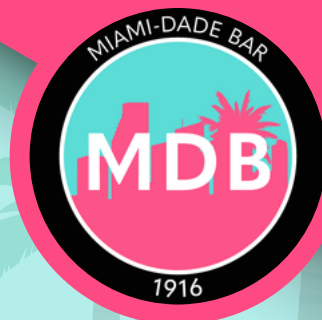


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MIAMI-DADE BAR BULLETIN



FALL 2026 EDITION

Article III And The Triumph Of Substance Over Form In *Trump V. Internal Revenue Service*

David M. Buckner

Partner, Buckner Miles

On July 13, Judge Kathleen Williams of the United States District Court for the Southern District of Florida issued her much-anticipated ruling arising out of the by-then voluntarily dismissed litigation between President Trump and the Internal Revenue Service. See *Trump v. IRS*, -- F. 3d --, 2026 WL 2015525 (S.D. Fla, July 13, 2026) (Williams, J.). In summary, Trump, his children, and his company sued the IRS because a contractor working for the agency leaked his tax returns (and those of a number of other very wealthy individuals). Trump sought \$10 billion in damages. Prior to any adjudication, and indeed before any substantive pleading other than the complaint was filed, the matter, which was ostensibly defended by the United States Department of Justice, was voluntarily dismissed by the plaintiffs after they allegedly reached a settlement with the government in which it would set up an "Anti-Weaponization Fund" of \$1.776 billion dollars. Shortly thereafter, the DOJ, through President Trump's former personal attorney Todd Blanche, purported to "release[] the President, his relatives, companies, and affiliates from 'any and all claims, counterclaims, [and] causes of Actions' that 'have been or could have been asserted' against Plaintiffs that arise out of '(1) any matters that were raised or could have been raised in the Case or the Pending Agency Claims; (2) Lawfare and/or Weaponization; (3) any matters currently pending or that could be pending (including tax returns filed before the Effective Date) before Defendants or other agencies or departments.'" *Id.* at *4.

Judge Williams found the timing of all this a bit too convenient. Immediately prior to the dismissal of the lawsuit, she ordered the parties to brief the question of the court's subject matter jurisdiction "because the Court had serious concerns about whether it had subject matter jurisdiction in a case where the Lead Plaintiff ostensibly had direct, unassailable control over Defendants." *Id.* at *3. Neither DOJ nor Plaintiffs submitted briefing. Instead, the voluntary dismissal followed. I will not discuss in detail all of the facts found by Judge Williams with regard to the overlap between Trump, his personal attorneys, and the DOJ now run by them, though they ultimately form a key part of her ruling that there was no actual case or controversy here because both sides in this litigation were controlled by a single party, President Trump. I want to focus instead on the jurisdictional analysis engaged in by Judge Williams, and in particular where her analysis lies within the body of jurisprudence on this issue. Because while the conflicts of interest and undermining of the judicial process engaged in on behalf of President Trump by his lawyers are in many ways unprecedented, Judge Williams' ruling is not. To the contrary, it finds ample support within the body of case law on the subject of federal court jurisdiction and Article III of the Constitution.

The issue here was not whether Trump and his lawyers could do what they did with public funds and prosecutorial prerogatives. It was whether they can use the judicial system to do it. Or as Judge Williams framed the question:

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Whether Executive Branch actors can privately agree to give themselves and their former clients blanket immunities and billions of dollars in tax monies for legally undefined grievances was never an issue advanced to this Court. The question is whether the Parties could do so by claiming to be adverse and engaging the legitimacy of a court proceeding. The answer is a resounding “no”: the Lead Plaintiff and the Government are one, a fully realized unitary interest. Because “Plaintiffs have no answer for the fact that the [L]ead Plaintiff, President Trump, directs and controls the Defendants[,]” this “renders this lawsuit non-adversarial, collusive, and jurisdictionally improper.”

Id. at *18 (citation omitted). The court’s decision with regard to Article III standing thus comes down to adverseness, or “is there a case or controversy presented in this litigation.” *Id.* at *5. “Adverseness is essential to a federal court’s ability to adjudicate the merits of a case where federal courts are restricted to ‘questions presented in an adversary context[.]’” *Id.* at *6 (citation omitted). Ultimately Judge Williams found that there was no justiciable case or controversy here because “Plaintiffs and Defendants are not adverse because one party controls this litigation.” *Id.* at *8.

As it turns out, this jurisdictional question is one with which federal courts have wrestled repeatedly over the years. It is helpful, therefore, to look at the last time the Supreme Court spoke at length on this issue to place Judge Williams’ ruling in the proper context. The Supreme Court in *United States v. Windsor*, 570 U.S. 744 (2013), confronted the issue of constitutional standing in the context of a statute duly enacted by Congress during a prior presidential administration but as to which the current administration found constitutionally wanting. In *Windsor*, the Department of Justice chose not to defend a provision in the Defense of Marriage Act (“DOMA”) that defined “marriage” as the union between one man and one woman and “spouse” as a person of the opposite sex. 1 U.S.C. § 7 (as amended). DOJ notified Congress it would not defend the statute, to give Congress the opportunity to defend the enactment itself. The Bipartisan Legal Advisory Group (“BLAG”) of the House of Representatives moved to intervene to do just that, and was granted permissive intervention by the district court.

While the parties agreed that there was a live controversy in the district court, by the time the case reached the appellate court that controversy, according to amici, was gone. DOJ declined to defend the Act, having determined it was unconstitutional, and the claimant had obtained relief with regard to her tax claim below.

Justice Kennedy, writing for the majority, described the two strands of Article III standing: “Article III standing, which enforces the Constitution’s case-or-controversy requirement . . . and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction,’” *Id.* at 757-57 (citations omitted). While Article III standing, Kennedy noted, contains the familiar requirement that the action be based on a concrete, redressable injury caused by some action of the defendant,

Rules of prudential standing, by contrast, are more flexible “rule[s] . . . of federal appellate practice,” . . . designed to protect the courts from “decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”

Id. at 757. He wrote that while Article III standing was still sufficiently present (because the government was ordered to give a tax refund to the claimant, which caused injury to the treasury of the United States), “[i]t would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s ruling.” *Id.* at 758. That is, there was “sufficient adverseness and an ‘adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.’” *Id.* at 759 (citing *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)). Similarly, in *Chadha*, the government indicated it intended to follow a congressional decree to deport Mr. Chadha even though it deemed that decree unconstitutional. Yet that adverseness is precisely what Judge Williams found lacking in *Trump*. Because in *Trump*, the evidence was that the government never had any intent to defend against the president’s lawsuit. Instead it intended to give him all of the relief he requested (and more).

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Thus this case falls within the “different case if the Executive had taken the further step of paying,” vitiating adverseness as recognized by Justice Kennedy. See *Trump*, 2026 WL 2015525, at *10 (“in this case ... Defendants and their representatives are unable to advance any legal position or interpretation—however legitimate or well-reasoned—contrary to that held by Lead Plaintiff in this matter, President Trump. Not surprisingly then, no attorney appeared on Defendants’ behalf, challenged Plaintiffs’ actions, or justified the United States’ position in any way.”).

