. Soon thereafter, Dresser's uncle died and she later received an anonymous letter purportedly sent by "friends of' her husband, stating that hidden aspects about Cantor's personal life-style was the reason for him having committed suicide.

R:5952–53.

> On November 26, 2016, six weeks after her husband's death and under Attorney Brian Goodkind's watch, Dresser signed the settlement agreement with Hal J. Webb, P.A. and Webb individually for the transfer of his shares in the firm and other businesses owned jointly with Cantor, and releasing Webb from all claims, including any claim to the death benefit or proceeds of the $2 million Keyman Policy, and any claim relating to the Shareholder's Agreement. *Though she repeatedly expressed to her lawyer dissatisfaction with the terms of settlement, Dresser's attorney Goodkind demanded she sign the agreement, or he would withdraw as her counsel and would no longer represent her. Having no other choice, Dresser signed the agreement*.
>
> Dresser, on behalf of herself and The Cantor Group, received nothing from an agreement whose provisions were, *notes the complaint, "unconscionable, ridiculously unfair and prejudicial to Dresser and The Cantor Group, and all of which substantially benefit and enrich Webb,"* said Robert M. Einhorn, Co-Counsel in the case.

R:5953 (redactions in italics).

B. Dresser's Motions for Directed Verdict Were Denied.

Dresser moved for directed verdict. R:13714–29; T:1169-1239. She reiterated her arguments that Webb failed to prove his prima facie case of defamation because the statements by prior counsel, attorney Zarco, in the press release were nonactionable pure opinion. R:13717–20; T:1170-82.

Dresser further maintained that directed verdict was required based on her remaining defense of substantial truth. R:13724.

Dresser also argued that the trial court should direct the verdict on Webb's punitive damages claim because he failed to present clear and convincing evidence that the Dresser Parties engaged in intentional misconduct or had a specific intent to harm Webb. R:13724–27; T:1192-95.

The trial court denied Dresser's directed verdict motions. T:1235-39.

C. Webb's Motion for Directed Verdict on the Substantial Truth Defense Was Granted.

Webb moved for directed verdict on the Dresser Parties' remaining defense of substantial truth (R:13622–27; T:1240–1244), and she responded (R:13645–55; T:1244–49). Webb argued Dresser was conflating her previously stricken defense of fair reporting privilege with the substantial truth defense.

Dresser opposed directed verdict on substantial truth, arguing the relevant time period for the substantial truth defense was the time of the initial complaint and the publication of the press release and news articles (January 2018), and that the prior judge's falsity finding was not made until three years later (February 2021). T:1248-49

The trial court ruled that it could not instruct the jury that they were bound to accept the eight statements about the Dresser Parties' lawsuit as false (as established by the trial court's Predicate Summary Judgment years after the statements were made) and yet allow Dresser a defense that the statements were substantially true at the time they were made. T:1245, 1258–61, 1264.

D. Jury Instructions.

The trial was bifurcated into Phase I (liability and nominal damages) and Phase II (punitive damages).

The Phase I jury instructions stated that the trial court "already determined that each of the published statements that Webb claims were defamatory were false," R:13752–53, and listed the following statements contained in the Press Release and made by Attorney Robert Zarco, the *Miami Herald*, *Daily Business Review*, and *Law.com*:

1) “Attorney Hal J. Webb Schemed to Defraud Former Partner Steve Cantor's Widow from Keyman Insurance Proceeds.”
2) “Webb schemed to remove her and her husband's law firm as Keyman policy beneficiaries following Steven Cantor's death.”
3) “Partner absconds with $2 Million [i]n insurance money.”
4) “Ms. Dresser became a widow at 53 and was left penniless by a scheming former law partner.”
5) "[A]fter her husband's death Dresser signed the settlement agreement with Hal J. Webb, P.A. and Webb .... Dresser, on behalf of herself and The Cantor Group, received nothing from [the] agreement.”
6) “‘Suicide by Lawyer’ Plot Enriched Hal. J. Webb, while leaving Widow and Former Firm to Suffer.”
7) “‘This is suicide by lawyer.’ When you connect the dots, it becomes clear that Mr. Webb devised a scheme to enrich himself from the death of his long-time partner.”
8) “Webb knew that should Cantor die in the near future, Webb stood to financially benefit from his death. Webb purposely delayed and avoided transferring the Keyman Policy to The Cantor Group with this morbid aspiration in mind.”

R:13752.

During the Phase II charge conference, the parties disputed the jury instructions and verdict form's treatment of the statutorily-mandated punitive damages caps. T:1423–25, 1582–1607. Dresser contended that the full standard instruction on Section 768.73, Fla. Stat. should be given, as follows:

> (A). the nature, extent and degree of misconduct and the related circumstances, including the following:
>
> i. Whether the wrongful conduct was motivated solely by unreasonable financial gain;
>
> ii. whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by, the Cantor Group Law, P.A. Sharon Dresser, and/or the Estate of Steven Cantor; and
>
> iii. whether, at the time of injury or damage, the Cantor Group Law, P.A., Sharon Dresser, and/or the Estate of Steven Cantor had a specific intent to harm Webb and the conduct did in fact harm Webb. Webb is not claiming that he suffered any economic harm; and
>
> (B). the financial resources of the Cantor Group Law, P.A., Sharon Dresser, and/or the Estate of Steven Cantor.

R:13437 (Dresser proposed instruction). *Compare with* § 768.73(1)(a) & (b).

