No. 5D17-3572

IN THE FIFTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

GEICO GENERAL INSURANCE COMPANY,
Petitioner,

v.

ATHINA DEVER, Individually and as Personal Representative of the Estate of JOHN KENT DEVER,
Respondent.

On Petition for a Writ of Certiorari
to the Circuit Court of the Eighteenth Judicial Circuit
in and for Seminole County, State of Florida
L.T. No. 11-CA-1162-08-K, Hon. Jessica J. Recksiedler

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

THE MCMICHAEL LAW FIRM, PL

Alan E. McMichael
Florida Bar No. 441732
alan@alanmcmichael.com
527 E University Avenue
Gainesville, Florida 32601
Telephone: (352) 375-4449
Facsimile: (352) 375-4449

DAVID & PHILPOT, PL

Timothy H. David
Florida Bar No. 485993
tdavid@davidlaw.com
124 Florida Ave S.
Lakeland, Florida 33802
Telephone: (407) 830-5050
Facsimile: (407) 830-9064

CREED & GOWDY, P.A.

Rebecca Bowen Creed
Florida Bar No. 975109
rcreed@appellate-firm.com
filings@appellate-firm.com
Thomas A. Burns (*Of Counsel*)
Florida Bar No. 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimile: (904) 503-0441

Counsel for Athina Dever

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

Regulations

Other Authorities

BASIS FOR JURISDICTION

This Court has jurisdiction to review whether the trial court complied with the procedural requirements of § 768.72, *Fla. Stat. See* Fla. Const. art. V, § 4(b)(3); Fla. R. App. P. 9.030(b)(2)(A); *Globe Newspaper Co. v. King*, 658 So. 2d 518, 520 (Fla. 1995). It does not, however, have jurisdiction to consider whether the evidence was sufficient to provide a reasonable basis for punitive damages. *Globe Newspaper*, 658 So. 2d at 519. As such, Respondent, Athina Dever, respectfully[1] requests that the petition be denied on the merits and with prejudice.

FACTS ON WHICH RESPONDENT RELIES

Nature of the case

This certiorari proceeding concerns whether, in allowing Ms. Dever to bring a punitive damages claim against Petitioner, GEICO General Insurance Company, the trial court departed from the procedural requirements of § 768.72, *Fla. Stat.*

[1] Throughout its petition, GEICO overuses hyperbolic language and emotional adverbs, *e.g.*, Pet. 10 ("wholly inapposite," "abundantly clear," "no authority whatsoever"), 13 ("abundantly clear"), 14 ("completely improper"), 15 ("unequivocally clear"), 17 ("clearly not the standard" and "woefully failed to meet her burden"), 22 ("absolutely no evidence"), 23 ("completely unreasonable"), 24 ("patently obvious[]"), 27 ("simply not a single shred of evidence"), 28 ("completely meritless"), 29 ("completely erroneous," "baseless argument," and "unequivocally clear"), 32 ("woefully fails"), 34 ("absolutely zero evidence"), and makes *ad hominem* attacks on Ms. Dever's trial counsel, *e.g.*, Pet. 10 ("intended to mislead"), 11 ("either failed to recognize, or intentionally omitted"), 12 ("either unaware of the current standard … or intentionally trying to mislead the circuit court"), 13 ("intended to mislead"). But bluster is not substance. Instead of responding in kind to GEICO's hyperbole, histrionics, and accusations, this response simply explains why the petition's arguments are wrong.

Course of the proceedings

Ms. Dever sued GEICO for, *inter alia*, outrage (A. 31-35), which is also called intentional infliction of emotional distress ("IIED"). *See Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 152 (Fla. 5th DCA 1980); *Winter Haven Hosp. v. Liles*, 148 So. 3d 507, 515 (Fla. 2d DCA 2014). She moved for leave to amend her complaint to add a punitive damages claim. (A. 171-179.) After a hearing (Supp. A. 8-36), the trial court denied the motion. (A. 180.) Five days before trial, Ms. Dever moved for a continuance (A. 204-05) and filed her second amended motion for leave to add a claim for punitive damages. (A. 181-91.) After a hearing on the motion to continue (*see* Supplemental Appendix (hereafter "Supp. A."), at 37-93), Ms. Dever filed a third amended motion for leave (A. 208-18), and the trial court held a second hearing on Ms. Dever's entitlement to a punitive damages claim. (A. 282-350.) This time, the trial court granted leave. (A. 6-7.[2]) This petition followed.

Disposition in the lower tribunal

A. Ms. Dever's evidentiary proffer.

While riding his motorcycle, Athina Dever's husband, John Dever, was involved in a traffic accident. (A. 214.) GEICO concedes the driver who struck Mr. Dever was its insured when the accident occurred. (Pet. 2.) Mr. Dever was

[2] Ms. Dever's third amended motion for leave to add a punitive damages claim made the same evidentiary proffer and arguments as her second motion for leave, but also made substantive changes to the proposed third amended complaint. (*Compare* A. 181-204, *with* A. 208-30.)

hospitalized. (A. 214.[3]) During his hospitalization, Ms. Dever communicated with Jamie Yothers, a GEICO adjuster (*i.e.*, claims representative). (A. 214.) When Mr. Dever's condition began to deteriorate (A. 214), Ms. Dever became "overwhelmed by fear" that her husband's injuries would kill him or render him incapable of supporting their family. (A. 732-33.) Eventually, Mr. Dever was admitted to the intensive care unit ("ICU") and placed in a medically induced coma. (A. 214.)

While Mr. Dever was in the hospital, Ms. Dever became so "apprehensive and uncertain" that she felt she could no longer meaningfully communicate with Ms. Yothers. (A. 733-34.) Accordingly, Ms. Dever retained Tim David, Esq. to represent her and Mr. Dever in this matter. (A. 214, 733-34.) She then called the adjuster, told her she had hired counsel, and asked Ms. Yothers to communicate only with Mr. David from that point forward. (A. 214, 734.)

Shortly thereafter, Ms. Yothers sent Detlev Schwarz, a GEICO field adjuster, to the ICU to "attempt to settle the case directly with Ms. Dever by offering a check for the policy limits." (A. 215; A. 216-17.) Mr. Schwarz testified, however, that he was not prepared to tender settlement proceeds when he went to the ICU. (A. 617.)

When Mr. Schwarz walked into Mr. Dever's room, Ms. Dever was sitting beside her husband, who was fighting to stay alive. (A. 214.) She had never seen Mr.

[3] Though not mentioned in Ms. Dever's proffer, Mr. Dever's injuries led to his death. (A. 27, 208.)

Schwarz before. (A. 214.) Ms. Dever asked Mr. Schwarz if she could help him. (A. 214.) He stated "he was there to speak to John Dever and to learn about his condition." (A. 214.) Ms. Dever told Mr. Schwarz he could not speak to Mr. Dever. (A. 214.) She also explained she had notified GEICO she was represented by counsel, and GEICO employees were to communicate with Mr. David, not the Devers. (A. 214.) Mr. Schwarz "then tried to ask Mrs. Dever questions about her husband's condition, but she refused and asked him to leave." (A. 214.)

"Ms. Dever was shocked and angry at this intrusion." (A. 214; A. 734-35.) Wondering why GEICO would resort to such indecent measures and whether they would continue, she "became extremely fearful and anxious." (A. 214; A. 736-37, 756.) Ultimately, her confidence in the hospital's ability to protect her unconscious, vulnerable husband had been badly shaken. (A. 214.)

At deposition, Ms. Yothers admitted she knew Ms. Dever had a lawyer when she sent Mr. Schwarz to the ICU "to attempt to settle." (A. 215.) She further "testified that in serious injury cases, GEICO adjusters were instructed to contact the claimant and tender a settlement check directly to the claimant or the claimant's family." (A. 215.) According to Ms. Yothers, GEICO instructed its adjusters to pursue this course of action so long as no letter of representation had been received; actual notice that the claimant or his family had retained counsel did not matter. (A. 215.) Ms. Yothers also conceded she had expected Ms. Dever to be distraught, and

it was inappropriate for Mr. Schwarz "to enter the ICU without being invited." (A. 215.) Ms. Yothers's supervisor, Michael White, "testified that it would be improper for GEICO to contact the claimant if the adjuster knew the claimant was represented" by counsel. (A. 215.)

GEICO designated Virginia Sanders to testify as its corporate representative at trial. (A. 216.) She was expected to testify about "GEICO's claims handling policies and procedures." (A. 216.) At deposition, she "expressly condoned and ratified" the adjusters' "actions on behalf of GEICO." (A. 216-17.)

Dr. Richard Hall, a psychiatrist who examined Ms. Dever, concluded that Mr. Schwarz's intrusion at the ICU "caused her severe mental anguish of a significant duration." (A. 215.)

B. The hearings on Ms. Dever's motions for leave to add a punitive damages claim.

The trial court heard and evaluated evidence concerning Ms. Dever's entitlement to punitive damages at the hearing on her motion for leave to add a punitive damages claim (Supp. A. 8-36) and her third amended motion for leave to add a punitive damages claim. (A. 282-349[4].)