Justice Kennedy found the prudential question in *Windsor* more challenging. He worried that “[t]he Executive’s agreement with Windsor’s legal argument raises the risk that instead of a ‘real, earnest and vital controversy,’ ” the Court faces a “friendly, non-adversary, proceeding ...” *Windsor*, 570 U.S. at 759 (citations omitted). Accordingly, “[e]ven when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’ ” *Id.* at 760 (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

Justice Scalia, writing in dissent and joined by Justice Thomas and the Chief Justice, took an even more restrictive view of the Court’s jurisdiction in *Windsor*, focusing on the critical element of a live controversy as antecedent to any pronouncement by the courts on issues of law.

The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons.

Id. at 780 (Scalia, J., dissenting) (emphasis added). He insisted that the Supreme Court can only exercise its power “to say what the law is,” the quintessential view of the Court’s role since *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), “when that is necessary to resolve the dispute before us.” *Windsor*, 570 U.S. 781 (emphasis added). “Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint.” *Id.* at 784 (emphasis in original).

He found jurisdiction in *Windsor* absent because “the question is whether there is any controversy (which requires contradiction) between the United States and Ms. Windsor. There is not.” *Id.* at 785 (emphasis in original). Justice Scalia would have held that adverseness is not simply part of the prudential analysis for standing (which can arguably be set aside as circumstances warrant, hence its “prudential” quality), but a fundamental component of Article III standing as set forth in the “case or controversy” requirement. Quoting, as does Judge Williams, *Lord v. Veazie*, 8 How. 251, 255-56, 12 L.Ed. 1067 (1850), Justice Scalia highlighted his view of the central role an actual controversy must play in every determination by a federal court:

The objection in the case before us is ... that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be. A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible.... A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed.

Windsor, 570 U.S. 787-88 (internal quotations omitted). “Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?” *Id.* at 779 (Scalia, J., dissenting).

That, in essence, is what Judge Williams is asking in *Trump*. Her answer, as set forth in her detailed discussion of the involvement of people who were employed by and answer directly to President Trump as representatives of the titular defendant in this matter, is that “this lawsuit [is] non-adversarial, collusive, and jurisdictionally improper” and “brought for an improper purpose.” *Trump*, 2026 WL 2015525, at *17.

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Judge Williams' decision sits comfortably within the Supreme Court's Article III case or controversy jurisprudence as articulated by the competing opinions in *Windsor*. Whether adverseness is a prudential consideration, as Justice Kennedy would have it, or a central component of Article III standing, per Justice Scalia, they both agree that there must be adverseness among the parties for the federal courts to adjudicate a matter. And that adverseness is precisely what Judge Williams found was missing in *Trump*. Just as the justices and some *amici* worried to varying degrees that the appellate argument in *Windsor* was not an actual controversy but instead was a presentation by aligned parties to the Supreme Court seeking what would otherwise be an advisory opinion on the constitutionality of DOMA, that actuality, according to Judge Williams, is unmistakable in *Trump*. Certainly the circumstances are unusual: a sitting president and his former personal lawyers now in charge of the Department of Justice allegedly colluding to create a fund to reward the president's supporters and a "settlement" that purports to place the president and his family outside the reach of the tax laws of the United States. But the outcome is dictated by settled law. There was no adverseness between DOJ and the *Trump* plaintiffs. Trump controlled them both, in both law and fact. The matter was brought before the court so that Trump and his lawyers could use the imprimatur of the federal judiciary to bless his "Anti-Weaponization Fund" and grant him permanent relief from tax liability. Judge Williams made no law here, nor did she need to. Her decision finds support within both the views of the majority and Justice Scalia's dissent in *Windsor*. One might even argue, with considerable support, that hers is a conservative decision, taking as it does a strong stand on the limited purview of the federal courts with regard to the scope of federal jurisdiction.

Before closing, I think it important to consider another potentially "prudential" consideration. When Judge Williams' decision came out, a friend of mine who is a member of the plaintiff's bar worried that it would set a precedent that would prevent litigants from ending litigation on their own terms, and instead leave them at the mercy of the court. What if, he reasoned, a plaintiff decided the litigation no longer made economic sense, or even was simply no longer something the plaintiff wanted to pursue. Could she be forced to continue on pain of sanction? Judge Williams seems to have anticipated this, because early in her decision she set forth some limiting principles that avoid the issue that troubled this distinguished member of the bar. While a voluntary dismissal typically deprives a court of jurisdiction to adjudicate the merits of an action,

a voluntary dismissal does not deprive the court of authority to resolve issues collateral to the merits. *Absolute Activist Value Master Fund*, 998 F.3d at 1266. Among these collateral issues are those relating to Rule 11 sanctions. *Id.* (noting that "it is clear that even when a voluntary dismissal disposes of an entire action, district courts retain jurisdiction to consider at least five different types of collateral issues: costs, fees, contempt sanctions, Rule 11 sanctions, and motions to confirm arbitral awards.").

Trump, 2026 WL 2015525, at *4. Her decision is not an expansion of judicial power but a conservative pronouncement imbued with considerable judicial restraint yet designed to protect the federal courts from abuse. Notably, four of the five areas of retained jurisdiction she references deal with sanctions or matters akin to them, meant to prevent abuses just like the one with which Judge Williams was confronted here. Her defense of the dignity, incorruptibility, and independence of the federal judiciary is the result.



David Buckner, a founder of Buckner + Miles, is a trial and appellate lawyer who for more than thirty years has handled arbitrations, tried cases, and argued appeals around the United States. He earned his B.A. in Political Science with High Honors from Rutgers College, and was selected a Harry S Truman Scholar. He received his J.D. from Harvard Law School, magna cum laude, and his Master of Public Policy from the John F. Kennedy School of Government at Harvard University. David served as a law clerk for Judge R. Lanier Anderson III of the United States Eleventh Circuit Court of Appeals.

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Building a Legal Career One Case at a Time

Maria Papasakelariou, President - Young Lawyers Section, Miami-Dade Bar



In her book "Bird by Bird," Anne Lamott tells the story of her brother, overwhelmed by a school project on birds that he'd put off for months. Her father's advice? "Bird by bird, buddy. Just take it bird by bird."

Ten years into practice, I've learned that legal careers work the same way. Case by case. Motion by motion. Deposition by deposition. Hearing by hearing. There's no single moment that transforms you into the lawyer you want to become. There's only the accumulation of small experiences, building on each other over time.

And here's what I've observed from watching more senior attorneys: this truth doesn't change at year fifteen, year twenty, or year thirty. The principles remain the same, even if the stakes and goals evolve.

The Myth of the Big Break

Somewhere along the way, we bought into the idea that careers happen in dramatic leaps. You win the big trial and suddenly you're a rainmaker. You argue one appellate case and become a sought-after expert. You land one major client and your practice takes off. It doesn't work that way. Or rather, it rarely works that way, and when it does, there's usually years of invisible groundwork that made that "overnight success" possible.

Yes, some lawyers do get lucky. A cold email to a potential client arrives the day they fired their previous counsel. Someone else gets handed a major client through a personal connection. A few attorneys are genuinely in the right place at the right time and their careers skyrocket.

It happens. It's rare, and it's completely outside your control. You can't build a career strategy around hoping for luck, and comparing yourself to the lucky few is pointless. Focus on what you can control: showing up, doing good work, building relationships. Sometimes luck finds the people who've been doing that work all along.

I know lawyers who are still waiting for their big break at year seven, year ten, year fifteen. They're frustrated because they haven't hit some imagined benchmark. They're not where their classmates are. They haven't made partner on schedule. They haven't developed a book of business. They haven't become the trial lawyer or rainmaker they thought they would be by now.