Webb sought to deviate from this standard instruction by omitting the material portion of the standard instruction addressing the first exception to the statutory caps, for "conduct motivated solely by unreasonable financial gain":

> You are to decide the amount of punitive damages, if any, to be assessed as punishment against Sharon Dresser and/or The Cantor Group Law P.A., and as a deterrent to others. This amount would be in addition to any damages you have previously awarded. In making this determination, you should consider the following:
>
> (A). the nature, extent and degree of misconduct and the related circumstances, including the following:
>
> whether, at the time of injury or damage, Sharon Dresser and/ or The Cantor Group Law P.A., had a specific intent to harm Webb and the conduct did in fact harm Webb; and
>
> (B). the financial resources/ net worth of Sharon Dresser.

R:13749.

Webb argued that the "unreasonable financial gain" exception to the statutory cap of $500,000 did not apply to this defamation case, and thus the instruction and question should be removed from the jury's determination altogether. T:1583-87. Dresser countered that well-established precedent on defamation had applied the standard instruction – and the cap -- in this context. T:1587-90.

The trial court agreed with Webb and removed the standard instruction's statutory cap question because, according to the trial court, the question was "tethered to the unreasonably dangerous nature of the conduct within the statute, [which] has no bearing to this defamation case." R:1607.

The Phase II instructions thus omitted statutorily-mandated language necessary to the application of punitive damages caps, which Dresser proposed in her standard instruction:

E. Verdict and Final Judgment.

In Phase I of the trial, the jury entered its verdict against both Dresser and the Cantor Group Law. P.A., finding that the statements that were judicially determined to be false "tend[ed] to expose Webb to hatred, ridicule or contempt or tended to injure Webb in his business, reputation or occupation." R:13746–47. (The jury did not find the Estate of Steven L. Cantor liable). The jury awarded ***nominal*** damages of $100. R:13747.

In Phase II, the jury awarded $3,040,000.00 in ***punitive damages*** against Dresser alone. The jury found that Dresser, at the time of the Press Release and news articles about the newly filed initial complaint, had a "specific intent to harm Webb and did … in fact harm Webb." R:13745.

Thus, the entirety of the award against Dresser, an individual widow, was punitive damages for statements published by then-attorney Zarco in the wake of Dresser's husband's suicide.

F. Post-Trial Motions and Amended Final Judgment.

The Dresser Parties filed their Motion for New Trial and for Remittitur, or Alternatively, a New Trial on Damages, and for Judgment in Accordance with Prior Motion for Directed Verdict. R:15811–78.

The trial court denied the new trial motion, but remitted the award to $1,520,000.00 (R:16608, 16625), and entered an Amended Final Judgment. R:16689–91.

This appeal follows.

SUMMARY OF ARGUMENT

THE PREDICATE SUMMARY JUDGMENT IMPROPERLY RESOLVED GENUINE ISSUES OF MATERIAL FACT

As a threshold matter, the Predicate Summary Judgment on the Second Amended Complaint was precluded by genuine issues of material fact regarding the validity of the Settlement Agreement, Webb's ownership of the "keyman" policy, and his fraud and concealment of these facts. The trial court improperly resolved these disputed issues of fact when it entered judgment in Webb's favor on Dresser's Second Amended Complaint, and reversal is required for further proceedings.

THE ORDER STRIKING AFFIRMATIVE DEFENSES IMPROPERLY GRANTED JUDGMENT ON THE FALSITY ELEMENT OF THE DEFAMATION COUNTERCLAIM.

The Order striking the Dresser Parties' affirmative defenses to Webb's defamation Counterclaim must be reversed because, in addition to being entirely premised on the erroneous Predicate Summary Judgment, it improperly determined the element of falsity in Webb's defamation Counterclaim. That is, Webb's motion to strike seeking, in effect, judgment on his prima facie claim, was in substance an improper motion for summary judgment that failed to comply with procedural requirements. By relieving Webb of the burden to prove his defamation claim at trial, and removing Dresser's defenses, Dresser was denied her fair opportunity to defend.

Indeed, had the pure opinion doctrine been available at trial, Dresser would have secured directed verdict, as the allegedly defamatory statements were inactionable opinions based on disclosed facts.

DIRECTED VERDICT ON SUBSTANTIAL TRUTH WAS ERRONEOUS

The trial court also erroneously granted directed verdict on the substantial truth defense; which is to say, whether the allegedly defamatory statements were substantially true was a question for the jury. The Press Release and news articles were reporting on ongoing litigation, and at the time of publication, the claims had not yet been adjudicated meritless. The jury should have been permitted to consider whether the publications were substantially true reports of the pending claims, at the time they were published.

REDACTION OF THE PRESS RELEASE WAS IMPROPER

The trial court further violated the fundamental rule that defamation must be considered in full context of the publication when it submitted to the jury a heavily redacted version of the Press Release and news articles. The redactions removed content relating to the underlying facts and allegations of the initial complaint, thereby depriving the jury of the proper context necessary to evaluate whether the statements were, in fact, defamatory.

THE PUNITIVE DAMAGES VERDICT WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AND IT WAS TAINTED BY AN ERRONEOUS INSTRUCTION

Finally, the punitive damages verdict should fall, irrespective of the foregoing merits arguments. Webb failed to meet his burden of proving malicious intent by clear and convincing evidence because the evidence presented fell far short of establishing that Dresser had actual knowledge of the wrongfulness of the publication. Additionally, the trial court erred by omitting the standard jury instruction on whether the conduct was "motivated solely by unreasonable financial gain," which was relevant to determining the statutory cap. This omission deprived Sharon of the opportunity to argue that her actions were not solely financially motivated and allowed Webb to pursue uncapped punitive damages.