[4] Relatedly, at the hearing on Ms. Dever's motion to continue, Ms. Dever's counsel summarized his understanding of the trial court's conclusions at the hearing on the motion to amend (not the hearing on the third motion to amend) and discussed the standard that governs requests for leave to add a punitive damages claim. (*See* Supp. A. 42-43.)

Specifically, at the hearing on Ms. Dever's initial motion for leave, the trial court evaluated evidence concerning whether Ms. Yothers's behavior constituted intentional misconduct under § 768.72. (*See* Supp. A. 10-19.) The trial court also evaluated whether the evidence showed a reasonable basis to hold GEICO itself liable for punitive damages. (*See* Supp. A. 19-25.) Ultimately, it ruled the evidence did not satisfy § 768.72's employer-liability provisions and denied leave to amend without prejudice. (A. 180; Supp. A. 31.)

At the hearing on the third amended motion for leave, the trial court evaluated Ms. Dever's amended proffer and the record evidence to once again determine whether that provided a reasonable basis for finding Ms. Yothers guilty of intentional misconduct (A. 298-310) and finding GEICO liable for punitive damages as an employer. (A. 318, 323-25.) This time, however, the court ruled there was a reasonable evidentiary basis for punitive damages (A. 318-25) and granted Ms. Dever's third amended motion for leave to amend. (A. 6.) In doing so, it noted IIED's outrageous conduct element inherently required proof of intentional misconduct. (A. 320-22.)

ARGUMENT

Under § 768.72, a plaintiff may not bring a punitive damages claim unless evidence in the record or a proffer establishes a reasonable basis for punitive damages. On certiorari, an appellate court may not review whether the evidence was

sufficient to support a trial court's determination that the plaintiff established a reasonable evidentiary basis for punitive damages. It may review only whether the trial court complied with the statute's procedural requirements.

To determine whether the trial court complied with the procedural requirements of § 768.72, a primer on what the plaintiff must show to establish entitlement to a punitive damages claim is helpful. In cases where a plaintiff seeks a punitive damages claim against a corporation for injury directly caused by its employees, § 768.72 requires a reasonable evidentiary basis for two propositions. First, the evidence must show the plaintiff's injury was caused by the "intentional misconduct" of one of the corporation's employees. *See* §§ 768.72(2)-(3), *Fla. Stat.* Second, the evidence must show the corporation "actively and knowingly participated in such conduct," or its "officers, directors, or managers … knowingly condoned, ratified, or consented to such conduct." § 768.72(3), *Fla. Stat.* Because Ms. Dever based her punitive damages claim against GEICO on the intentional misconduct of a GEICO employee, the trial court needed to determine whether there was a reasonable evidentiary basis for both propositions.

GEICO argues that in granting leave, the trial court incorrectly observed that IIED's outrageous conduct element inherently included proof of "intentional misconduct." On that basis, GEICO claims the trial court did not follow the procedural requirements of § 768.72. GEICO is mistaken for two reasons.

First, the trial court's legal observation about the relationship between IIED and intentional misconduct was correct. Accordingly, it could not have contributed to a departure from the procedural requirements of § 768.72.

Second, even if the trial court had erred in this legal conclusion, GEICO's argument about the effect of that error is not properly before this Court. The trial court ruled: Ms. Dever had presented sufficient evidence to sustain an IIED jury verdict; IIED's outrageous conduct element inherently involves "intentional misconduct"; and therefore, the same evidence that was sufficient to create a jury issue as to the elements of IIED also provided a reasonable basis for punitive damages. GEICO contends that because "intentional misconduct" requires more proof than outrageous conduct, the trial court determined Ms. Dever was entitled to a punitive damages claim based on evidence that, while sufficient to establish IIED, was insufficient to establish a reasonable basis for "intentional misconduct." This Court does not have certiorari jurisdiction to review such arguments.

Accordingly, the only question properly before this Court is whether the trial court complied with § 768.72's procedural requirements. In that regard, Ms. Dever moved for leave to add a punitive damages claim and proffered evidence in support of both relevant § 768.72 provisions. The trial court evaluated this evidence at two separate hearings and determined the evidence established a reasonable basis for

punitive damages. Therefore, it complied with the procedural requirements of § 768.72 and certiorari should be denied.

Standard of review

A writ of certiorari is an extraordinary common law remedy that must meet "strict prerequisites," should be employed only in "very limited circumstances," is "entirely within the discretion of the court," and is "[not] available as a matter of right." *Abbey v. Patrick*, 16 So. 3d 1051, 1053 (Fla. 1st DCA 2009). It "'should not be used to circumvent the interlocutory appeal rule.'" *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (citations omitted).

To prevail, a petitioner must establish: (1) "the trial court departed from the essential requirements of law"; (2) "the departure resulted in material injury to the petitioner"; and (3) "the injury cannot be remedied in a postjudgment plenary appeal." *Varnedore v. Copeland*, 210 So. 3d 741, 744 (Fla. 5th DCA 2017) (citing *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011)). Prongs (2) and (3) concern only this Court's jurisdiction. *Williams*, 62 So. 3d at 1132–33 (characterizing "[t]he last two elements" as "jurisdictional"). On the other hand, prong (1) describes "the appellate court's standard of review on the merits." *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d DCA 1995).

In that regard, § 768.72 and Rule 1.190 enumerate "[t]he essential requirements of law for seeking leave to file a pleading asserting a claim for punitive

damages." [5] *Varnedore*, 210 So. 3d at 744. Importantly, § 768.72 requires "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of [punitive] damages." § 768.72.

The Florida Supreme Court has "read section 768.72 to create a substantive legal right" to be free from punitive damages litigation and related financial worth discovery until there is a reasonable evidentiary basis to support a punitive damages claim. *Globe Newspaper*, 658 So. 2d at 519. For that reason, "appellate courts … have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72." *id.* at 519; *accord, e.g., Varnedore*, 210 So. 3d at 744. Certiorari is unavailable, however, to review a trial court's determination that an evidentiary showing under § 768.72 was sufficient to establish a "reasonable basis for recovery of [punitive] damages." *Globe Newspaper*, 658 So. 2d at 519.[6]

"Moreover, certiorari jurisdiction cannot be used to *create* new law where the decision below recognizes the correct general law and applies the correct law to a

---

[5] GEICO does not argue the trial court departed from the pleading mechanics prescribed by Rule 1.190. Accordingly, the scope of this Court's review is limited to the evidentiary mandates of § 768.72.

[6] *Accord Parker, Landerman, & Parker, P.A. v. Riccard*, 871 So. 2d 1043, 1043-44 (Fla. 5th DCA 2004); *Estate of Esterline v. Avante at Leesburg, Inc.*, 845 So. 2d 1028, 1029 (Fla. 5th DCA 2003); *Delta Health Grp., Inc. v. Jackson*, 798 So. 2d 857, 857-58 (Fla. 5th DCA 2001); *Orlando Jewelers, Mfg., Inc. v. Foster*, 790 So. 2d 1266, 1267 (Fla. 5th DCA 2001).

new set of facts to which it has not been previously applied. In such a situation, the law at issue is not a clearly established principle of law." *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012).

Merits

I. The procedural requirements of § 768.72, *Fla. Stat.*, require a reasonable evidentiary basis for punitive damages

Section 768.72 "requires a plaintiff to provide the court with a reasonable evidentiary basis for punitive damages before the court may" grant him leave to add a punitive damages claim to his complaint. *Globe Newspaper*, 658 So. 2d at 520. In the specific context of IIED, proof of conduct sufficient to sustain a jury verdict on IIED's elements likewise satisfies the intentional misconduct component of § 768.72's reasonable evidentiary basis standard. The nature of the conduct actionable as an IIED claim subsumes the conduct that § 768.72(2)(a) defines as "intentional misconduct."

Through piecemeal reliance on cases interpreting § 768.72 in the context of tortious interference with business relations, GEICO invents a new legal standard. (Pet. 8-9.) GEICO claims that evidence sufficient to create a jury issue as to the elements of IIED cannot provide a reasonable basis for recovery of punitive damages under § 768.72. Florida law recognizes no such standard.

Furthermore, referencing cases cited in Ms. Dever's amended motions for leave to add a punitive damages claim, GEICO claims her counsel tried to trick the

trial court into applying the wrong legal standard. (*See supra* note 1.) A simple review of the record reveals Ms. Dever identified the correct legal standard for evaluating requests for leave to add a punitive damages claim. What the record does not reveal, however, is any indication the trial court relied on the cases with which GEICO now takes issue. And in any case, on certiorari, this Court reviews whether the trial court departed from the essential requirements of law, not whether a plaintiff's motion correctly stated those requirements.

A. In an intentional tort case, a reasonable basis for punitive damages under § 768.72, Fla. Stat., requires proof of "intentional misconduct."