And I've watched attorneys at year twenty-five or year thirty feel the same way. Maybe they never made equity partner. Maybe their practice or book of business never grew the way they envisioned. Maybe they're still doing work that feels beneath their experience level. Maybe they changed paths and feel like they're starting over. Maybe they look at peers who seem more successful and wonder where they went wrong.

How Skills Actually Develop

You don't become a skilled trial lawyer by trying one perfect case. You become one by trying fifteen mediocre ones first. Each time, you get a little better at jury selection. You learn what works in opening statements and what falls flat. You figure out how to think on your feet during cross-examination. You develop instincts about when to object and when to let something go.

Rainmaking works the same way. You don't wake up one day with a full book of business. You have coffee with a former colleague. You give a helpful answer at a bar association meeting. You do excellent work on a small matter, and that client remembers you for the next one. You write an article that someone reads six months later when they need your expertise. These tiny seeds planted over years eventually grow into referrals and relationships.

And if you're thirty years in and feel like you never mastered rainmaking or never became the trial lawyer you wanted to be? You're probably closer than you think. Those three decades of relationships, reputation, and experience are assets you can't see clearly from the inside. The difference between where you are and where you want to be might be smaller than it appears.

The One-Inch Frame

Lamott also talks about the "one-inch picture frame" she keeps on her desk. When writing feels overwhelming, she only focuses on what she can see through that tiny frame. Not the whole book. Just the next paragraph. Just the next sentence.

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Building a Legal Career One Case at a Time

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Apply this to your career, regardless of how many years you've been practicing. You don't need to figure out how to become a partner right now. You need to figure out how to handle the summary judgment motion due next week. You don't need to master trial advocacy today. You need to prepare for the deposition scheduled for Thursday.

Why Your Timeline Doesn't Matter

At year five, I looked around and felt behind. Some classmates had already made partner. Others were handling high-profile cases. A few had developed thriving practices. Meanwhile, my career was anything but linear. What I didn't see then but understand now: everyone's timeline is different, and that's not just okay, it's how it should be.

And if you're decades into practice and still feel like you haven't "arrived"? Consider this: you've spent years, maybe decades, building expertise that younger attorneys would pay dearly to have. You know things that can't be taught in a seminar. You've developed judgment and instincts that only come from experience. You have relationships and a reputation that took years to cultivate. You're probably much closer to your goals than you realize. Sometimes the final pieces fall into place faster than the first ones did. The compound effect of that

experience is enormous, even if you can't feel it from the inside. Sometimes the distance between where you are and where you want to be is just a matter of perspective, or one or two small strategic shifts, not a complete overhaul.

Moving Forward

Legal careers are long. Thirty, forty, fifty years long. Year ten is early. Year five is the beginning. Even year fifteen is still building. You likely have more time and more opportunity than you think. You don't need a dramatic transformation or a big break. You need to keep showing up, keep doing good work, keep learning from each case. The skills will develop. The opportunities will come. The career will build itself, one small piece at a time.

Bird by bird, buddy. Or in our case, brief by brief. Motion by motion. Case by case.

That's how lawyers are made. Not in giant leaps, but in the quiet accumulation of experience, built so gradually you don't even notice it's happening until one day you look back and realize how far you've come. And that realization can happen at year ten or year thirty. The timeline doesn't matter. The work does.

Maria Papasakelariou is an Of Counsel attorney at Wilson Elser and the President of the Miami-Dade Bar Young Lawyers Section (YLS). Admitted to the Florida Bar in 2016 after earning her J.D. from Florida International University College of Law, she focuses her practice on complex civil and defense litigation.

A dedicated leader within the South Florida legal community, Maria spearheads YLS initiatives dedicated to professional development, mentorship, and public service. Her legal acumen and leadership have earned widespread recognition, including the Miami-Dade Bar Circle of Excellence Award, the YLS 40 Under 40 Award, and the Florida Bar Young Lawyers Division's 36 Under Thirty-Six Professionalism Award.



Maria Papasakelariou

President - Young Lawyers Section, Miami-Dade Bar



AI DISCLOSURES IN COURT FILINGS: UNDERSTANDING MIAMI - DADE'S NEW GENERATIVE AI REQUIREMENT

Christopher E. Benjamin, County Court Judge, Eleventh Judicial Circuit of Florida

Effective January 15, 2026, the Eleventh Judicial Circuit implemented Administrative Order 26-04, joining other Florida circuits in requiring disclosure when generative artificial intelligence (AI) is used to prepare court filings.¹ This order reflects a broader national transition as courts respond to the integration of generative AI into legal practice. Courts are not prohibiting AI use; rather, they are reinforcing longstanding principles of attorney competence, candor, and certification responsibility.²

The order addresses a specific and documented concern: generative AI systems can produce fabricated legal authority, commonly referred to as "hallucinations." In *Takefman v. Pickleball Club, LLC*, the Third District Court of Appeal confronted a filing that cited nonexistent cases generated by an AI system and emphasized that courts "should not have to parse case citations and parentheticals to discern whether cases exist."³ Administrative Order 26-04 responds to this risk by requiring transparency and reaffirming that the filing party retains full responsibility for accuracy. The Court is fine with the use of intelligence that may be artificial as long as the cases are real.

What Is Generative AI?

Generative AI refers to machine-learning systems that create new content—such as text, images, audio, or video—by identifying patterns learned from large datasets.⁴ Unlike traditional legal research tools that find existing authority, generative systems produce original output based on user prompts.⁵ The National Institute of Standards and Technology, the American Bar Association, and federal and state authorities have adopted consistent definitions highlighting this content-generation ability.⁶

This distinction is crucial. Retrieval systems, like traditional Westlaw or Lexis searches, find existing legal authority. Generative systems, on the other hand, produce new narrative content, such as legal analyses, summaries, or draft pleadings. The disclosure requirement only applies to the latter. The simple rule of thumb is: if it creates new content, disclose it; if it just checks or reformats existing material, don't disclose.

Why Disclosure Is Required: Certification and Accountability

The disclosure requirement reinforces existing ethical and procedural duties. Attorneys already attest to the accuracy of filings through their signatures.⁷ The Florida Rules of Professional Conduct require competence, supervision, and candor toward the tribunal.⁸ Generative AI does not change these obligations. Instead, disclosure requires transparency and confirms that the attorney has independently verified all authority and factual assertions.

Importantly, disclosure does not mean misconduct. Courts focus only on accuracy, reliability, and accountability. Using AI responsibly, along with independent verification, aligns with current professional duties.

Tools That Require Disclosure

Generative AI platforms that create legal text—including ChatGPT, Claude, Google Gemini, Microsoft Copilot, Lexis+ AI, Westlaw Precision AI, Harvey AI, and similar tools—are subject to the disclosure requirement when used to draft or significantly revise filings. These systems generate synthesized content rather than retrieving existing authority.

¹ Eleventh Judicial Circuit of Florida, Administrative Order No. 26-04 (Jan. 15, 2026).

² Fla. R. Gen. Prac. & Jud. Admin. 2.515.

³ *Takefman v. Pickleball Club, LLC*, 418 So. 3d 826 (Fla. 3d DCA 2025).

⁴ Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

⁵ ABA Formal Op. 512 (2024).

⁶ NIST AI Risk Management Framework (2024).

⁷ Fla. R. Gen. Prac. & Jud. Admin. 2.515.

⁸ Rules Regulating the Fla. Bar 4-1.1, 4-3.3, 4-5.1.

