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IN THE CIRCUIT COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: "AH"
CASE NO.: 50-2019-CA-009962-XXXX-MB

KIM BANNER,
Plaintiff/Petitioner
vs.
FIRSTFLEET INC OF TENNESSEE,
RICHARD KEITH WOOD,
TESLA INC,
Defendant/Respondents.
____/

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND TO PLEAD PUNITIVE DAMAGES

(It is HEREBY ORDERED that the Clerk shall keep the following orders confidential except from the parties to the case until further order of the Court. This is in compliance with the prior Order of Protective Order filed July 15, 2020 (DE # 76).

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THIS CAUSE came on for consideration before this Court on September 18, 2023 on the Plaintiff's Motion for Leave to Amend to Plead Punitive Damages. This Court having reviewed the Court file in its entirety, reviewed the submissions and evidence by both the Plaintiff and the Defendant, reviewed all the applicable case law and statutory authority provided by the Plaintiff and the Defendant, heard the arguments from both the Plaintiff and the Defendant at the Omnibus Motion Hearings on September 18, 2023, reviewed all supplemental authority provided by both the Plaintiff and the Defendant and otherwise being fully advised in the premises hereby **GRANTS** the Plaintiff's Motion for Leave to Amend to Plead Punitive Damages and makes the following findings in support thereof:

STATEMENT OF THE CASE AND RELEVENT FACTS

I. **Mr. Banner and his Tesla**

This case stems from an automobile accident, which occurred on or about

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March 1, 2019 in the city of Delray Beach, Palm Beach County, Florida. The immediate facts surrounding the actual crash are largely not in dispute. The accident occurred in the outside southbound lane of State Road 7, County Road 441 in the early morning hours. On that morning, the deceased in this case, Jeremy Banner (Banner) occupied his 2018 Tesla Model 3 sedan from the driver's seat. Banner purchased the Tesla Model 3 with an optional package called "Enhanced Autopilot." Mr. Banner did not purchase the "Full Self Driving Capability Package." "Enhanced Autopilot" package was an upgrade over the standard "Autopilot" package. The "Enhanced Autopilot" package included several premium features, two of which were named "Traffic Aware Cruise Control (TACC)" and "Autosteer." The Tesla also employed a steering wheel torque system as a means of monitoring driver inattention. By all accounts in the record Banner was an extremely educated and highly technically proficient person in all areas of computers and technology.

The 2018 Tesla Model 3 was classified as a "level 2" autonomous vehicle based on the classifications of the Society of Automotive Engineers (SAE). It was, and is still, the highest level of vehicle available on the market for consumer purchase. However, the reality is that a "level 2" vehicle is not a fully autonomous vehicle and does require does human interaction to safely and fully control. On the morning of the crash, Banner left for work in his Tesla, traveling southbound on State road 7. As he approached an access road just north of Boynton Beach Boulevard, a semi-tractor trailer driven by Richard Wood (Wood) approached State Road 7 from a west direction. As Wood approached the intersection, he failed to properly stop at a stop sign and drove through the south bound lanes on State Road 7 in an attempt to make a left hand turn to proceed north bound. At the time that Wood entered the path of travel of the south bound lane on State Road 7, Banner quickly approached from the north.

Approximately 10.2 seconds prior to the impact, Banner turned on the "TACC" function of his Tesla. At 9.2 seconds prior to the crash, Mr. Banner engaged the "Autosteer" function. As the Tesla approached an access road south of Boynton Beach, Boulevard, Mr. Wood was driving the tractor trailer in the east bound direction attempting to cross State Road 7. The evidence is undisputed that

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Wood failed to stop at the stop sign and proceeded into the south bound lane as Mr. Banner approached from the north. At the time the Tesla approached the tractor trailer, the Tesla was traveling at a speed of 69 miles per hour. The Defendant submitted for the Court's review, the actual video from inside the Tesla. The video captured the sequence of events leading up to the crash to the point of impact. The Defendant also submitted a simulation of the crash, using multiple camera angles for the Court's review.

While is it is clear from the video from inside of the Tesla that the tractor trailer driven by Wood is visible, it is somewhat more difficult to see due to lighting conditions at that time. It is important to note that the lighting conditions on that morning were dimly lit dawn-like conditions, making the tractor trailer more difficult to see than had it been later in the day. At that time, Wood would likely have had a superior position of visibility being at a higher elevation than the Tesla.

At approximately 7.7 seconds prior to the accident, the Tesla no longer detected Banner's hands on the steering wheel. The Tesla utilized a "torque detection" system on the steering wheel as a means of attenuating driver inattention when "Autopilot" features were engaged. The Tesla quickly approached the tractor trailer from the north direction, never slowing or stopping, and impacted the tractor trailer approximate halfway on the side of the trailer. As the Tesla traveled underneath the tractor trailer it sheared the top portion of the Tesla off the vehicle and instantly killing Mr. Banner. This suit was initiated in 2019. The co-defendant Wood is no longer a party to this action, having settled his liability.