ARGUMENT

I. THE PREDICATE SUMMARY JUDGMENT ON THE SECOND AMENDED COMPLAINT WAS PRECLUDED BY GENUINE ISSUES OF FACT.

A. Standard of Review.

The Court reviews orders granting summary judgment de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 129 (Fla. 2000).[4]

A motion for summary judgment cannot be used as a pre-trial motion for directed verdict, whereby the trial court weighs the evidence and the probability for success at trial. *E.g.*, *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30 (Fla. 1977), *Le v. Lighthouse Assocs., Inc.*, 57 So. 3d 283, 287 (Fla. 4th DCA 2011), *Copeland v. Albertson's Inc.*, 947 So. 2d 664 (Fla. 2d DCA 2007), *Bradford v. Bernstein*, 510 So. 2d 1204, 1206 (Fla. 2d DCA 1987). That is, when "a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove his cause of action." *Jennaro v. Bonita-Fort Myers Corp.*, 752 So. 2d 82, 83

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[4] Although the Florida Supreme Court has recently adopted the federal summary judgment standard, the Predicate Summary Judgment and Order Granting Motion to Strike predate the effective date of that rule change. R:10060-96, 11270-92. The pre-amendment standard requires that "a party moving for summary judgment must show ***conclusively*** the absence of any genuine issue of material fact and the court must draw ***every possible inference*** in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)

(Fla. 2d DCA 2000). Rather, the trial court's function is solely to determine whether the record conclusively shows that the claim cannot be proved as a matter of law. *Id*. *And see* *Fiedler v. James*, 971 So. 2d 256, 258 (Fla. 2d DCA 2008) ("[t]he question is not whether the plaintiff has evidence to prove her case at a given point in the litigation or has personal knowledge of facts establishing the defendant's negligence.")

B. Complex and Intertwined Factual Disputes Remained Over Webb's Fraud and Misrepresentation, the Amendment to the Shareholders' Agreement, and Ownership of the Keyman Policy.

The Predicate Summary Judgment formed the sole basis of the trial court's Order Granting Motion to Strike, thereby effectively entering judgment against Dresser on her defense of, among others, the pure opinion doctrine.

And the Predicate Summary Judgment itself was erroneous, as genuine issues of material fact precluded the trial court's rulings on the merits of the Second Amended Complaint. Thus, the Predicate Summary Judgment must be reversed, and along with it the Order Granting Motion to Strike.

Webb moved for summary judgment on the Second Amended Complaint primarily on the basis that the Settlement Agreement and Release between Webb and Dresser barred each and every claim. R:10060–96.

But Dresser asserted, among other claims against Webb, the following counts directly challenging the propriety of the Settlement Agreement and Release:

- Rescission,
- Fraud and fraudulent concealment, and
- Negligent misrepresentation.

R:11212-13.

These claims, if proven, would have allowed Dresser to ***rescind*** and set aside the Settlement Agreement and release, and thereby maintain her remaining claims against Webb. "Under Florida law, a release may be set aside where it was obtained by fraud." *Defigueiredo v. Publix Super Markets, Inc.*, 648 So. 2d 1256, 1257 (Fla. 4th DCA 1995). In other words, if Dresser prevailed on these claims, the Settlement Agreement was no bar to the Second Amended Complaint.

Whether Dresser could "present sufficient evidence of [Webb's] misrepresentation" or concealment was irrelevant on summary judgment, "as those are ***questions of fact to be determined by a jury***." *Wadlington v. Cont'l Med. Services, Inc.*, 907 So. 2d 631, 633 (Fla. 4th DCA 2005) (emphasis added).

Indeed, "[i]n fraud cases, summary judgment is rarely proper as the issue so frequently turns on the axis of the circumstances surrounding the complete transaction, including circumstantial evidence of intent and knowledge." *Cohen v. Kravit Estate Buyers, Inc.*, 843 So. 2d 989, 991 (Fla. 4th DCA 2003). *Accord Amazon v. Davidson*, 390 So. 2d 383, 385 (Fla. 5th DCA 1980) ("Generally, the issue of fraud is not a proper subject of a summary judgment since it is a subtle thing requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud.") (citation omitted) (footnote omitted).

Factual disputes remained that precluded the Predicate Summary Judgment, specifically regarding when Dresser discovered the amendment to the Shareholders' Agreement, among other facts concealed by Webb, including his course of conduct in taking steps to change the beneficiary on the insurance policy prior to his resignation, consistent with the amendment to the Shareholders' Agreement. R:10733, 10735–36. These factual disputes went to the heart of Webb's ratification and acceptance of the benefits affirmative defense, because "[a]n agreement is deemed ratified where the principal has ***full knowledge*** of ***all the material facts*** and circumstances relating to the unauthorized act or transaction at the time of the ratification." *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012,

1022 (Fla. 2000) (emphasis added). *Accord Zurstrassen v. Stonier*, 786 So. 2d 65, 71 (Fla. 4th DCA 2001) ("The issue of ratification is one of fact.").

More to the point, Dresser pled and presented evidence of her offer to return the benefits she received under the Settlement Agreement, as required to maintain her claim for rescission. *See* R:2767 (operative Second Amended Complaint alleging Dresser "offered to restore any benefits which [she] ha[d] received from the Agreement and Release."); R:10741 (Letter from Robert Zarco to Dennis Richard, dated July 25, 2019, tendering settlement amounts). *Bland v. Freightliner LLC*, 206 F. Supp. 2d 1202, 1206 (M.D. Fla. 2002) (a party seeking rescission must offer to return both contracting parties to the status quo). The trial court's finding that Dresser continued to accept the benefits of the Settlement Agreement was directly contradicted by the record evidence.