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Christopher E. Benjamin, County Court Judge, Eleventh Judicial Circuit of Florida

Tools That Do Not Require Disclosure

Traditional research tools, citation checkers such as Shepard's and KeyCite, and basic spelling and grammar tools like Grammarly & MS Word's internal spell check do not require disclosure because they retrieve or correct existing content rather than generating new legal analysis. However, their hybrid versions, Microsoft 365 Copilot and GrammarlyGO's features, are generative AI when engaged.

Required Disclosure Language

Administrative Order 26-04 provides certification language substantially in the following form:

"Generative artificial intelligence was used in the preparation of this filing. The undersigned certifies that all factual assertions, legal authority, and citations have been independently reviewed and verified for accuracy and accepts full responsibility for the contents of this filing."

This statement should appear above the signature block or at the conclusion of the filing.

The Broader Transition in Legal Practice

Administrative Order 26-04 marks an early step in a broader evolution of legal practice. Generative AI is rapidly becoming integrated into everyday legal workflows. Courts are responding not by prohibiting these tools, but by ensuring that traditional principles of professional responsibility are maintained.

The core rule remains unchanged: attorneys and self-represented litigants are responsible for the accuracy of every filing they submit to the court. Generative AI is, without a doubt, one of the most significant technological advancements in legal practice. It can generate arguments in seconds, summarize cases in moments, and reorganize complex legal analysis with impressive fluency. When used properly, it is an extraordinary tool. However, it is still just a tool – nothing more. It does not swear an oath, hold a law license, sign pleadings, appear at hearings, or answer to the court – attorneys do that. The responsibility to adhere to professional duties such as competence, candor, diligence, and certification does not diminish with artificial intelligence; these responsibilities remain where they always have – with the attorney whose name appears at the bottom of the page.

The Tool is Artificial, but the Responsibility is Not!

Disclosure: This article was prepared using generative artificial intelligence. All factual claims, legal references, and citations have been independently checked for accuracy. The author takes full responsibility for the content of this article.



Judge Christopher Benjamin serves as a Miami-Dade County Court Judge in Florida's 11th Judicial Circuit. A U.S. Army veteran, he earned his undergraduate degree from Florida Memorial University and his law degree from St. Thomas University School of Law.

Prior to taking the bench, Judge Benjamin built a multifaceted legal career spanning more than two decades, managing his own firm and serving as an arbitrator, certified mediator with Salmon & Dulberg, and traffic hearing officer. He also represented District 107 in the Florida House of Representatives from 2020 to 2024, championing civic engagement, procedural justice, and accessible dispute resolution.

The Honorable Christopher Benjamin

County Court Judge, Eleventh Judicial Circuit of Florida



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Constitutional Calendar

The Honorable Milton Hirsch, 11th Judicial Circuit,



September

On the suggestion of some tattletales, Judge Vincent Giblin of the 11th Judicial Circuit Court of Florida – the court upon which I am honored to sit – caused a show-cause order to issue to Attorney Leo Sheiner. Sheiner had lived in Miami for a number of years, maintaining a small practice in real-estate and commercial law. He was ordered to show cause why he shouldn't be disbarred for being a communist.

A hearing was had before Judge Giblin on September 3, 1954. The transcript consists of more, but not much more, than the following:

The Court: . . . Have you ever been a member of the Communist Party?

Sheiner: If it please the Court, I must respectfully refuse and decline to answer the question upon [Fifth Amendment, and what today would be Fla. Const. Art. I § 9] grounds . . . sir.

The Court: Are you now a member of the Communist party?

Sheiner: I must respectfully refuse and decline to answer that question on the [same] grounds . . .

The Court: The judgment of disbarment will be entered against the respondent.

Judge Giblin refused to enter a stay pending appeal. Leo Sheiner would be without a law license, or any other means to support his family, for the next five years. Judge Giblin entered a written order in support of his ruling, excoriating not only Mr. Sheiner but also, for reasons less than entirely clear, university professors in general, whom he characterized as "pygmies on stilts." (As a lawyer, Judge Giblin had represented Al Capone in some of his litigation in South Florida. I guess the reasoning was that, hey, Capone may have been a murderer and a racketeer, but at least he wasn't a communist.)

The decision of the Florida Supreme Court in *Sheiner v. State*, 82 So. 2d 657 (Fla. 1955), is one of the high water marks in Florida jurisprudence. Although the court didn't phrase it quite this way, there were four questions before it: (1) can a respondent assert his Fifth Amendment privilege in a bar proceeding, which is not a criminal case? (2) is the respondent's refusal to answer questions posed by the court or Bar regarding his entitlement to practice law itself a sufficient basis for disbarment? (3) is a court, or the Bar, entitled to draw a negative inference from a respondent's refusal to answer questions in this context (as it would be in a civil, but not a criminal, lawsuit)? and (4) is such a negative inference, if permissible, sufficient without more to justify disbarment?

Across the divide of three-quarters of a century, we have lost any feeling for the terror that gripped Americans as a consequences of the Red Scare. The three Florida justices who wrote opinions in *Sheiner* felt that terror keenly. Whatever their opinions about the case itself, they made a point of dilating on the Red Menace, on the barbarians at the gate, on the horrors of world communism. Triumphant over these fears, Justice Terrell, writing for the majority, held that Sheiner had been deprived of his bar membership without due process. Justice Floyd, concurring for himself, came to the same conclusion. Justice Jones, dissenting, chose a different path. Herewith brief excerpts from their lengthy opinions.

Terrell, Justice

. . .

If any court can hold that appellant's refusal to answer the question whether he is now or was ever a member of the Communist Party, supported by nothing more than [his exercise of his privilege] and the inferences therefrom, is sufficient to disbar him, then one's privilege to practice law may be made to depend on a very tenuous thread.

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Constitutional Calendar

The Honorable Milton Hirsch, 11th Judicial Circuit,



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If any court can hold that appellant's refusal to answer the question whether he is now or was ever a member of the Communist Party, supported by nothing more than [his exercise of his privilege] and the inferences therefrom, is sufficient to disbar him, then one's privilege to practice law may be made to depend on a very tenuous thread.

...

[W]e do not overlook the contention of the state that there is a distinction between the right of the individual and the right of the lawyer as such to invoke protection of the Fifth Amendment; that while he may invoke such protection as an individual if he does so as a lawyer he forfeits the privilege to practice law. We know of no warrant for any such distinction and cannot see that it has any place in this case.

...

Invoking the Fifth Amendment may or may not imply good character; [but] neither does it prove guilt.

...

[A]ppellant was not accorded due process, in that there is no evidence connecting him with communistic activities except . . . inferences that may be drawn from . . . the fact that he invoked the protection of the Fifth Amendment.

Floyd, Justice (concurring)

...

I cannot agree with the contention that would relegate members of the Bar to the status of "secondary citizens" under the Constitutions of Florida and the United States. Whatever rights lawyers enjoy as individuals under these two documents, they must also enjoy as attorneys.

...

Democracy . . . must be sold on its own merits, not on the demerits of communism. We will convict in the American way, that is, charge, try, prove and convict – on the basis of the time-honored tradition of democratic precepts. Any deviation from these principles make for but better fodder for the master propagandists of tyranny, and we would unwittingly be playing into their hands.

Edwin L. Jones, Justice (dissenting)

...