GEICO explains the evidentiary determinations required by § 768.72. (Pet. 6-13.) But in emphasizing case law that describes the nature of conduct egregious enough to warrant punitive damages,[7] (s*ee* Pet. 6-13), GEICO diverts the focus of this Court's inquiry from the statute's procedural requirements. Certiorari review is limited to whether the trial court complied with § 768.72's procedural requirements. Thus, an explanation of those requirements, tailored to the scope of this Court's review, is necessary.

[7] "[A] demand for punitive damages is 'not a separate and distinct cause of action; rather it is auxiliary to, and dependent upon, the existence of an underlying claim.'" *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016) (citation omitted). "In fact, a plaintiff cannot even include a demand for punitive damages in the initial complaint and is allowed to add a request for punitive damages *only if* the evidence establishes a right to claim punitive damages by a 'reasonable evidentiary showing in the record.'" *Id.* (quoting § 768.72, *Fla. Stat.*).

Subsection (1) of § 768.72 establishes the reasonable evidentiary basis prerequisite for adding a punitive damages claim. When a plaintiff seeks leave to add a punitive damages claim against *an employer for the conduct of its employee*, the trial court must look to subsections (2) and (3) of § 768.72 to determine whether the record evidence (or evidentiary proffer) provides a reasonable basis for punitive damages.

"Subsection (2) of [§ 768.72] sets forth the burden of proof [for proving punitive damages] at trial." *Bistline v. Rogers*, 215 So. 3d 607, 609 (Fla. 4th DCA 2017). With regard to punitive damages claims based on underlying causes of action that "do not sound in negligence," § 768.72(2) states "'[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds the defendant was personally guilty of *intentional misconduct*.'" *Id.* at 609 (quoting § 768.72(2), *Fla. Stat.*). It is worth noting that under § 768.72(2), the clear and convincing evidence standard applies to the evidence necessary to support the trier of fact's ultimate punitive damages award. In contrast, when a plaintiff is seeking leave to amend his complaint to add a punitive damages claim, he need only proffer a reasonable basis upon which a trier of fact could find "intentional misconduct." *See* § 768.72, *Fla. Stat.*

The punitive damages claim at issue here was based on IIED, which does not sound in negligence. Hence, the reasonable-evidentiary-basis analysis involved a

determination whether the harm Ms. Dever suffered was caused by "intentional misconduct." *See* § 768.72, *Fla. Stat.*; *Bistline*, 215 So. 3d at 609.

Although the "personally guilty" language of § 768.72(2)'s "intentional misconduct" requirement seems to indicate only defendants who themselves committed intentional misconduct can be liable for punitive damages, employers can also be liable for their employees' intentional misconduct. *See* § 768.72(3), *Fla. Stat.* When a plaintiff asserts a punitive damages claim against an employer for its employee's intentional misconduct, he must reasonably show: (1) "[t]he employer … actively and knowingly participated in such conduct"; or (2) "[t]he officers, directors, or managers of the employer … knowingly condoned, ratified, or consented to such conduct." § 768.72(3)(a)-(b), *Fla. Stat.* In this context,

> "[i]ntentional misconduct" means that the [employee] 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), *Fla*. *Stat*.

In sum, § 768.72(1)-(3) required the trial court to evaluate the evidence or proffer to determine whether it established a reasonable basis for a trier of fact to find that: (1) GEICO's employee (Ms. Yothers) was guilty of intentional misconduct, and (2) GEICO either "actively and knowingly participated in such

conduct" or its "officers, directors, or managers … knowingly condoned, ratified, or consented to such conduct." § 768.72(3)(a), (3)(b), *Fla. Stat.*

B. Evidence sufficient to prove IIED is necessarily sufficient to prove "intentional misconduct" under § 768.72, *Fla. Stat.*

GEICO argues that the trial court erred when it determined the outrageous conduct element of IIED inherently requires proof of "intentional misconduct." (Pet. 10-13, 28-33.) GEICO is mistaken.

The elements of IIED require proof of conduct very similar to the conduct described in § 768.72(2)(a)'s definition of "intentional misconduct." Thus, a plaintiff could use the same evidence to prove the elements of IIED and to demonstrate that the conduct of a defendant's employee qualifies as "intentional misconduct." Also, "intentional misconduct" is inherent in the elements of IIED. Accordingly, when evidence is sufficient to establish the elements of IIED, it necessarily provides a reasonable evidentiary basis for the trier of fact to find an employee guilty of "intentional misconduct." *See* § 768.72(1)-(3), *Fla. Stat.*

"The Florida Supreme Court first explicitly recognized" IIED as an independent tort "(as contrasted with emotional distress as an element of damages caused by another tort) in *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985)." *Williams v. City of Minneola*, 575 So. 2d 683, 691 (Fla. 5th DCA 1991). IIED's elements are: (1) "deliberate or reckless infliction of mental suffering" via (2) "outrageous conduct" that (3) "caused the emotional distress," which was (4)

"severe." *Williams*, 575 So. 2d at 691 (quoting *Dependable Life Ins. Co. v. Harris*, 510 So. 2d 985, 986 (Fla. 5th DCA 1997)); *see also Lashley v. Bowman*, 561 So. 2d 406, 408-09 (Fla. 5th DCA 1990).

1. The intent elements are identical.

With regard to IIED's intent aspect, *Metropolitan Life* explained "that the defendant must have intended to inflict emotional distress, or must have acted with an intent which is tortious or criminal, or must have engaged in conduct characterized by 'malice' or a degree of aggravation which would entitle *the plaintiff to punitive damages for another tort*." [8] *Williams*, 575 So. 2d at 690 (citing *Metropolitan Life Ins. Co.*, 467 So. 2d at 278) (emphasis added). Put differently, the intent element of IIED (deliberate or reckless infliction) is satisfied when the tortfeasor either "intended the wrongful result of his behavior" or knew the harm was "certain or substantially certain to result from his act." *Id.* at 692.

In cases involving a punitive damages claim against an employer, "intentional misconduct" requires the employee who directly harmed the plaintiff to have intentionally pursued the course of conduct that caused the harm with "actual knowledge of [its] wrongfulness … and the high probability that injury or damage

[8] The Second Restatement of Torts even observed that in determining what type of conduct was outrageous enough to satisfy an IIED claim, the cases that had been decided prior to its publication required conduct even more egregious than that which "would entitle the plaintiff to punitive damages for another tort." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

… would result." *See* § 768.72(2)(a)-(3), *Fla. Stat.* The intent requirements of both IIED and "intentional misconduct" demand proof of the same type of bad intent or culpability. When evidence is sufficient to satisfy the intent element of IIED, it will also provide a reasonable evidentiary basis to satisfy the intent component of "intentional misconduct."

2. The conduct elements are identical.

While all elements of IIED are essential, "outrageousness is the threshold test for recovery." *Williams*, 575 So. 2d 683, 691 (Fla. 5th DCA 1991). It requires proof of "extreme behavior, beyond all bounds of decency, [that is] atrocious and utterly intolerable in a civilized community." *Id.* at 691.

Section 768.72(2)(a)'s definition of intentional misconduct somewhat "lacks specificity." *Cf. Beverly Health and Rehab. Servs., Inc. v. Meeks*, 778 So. 2d 322, 325 (Fla. 2d DCA 2000) ("[w]hen the law lacks specificity, … the appellate court has little more to determine than whether the trial court infringed upon the basic requirements of due process"). It does not expressly require a showing of conduct as egregious as that required by the outrageous conduct element of IIED. Nevertheless, § 768.72(2)(a) does, at a minimum, require an evidentiary showing that the defendant's conduct was "wrongful[]." § 768.72(2)(a), *Fla. Stat.*

Conduct that is "beyond all possible bounds of decency," "regarded as atrocious," and "utterly intolerable in a civilized community" is, without question,

wrongful. Accordingly, evidence that satisfies the outrageous conduct element of IIED likewise satisfies the wrongful conduct requirement of § 768.72(2)(a)'s definition of "intentional misconduct."

3. The causation-of-harm elements are identical.

Finally, IIED and the definition of "intentional misconduct" both require the defendant's outrageous (IIED) or wrongful ("intentional misconduct") conduct to have caused the plaintiff's harm. *Compare Williams*, 575 So. 2d at 691, *with* § 768.72(2)(a), *Fla. Stat.* Hence, evidence sufficient to satisfy IIED's causation element will also provide a reasonable basis upon which a jury could find the defendant's "intentional misconduct" caused the plaintiff's harm.

The only relevant difference between the elements of IIED and the requirements of "intentional misconduct" concerns the type and degree of harm. IIED requires a specific type of harm (emotional distress) and a specific degree of harm (severe). *Williams*, 575 So. 2d at 691. On the other hand, the definition of "intentional misconduct" does not require a specific type or degree of harm; rather, it requires only that the misconduct result in "injury or damage" to the plaintiff. § 768.72(2)(a). "Severe mental distress" (IIED) is a type of "injury" ("intentional misconduct"). *Williams*, 575 So. 2d at 691 (emotional distress is "'psychic injury'" (quoting *Eastern Airlines, Inc. v. King*, 557 So. 2d 574, 579-80 (Fla. 1990)); *accord Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956, 959 (Fla. 1st DCA 1979) (using

terms "emotional distress" and "emotional injury" interchangeably). Therefore, evidence of harm sufficient to satisfy the severe emotional distress threshold of IIED would likewise constitute a reasonable evidentiary showing of "injury" under the definition of "intentional misconduct."