Further disputed issues of material fact include the "question of whether or not [Webb and Cantor's] negotiations produced a binding" amendment to their Shareholders' Agreement that required Webb to turn over the "keyman" policy upon his resignation, further implicating the factual question of Webb's fraudulent inducement and concealment of facts from Dresser. *Smith v. Royal Auto. Group, Inc.*, 675 So. 2d 144, 152 (Fla. 5th DCA 1996). That question of whether an amendment was formed — and, in

turn, the question of whether Webb owned the policy or not at the time of the subsequent negotiations with Dresser — was "a question of intent, which in turn is a question of fact." *Id.* Indeed, evidence of Webb's course of conduct after negotiating with Cantor indicated that ***Webb himself*** thought the amendment to the Shareholder's Agreement was in force.

As this Court has held, "[w]hether a written contract has been modified by subsequent oral agreement or by course of dealing is ***a question of fact for the jury***." *Kiwanis Club of Little Havana, Inc. v. de Kalafe*, 723 So. 2d 838, 841 (Fla. 3d DCA 1998) (emphasis added). *Accord*, *e.g.*, *RX Imaging of SWFL, LLC v. Irving Radiology, Inc.*, No. 6D23-469, at *6 (Fla. 6th DCA July 21, 2023) (reversing summary judgment finding no amendment because the facts, when "viewed in a light most favorable to [the non-movant]," did not conclusively show "at the summary judgment stage that there was no modification of the contract").

Although Webb did not formalize the amendment to the Shareholders' Agreement with an executed writing (Cantor did sign the amendment), "[a] contract may be binding on a party despite the absence of a party's signature," because the "object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, ***by the acts or conduct of the parties***." *Gateway Cable T. V., Inc. v. Vikoa Const. Corp.*,

253 So. 2d 461, 463 (Fla. 1st DCA 1971) (reversing directed verdict ruling that no contract had been formed).

In fact, the jury instructions on contract formation expressly direct that the jury consider "words ***and conduct*** of each party" to determine whether a contract was formed. *In re Standard Jury Instructions--Contract & Bus. Cases*, 116 So. 3d 284, 304–05 (Fla. 2013) (emphasis added).

Webb's "course of dealing" and conduct after he and Cantor negotiated over the amendment to the Shareholders' Agreement evidenced Webb's assent to the modifications signed by Cantor, which included turning over ownership of the "keyman" policy upon resignation. *Kiwanis Club of Little Havana, Inc.*, 723 So. 2d at 841.

- Webb requested the necessary forms from the insurer to change the ownership and beneficiary of the "keyman" policy in the weeks prior to Cantor's death. R:10733 (letter from Prudential to Webb with instructions and forms on changing ownership).
- Webb created a "To Do" list for himself prior to departing the Cantor firm, which specifically included an item to "[c]hange ownership of life insurance policies." R:10736.

- Webb shared this "To Do" list with the Chief Operating Officer of Cantor & Webb, P.A., who responded "let's discuss items related to the partnership, etc." R:10735.

These facts, when "viewed in a light most favorable to [Dresser]," did not conclusively show "at the summary judgment stage that there was no modification of the contract." *RX Imaging of SWFL, LLC*, No. 6D23-469, at *6 (reversing summary judgment)

To the contrary, from this evidence, a jury could reasonably conclude that Webb's "acts or conduct" showed "mutuality or assent" to Cantor's amendment to the Shareholders' Agreement. *Gateway Cable T. V., Inc.*, 253 So. 2d at 463. *See also In re Standard Jury Instructions--Contract and Business Cases*, 116 So. 3d at 304–05.

Indeed, both Webb and Cantor's proposed amendments contained the ***same*** language governing the "keyman" policies: "[I]f on the Triggering Event Date the Departing Shareholder owns any life insurance policies insuring the life of any other Shareholder, then the Departing Shareholder shall transfer at Settlement the ownership of such policies to such other Shareholder." *Compare* R:10668 (Webb's proposed amendment), *with* R:10672 (Cantor's proposed amendment).

The trial court's Predicate Summary Judgment ruling, that Cantor's signed amendment to the Shareholders' Agreement was a counteroffer that Webb rejected, ignored the evidence of Webb's actions consistent with the amendment. Reversal and remand is required for a jury to determine the factual questions surrounding the amendment to the Shareholders' Agreement, and thus the ultimate question of whether Webb, in fact, falsely claimed to own the "keyman" policy despite the amendment to the Shareholders' Agreement.

II. THE ORDER STRIKING DRESSER'S AFFIRMATIVE DEFENSES TO WEBB'S DEFAMATION COUNTERCLAIM SHOULD BE REVERSED.

A. The Motion to Strike Was in Substance a Noncompliant Motion for Summary Judgment.

The order granting Webb's Motion to Strike Dresser's affirmative defenses to the defamation Counterclaim was based entirely on the Predicate Summary Judgment, which has been shown to have been entered in error. It must, therefore, be reviewed under the same standard: de novo. *See* Point I.A., *supra*.

The Predicate Summary Judgment on Dresser's Second Amended Complaint was used preclusively by Webb to establish the falsity element of his defamation Counterclaim and strike Dresser's affirmative defenses. But

Dresser was never afforded notice that the Counterclaim, or her affirmative defenses thereto, were at issue on summary judgment alongside Webb's defensive summary judgment directed to Dresser's Second Amended Complaint. This lack of due process compels reversal of the Motion to Strike.