[A]ll parties agreed the dominating question is: Was the appellant's refusal to answer the questions of whether or not he was or ever had been a member of the Communist party sufficient to disbar him . . . ?

...

No person can become [a member of the Bar] without taking the oath to support, protect and defend the Constitution. It is urged that to ask such person the simple question at a later date whether or not he is, or ever has been, a member of an organization whose avowed purpose is the overthrow of this government by force and violence, invades his constitutional right of being compelled to be a witness against himself. Such a contention is just as logical as it would be to say that the prescribed oath could not be required of a [member of the Bar] in the first place because it may invade his constitutional right.

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...

The evidence preponderated against the appellant at the instant he refused to answer the direct question propounded by the trial judge, "Are you now a member of the Communist party?" . . . His immorality was then established. He had the constitutional right to invoke the immunity provisions of the fundamental law, but by so doing, he made his choice. . . . He could not invoke this right and at the same time retain the high privilege which had been granted to him by the State to be an attorney at law.

...

In the face of such a question [i.e., Are you now or have you ever been a member of the communist party?], men commonly do not remain mute but voice their denial with earnestness, if they can do so with honesty. Culpability alone seals their lips. Men with honest motives and purposes do not remain silent when their honor is assailed. As to the nature of his unspoken answer appellant's silence can lead reasonable men to only one inference.

October

Although she was sworn in over the summer, on Monday, October 3, 2022, Ketanji Brown Jackson became the first Black woman to sit as a justice of the Supreme Court of the United States. She also became the first Floridian.

Justice Jackson attended Miami Palmetto Senior High School. She then went to college at Harvard, where she graduated magna cum laude. After working for a year she returned to Harvard for law school, serving as supervising editor of the Harvard Law Review and graduating cum laude. She clerked at the district court, circuit court, and Supreme Court levels before entering practice. In 2013 she became a federal judge.

Although she is the first Floridian actually to serve on the Court, she is not the first Floridian nominated to the Court. On January 19, 1970, President Nixon had nominated a Floridian, Judge G. Harrold Carswell, to the Supreme Court. During the Senate confirmation hearings, it was reported that 40 percent of Carswell's opinions in his years as a district judge had been reversed on appeal. Louis H. Pollak, then dean of the Yale Law School, testified that, "There is nothing in these opinions that suggests more than at very best a level of modest competence, no more than that." Senator George McGovern used the word, "mediocrity."

In response, Senator Roman Hruska of Nebraska, a devout Nixon supporter, told reporters, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Frankfurters, and Cardozos."

November

Readers of Earl Warren's memoirs are sometimes surprised to learn that the great Chief Justice did not consider *Brown v. Topeka Board of Education* the most important opinion of his tenure. Significant as *Brown* was, Warren considered *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Baker v. Carr*, 369 U.S. 186 (1962) – commonly referred to as the "one man, one vote" cases – as the most important of all. His reasoning was simple: the right to vote is the gateway to all other legal rights.

Which brings us to Ocoee, Florida, on election day, November 2, 1920.

If you don't live in Florida, and even if you do, you may never have heard of Ocoee. It's a small town in Orange County, quite close to Disney World.

African-Americans had been, for all intents and purposes, disenfranchised in Florida since at least the outset of the 20th century. In 1920, however, the Black community made concerted and organized efforts to get Blacks to register and vote. On election day, Mose Norman and Julius Perry were among the leaders of those presenting themselves at the polls and demanding to exercise their franchise.

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Constitutional Calendar

The Honorable Milton Hirsch, 11th Judicial Circuit



What followed is remembered to history – if it is remembered at all – as “the Ocoee Massacre.” Perhaps 30 or 35 Blacks were murdered by a mob, and all the Black homes, as well as churches and schoolhouses, were burned to the ground. Julius Perry’s body was taken to Orlando, the nearest big city, hanged from a telephone pole, and left to rot as an example to others. Mose Norman was never seen or heard from again.

The surviving members of the Black community fled. No Black person lived in Ocoee until 1981.

No one was ever sued or prosecuted for the Ocoee Massacre. That would have required access to the court system, to the legal system, to the organs of government. But without the right to vote, that access is easily denied. The right to vote is – as Earl Warren realized – the gateway to all other legal rights.

Hon. Milton Hirsch
Judge, 11th Judicial Circuit
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Do you receive my “Constitutional Calendar” emails? If not, contact my j.a. Isaac at izavala@jud11.flcourts.org and sign up for them!



Hon. Milton Hirsch is a judge of the 11th Judicial Circuit, assigned to the civil division.

The Honorable Milton Hirsch
County Court Judge, Eleventh Judicial Circuit of Florida



2026 Florida Probate Law Updates: Key Changes for Miami-Dade Practitioners



Latisha Russell, M.B.A., M.S.F., M.S.I.R.E., J.D., L.L.M.

If you practice probate in Miami-Dade County, several major statutory and procedural updates took effect earlier this summer on July 1, 2026. Enacted under Chapter 2026-57, Laws of Florida, and implemented by the Florida Supreme Court in In re Amendments to Florida Probate Rules – 2026 Legislation (Case No. SC2026-0690), these revisions modernized long-standing monetary thresholds, safe-deposit box access protocols, and adversary enforcement procedures.

Key Highlights of the 2026 Amendments

- **Summary Administration Limit Doubled:** The non-exempt estate valuation threshold doubled from \$75,000 to \$150,000 for decedents dying on or after July 1, 2026. Estates of decedents who died before that date remain subject to the prior \$75,000 limit, regardless of when the petition is filed. Local Eleventh Judicial Circuit court checklists CC-01 (Intestate) and CC-02 (Testate) were updated to reflect this \$150,000 threshold. Florida Probate Rule 5.530 was formally amended to align with F.S. § 735.201.
- **Easier Small Estate Transfers:** Under Florida Probate Rule 5.425 and F.S. § 735.304, the maximum value of non-exempt personal property eligible for disposition without administration doubled from \$10,000 to \$20,000, provided the decedent has been deceased for more than one year and no administration is pending.
- **Streamlined Safe-Deposit Box Access:** Under amended F.S. §§ 655.933 and 655.936, financial institution lessors must immediately grant a personal representative (PR) access to safe-deposit boxes upon presentation of certified letters of administration. Lessors must allow the PR to remove all contents, and the PR or their attorney may pay accumulated lease charges to terminate the lease. Access may also be granted to co-fiduciaries (such as co-personal representatives) or authorized agents (such as the personal representative's attorney) with proper written consent and presentation of certified letters of administration.
- **Stronger Enforcement Powers for Personal Representatives:** F.S. § 733.612(28) authorized personal representatives to institute court proceedings to enforce their authority. Under Florida Probate Rule 5.025(a)(14), these actions became automatic adversary proceedings. Furthermore, F.S. § 733.6125 mandated that prevailing personal representatives recover taxable costs and legal fees, which are categorized as extraordinary services under F.S. § 733.6171(4)(l).
- **Higher Direct Payout Caps:** Financial institutions can now pay out up to \$2,000 (up from \$1,000) directly to surviving family members under F.S. § 735.303, provided the account is a qualified account – meaning, a depository account or certificate of deposit in the decedent's sole name without any pay-on-death or survivor designation. Additionally, federal income tax refund direct distribution caps under F.S. § 735.302 rose from \$2,500 to \$5,000, regardless of whether the decedent filed a joint or separate return.