4. Given the identical elements, the evidence was sufficient.

Here, the trial court found Ms. Dever had presented sufficient evidence to sustain a jury verdict on IIED's elements. (*See* A. 288-89, 318-25; Supp. A.31; Supp. A. 4-7.) This means the trial court determined Ms. Dever's evidence was convincing enough that a reasonable jury could find she had established the elements of IIED by a preponderance of the evidence. *See, e.g.*, *South Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014) ("preponderance" is "the applicable burden of proof in civil cases").

Preponderance is a higher standard than the reasonable-evidentiary-basis standard; *i.e.*, a plaintiff can show a reasonable basis with less convincing evidence than that required by the preponderance standard. *See Johnson v. Dicks*, 76 So. 2d 657, 661 (Fla. 1954) (explaining, in the context of workmen's compensation cases, "the preponderance of evidence rules" require more than "proof [that] furnishes a reasonable basis for an inference"). Accordingly, when the evidence before a trial court does "not preclude as a matter of law the possibility of a[n] [IIED] jury verdict in [the plaintiff's] favor," it means that "a proper evidentiary basis exists" for a jury

to reasonably "find intentional infliction of emotional distress." *Williams*, 575 So. 2d at 691. In other words, when a plaintiff produces sufficient evidence to sustain an IIED verdict in his favor, he has, at the very least, made an evidentiary showing establishing a reasonable basis for recovery on his IIED claim.

To be clear, evidence that is sufficient to create a reasonable basis for an IIED jury verdict in the plaintiff's favor provides a reasonable evidentiary basis for finding that the plaintiff's harm was caused by "intentional misconduct." Thus, the evidence sufficient to sustain a jury verdict on Ms. Dever's IIED cause of action, in and of itself, provides a reasonable evidentiary basis for a jury to find that a GEICO employee (Ms. Yothers) was guilty of intentional misconduct. (*See* A. 320.) For the trial court to grant Ms. Dever leave to amend her complaint to add a claim for punitive damages, it was still required to make a determination whether there was a reasonable evidentiary basis that GEICO participated in – or its officers, directors, or managers knew of or were otherwise complicit in – the employee's intentional misconduct. (*See supra* Argument I.A.) Because the trial court did exactly that, (*see* A. 323-25), certiorari must be denied. *Royal Caribbean Cruises, Ltd. v. Doe*, 44 So. 3d 230, 243 (Fla. 3d DCA 2010) (if the record "suggest[s] that the trial court made an evidentiary inquiry and/or factual determinations as required by section 768.72," certiorari must be denied).

C. Citing inapposite case law, GEICO implies evidence sufficient to establish the elements of IIED does not necessarily provide a reasonable evidentiary basis for "intentional misconduct."

For the most part, GEICO lays out the correct legal standard for evaluating motions for leave to amend to add a punitive damages claim. (*See* Pet. 6-13.) In two instances, however, it borrows language that is inapplicable here.

First, GEICO claims: "In the context of intentional torts, courts have said '[r]ecord evidence may support an intentional tort, but not necessarily an award of punitive damages.'" (Pet. 8 (quoting *Air Ambulance Prof'l, Inc. v. Thin Air,* 809 So. 2d 28, 30 (Fla. 4th DCA 2002)), and citing *Bistline*, 215 So. 3d at 609)). But *Air Ambulance* and *Bistline* both involved tortious interference with business relations, not IIED. Indeed, the sentence in *Air Ambulance* that immediately follows the language quoted by GEICO states, "Proof of the elements of *tortious interference* may be established even though the evidence may not justify an award of punitive damages." 809 So. 2d at 30 (emphasis added); *accord Bistline*, 215 So. 3d at 611 ("Merely pleading a facially sufficient claim for an *intentional business tort* is not sufficient to claim punitive damages.").

This rule makes sense in the context of tortious interference with business relations because, unlike IIED, tortious interference does not require proof of "conduct characterized by 'malice'" or "a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Williams,* 575 So. 2d at 690. Nor

does it require "extreme behavior" that goes "beyond all bounds of decency." *Id.* at 691. As such, it is surely possible for a plaintiff to prove the elements of tortious interference without establishing a reasonable evidentiary basis for finding the defendant guilty of "intentional misconduct." The same is not true for IIED.[9] Notably, the trial court recognized this distinction in ruling on Ms. Dever's motion for leave to add a punitive damages claim. (A. 321-22.)

Additionally, the trial court recognized the correct general law (§ 768.72) and applied it to the facts of this case. (*See, e.g.*, A. 298-325.) Because *Air Ambulance* and *Bistline* involved business tort fact patterns, extending the principles applied in those cases to the facts of this IIED case would be "creat[ing] new law." *Nader v. Fla. Dept. of Highway Safety and Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012). Therefore, the *Air Ambulance* and *Bistline* proposition concerning the varying sufficiency of tortious interference evidence and punitive damages evidence "is not a clearly established principle of law" for certiorari purposes. *See Nader*, 87 So. 3d at 723. As such, it cannot be the basis for a writ of certiorari particularly where, as here, the trial court applied the correct general principle to the facts before it. *See id.*

[9] The elements of tortious interference with business relations are: "'(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.'" *Kenniasty v. Bionetics Corp.*, 82 So. 3d 1071, 1074 (Fla. 5th DCA 2011) (citation omitted).

Second, GEICO states: "'[M]ere proof of an intentional tort does not ipso facto entitle the plaintiff to punitive damages.'" (Pet. 9 (quoting *Genesis Publ'ns, Inc. v. Goss*, 437 So. 2d 169, 170 (Fla. 3d DCA 1983)), and citing *Lancer Arabians, Inc. v. Beech Aircraft Corp.*, 723 F. Supp. 1444, 1447 (M.D. Fla. 1989). As a general proposition, this is true, but it is inapplicable here.

As mentioned above, to prove an intentional tort, a plaintiff must establish its elements "by a preponderance or greater weight of the evidence." *Watson Realty Group v. Quinn*, 435 So. 2d 950, 950 (Fla. 1st DCA 1983); Fla. Std. Jury Instr. (Civ.) 410.8. On the other hand, a plaintiff must prove entitlement to punitive damages with "clear and convincing evidence." § 768.72(2), *Fla. Stat.* Because the clear-and-convincing standard "requires more proof than a 'preponderance of the evidence,'" a plaintiff may recover compensatory damages for an intentional tort with evidence less weighty than that required to recover punitive damages. *See In re Watson*, 174 So. 3d 364, 368 (Fla. 2015) (citation omitted). Accordingly, the evidence sufficient to sustain a verdict on the elements of an intentional tort could be insufficient to sustain a punitive damages award.

But the relevant evidentiary comparison in this case is not between evidence sufficient to permit recovery for IIED and evidence sufficient to satisfy the clear-and-convincing evidence standard for recovering punitive damages at trial. (*See supra* Argument I.B.) The order on review granted leave to add a punitive damages

claim (reasonable evidentiary basis); it did not concern a verdict awarding punitive damages (clear and convincing evidence). Accordingly, the relevant comparison is between proof sufficient to establish IIED by a preponderance and evidence sufficient to provide a reasonable basis for punitive damages. (*See supra* Argument I.B.) In that regard, the preponderance of the evidence standard requires more convincing evidence than the reasonable evidentiary basis standard. (*See supra* Argument I.B.) Therefore, proof of IIED by a preponderance, which inherently requires a showing of "intentional misconduct," categorically qualifies as a reasonable evidentiary basis for "intentional misconduct." The "ipso facto" general proposition is thus inapplicable where, as here, the intentional tort at issue is IIED and the operative burdens are preponderance of the evidence (establishing the tort) and reasonable evidentiary basis (showing entitlement to add a punitive damages claim).

The general proposition is also true for another reason: not all torts that require the tortfeasor to have committed the conduct intentionally or recklessly require proof of conduct sufficiently egregious to establish a reasonable basis for punitive damages. IIED, however, does require proof of such conduct, distinguishing it from all intentional torts that do not. (*See supra* Argument I.B.) Hence, IIED's nature excepts it from the general proposition asserted in *Genesis Publications.*

Moreover, *Genesis Publications* was decided before the Florida Supreme Court first recognized IIED as a stand-alone tort in *Metropolitan Life Insurance*. *See Williams*, 575 So. 2d at 691.[10] As such, the Court could not have contemplated IIED's elements when it observed, as a general rule, that establishing an intentional tort does not automatically entitle a plaintiff to recover punitive damages.