"Under Florida Rule of Civil Procedure 1.510, a motion for summary judgment 'must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ('summary judgment evidence') on which the movant relies.'" *Florida Holding 4800, LLC v. Lauderhill Lending, LLC*, 275 So. 3d 183, 187 (Fla. 4th DCA 2019) (quoting Fla. R. Civ. P. 1.510(c)). This "is designed to prevent ambush by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing." *Id*. (internal citation and quotation marks omitted).

Moreover, Rule 1.510 (as written in 2020), required the movant to serve the motion "at least 20 days before the time fixed for hearing" to provide the non-movant adequate notice. The rule also bifurcated the requirements for "claimant[s]" and "[d]efending [p]art[ies]":

> (a) For Claimant. A party seeking to recover on a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party's favor on all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits.

Fla. R. Civ. P. 1.510 (2020).

Webb's Motion for Summary Judgment was filed as a party ***defendant***; he chose not to move for summary judgment on any element of his defamation Counterclaim, as a counter-plaintiff. And Webb's Motion for Summary Judgment did not seek any relief related to his Counterclaim, nor did it request any findings that would govern the trial of the defamation claim.

Having failed to invoke Rule 1.510 as to his Counterclaim, Webb could not later circumvent its procedural requirements by filing a summary judgment in the guise of a "motion to strike." The First District disapproved this subterfuge in *Brock v. G.D. Searle & Co.*, 530 So. 2d 428, 430–31 (Fla. 1st DCA 1988), where a party filed a nominal "motion in limine," that, in substance, sought summary judgment on some of the plaintiff's claims. The First District ruled that although "the motion was initially styled as a motion

in limine," that title "did not affect the 20–day notice requirement" of Rule 1.510. *Id*. The First District reversed for failure to abide by these basic notice requirements, reiterating that "trial courts [should not] allow 'motions in limine' to be used as unwritten and unnoticed motions for partial summary judgment or motions to dismiss." *Id*. at 431 (quoting *Rice v. Kelly*, 483 So. 2d 559, 560 (Fla. 4th DCA 1986)).

Likewise, here, the trial court erred in determining the falsity element of Webb's defamation Counterclaim and permitting Webb's Motion to Strike to be used as a shadow motion for summary judgment designed to circumvent the notice requirements of Rule 1.510 and secure conclusive findings on elements of his defamation Counterclaim. Reversal and remand is warranted for this reason alone.

B. At Trial, the Verdict Should Have Been Directed in the Dresser Parties' Favor under the Pure Opinion Doctrine.

Falsity was an element of Webb's prima facie claim for defamation, which he should have been required to prove at trial. Moreover, Dresser should have been permitted to contest falsity through the pure opinion doctrine. Had the doctrine been properly considered, rather than swept aside through the Predicate Summary Judgment (and later striking of

Dresser's affirmative defenses), it would have compelled directed verdict in Dresser's favor.

As the doctrine presents a question of law, this Court "may make the determination of opinion versus fact on review." *Stembridge v. Mintz*, 652 So. 2d 444, 447 (Fla. 3d DCA 1995) (quoting *Zambrano v. Devanesan*, 484 So. 2d 603 (Fla. 4th DCA 1986)). *See also Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702, 705 (Fla. 3d DCA 1999) ("[A] reviewing court may reverse a jury verdict and instruct the lower court to enter a judgment in favor of the defendant where the statement is not capable of a defamatory effect, *i.e.*, not a "false statement which naturally and proximately results in injury to another.").

A claim for defamation cannot stand if the allegedly defamatory publications are "pure opinion." *See Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984) ("The complaint in the case sub judice was defective because it was based upon an expression of pure opinion and therefore failed to allege a false and defamatory statement of and concerning the appellant.").

"A statement is pure opinion when it is 'commentary or opinion ***based on facts that are set forth in the subject publication*** or which are otherwise known or available to the reader or listener.'" *Ozyesilpinar v.*

Reach PLC, 365 So. 3d 453, 459 (Fla. 3d DCA 2023) (quoting *Skupin v. Hemisphere Media Group, Inc.*, 314 So. 3d 353, 356 (Fla. 3d DCA 2020)) (emphasis added).

"Mixed expression of opinion occurs," on the other hand, "when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have ***not been stated in the article*** or assumed to exist by the parties to the communication." *Stembridge v. Mintz*, 652 So. 2d 444, 446 (Fla. 3d DCA 1995) (emphasis added).

In *Stembridge*, this Court held that a bar complaint against an attorney by an opposing party was inactionable pure opinion because the complaint set forth the facts upon which the opinion was based:

> When the Bar Inquiry form is read in its full context, it is clear that Stembridge has expressed a pure opinion, ***the basis for which is fully disclosed in the Bar Inquiry form***. In our view the Bar Inquiry form, when read as a whole, cannot be reasonably interpreted to imply "the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts § 566.

Stembridge, 652 So. 2d at 447. This Court reversed summary judgment in the plaintiff, Mintz's favor and remanded with directions to "enter judgment in favor of defendant Stembridge on the defamation complaint." *Id*.

The facts in *Stembridge* are strikingly similar to those here. In *Stembridge*, the plaintiff made statements on what he believed to be

unethical conduct by the defendant, but which conduct was ultimately determined **not** to warrant disciplinary action. *Id*. at 445. Nevertheless, despite the fact that The Bar complaint statements ultimately determined to be meritless, the statements were inactionable as ***pure opinion*** because their basis was "fully disclosed" in the publication. *Id*. at 447

Here too, despite the fact that the allegations of the Second Amended Complaint were ultimately determined to be without merit, the Press Release detailing the original complaint's allegations and claims was nonetheless inactionable pure opinion because the Press Release contained the basis for the opinions expressed ***and*** the facts upon which the opinions were based were "otherwise known or available to the reader or listener'" in the publicly-available case docket. *Ozyesilpinar*, 365 So. 3d at 459.