Summary of Statutory & Rule Monetary Threshold Changes

Statutory / Rule Provision	Florida Statute / Rule	Previous Limit	New Limit (July 1, 2026)
Summary Administration Estate Cap	F.S. § 735.201 / Rule 5.530	\$75,000	\$150,000
Disposition Without Administration	F.S. § 735.304 / Rule 5.425	\$10,000	\$20,000
Direct Bank Payouts to Family	F.S. § 735.303	\$1,000	\$2,000
Federal Tax Refund Direct Distribution	F.S. § 735.302	\$2,500	\$5,000

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The 2026 statutory updates bring meaningful modernizations to Florida probate practice by significantly raising key monetary caps for summary administration, small estate transfers, and direct family distributions. At the same time, personal representatives gain clearer authority and streamlined access to safe-deposit boxes, supported by statutory fee recovery in adversary proceedings. For Eleventh Judicial Circuit practitioners, adapting to these updated thresholds is vital for ensuring seamless e-filing submissions and avoiding administrative delays with local probate clerks.

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Source References

1. Chapter 2026-57, Laws of Florida (Committee Substitute for House Bill No. 1337): Legislative act revising statutory monetary thresholds, safe-deposit box fiduciary access, and personal representative enforcement powers across F.S. §§ 655.933, 655.936, 733.603, 733.612, 733.6125, 733.6171, 735.201, 735.302, 735.303, and 735.304 (Approved April 29, 2026; Effective July 1, 2026).
2. In re Amendments to Florida Probate Rules – 2026 Legislation, Case No. SC2026-0690 (Fla. July 16, 2026): Supreme Court of Florida publication notice amending Rules 5.025 (Adversary Proceedings), 5.425 (Disposition Without Administration), and 5.530 (Summary Administration).
3. Checklist and Certification – Summary Administration – Intestate (Form CC-01): Eleventh Judicial Circuit Court of Florida, Probate Division form setting filing requirements and certifying estate valuation under F.S. § 735.201 (\$150,000 threshold for deaths on/after July 1, 2026).
4. Checklist and Certification – Summary Administration – Testate (Form CC-02): Eleventh Judicial Circuit Court of Florida, Probate Division form setting filing requirements and certifying estate valuation under F.S. § 735.201 (\$150,000 threshold for deaths on/after July 1, 2026).



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Update on Pleading Punitive Damages in Florida: The Impact of *Perlmutter* and Subsequent Cases



Co-Authored by: *Michelle Hendler, Esq.* Partner and Co-Chair of the Creditors' Rights and Bankruptcy Practice Group, *Shutts & Bowen LLP*, and *Julissa Rodriguez, Esq., B.C.S.*, Appellate Partner, *Shutts & Bowen LLP*.

Florida's punitive damages framework has been evolving significantly since 1986, when the Legislature enacted section 768.72, Fla. Stat. Among the key issues in this area is what a plaintiff must show to obtain leave to plead punitive damages. The latest development on this issue is the Florida Supreme Court's June 11, 2026 decision in *Perlmutter v. Federal Insurance Company*, 434 So. 3d 681 (Fla. 2026) ("*Perlmutter II*"). There, the Florida Supreme Court resolved a district court conflict by significantly clarifying the standards for pleading punitive damages in Florida. The bottom line: *Perlmutter II* holds that, at the pleading stage, in evaluating whether a moving party may add a claim for punitive damages under section 768.72, Florida Statutes, trial courts: (1) may consider only the claimant's evidence (not the defendant's evidentiary counter submission); and (2) must apply the "reasonable showing" standard in section 768.72(1) (not the higher "clear and convincing evidence" standard under section 768.72(2)) to determine whether a reasonable person could conclude from the claimant's evidence that the defendant committed "intentional misconduct" or "gross negligence," as those terms are defined in section 768.72(2)(a) and (b). In short, it got easier to plead punitive damages, but there are still guardrails.

Below is an overview of the *Perlmutter II* decision, how subsequent cases have applied *Perlmutter II* so far, and final thoughts on the implications of the decision.[1]

The *Perlmutter II* Decision

The Backstory—This was a dispute over the management of a Palm Beach residential community, which turned into a DNA-collection saga. Harold Peerenboom sued the Perlmutteres for defamation over an alleged hate-mail campaign. The Perlmutteres countersued and later sought to add punitive damages, alleging Peerenboom and his lawyer improperly harvested their DNA and rigged lab results to frame them.

The trial court granted the Perlmutteres leave to plead punitive damages. The Fourth District, sitting en banc, reversed, holding that trial courts must weigh both sides' evidence and ask whether a jury could find by clear and convincing evidence that punitive damages are warranted. *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24, 33 (Fla. 4th DCA 2023) ("*Perlmutter I*") (holding "a trial court must consider the evidentiary showing by all parties at the hearing on the motion to amend, that is, evidence 'in the record' and evidence 'proffered by the claimant'"; and reading sections 768.72(1) and 768.72(2) together, to mean that the clear and convincing evidentiary standard applies to both the pleading stage and the proof stage: "[W]e interpret section 768.72(1) and (2) to require the trial court to make a preliminary determination of whether a reasonable jury, viewing the totality of proffered evidence in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted"—without weighing the evidence or determining witness credibility) (emphasis in original).

That put the Fourth District in conflict with the Second and Fifth Districts, which did not apply the "clear and convincing evidence" standard when assessing the reasonableness of a claimant's evidentiary submission in a proceeding under section 768.72(1). Instead, for example, in *Werner Enterprises, Inc. v. Mendez*, 362 So. 3d 278 (Fla. 5th DCA 2023), the Fifth District explained that the court's task is simply "to determine if there is a reasonable view of the evidence that supports the plaintiff's position." *Id.* at 283, *see also Deaterly v. Jacobson*, 313 So. 3d 798 (Fla. 2d DCA 2011); *Wiendl v. Wiendl*, 371 So. 3d 964 (Fla. 2d DCA 2023); *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637 (Fla. 5th DCA 2005); *Cook v. Florida Peninsula Ins. Co.*, 371 So. 3d 958 (Fla. 5th DCA 2023).

In addition to certifying conflict with the Second and Fifth Districts, the Fourth District also certified the following question of great public importance:

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[1] This article does not address the requirements for pleading punitive damages against an employer for the actions of an employee or the legal nuances involved when punitive damages are sought against a corporation. Those topics are covered by section 768.72(3), Fla. Stat., which *Perlmutter II* does not analyze. *See Perlmutter II*, 434 So. 3d at 691 ("We express no view on the merits of the Fourth District's analysis as it relates to any distinct issues presented by the application of section 768.72(3) to the Perlmutteres' claims against Federal Insurance.").

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*On a motion to amend to add a punitive damages claim, does section 768.72(1) *688 and (2), Florida Statutes, when read in pari materia, require a trial court to make a preliminary determination of whether a reasonable jury, viewing the totality of evidence identified in support of or opposition to the motion, and in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted?*

Perlmutter I, 376 So. 3d at 38 (emphasis in original).

The Florida Supreme Court accepted jurisdiction to review *Perlmutter I* and ultimately quashed that decision and approved the decisions of the Second and Fifth Districts, to the extent they are consistent with the *Perlmutter II* decision.

The Analysis and Holding—*Perlmutter II* centered on section 768.72, Fla. Stat., which provides in relevant part:

(1) In any civil action, no claim for punitive damages shall be permitted **unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages**. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. . . .