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II. **Marketing Strategy by Tesla and CEO Elon Musk**

As part of her proffer, the Plaintiff presented a number of events and circumstances, predating Mr. Banner's death as proof that (1) the Tesla vehicle in question had a defective Autopilot system that was not fully tested for driving on roadways with cross-traffic; (2) Tesla was aware of problems with their Autopilot software and programed the vehicles to use the software knowing that they were not suitable for such; and (3) that Tesla continued to intentionally oversell the capabilities of the system and their vehicle despite this knowledge.

A. **Representations made by Tesla**

The Plaintiff proffered a number of representations made by Mr. Elon Musk (Musk), either personally or vicariously, and Tesla made in the years before Mr. Banner was killed. At all times when Musk made the statements he was the Chief Executive Officer of Tesla, Inc.

1. In 2014 Tesla began equipping its Model S sedan with hardware intended to make the vehicles autonomous. Tesla eventually coined this feature "Autopilot." The proffered evidence showed that the name "Autopilot" concerned some engineers within Tesla, but was ultimately affirmed by Musk.
2. In December 2015, Musk stated publicly that Teslas would drive themselves "within about two years." This predates the death of Mr. Joshua Brown (discussed later) and Banner.
3. In January 2016, Musk stated that "Autopilot" was better than a human driver and that Teslas would drive significantly better than a human within two to three years. (Predates death of Brown and Banner).
4. In June 2016, Musk stated, that "autonomous driving" was "basically a solved problem" and that they were "two years away from complete autonomy." (Statement after death of Brown but prior to death of Banner).
5. In July 2016, Musk commented by means of Tesla's official blog that once approved by regulators, Teslas could be "summoned" from anywhere, drive autonomously (without the driver in the vehicle) to pick up its "driver" and the occupant would be able to ride to its destination while reading, sleeping etc. (Statement after death of Brown but prior to death of Banner).
6. In August 2016, Tesla announced that all new Tesla cars would come with "Autopilot 2" comprising of all new technology allowing the cars to soon become autonomous. Tesla further announced that all of its vehicles would have hardware needed for full self-driving capacity. (Statement after death of Brown but prior to death of Banner).
7. In October 2016 Tesla held a conference call during which Musk stated that all new Tesla cars would include all hardware needed for "full self-driving." (Statement after death of Brown but prior to death of Banner).

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B. **"Autopilot" Video**

The Plaintiff proffered evidence that Tesla produced a video, in October 2016, showing a Tesla vehicle driving without any human intervention as a way to market their Advanced Driver Assistance Systems (ADAS) "Autopilot" Technology. The video is cited to in the Plaintiff's motion and depicts a video from the inside of a Tesla vehicle showing the vehicle driving autonomously through a series of intersections, cross walks with pedestrians, turns and curves in the road, and other customary driving obstacles and hazards. The beginning of the video shows a disclaimer which reads ***"The person in the driver's seat is only there for legal reasons. He is not driving anything. The car is driving itself."*** The video shows the Tesla vehicle camera on the left side of the screen showing the car driving itself, while on the right side of the screen there are digital illustrations that appear to show the "Autopilot" computer of the vehicle recognizing and analyzing the surrounding environment while driving.[1] The representation from the video is clearly for the purposes of demonstrating advanced technological capabilities. On the bottom of the screen at 00:15 there is a banner which reads *"Advanced Sensor Coverage: Eight cameras and powerful vision processing provide 360 degrees of visibility at up to 250 meters of range."* At 00:25, 00:39, 01:32 the video depicts the Tesla approaching intersections with cross traffic not dissimilar from the general situation encountered by Banner, in which the Tesla slows, stops and turns without human intervention. Absent from this video is any indication that the video is aspirational or that this technology doesn't currently exist in the market.

C. **Deposition of Chris Payne:**

The Plaintiff proffered the deposition of Mr. Chris Payne (Payne) for the Court's consideration. At the time of his deposition Payne was an "Autopilot" engineer at Tesla. Mr. Payne stated that there was a failure to detect the semi-tractor in the case of Banner's death due to lighting conditions and limitations of the Tesla's capabilities. This failure was a cause of the vehicle failing to decelerate prior to the crash. (Payne Depo. P. 59). Payne testified that the vehicle's "Autopilot" system could not detect cross traffic (Payne Depo. P. 31-

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32). Payne testified that it was technically possible for the "Autopilot" system to detect when the vehicle was on roads with cross traffic and could gradually disengage. (Payne Depo. P. 90-95). Payne also testified that he was not aware of any changes to the "Autopilot" system following the death of Joshua Brown in Williston, Florida. (Payne Depo. P. 17). Payne also testified that all the directors of the "Autopilot" program reported directly to Mr. Musk. (Payne Depo. P. 10-11).

D. **Depositions of Mr. Richard Baverstock and Mr. Ashok Elluswamy:**

The Plaintiff proffered the deposition testimony of Mr. Richard Baverstock, Tesla "Autopilot" engineer. At numerous points in his deposition Baverstock acknowledges Mr. Musk's knowledge and involvement with the "Autopilot" program. Mr. Elluswamy, another "Autopilot" engineer, echoed Mr. Baverstock's testimony regarding Mr. Musk's decision making and involvement with the "Autopilot" program. (Elluswamy Depo. P. 9). Elluswamy also stated he reported directly to Musk regarding the "Autopilot" program. (Elluswamy Depo. P. 9).