Indeed, the Press Release (redacted from the jury, see Point III, *infra*) faithfully based its opinions on the allegations drawn from the original complaint, which allegations were also reported directly in the Press Release and News Articles:

Press Release	Original Complaint
Cantor & Webb, P.A. hung its shingle in January, 2004 ..	In January of 2004, Cantor & Webb, P.A. (the "Firm") was formed and registered with the Florida Department of State Division of Corporations as a Florida professional for Profit Corporation. (¶6)
... as a partnership between attorneys, majority shareholder Steven L. Cantor and minority owner Hal J. Webb.	Pursuant to the Shareholder's Agreement, Cantor and Webb were the sole shareholders of the Firm, with Cantor owning 60% of the shares, and Webb owning 40% of the shares. (¶9)
The two later decided to purchase $2 million in Keyman insurance policies on each other.	As Cantor and Webb were the sole shareholders of the Firm, they decided to obtain life insurance policies on each other in order to facilitate business continuity and compensate the Firm for financial losses that would arise from the death or extended incapacity of wither of the sole shareholders of the Firm. (¶10)
Webb knew that should Cantor die in the near future, Webb stood to financially benefit from his death. Webb purposely delayed and avoided transferring the Keyman Policy to The Cantor Group "with morbid aspiration in mind," the suit alleges.	... Webb knew that should Cantor die in the near future, Webb stood to financially benefit from his death. Webb purposely delayed and avoided transferring the Keyman Policy to The Cantor Group with this morbid aspiration in mind. (¶51)

Press Release	Original Complaint
On November 26, 2016, six weeks after her husband's death and under Attorney Brian Goodkind's watch, Dresser signed the settlement agreement with Hal J. Webb, P.A. and Webb individually for the transfer of his shares in the firm and other businesses owned jointly with Cantor, and releasing Webb from all claims, including any claim to the death benefit or proceeds of the $2 million Keyman Policy, and any claim relating to the Shareholder's Agreement.	On November 26, 2016, six weeks after her husband's death, 10 days after her uncle's death, and not even one (1) month after retaining an attorney, Dresser, individually, on behalf of the estate of Cantor, and on behalf of The Cantor Group, executed an Agreement with Hal J. Webb, P.A and Webb individually for the transfer of his shares in the Firm and other businesses owned jointly with Cantor (the "Agreement"). (¶87)
"..., an agreement whose provisions were, notes the complaint, 'unconscionable' …" said Robert M. Einhorn, Co-Counsel in the case.	Aside from the above provisions, the Agreement also contained numerous other provisions which were unconscionable, ridiculously unfair and prejudicial to Dresser and The Cantor Group, and all of which substantially benefit and enrich Webb. (¶95)

R:5951–53, R:5955–94.

Moreover, the original complaint was circulated as one package along with the Press Release. *See* R:5955–94. Accordingly, the Press Release and News Articles were inactionable pure opinion because they reported the allegations on which the opinions were based, ***and*** those allegations were publicly available and submitted along with the statements. And Robert Zarco's additional statements in the Press Release were likewise matters of

opinion.[5] The Order Granting the Motion to Strike ruling otherwise, depriving Dresser the opportunity to defend against Webb's defamation Counterclaim, must be reversed and, on remand, verdict should be directed in favor of Dresser on the defamation Counterclaim.

III. THE JURY VERDICT MUST BE REVERSED BECAUSE THE REDACTED PRESS RELEASE FAILED TO PROVIDE THE JURY THE ENTIRE CONTEXT FOR DEFAMATION.

A further error at trial related to the jury's consideration of the Press Release and news articles. The trial court redacted more than half of the Press Release's content from the version considered by the jury — and all of the redactions related to the facts and allegations as asserted in Dresser's initial complaint — which complaint was attached to the Press Release and thus was part of the entire publication. This violated the fundamental rule that "a publication must be considered in its totality." *Smith*, 731 So. 2d at

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[5] With respect to Attorney Zarco's statement that Sharon was "penniless," it was error for the Court to determine that to be a false statement, as a matter of law. One can well imagine a construction of that statement that is literally not defamatory and which constitutes non-actionable hyperbole. No one is ***penniless*** (pennies adorn the sidewalk, after all). Dresser, having been married to one of the most successful tax attorneys in Miami, was accustomed to a certain lifestyle that was now lost to her. Dresser was entitled to present these circumstances and context to the jury as they assessed whether or not this statement was actually defamatory, or just opinion.

705 (reversing and remanding jury verdict where full "context of the publication" was not susceptible to a defamatory effect).

The trial court abuses its discretion when it permits only the purportedly defamatory portions of a publication to be seen by the jury. *E.g.*, *Smith*, 731 So. 2d at 705 (citing *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983); *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 923 (M.D. Fla. 1996).

"The court must consider ***all the words used***, not merely a particular phrase or sentence." *Smith*, 731 So. 2d at 705 (quoting *Byrd*, 433 So. 2d at 595) (emphasis added). *See also Skupin*, 314 So. 3d at 356 ("When the court makes these determinations [on whether a statement is pure opinion or libel], it must construe the statement in its totality, examining not merely a particular phrase or sentence, but all the words used in the publication.") (internal citation and quotation marks omitted).

Indeed, a comparison of the redacted Press Release allowed into evidence to the full unredacted Press Release, with the attached complaint, reflects the error of allowing Webb to cherry-pick attorney Zarco's statements out of the proper context in which they were made. *Compare* R:5951–54 (unredacted Press Release), *with* R:13838–840 (redacted Press Release).