§ 768.72(1)-(2), Fla. Sta. (emphasis added); see Fla. R. Civ. P. 1.190(f) ("A motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages. . . .");

Globe Newspaper Co. v. King, 658 So. 2d 518, 519 (Fla. 1995) (Section 768.72 creates "a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages.").

The parties' dispute principally involved the first sentence of section 768.72(1) and the legal meaning of the phrase "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of [punitive] damages." *Perlmutter*, 484 So. 3d at 684.

To answer the Fourth District's certified question and resolve the district court conflict, the Florida Supreme Court addressed "two related but distinct issues about the operation and meaning" of section 768.72(1): (1) "whether a trial court applying the statute should consider only evidence identified or put forward by the claimant, or whether the court should also consider an evidentiary submission by the opponent"; and (2) "whether the trial court should consider the 'clear and convincing evidence' standard of proof when determining if the evidence shows a reasonable basis for the recovery of punitive damages." *Perlmutter II*, 434 So. 3d at 688.

The Florida Supreme Court read sections 768.72(1) and 768.72(2) to apply to different stages of litigation—pleading and trial, respectively:

[W]e do not think it follows that section 768.72(1) implicitly incorporates the trial-level standard of proof referred to in section 768.72(2). After all, the pleading stage—even under the unique procedure mandated by section 768.72(1)—is not the time for the claimant to prove its case. Pleading is remote from the "trier of fact" and the factual "find[ings]" mentioned in section 768.72(2)."

See *Perlmutter*, 434 So. 3d at 690. To support its interpretation, the Supreme Court contrasted section 768.72(1) with the nursing home punitive damages statute, § 400.0237, Fla. Stat., which, "[u]nlike section 768.72(1), ... expressly calls for evidentiary submissions by 'the parties[,]'" [a]nd it expressly tells the trial court to determine whether there is a reasonable basis to

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believe the claimant could satisfy the 'clear and convincing evidence' standard at trial." *Perlmutter II*, 434 So. 3d at 690.

With that framework in mind, on the first issue, the Florida Supreme Court concluded that, "in a proceeding under section 768.72(1), the trial court should consider only the evidence identified or proffered by the claimant; it should not entertain an evidentiary counter-submission from the opponent." *Perlmutter*, 434 So. 3d at 688; see *id.* at 689 ("Even though section 768.72(1) undoubtedly departs from the norm by requiring a pre-pleading evidentiary showing at all, we adopt the interpretation that is most consistent with the ordinary rules of civil procedure. One would expect an express command if the Legislature intended for the trial court to evaluate competing evidentiary submissions at the pleading stage.") (citation omitted). In conducting its section 768.72(1) review, a trial court must view the plaintiff's evidence "in the light most favorable to the plaintiff" and must not "act as a fact-finder" or "weigh the claimant's evidence, meaning that its role is not to decide the truth of the matter." *Perlmutter*, 434 So. 3d at 689 (citation and quotation marks omitted).

That does not mean, however, that a movant's mere allegations are dispositive of whether a movant may plead punitive damages. *Perlmutter*, 434 So. 3d at 689. Rather, the claimant must make a proper evidentiary showing (not merely raise allegations) to support a request to plead punitive damages. *Perlmutter*, 434 So. 3d at 689, 691 ("Of course, the allegations contained in the claimant's proposed amended complaint are not themselves evidence—the whole point of a proceeding under section 768.72(1) is to determine whether the claimant can show reasonable evidentiary support for those allegations.").

In addressing the second issue, the Florida Supreme Court held that the clear and convincing standard does not apply at the pleading stage. *Perlmutter*, 434 So. 3d at 688-89. Instead, "the test for deciding evidentiary

sufficiency under section 768.72(1) is whether a reasonable person could conclude, based on the claimant's evidence, that the defendant committed "intentional misconduct" or "gross negligence," as defined in section 768.72(2), Fla. Stat. *Perlmutter*, 434 So. 3d at 688; see *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 642 (Fla. 5th DCA 2005) ("A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court.").

For an intentional tort, the movant must show that the "defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." § 768.72(1), Fla. Stat.; see *CCP Harbour Island, LLC v. Manor at Harbour Island, LLC*, 373 So. 3d 18, 28 (Fla. 2d DCA 2023) ("Because [plaintiff] seeks to recover punitive damages for intentional torts, it must show intentional misconduct; gross negligence would not suffice.").

If a party seeks to add a claim for punitive damages based on gross negligence, it must make a reasonable showing that "the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." That is a demanding standard. As the Florida Supreme Court explained in *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1, 11 (Fla. 2016), "the required level of negligence for punitive damages is equivalent to the conduct involved in criminal manslaughter." *Id.* (citing *Como Oil Co., Inc. v. O'Loughlin*, 466 So. 2d 1061, 1062 (Fla. 1985)).

Finally, the Supreme Court observed that, "[b]ecause punitive damages never stand alone, the trial court must review the request for punitive damages in the context of the underlying claims"—not in a vacuum. *Perlmutter*, 434 So. 3d at 688 (citations and internal quotation marks omitted).[2]

continued on next page...

[2] The Florida Supreme Court "decline[d] to address ... the standard of review in appeals from orders granting or denying leave to amend under section 768.72(1), an issue outside the scope of the certified question and on which the district courts are not in conflict." *Perlmutter II*, 434 So. 3d at 691; see, e.g., *Turo, Inc. v. Mobley*, 430 So.3d 243, 247 (Fla. 6th DCA 2026) (applying de novo standard); *McLane Foodservice Inc. v. Wool*, 400 So. 3d 757, 760 (Fla. 3d DCA 2024) (same); *Publix Super Mkts., Inc. v. Levi*, 399 So. 3d 1212 (Fla. 2d DCA 2024) (same); *Hosp. Specialists, P.A. v. Deen*, 373 So. 3d 1283, 1287 (Fla. 5th DCA 2023) (same); *701 Palafox, LLC v. Scuba Shack, Inc.*, 367 So.3d 624, 627 (Fla. 1st DCA 2023) (same); *Cleveland Clinic Florida Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 705 (Fla. 4th DCA 2023) (same).

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Cases Applying *Perlmutter II*

Since the *Perlmutter II* decision, a handful of cases have applied its holding. For example, in *Goldman v. Lewin*, 3D2024-2096, 2026 WL 2505897, at *2 (Fla. 3d DCA Aug. 26, 2026), the Third District concluded that *Perlmutter II*'s holding—that a “trial court should consider only the evidence identified or proffered by the claimant” and “should not entertain an evidentiary counter-submission from the opponent”—“renders the need for a trial court to make findings of fact when granting a motion for leave to amend superfluous.” See *id.* (“While this Court has previously concluded that a trial court’s failure to make findings identifying the evidence it considered sufficient to provide a statutory ‘reasonable basis’ for granting the motion to amend... was a departure from applicable law,” *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019), we find that decision has been superseded by [*Perlmutter II*]”).