Lancer Arabians, on which GEICO also relies for the "ipso facto" proposition, was a federal district court case decided after *Metropolitan Life Insurance*. Nevertheless, *Lancer Arabians* cited *Genesis Publications* for its general proposition distinguishing intentional torts and punitive damages claims. Importantly, although *Lancer Arabians* did not mention the type of intentional tort addressed, the opinion did explain that the plaintiff had "rel[ied] on the intentional nature of the tort alleged" in seeking to add a claim for punitive damages. *Lancer Arabians, Inc.*, 723 F. Supp. at 1447. It is IIED's outrageous conduct element, not its intentional nature, that qualifies IIED as a tort requiring conduct egregious enough to warrant punitive damages.

Accordingly, the rules relied upon by GEICO to imply that evidence sufficient to sustain an IIED verdict cannot provide a reasonable evidentiary basis for punitive damages are inapplicable here.

---

[10] *Genesis Publications* was decided in 1983, and *Metropolitan Life Insurance* was decided in 1985. *See Genesis Publications, Inc.*, 437 So. 2d 169; *Metropolitan Life Ins. Co.*, 467 So. 2d 277.

D. Relying on a faulty understanding of what standard Ms. Dever posited in her amended motions for leave to add a punitive damages claim, GEICO attacks arguments that have no bearing on this Court's review.

GEICO argues: "Ms. Dever's counsel relied on three cases that are all red herrings intended to mislead the trial court to the conclusion that the standard for amending a Complaint to add a claim for punitive damages is no different than for any other cause of action." (Pet. 13.) It further claims: "That is simply not the case as § 768.72, *Fla. Stat.*, makes it abundantly clear that adding a claim for punitive damages requires a much higher standard, one that requires a reasonable evidentiary basis." (Pet. 13.) This summary and attendant argument misapprehend the evidentiary standard Ms. Dever advanced below, and overstate the import of her trial counsel's citation to cases on which the trial court did not expressly rely.

Discussing three cases Ms. Dever cited in her motions for leave to amend (Pet. 10-13), GEICO accuses her counsel of being "either unaware of the current standard for adding punitive damages or … intentionally trying to mislead the circuit court in order to evade *her burden of establishing a reasonable evidentiary basis* to support her claim." (Pet. 12.)

This accusation is misguided because Ms. Dever's second and third amended motions for leave to amend described the standard for pleading punitive damages by quoting the entirety of § 768.72 (with the exception of subsection (4), which merely

states the statute's chronological applicability). (A. 182-84, 209-211.) GEICO also overlooks an important portion of her motions, which explained:

> Plaintiff does not suggest that *any* intentional act automatically entitles the plaintiff to recover punitive damages. Rather, Plaintiff suggests that the elements required by § 768.72 to plead and prove punitive damages are inherent in the elements of the tort of intentional infliction of emotional distress, and, this Court having already determined that the record evidence could support a verdict against GEICO for intentional infliction of emotional distress, the same evidence supports a claim for punitive damages.

(A. 185, 212.) This language demonstrates Ms. Dever was not, as GEICO claims, arguing "the standard for amending a Complaint to add a claim for punitive damages is no different than for any other cause of action." (Pet. 13.) Rather, she was claiming the evidence supporting her IIED cause of action also demonstrated a reasonable basis for punitive damages under § 768.72.

Furthermore, at the hearing on Ms. Dever's motion to continue, Ms. Dever's counsel stated:

> Well, our position is that the Statute 768.72 has now codified—this was enacted in 1986. First enacted in 1986 'cause that has codified the standard for punitive damages and, in fact, our initial position was that, hey, this is an intentional tort; we're automatically entitled to punitive damages. But the defense argued, well, you have to meet the statute. And I think that's probably a point well taken.
>
> So at our last hearing, where the Court denied the motion to add punitive damages without prejudice, we went through the statute and I believe I'm correct in asserting that we had met all of the elements in our proffer except for the last one.

(Supp. A. 42-43.) These remarks further show Ms. Dever expressly acknowledged the evidentiary benchmark for granting leave to add a punitive damages claim is the one set forth in § 768.72.

More importantly, however, there is no indication the trial court relied on any of the cases with which GEICO now takes issue when it determined the standard for evaluating Ms. Dever's motion for leave to amend. On certiorari, this Court reviews whether the trial court departed from the essential requirements of law, not whether a plaintiff correctly stated the essential requirements of law in a motion. *See Varnedore*, 210 So. 3d at 744. Therefore, the applicability of those cases has no bearing on this Court's analysis.

II. The trial court did not depart from the essential requirements of law when it determined Ms. Dever had established a reasonable evidentiary basis for punitive damages under § 768.72, *Fla. Stat.*

GEICO's petition essentially advances two arguments. Neither establishes a basis for a writ of certiorari.

First, GEICO argues the trial court erred when it concluded evidence sufficient to establish an IIED cause of action necessarily constitutes a reasonable showing of "intentional misconduct." (Pet. 13, 14-17, 28-32.) On that basis, it contends the trial court did not comply with the procedural requirements of § 768.72, *Fla. Stat.* That argument misapprehends the dispositive question in this certiorari proceeding. The trial court's musings about the legal relationship between the

elements of IIED and the definition of "intentional misconduct" (Pet. 16-17) were purely academic and had no bearing on whether the trial court "conducted the evidentiary inquiry required by section 768.72." *Globe Newspaper*, 658 So. 2d at 520.

Second, GEICO argues the trial court failed to comply with the procedural requirements of § 768.72 because the evidence and the proffer were insufficient to provide a reasonable basis for punitive damages. (Pet. 17-28; 33-37.) On certiorari, this Court has no jurisdiction to review the trial court's determination that the evidence and the proffer were sufficient to establish a reasonable basis for punitive damages. *See, e.g.*, *Orlando Jewelers, Mfg., Inc.*, 790 So. 2d at 1267.

A. The trial court complied with the procedural requirements of § 768.72, *Fla. Stat.*, because it evaluated the record evidence and Ms. Dever's proffer and ultimately determined there was a reasonable basis for punitive damages.

The resolution of this certiorari proceeding turns primarily on the scope of this Court's review: "[A]ppellate courts do have jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72, but do not have certiorari jurisdiction to review a decision of a trial judge granting leave to amend a complaint to add a claim for punitive damages when the trial judge has followed the procedural requirements of section 768.72." *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995).

"Although *Globe Newspaper* gives us the power in a certiorari proceeding to enforce the procedures associated with section 768.72, the truth is that there are very few established procedures." *Beverly Health & Rehab. Servs., Inc. v. Meeks*, 778 So. 2d 322, 325 (Fla. 2d DCA 2000). And "where the law lacks specificity, this leaves the appellate court with little more to determine than whether the trial court infringed upon the basic requirements of due process." *Id.* Due to this "void within the statute and the rules of procedure addressing" the requirements for amending a complaint to add a punitive damages claim, the trial court's decision must withstand certiorari review "so long as the decision is consistent with the statute and the court has satisfied the requirements of due process." *Id.*

The procedural requirements of §768.72 are satisfied when: (1) a plaintiff "sought leave to amend the complaint to add a claim for punitive damages"; (2) she "proffered evidence at a hearing in support of her punitive damages claim"; and (3) "[a]fter hearing the proffer, the trial court found the proffer sufficient to allow the punitive damages claim." *Delta Health Grp., Inc. v. Jackson*, 798 So. 2d 857, 858 (Fla. 5th DCA 2001). Because the trial court complied with each procedural requirement, certiorari must be denied.

Relatedly, the correctness of the trial court's legal conclusion—*i.e.*, that "intentional misconduct" is inherent in the elements of IIED—is not properly before the Court in this certiorari proceeding. Although that conclusion was correct, (*see*

supra Argument I.B.), its correctness is immaterial to whether the trial court complied with the procedural requirements of § 768.72. Indeed, the trial court evaluated Ms. Dever's proffer and the record evidence pursuant to § 768.72 and determined she had established a reasonable basis for punitive damages; that is all the procedural requirements of § 768.72 mandate. *See Delta Health Grp., Inc.*, 798 So. 2d at 858.

If GEICO believes the trial court's conclusion about the relationship between IIED's elements and "intentional misconduct" caused the trial court to find a reasonable evidentiary basis for punitive damages upon insufficient evidence, it can challenge that ruling in a plenary appeal. *See Estate of Esterline v. Avante at Leesburg, Inc.*, 845 So. 2d 1028, 1029 (Fla. 5th DCA 2003) (denying certiorari with regard to the plaintiff's arguments about the evidentiary sufficiency of her proffer because she had available "an adequate remedy on appeal"). It cannot, however, challenge that ruling via certiorari. *See, e.g.*, *Massey Servs., Inc. v. Brown*, 801 So. 2d 307, 308 (Fla. 5th DCA 2001) (no certiorari jurisdiction to review "the trial court's determination that the claimant demonstrated a reasonable basis for recovery of [punitive] damages").

1. Ms. Dever proffered evidence in support of a reasonable-evidentiary-basis showing under § 768.72, *Fla. Stat.*

As a threshold matter, Ms. Dever sought leave to amend her complaint to add a punitive damages claim. (*See* A. 171-79, 181-91, 208-218.) Accordingly, she

satisfied the first of the statute's procedural requirements. *See, e.g.*, *Delta Health Grp., Inc.*, 798 So. 2d at 858.