"There is," accordingly, "no way to determine the 'gist' or 'sting' of the publication in the mind of the average [reader] without examining the statement in context." *Smith*, 731 So. 2d at 705–06.

Because the trial court failed to provide the jury the full context of the allegedly defamatory publication — contrary to binding law from this Court — the jury verdict must be reversed and remanded.

IV. DIRECTED VERDICT ON THE SUBSTANTIAL TRUTH DOCTRINE WAS ERRONEOUS AS A MATTER OF LAW

The Predicate Summary Judgment and Order Granting Motion to Strike left standing Dresser's defense of substantial truth; however, the trial court eliminated this defense at the close of evidence at trial, directing verdict thereon and conclusively removing from the jury the ability to determine the falsity of the allegedly defamatory statements.

"An order on a motion for directed verdict and for judgment notwithstanding the verdict is reviewed de novo." *Shoma Coral Gables, LLC v. Gables Inv. Holdings*, No. 3D22-206, at *10 (Fla. 3d DCA July 26, 2023) (quoting *Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017)). The "evidence and all inferences of fact" must be viewed "in the light most favorable to the ***nonmoving*** party," here, Dresser, and the appellate court "can affirm a

directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Id*. (emphasis added).

Defamation requires (1) "publication [of a statement]; (2) falsity [of such statement]; (3) [that the] actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) [that] the statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

"A false statement of fact is the *sine qua non* for recovery in a defamation action." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1253 (S.D. Fla. 2014) (*Byrd*, 433 So. 2d at 595). And "it is normally a decision for the fact-finder to determine what a reasonable person hearing the statement would likely have understood it to mean, based on the circumstances and audience involved." *Scott v. Busch*, 907 So. 2d 662 (Fla. 5th DCA 2005). Thus, "the law is well-settled that where a publication is susceptible of two reasonable interpretations, one of which is defamatory, the issue of whether the publication was defamatory becomes one of fact and ***must be submitted to a jury***, as here, for a fact-finding determination." *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376, 389 (Fla. 3d DCA 1982) (emphasis added). *See*, *e.g.*, *Drennen v. Westinghouse Elec. Corp.*, 328

So. 2d 52, 55 (Fla. 1st DCA 1976) (reversing a directed verdict for defendant on truth defense where plaintiff presented sufficient evidence to submit the "issue of truth" to the jury).

Further, "[u]nder the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *Smith*, 731 So. 2d at 706. "Florida law requires 'that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial." *Ozyesilpinar*, 365 So. 3d at 459 (quoting *McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962)). "According to the U.S. Supreme Court and Florida case law, falsity only exists if the publication is substantially and materially false, not just if it is technically false." *Smith*, 731 So. 2d at 707.

In *Klayman*, the Southern District of Florida denied a defamation defendant's motion for summary judgment, finding that Florida's substantial truth doctrine dictated that the jury determine the overall effect of the statements. *Klayman*, 22 F. Supp. 3d 1240. Klayman brought a defamation action against Judicial Watch, Inc. for publishing reports about ongoing litigation involving Klayman, including criminal charges. The district court ruled that while some aspects of the publications may not have been accurate, the overall publication, as a whole, could be viewed as

substantially true. *Id*. at 1254 (“In other words, while the statement Klayman was "convicted," as written on Taitz's website, is technically false, whether the falsity is negated because the online posting taken as a whole is substantially true is an issue for the jury.”).

Here, as in *Klayman*, the Press Release and resulting news articles were reporting on litigation. The Press Release relayed the allegations as stated in the initial complaint regarding the amended Shareholders’ Agreement and Webb’s failure to disclose his obligations to transfer the “keyman” policy upon his resignation, and the initial complaint was provided with the Press Release. At the time the Press Release was filed, the trial court had not yet made the legal determination that the amendment to the Press Release was ineffective such that Webb had no obligation to transfer the policy. Thus, the Press Release was, taken as a whole, a truthful report of the claims which Dresser in good faith believed to be meritorious.

Indeed, conspicuously absent from the record is any motion for sanctions by Webb under Section 57.105, Florida Statutes directed to the initial complaint asserting that the claims were frivolous. Although Webb ultimately secured judgment on the claims asserted in the Second Amended Complaint (a ruling that was error, in and of itself, as argued above), that after-the-fact legal determination of the merits of the litigation cannot change

the veracity of the contemporaneous reporting of the claims at the outset of the case.

It was error to deny Dresser the ability to present this remaining affirmative defense to the jury, especially after the Court had improperly stricken her two other defenses. The combination of the pre-trial and trial rulings left Dresser with no defenses to the defamation claim. Reversal and remand is required for a new trial at which substantial truth of the Press Release may be considered by the jury.

V. PUNITIVE DAMAGES SHOULD BE REVERSED.

A. Judgment Should Have Been Directed In Dresser's Favor Because Webb Failed to Meet his High Burden of Proving Malicious Intent by Clear and Convincing Evidence.

The punitive damages verdict should be reversed because Webb failed to carry his substantial burden to prove by clear and convincing evidence that Dresser committed "intentional misconduct." § 768.72(2)(a), Fla. Stat. *See also* § 768.725, Fla. Stat. ("In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages.")

Intentional misconduct means "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." § 768.72(2)(a).