That same day, the Third District also issued *Yellowfin Yachts, LLC v. Rosen*, 3D2025-1665, 2026 WL 2504975, at *1 (Fla. 3d DCA Aug. 26, 2026), a dispute over the purchase of a fishing boat. Plaintiff sued the seller, Yellowfin Yachts, raising fraudulent misrepresentation and FDUTPA claims, and successfully moved to add a claim for punitive damages, alleging that the seller had engaged in “intentional misconduct” and “gross negligence.” *Id.* The Third District affirmed based on plaintiff’s proffer, which consisted of the following: the seller “deliberately concealed facts that, during a sea trial of the vessel – conducted as part of the manufacturing process – a Yellowfin Yachts employee grounded [plaintiff’s] boat on a sandbar, allegedly causing significant damage to the vessel”; as to the FDUTPA claim, plaintiff’s proffer consisted of “evidence allegedly showing that [the seller] made inadequate repairs to the vessel after its grounding, delivered an unfit vessel to [plaintiff], and demanded full payment of the balance due under allegedly false pretenses.” *Id.*

In *Estancia US Ltd. Partnership v. Aji -Dawkins*, 6D2025-0673, 2026 WL 2363549 (Fla. 6th DCA Aug. 14, 2026), the Sixth District applied *Perlmutter II*, in the context of section 768.72(3), to hold that no reasonable person could conclude that the corporate defendant committed gross negligence based on plaintiff’s

evidentiary record, which plaintiff’s trial counsel misrepresented. *Id.* at *3-4 (“the *Perlmutter* Court has described a pleading-based standard that does not require [plaintiff] to prove her case. But even under that standard, the evidentiary record does not support [plaintiff’s] insistence that a reasonable person could conclude that [defendant] committed gross negligence”; based on the misrepresentations by plaintiff’s trial counsel, the court directed the Clerk of Court to provide a copy of the opinion to The Florida Bar for further investigation).

Annesser Armenteros, PLLC v. Caparo, 3D2025-2154, 2026 WL 2035298 (Fla. 3d DCA July 15, 2026) also involved a section 768.72(3) issue. The Third District analyzed the issue under the following framework: “the gatekeeping function of the trial court in assessing a motion to amend to add a claim for punitive damages requires a determination of whether the proffer, if proven, provides competent, substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment.” *Id.* at *1 (quoting *McLane*, 400 So. 3d at 760-61). The court affirmed the order on appeal, in part, concluding that counter-plaintiff’s “proffer and record do contain sufficient allegations against [the corporate defendant, a law firm] to allow an amendment for a punitive damages claim,” where the “complaint and proffer allege the appellants aided and abetted [] fraud and breaches of fiduciary duty by drafting and recording a fraudulent quit claim deed.” *Id.* at *2 (citing for support: *Palm Bay Towers Condo. Assoc., Inc. v. Marrazza*, 404 So. 3d 552, 557 (Fla. 3d DCA 2025) (“[B]ecause a corporation cannot act on its own, ‘there must be a showing of willful and malicious action on the part of a managing agent of the corporation’ to establish direct punitive liability.”) (citation omitted); and *JVA Eng’g Contractor, Inc. v. Doral IO, LLC*, 402 So. 3d 1175, 1177 (Fla. 3d DCA 2025) (“[T]o assert a punitive damages claim against [a corporation], it was incumbent upon [the claimant] not only to allege and proffer evidence of a [corporation] employee’s ‘intentional misconduct’ ... but also to allege and proffer evidence that [the corporation] either participated in the employee’s conduct, condoned, ratified, or consented to the employee’s conduct, or itself engaged

Update on Pleading Punitive Damages in Florida: The Impact of *Perlmutter* and Subsequent Cases



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in the conduct.”) (citing § 768.72(3), Fla. Stat. (2024)). The Third District added that, “[w]hile this isn’t the time to prove that the defendant was ... guilty of intentional misconduct ... we find here that if the alleged conduct is proven to be true at trial, it could rise to the level of outrageous behavior of the sort warranting recovery of punitive damages.” *Id.* at *2 (citations and internal quotation marks omitted). In a special concurring opinion, Judge Lindsey addressed *Perlmutter II*, observing that the Florida Supreme Court’s decision “does not alter the outcome here,” but “it sets the bar for all such cases.” *Id.* at *2.

Lastly, in *Liston v. Salvi*, 4D2025-3316, 2026 WL 2177271, at *1-2 (Fla. 4th July 29, DCA 2026), the Fourth District applied *Perlmutter II* to affirm in part, and deny in part, an order granting plaintiff leave to plead punitive damages against two of her neighbors, husband and wife, for attacking her while she walked her dog. The Fourth District affirmed the order as to the defendant husband because plaintiff’s proffer showed he “had veered his truck onto the sidewalk to block [plaintiff’s] path, approached [plaintiff] aggressively while yelling and cursing, picked up [plaintiff’s] dog by the collar and choked it, punched [plaintiff] twice, causing her to fall to the ground, and threw hot coffee on her.” *Id.* at *2. “This evidence, viewed in the light most favorable to [plaintiff], could reasonably support a finding that [defendant husband] had committed intentional misconduct or gross negligence as defined in section 768.72(2).” *Id.* (citing *Perlmutter II*). In contrast, the court reversed the order allowing plaintiff to plead punitive damages against defendant wife, “because [plaintiff] did not proffer evidence that [defendant wife], personally, had done anything more than spit in [plaintiff’s] face twice.” *Liston*, 2026 WL 2177271 at *2.

Final Thoughts

Perlmutter II is a significant shift in the approach to pleading punitive damages in Florida. Statewide, the test now is whether a reasonable person, looking at the plaintiff’s evidence alone, could conclude that the defendant’s conduct meets the statutory definition of intentional misconduct or gross negligence. So, if you are on the plaintiff side, front-load your best evidence in the punitive damages proffer because that is now the only evidence that counts at the pleading stage.

If you are a defendant, save your firepower for summary judgment and trial, and focus your early motion practice to argue the legal insufficiency of the plaintiff’s evidence. To both sides, keep in mind that a non-final order on a motion for leave to amend to add a claim for punitive damages can be tested before trial, through an interlocutory appeal as of right (see Fla. R. App. P. 9.130(a)(3)(G), (b), (f), (h)), which provides *de novo* scrutiny on the legal sufficiency question (see *supra*, n. 2).

Despite the pivot in *Perlmutter II*, that case does not change that punitive damages remain “the exception, not the rule.” *McLane Foodservice Inc. v. Wool*, 400 So.3d 757, 761 (Fla. 3d DCA 2024); see *Estancia US Ltd. Partnership*, 2026 WL 2363549, at *3 (recognizing that “[t]he Florida Legislature has implemented a framework that governs claims for punitive damages in civil actions” and “[t]his framework ‘presumes that punitive damages claims will be the exception in [these] actions, not the rule.’”) (quoting *McLane*, 400 So. 3d at 760). That is because “punitive damages are reserved for truly culpable conduct ... so outrageous in character, and so extreme in degree that the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’ ” *Id.* (quoting *Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 706 (Fla. 4th DCA 2023) and collecting cases); see *River Front Master Ass’n, Inc. v. North Inv. Group, LLC*, 399 So. 3d 1106, 1107-08 (Fla. 3d DCA 2024) (reversing order granting leave to amend to add claim for punitive damages “[b]ecause the asserted facts in the record do not rise to the level of outrageous behavior of the sort required to support a claim for punitive damages”); *Annesser Armenteros, PLLC*, 2026 WL 2035298 at *1, 2 (“the gatekeeping function of the trial court ... requires a determination of whether the proffer, if proven, provides competent, substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment.”) (quoting *McLane*). And so, even under the reasonable showing standard clarified in *Perlmutter II*, the plaintiff’s evidence should point to conduct of such character—in the nature of “intentional misconduct” and/or “gross negligence,” as defined by section 768.72(2)(a) and (b). Fla. Stat.

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