Additionally, in her second and third amended motions for leave to amend, Ms. Dever proffered evidence, (*see* A. 187-190, 214-217), in support of "every element for punitive damages in this case." (A. 190, 217.) In her motions, she argued that "[t]he record evidence supports a determination that GEICO 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." (A. 190, 217; *see also* § 768.72(2)(a), *Fla. Stat.*) She further argued "the evidence demonstrates that GEICO knew that its adjusters engaged in such practices and that these practices were a regular business practice of GEICO." (A. 190, 217.) Finally, she contended "GEICO condoned and ratified the actions of [its] employees." (A. 190, 217.)

In support of a reasonable evidentiary basis for punitive damages, Ms. Dever's proffer referenced: her deposition (A. 497-585); the deposition of Dr. Hall, the psychiatrist who examined her after her interaction with Mr. Schwarz at the hospital (A. 678-837); the deposition of Ms. Yothers, the GEICO adjuster who sent Mr. Schwarz to the hospital (A. 625-77); the deposition of Ms. Yothers's supervisor, Mr. White (A. 188-89, 215-16); the deposition of Ms. Sanders, GEICO's corporate representative (A. 838-959); and the Florida Administrative Code. (A. 187-190, 214-217.)

With regard to the wrongful conduct aspect of "intentional misconduct," (*see supra* Argument I.A), Ms. Dever's proffer began by explaining the events culminating in Mr. Dever's admission to the ICU and his placement in a medically induced coma. (A. 187, 214 (citing Dever Dep.).) It further stated Ms. Dever had called Ms. Yothers, told Ms. Yothers she had retained an attorney (Mr. David), and "asked the GEICO representative to communicate through Mr. David [onward] from that point." (A. 187, 214 (citing Dever Dep.).) Thereafter, the proffer described the interaction between Ms. Dever and Mr. Schwarz that took place at the hospital. (A. 187, 214 (citing Dever Dep.).)

Still focusing on the wrongful conduct aspect of "intentional misconduct," Ms. Dever's proffer stated Ms. Yothers had "admitted that she knew Mrs. Dever was represented by an attorney on the date she dispatched a field adjuster to the Intensive Care Unit to attempt to settle the case directly with Mrs. Dever by offering her a check for the policy limits." (A. 188, 215. (citing Yothers Dep.).) The proffer also asserted:

> Ms. Yothers testified that in serious injury cases, GEICO adjusters were instructed to contact the claimant and tender a settlement check directly to the claimant or the claimant's family, despite GEICO's knowledge that the claimant was represented by an attorney, as long as a letter of representation had not been received.

(A. 188, 215.) Furthermore, Ms. Dever proffered Mr. White "testified that it would be improper for GEICO to contact the claimant if the adjustor knew the claimant

was represented by an attorney, regardless of whether GEICO had yet received a letter of representation." (A. 188, 215 (citing White Dep.).) The proffer corroborated this fact by stating, "GEICO's own claims manual for 2009 prohibits any claims representative from having any communication with a claimant if the adjustor knows the claimant is represented by an attorney." (A. 189, 216.)

In support of a showing that Ms. Yothers intentionally pursued the wrongful course of conduct with "actual knowledge" of its wrongfulness "and the high probability that injury or damage to the claimant would result," (*see supra* Argument I.B.); § 768.72(2)(a), *Fla. Stat.*, Ms. Dever's proffer explained:

> Ms. Yothers conceded that Mrs. Dever would be distraught and worried about her husband at the point Yothers dispatched the field adjuster to the ICU, that Mr. Dever's medical privacy should have been respected and that it would not be appropriate for the field adjuster to enter the ICU without being invited.

(A. 188, 215 (citing Yothers Dep.).)

With respect to the causation and injury components of "intentional misconduct," which require the intentional wrongful conduct to have resulted in injury to the claimant, (*see supra* Argument I.A); § 768.72(2)(a), *Fla. Stat.*, Ms. Dever's proffer relied on the deposition testimony of Dr. Hall:

> Mrs. Dever was shocked and angry at this intrusion, but then became extremely anxious and fearful, wondering why GEICO was resorting to such tactics and what information they had sought to obtain from her husband. Additionally, her confidence in the hospital's ability to protect her husband while he lay unconscious and vulnerable in the ICU was shaken and she felt that she now bore sole responsibility to protect him.

(A. 187; 214 (citing Hall Dep.).) Crucially, the proffer stated Dr. Hall "concluded that the incident caused her severe mental anguish of a significant duration." (A. 18, 215 (citing Hall Dep.).)

Ms. Dever's proffer also addressed how the evidence provided a reasonable basis for punitive damages under the employer liability provisions of § 768.72(3). (A. 189-190, 216-217.) She relied on the Florida Administrative Code, which states, in relevant part, that "[a]n adjuster shall not negotiate or effect settlement directly or indirectly with any third-party claimant represented by an attorney, if the adjuster has knowledge of such representation." (A. 189 (quoting Fla. Admin. Code R. 69B-220.201(3)(g)).) Additionally, the Florida Administrative Code provides: "An adjuster shall not attempt to negotiate with or obtain any statement from a claimant … at a time that the claimant … is, or would reasonably be expected to be, in shock or serious mental or emotional distress as a result of physical, mental, or emotional trauma associated with a loss." *Id.* (i) (cited in A. 189.) Citing Rule 69B-220.201 of the Florida Administrative Code, the proffer argued:

> The jury could conclude that, given the serious nature of Mr. Dever's injuries, GEICO, with full knowledge that Mrs. Dever had retained an attorney, sent a field adjuster to the ICU to settle the case on more favorable terms than it might have if the Devers' attorney was involved in the negotiation.

(A. 189, 216.) Ms. Dever further claimed the jury could find GEICO's standard practice "was to justify such ex parte settlement overtures by claiming that the

attorney's letter of representation arrived and therefore there was confusion or a lack of certainty as to attorney representation." (A. 189, 216.)

In support of a showing that GEICO "officers, directors, or managers … knowingly condoned, ratified, or consented to such conduct," *see* § 768.72(3)(b), *Fla. Stat.*, Ms. Dever's proffer pointed to the deposition testimony of Ms. Sanders (A. 838-959). According to Ms. Dever: "Ms. Sanders [testified] that the actions of Jamie Yothers and Detlev Schwartz were authorized by GEICO's claims handling policies and procedures. Ms. Sanders expressly condoned and ratified Yothers' and Schwartz's actions on behalf of GEICO." (A. 189-90, 216-17.)

There can be no reasonable dispute that Ms. Dever proffered evidence in support of each component of a reasonable basis for a showing of punitive damages under § 768.72. The proffer's sufficiency is not reviewable in this certiorari proceeding. *See, e.g.*, *Massey Services, Inc.*, 801 So. 2d at 308.

2. The trial court evaluated Ms. Dever's proffer and the record evidence and determined she had established a reasonable basis for punitive damages.

The trial court did not, as GEICO claims, "rel[y] on conclusory statements that were not supported by the record evidence" (Pet. 14) in determining Ms. Dever had shown a reasonable evidentiary basis for punitive damages. Rather, it evaluated the record evidence and Ms. Dever's proffer at both the hearing on Ms. Dever's motion for leave to add a punitive damages claim (Supp. A.8-36) and the hearing on

her third amended motion for leave to add a punitive damages claim (A. 282-349). Based on its evaluation of that evidence, the trial court ruled Ms. Dever had shown a reasonable basis for punitive damages. (A. 6-7, 318-25.)

Importantly, the trial court did not hear and evaluate evidence on the several requirements of § 768.72 all at once. It first analyzed whether there was a reasonable evidentiary basis to establish Ms. Yother's intentional misconduct at the hearing on the *motion for leave to add a punitive damages claim*. (*See* Supp. A. 8-36.) Then, after denying Ms. Dever's motion for leave to amend (A. 180), it evaluated her amended proffer at the hearing on the *third amended motion for leave*, held over a year after the hearing on the motion for leave. (A. 282-349.) The trial court then ruled that the elements of IIED inherently involve intentional misconduct and ultimately determined there was sufficient evidence to establish a reasonable basis for punitive damages under § 768.72. (A. 320-22, 325.)

In its petition, GEICO focuses solely on the hearing on the third amended motion for leave. That paints an incomplete picture of the evidentiary inquiry undertaken by the trial court. Review of *both* hearings and the hearing on Ms. Dever's second motion to continue reveals that the trial court's reasonable evidentiary basis determination was not based solely on the fact that Ms. Dever had sufficiently pled an IIED cause of action. Instead, the trial court independently evaluated the evidence and determined Ms. Dever had shown a reasonable basis for finding (1) Ms. Yothers

guilty of intentional misconduct under § 768.72(2) and (2) GEICO liable for punitive damages under the employer liability provisions of § 768.72(3). By doing so, the trial court complied with the procedural requirements of § 768.72.

a. The trial court evaluated the proffer of "intentional misconduct" at the hearing on the motion for leave to add a punitive damages claim.