The sole evidence for Dresser's "knowledge of the wrongfulness of" her conduct was Webb's testimony that Dresser threatened to "smear" Webb in the press in an email to Webb's former attorney, David Trench in March 2017. T:967. That email, however, was responsive to David Trench's firm's actions in unceremoniously dumping Cantor Law Group client files on Dresser's property. *See* R:13849. Moreover, that email was months before the initial complaint against Webb and the Press Release reporting on the initial complaint. Finally, while Dresser testified she authorized a press release about the case (T:845), she can hardly be said to have had "knowledge of the wrongfulness of" her conduct because she had a good faith basis to believe that the initial complaint was meritorious.

Indeed, the owner of the media relations firm tasked with issuing the Press Release confirmed that "the facts are the facts from the complaint" (T:545), and that she didn't find anything offensive in attorney Zarco's email to her. *Id*. The press agent testified that "[i]f it was directly defamatory, [she] would not [publish the statement]" (T:545-46), that "many times [she] ha[d] told clients we can't help them with things that they want to put out in the media because it's not appropriate," (T:545–46), and that in 20 years of

issuing press releases about ongoing court actions, this case was the first in which a statement she issued led to litigation. T:546.

Dresser testified she authorized a press release in the case *to reflect what was in the complaint*, and that's the *only* type of release she authorized. T:845.

Webb's single email (not even directed to him) falls far short of establishing "based on clear and convincing evidence [] that the defendant was personally guilty of intentional misconduct." *Taylor v. Mentor Worldwide LLC*, 940 F.3d 582, 596 (11th Cir. 2019). "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion 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 firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *In re Inquiry Concerning a Judge*, 174 So. 3d 364, 369 (Fla. 2015) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).[6]

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[6] Further, a jury's finding of defamation per se is also insufficient, alone, for entitlement to punitive damages. *See* *Army Aviation Heritage Found. &* (continued . . .)

Accordingly, the punitive damages verdict should be reversed and remanded for entry of judgment in accordance with Dresser's motion for directed verdict. *See*, *e.g.*, *Tiller v. Ford Motor Co.*, No. 3:03-CV-489-J-32HTS, 2006 WL 166530, at *3 (M.D. Fla. Jan. 21, 2006) (granting summary judgment to defendant on plaintiff's punitive damage claim because the evidence failed to show by clear and convincing evidence defendant engaged in intentional misconduct or was grossly negligent, even though the same evidence created a triable issue of fact on liability).

B. The Trial Court's Jury Instructions on the Punitive Damages Cap Misstated the Statute.

The trial court failed to give the standard, Phase-II punitive damages jury instruction that the jury should consider: "whether the wrongful conduct was motivated solely by unreasonable financial gain." Standard Civil Jury Instructions 503.1(c)(2)(A)(i). This instruction is directly tied to the

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Museum, Inc. v. Buis, 504 F. Supp. 2d 1254, 1259 & 1266–67 (N.D. Fla. 2007) (finding plaintiff was not entitled punitive damages despite defendant being liable for defamation per se as Defendant's false statements "were devoid of common law malice in the form of ill will, hostility, or evil intent"); *see also* *Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1221 (11th Cir. 2010) (affirming grant of defendant's motion for judgment as a matter of law on the issue of punitive damages, noting "[a]lthough malice is an element of malicious prosecution, a jury verdict for a plaintiff in a malicious prosecution suit does not by itself automatically establish a right to punitive damages.") (applying Florida law).

mandatory statutory caps set forth in Section 768.73(1)(a) and (b), which specifies that "punitive damages ***may not exceed*** the greater of … [t]hree times the amount of compensatory damages … or … ***[t]he sum of $500,000***," unless "the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain." § 768.73(1)(a) & (b), Fla. Stat. (2023) (emphasis added).

Accordingly, because the jury never determined that Dresser's conduct was motivated solely by unreasonable financial gain, damages could not exceed $500,000.

It was error for the Court to remove the "whether the wrongful conduct was motivated solely by unreasonable financial gain" finding from the jury instruction because Florida's punitive damage statute is progressive. Before a jury decides whether there was specific intent to harm with harm occurring, the jury must first determine whether the conduct was motived solely by unreasonably financial gain. *See* § 768.73(1).

Webb's own leading defamation per se case, *Lawnwood Med. Ctr., Inc. v. Sadow*, used this progression in the Phase II jury instructions, first asking the jury "whether the wrongful conduct was motivated solely by unreasonable financial gain," then "whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from

the conduct, was actually known by," before finally asking, whether, "at the time of the loss, injury or damage to [plaintiff], [defendant] had a specific intent to harm." 43 So. 3d 710, 720 n.10 (Fla. 4th DCA 2010).

Whether conduct was motivated "**solely** by unreasonable financial gain" is a heavy burden. *Crestview Hosp. Corp. v. Coastal Anesthesia, P.A.*, 203 So. 3d 978, 980 (Fla. 1st DCA 2016) (emphasis in original). When the Court removed this instruction, it unfairly precluded Dresser from arguing to the jury that her actions were not motivated ***solely*** by unreasonable financial gain. Instead, Webb was allowed to skip straight to uncapped punitive damages, contrary to the plain language of the statute.

This error was patently prejudicial and warrants a new trial at which the jury can determine whether the conduct was ***solely*** motivated by unreasonable financial gain.

CONCLUSION

The Predicate Summary Judgment and Order Granting Motion to Strike must be reversed and remanded for further proceedings on both the Second Amended Complaint and Counterclaim. Alternatively, the final judgment must be reversed for verdict to be entered in the Dresser Parties' favor under the pure opinion doctrine, or, at a minimum, for new trial, for all the reasons argued above.

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CERTIFICATE OF SERVICE

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I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 13,000 words, in compliance with Rule 9.210(a)(2)(B).

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