At the hearing on Ms. Dever's motion for leave to amend, the trial court asked her counsel why the conduct alleged in the motion "rises to the level of a claim for punitive damages":

> MR. McMICHAEL: Your honor, there's a statute that controls when you may plead and how you may prove punitive damages.
>
> THE COURT: Yes, I know. You have to have a reasonable basis, otherwise it can't be awarded unless there's clear and convincing evidence. I'm aware of the statute.
>
> MR. McMICHAEL: Correct. And what I thought I'd do is go through the elements of the Statute. I've got depositions with numbered tabs. I can very quickly go through and show you the testimony that shows that we've satisfied all of the elements of the Statute.
>
> ….
>
> THE COURT: Yes. This is the first part—the first part that I want you to focus on, if you can, please, is the aspect of the reasonable basis as to how going into the ICU unit raises to the level of punitive damages.

(Supp. A. 11-12.[11]) In response, Mr. McMichael noted Ms. Dever had "survived numerous motions to dismiss plus a motion for summary judgment" and created "a jury question as to the elements of [intentional] infliction of emotional distress." (Supp. A. 12-13.) Importantly, he then explained the evidence he had presented in the summary judgment proceedings also qualified as an evidentiary showing of intentional misconduct. (Supp. A. 12-13.[12])

But the trial court did not initially accept that proposition:

> I guess what I'm trying to figure out is how the intentional infliction of emotional distress claim, the claim itself, how does that arise to the level of punitive damages? Because it almost seems that the facts you're using to prove your claim are now, you're trying to say, the same facts that would be used accentuate the claim to a punitive damages claim.
>
> And I'm trying to figure out … where the distinction is from the original claim, to making it so egregious for the punitive damages claim. And that's what I'm trying to reconcile.

(Supp. A. 14-15).

Accordingly, Mr. McMichael proceeded to argue how his proffer and the record evidence established a reasonable basis for punitive damages. He explained

---

[11] Mr. McMichael presented the trial court and opposing counsel with copies of § 768.72 (the correct standard) and the depositions of Jamie Yothers, Michael White, and Dr. Richard Hall (the evidence). (*See* Supp. A. 12.)

[12] Although Ms. Dever's counsel did not cite the statutory section at this point in the hearing, the hearing transcript makes clear the parties were discussing whether her evidentiary showing established a reasonable basis for punitive damages. (*See, e.g.*, Supp. A. 26, 28 (while discussing GEICO's liability, its counsel referred specifically to "subsection three," which is the provision of § 768.72 that deals with employer liability for punitive damages).)

that, among other things, Ms. Yothers's deposition testimony showed GEICO had a pattern of practice that involved trying to settle catastrophic claims directly with distraught, upset, and vulnerable claimants (or their family members), even if they were represented by counsel. (Supp. A. 16-19.) He further argued the evidence showed this pattern of practice involved knowingly violating the Florida Administrative Code. (Supp. A. 16-17.) He also expounded on how Ms. Dever's proffer showed Ms. Yothers was guilty of intentional misconduct. (Supp. A. 17-18.)

The trial court then considered whether the evidence was sufficient under the intentional misconduct and employer liability provisions of § 768.72. (Supp. A. 19-21.) The trial court tried to "reconcile" how Ms. Dever could get punitive damages "against GEICO itself" based on its policy "rather than the individual behavior of the adjuster"; *i.e.*, "The fact that they knew there was an attorney. Not just that they went out there for the ICU, but the fact that they knew the attorney, knew the name, and they went out there." (Supp. A. 19-21.)

This exchange was the first indication that the trial court evaluated the proffered evidence to determine its sufficiency to establish a reasonable basis for a finding that Ms. Yothers was guilty of "intentional misconduct." The trial court began its deliberative process concerning the "intentional misconduct" evidence at the hearing on the motion to amend *before* ruling – at the hearing on the third amended motion – that IIED's elements involve "intentional misconduct." This

order of events shows the trial court was indeed independently analyzing the proffered evidence.

Nevertheless, after hearing argument from both parties concerning the evidentiary basis for employer liability under § 768.72(3) (Supp. A. 21-30), the trial court orally denied Ms. Dever's motion for leave:

> [T]his is what I'm going to do. Even with all due respect, even if the Court were to believe that Miss Yothers, indicating the investigator going out there and—could surpass as far as to the issue that the Court has is the aspect of the officers, managers, directors, otherwise condoning or ratifying evidence of that at this time. So I am going to deny the motion, but I'm going to deny it without prejudice. Okay.

(Supp. A. 31.)

That the trial court found the evidence insufficient under the employer liability provisions of § 768.72(3) further demonstrates it had evaluated Ms. Dever's evidentiary proffer pursuant to § 768.72. This refutes GEICO's claim that the trial court relied on Ms. Dever's statements instead of "determining whether Ms. Dever made a reasonable proffer." (Pet. 14.)

b. The trial court found a reasonable evidentiary basis for punitive damages

At the hearing on Ms. Dever's third amended motion for leave to amend, there was much argument about the legal relationship between the elements of IIED and "intentional misconduct." (A. 287-98.) The soundness of that argument and the trial court's ruling on that issue are irrelevant to this certiorari proceeding. The only issue

here is whether the trial court complied with § 768.72's procedural requirements. *See, e.g.*, *Globe Newspaper*, 658 So. 2d at 519.

To satisfy the procedural requirements of § 768.72, four things needed to happen. (*See supra* Argument I.A.) First, Ms. Dever had to make a reasonable evidentiary showing that Ms. Yothers "was guilty of intentional misconduct" within the meaning of § 768.72(2)(a). (*See supra* Argument I.A.) Second, Ms. Dever had to make a reasonable evidentiary showing that GEICO could be held liable for punitive damages under § 768.72(3). (*See supra* Argument I.A.) Third, the trial court needed to evaluate Ms. Dever's evidentiary proffer and/or the record evidence in determining whether it established a reasonable basis for punitive damages under § 786.72. *See Delta Health Grp., Inc.*, 798 So. 2d at 858. Fourth, the trial court needed to determine the evidence or proffer established a reasonable basis for punitive damages. (*See supra* Argument I.A.) Because all of these things happened, certiorari must be denied.

Ms. Dever made a reasonable evidentiary showing that Ms. Yothers was guilty of "intentional misconduct." The proffer in Ms. Dever's second and third motions for leave to amend set forth evidence that corresponded with each of the requirements for an "intentional misconduct" finding. (*See supra* Argument II.A.1.) Hence, the first part of § 768.72's procedural requirements was satisfied.

Ms. Dever also made a reasonable evidentiary showing that GEICO could be held liable for punitive damages under § 768.72(3). The proffer in Ms. Dever's second and third motions for leave to amend set forth evidence that corresponded with each of the requirements for employer liability under § 768.72(3), *Fla. Stat.* *(See supra* Argument II.A.1.) Thus, the second part of § 768.72's procedural requirements was satisfied.

At the hearing on Ms. Dever's motion for leave to amend, the trial court conducted an evidentiary inquiry (Supp. A. 10-19) regarding whether Ms. Dever's initial proffer (A. 177-78) was sufficient to provide a reasonable basis for an intentional misconduct finding. (*See supra* Argument II.A.2.a.) Then, at the hearing on Ms. Dever's third amended motion for leave to amend, the trial court conducted further evidentiary inquiry into (A. 298-309) whether Ms. Dever's amended proffer (A. 214-17) was sufficient to establish a reasonable basis for an "intentional misconduct" finding. This inquiry involved the trial court scrutinizing the depositions of Ms. Yothers and Mr. Schwarz and Ms. Dever's counsel explaining how Ms. Yothers's actions qualified as intentional misconduct. (*See* A. 300-10.) At the same hearing, the trial court also discussed the evidence pertaining to GEICO's liability for punitive damages as an employer. (*See* A. 323-325.) The crucial piece of evidence that the trial court relied on in resolving that issue was the deposition testimony of Ms. Sanders. (*See* A. 323-325.) Therefore, the trial court conducted the

evidentiary inquiry required by § 768.72. *See Globe Newspaper*, 658 So. 2d at 520; *Royal Caribbean Cruises, Ltd. v. Doe*, 44 So. 3d 230, 243 (Fla. 3d DCA 2010).

Finally, the trial court made the reasonable evidentiary basis determinations § 768.72 requires. *See Delta Health Grp., Inc.*, 798 So. 2d at 858. With regard to intentional misconduct, the trial court explained: "The issue specifically that the [c]ourt sees is not based necessarily on Mr. Schwartz's actions, but on Miss Yothers' actions as to whether or not she had knowledge and how he was proceeding, because it's clear Mr. Schwartz had no idea she had an attorney." (A. 320.) Based on Ms. Yothers's deposition, the trial court determined she knew Ms. Dever was represented when she sent Mr. Schwarz to the ICU. (A. 318-20.)

Then, in evaluating whether the evidence established a reasonable basis for finding Ms. Yothers's conduct rose to the level of intentional misconduct, the trial court noted evidence sufficient to create a jury issue as to the elements of IIED necessarily qualifies as a reasonable evidentiary basis for showing "intentional misconduct." (A. 320-22.) In light of that correct observation, (*see supra* Argument I.B.), the trial court ruled that because the evidence Ms. Dever had presented was sufficient to sustain an IIED jury verdict, it likewise provided a reasonable evidentiary basis to find Ms. Yothers guilty of intentional misconduct. (*See* A. 320-22.) Accordingly, GEICO's argument that the trial court did not undertake the required evidentiary inquiry into and make a determination regarding "intentional

misconduct" because it "wrongly determined that what constitutes 'outrageous conduct' for the tort of outrage is a question of fact" is misguided. (*See* Pet. 30.)

Importantly, the correctness of the trial court's analysis about the relationship between IIED and "intentional misconduct," and the application of that principle to the evidence, are not reviewable in this certiorari proceeding. By arguing the trial court erred in concluding the same evidence that was sufficient to sustain an IIED verdict likewise provided a reasonable evidentiary basis for "intentional misconduct," GEICO is essentially making a sufficiency argument, *i.e.*, the evidence that was sufficient to establish the elements of IIED was insufficient to provide a reasonable evidentiary basis for intentional misconduct. Such arguments are not reviewable in this certiorari proceeding. *See Orlando Jewelers, Mfg., Inc.*, 790 So. 2d at 1267.

The trial court also determined there was a reasonable evidentiary basis for holding GEICO liable for punitive damages under § 768.72(3). (*See* A. 324-25.) At the hearing on the third amended motion for leave, counsel for GEICO asked whether the trial court had "determin[ed] that the Plaintiff ha[d] proffered sufficient evidence to support a finding against GEICO for punitive damages under subsection 3 of the Statute." (A. 323.) In response, based on the deposition testimony of Ms. Sanders, the court stated:

> And she had indicated in the deposition that it is procedure where if there's not a letter of representation, that they would proceed forward, which would give an indication of a condoning.
>
> So, yes, the Court's indicating that based upon the circumstances, at least at this point, that there is at least the testimony sufficient to indicate that that fact has been presented.

(A. 324-25.) This determination was the last piece of the reasonable evidentiary basis puzzle.

In sum, Ms. Dever moved for leave to amend her complaint to add a punitive damages claim (A. 171-79, 181-91, 208-218), she proffered evidence in support of her punitive damages claim (A. 187-190, 214-217), the trial court conducted the required evidentiary inquiry, and it determined the evidence established a reasonable evidentiary basis under § 768.72, *Fla. Stat*. Therefore, the trial court complied with the procedural requirements of § 768.72, and certiorari must be denied. *See Delta Health Grp., Inc.*, 798 So. 2d at 858.

c. *Tilton v. Worbel* is distinguishable.

Relying on *Tilton v. Wrobel*, 198 So. 3d 909 (Fla. 4th DCA 2016), GEICO argues "the trial court here failed to make a decision concerning the sufficiency of the evidentiary proffer and, instead, concluded that as a matter of law a complaint alleging IIED allows a plaintiff to seek punitive damages." (Pet. 31-32.) But that is not what the trial court concluded. Rather, the trial court concluded the evidence that was sufficient to establish the elements of IIED by a preponderance of the evidence

provided a reasonable evidentiary basis for "intentional misconduct." (*See supra* Argument I.C.) If, as GEICO claims, the trial court had ruled the complaint automatically entitled Ms. Dever to seek punitive damages, it would not have evaluated her proffer and the record evidence concerning "intentional misconduct" at the hearings on her motion for leave to amend and her third amended motion for leave. (*See supra* Argument II.A.2.a-b.)

Additionally, *Tilton* did not, as GEICO claims, address "a very similar argument to the one Ms. Dever's counsel made here." (Pet. 30.) In *Tilton*, the plaintiff argued "his proffer was sufficient because: (1) the complaint clearly established that he, as a wrongfully discharged employee, was seeking damages for defamation *per se*; (2) there was no dispute as to the words [the defendant], an executive of the company, wrote in the letter to Forbes magazine stating that he stole from the company; and (3) his affidavit in support of his motion stated that he did not steal from the company." *Tilton*, 198 So. 3d at 909–10.

Here, Ms. Dever proffered her deposition (A. 497-585); the deposition of Dr. Hall (A. 678-837); the deposition of Ms. Yothers (A. 625-77); the deposition of Mr. White (A. 188-89, 215-16); and the deposition of Virginia Sanders (A. 838-959). While the so-called evidentiary proffer in *Tilton* was merely a statement of the allegations, *see* 198 So. 3d at 909-10, the proffer in this case included actual

testimony establishing a reasonable showing of "intentional misconduct" and employer liability under § 768.72(3). (*See supra* Argument II.A.1.)

Moreover, *Tilton* explained "the statements made by the trial court during the hearing fail to show that the trial court made any decision concerning the sufficiency of the evidentiary proffer. *Id.* at 910. Here, the transcript of the hearing on Ms. Dever's motion for leave and her third amended motion for leave show the trial court evaluated the evidentiary proffer and made the determinations required by § 768.72, *Fla. Stat. (See supra* Argument II.A.2.a-b.) Indeed, the trial court evaluated the depositions of Ms. Yothers, Mr. Schwarz, and Ms. Sanders at the hearing on the third amended motion for leave. Notably, the trial court even expressly based its "intentional misconduct" ruling on its evaluation of Ms. Yothers's deposition and its § 768.72(3) ruling on its evaluation of Ms. Sanders's deposition. (*See supra* Argument II.A.2.b.) Therefore, *Tilton* is inapposite.

B. This Court does not have jurisdiction to review the trial court's determination that the record evidence was sufficient to establish a reasonable basis for punitive damages

Much of GEICO's petition argues Ms. Dever "failed to proffer any evidence, let alone reasonable evidence" (Pet. 23) that established a reasonable basis for punitive damages. GEICO attempts to explain how Ms. Dever's proffer and the record evidence failed to establish some aspect of "intentional misconduct" (Pet. 17-28) or GEICO's employer liability under §768.72(3). (Pet. 33-37.) Because GEICO

challenges the trial court's determination of the *sufficiency* of the evidence contained in Ms. Dever's proffer and the record, the insurer's arguments are not reviewable in this certiorari proceeding. *See, e.g.*, *Parker, Landerman, & Parker, P.A. v. Riccard*, 871 So. 2d 1043, 1044 (Fla. 5th DCA 2004) (a "certiorari petition that is based on the contention that the facts in the record do not support a claim for punitive damages … is the type of issue that this court cannot review by certiorari").

Characterizing the evidence as nonexistent or unreasonable, even with adverbs, does not transform GEICO's sufficiency arguments into arguments an appellate court may consider on certiorari review of an order granting leave to add a punitive damages claim. *See Orlando Jewelers, Mfg., Inc.*, 790 So. 2d at 1267 (certiorari unavailable for sufficiency argument); *Delta Health Grp., Inc.*, 798 So. 2d at 858 (same); *Stock Dev., LLC v. Ulrich*, 7 So. 3d 582, 583 (Fla. 2d DCA 2009) (same). Ultimately, because the trial court complied with the procedural requirements of § 768.72, it did not depart from the essential requirements of law. *See e.g.*, *Globe Newspaper*, 658 So. 2d at 519.

CONCLUSION

The Court should deny the petition for writ of certiorari with prejudice.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/ *Rebecca Bowen Creed*
Rebecca Bowen Creed
Florida Bar No. 975109
rcreed@appellate-firm.com
filings@appellate-firm.com

/s/ *Thomas A. Burns*
Thomas A. Burns (*Of Counsel*)
Florida Bar No. 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimile: (904) 503-0441

Appellate Counsel for Athina Dever

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2018, I electronically served the following via eDCA and email:

B. Richard Young, Esq.
Jordan M. Thompson, Esq.
Megan E. Alexander, Esq.
Joshua J. Hartley, Esq.
Young, Bill, Boles, Palmer, & Duke, P.A.
401 East Jackson Street, Suite 2950
Tampa, FL 33602
ryoung@flalawyer.net
jthompson@flalawyer.net
jhartley@flalawyer.net
malexander@flalawyer.net
Counsel for Petitioner

Alan E. McMichael, Esq.
The McMichael Law Firm, P.L.
527 East University Avenue
Gainesville, FL 32601
alan@alanmcmichael.com
Trial Counsel for Respondents

Timothy H. David, Esq.
David & Philpot, P.L.
124 Florida Ave S.
Lakeland, Florida 33802
tdavid@davidlaw.com
sellig@davidlaw.com
abraga@davidlaw.com
Trial Counsel for Respondents

Mitchell N. Silver, Esq.
The Silver Law Firm, P.A.
280 Wekiva Springs Road, Suite 2030
Longwood, FL 32779
swallaker@thesilverlawfirm.com
msilver@thesilverlawfirm.com
bpink@thesilverlawfirm.com
Counsel for Monique Clowes White and Ashley White

/s/ *Rebecca Bowen Creed*
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Rebecca Bowen Creed*
Attorney