E. **Depositions of Mr. Andrej Karpathy and Mr. Milan Kovac:**

The Plaintiff proffered the deposition testimony of two directors of the Tesla "Autopilot" program who testified they met with Mr. Musk regarding the "Autopilot" program and that Mr. Musk was intimately involved in the development and testing of the "Autopilot" program. Mr. Kovac further acknowledged that there was no intermediary between himself and Musk.

F. **Deposition of Mr. Adam Gustafsson:**

The Plaintiff presented the deposition of Mr. Adam Gustafsson. Mr. Gustafsson was a systems engineer on the "Autopilot" program. Gustafsson testified that he was aware of and investigated both the Banner crash as well as the Joshua Brown crash that occurred three years prior to Banner. Gustafsson testified

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that in both Banner's case and Brown's case the "Autopilot" failed to detect the semi-tractor and stop the vehicle. Gustafsson testified that there were no changes made to the cross traffic detection warning system from the date of Brown's crash until Banner's crash to account for cross traffic. (Gustafsson Depo. P. 40-41).

G. Evidence of Prior Crashes Involving ADAS

1. Death of Joshua Brown: Williston, Florida

The Plaintiff's proffered the accident and death of Mr. Joshua Brown who was killed in Williston, Florida on May, 7, 2016 while occupying a Tesla Model S using Tesla's "Autopilot" feature. Mr. Brown's Tesla crashed into the side of a tractor trailer, passing under at approximately 74 miles per hour. Tesla allegedly stated publically that the "Autopilot" software failed to detect the tractor trailer crossing in front of Brown's vehicle. Although Tesla claimed that the software issue was remedied after the accident, the Plaintiff's proffered evidence from Banner's accident to suggest this was incorrect.

2. Death of Walter Huang: Mountain View, California

The Plaintiff also proffered the facts and circumstances surrounding the death of Mr. Walter Huang, who died in March 2018 in California when his Tesla Model X veered into a concrete barrier. At the time of the accident, the Tesla Model X had the "Autopilot" feature engaged. The Defendant presented proffered testimony and argument that the deceased occupant was playing a video game at the time of the accident as proof that the accident was not substantially similar to Banners. The Court took this into consideration and gave the evidence the appropriate weight considering the specific facts and circumstances surrounding the accident.

H. The Testimony of Dr. Mary "Missy" Cummings

The Plaintiff proffered the testimony of Dr. Mary "Missy" Cummings (Cummings). Dr. Cummings holds a Ph.D. in systems engineering and has spent

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her career studying and working in the fields of human systems engineering, driver monitoring systems, human monitoring systems, and autonomous systems in vehicles. Dr. Cummings reviewed documents, data, videos, images, reports, advertisement materials, depositions, and pleadings relevant to the subject crash in offering her opinions. Dr. Cummings provided her expert opinions in multiple forms including an enumerated professional opinion, a sworn affidavit, and deposition testimony. Dr. Cummings provided the Court with a number of expert opinions citing to actions of the Defendant Tesla, which the Plaintiff argues are negligent. Dr. Cummings also provided testimony that refuted some of the Defendant's claimed undisputed facts.

Cummings gave the following opinions:

1. That Tesla should not have allowed their vehicles' "Autopilot" system to be used on roads and areas with cross traffic and should not have been allowed to exceed the speed limit.
2. That Tesla made statements over representing the "Autopilot" technology as far more capable than it actually was.
3. That the "Autopilot" system increased risk of secondary engagement in tasks over time causing drivers to shift their attention to other tasks while "driving."
4. That Tesla used insufficient avoidance detection technology and failed to retrain its computers following a series of crashes in which "Autopilot" was engaged.
5. That the steering wheel torque driver inattention attenuation technology was substandard to driver facing cameras used by other auto manufacturers.
6. That Tesla failed to provide an adequate warning system to its drivers about the dangers and limitations of the "Autopilot" technology.
7. That Tesla failed to use proper testing of its Autopilot features.
8. That the clickwrap agreement insufficiently warned drivers of the dangers of using "Autopilot" and that its effects were outweighed by the autonomous vehicle marketing campaign of Tesla.

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9. That users failed to read the information in a clickwrap agreement.
10. That based on the totality of her opinions, the foregoing all led to the foreseeability of the resulting crash in this case.

Dr. Cummings also provided testimony that disputed some claims of undisputed facts of the Defendant. Cummings disagreed with the Defendant's assertion that the with respect to level two autonomous vehicles that it is the driver who decides when to engage the autonomous driving systems. Cummings testified that there was a debate within the scientific community as to the adequacy of the control exerted by Tesla in allowing the "Autopilot" to be used outside of its "Operational Design Domain (ODD)." This is a genuine issue of disputed fact.

I. **Testimony of Mr. Daniel Melcher**

The Plaintiff proffered the testimony of Mr. Daniel Melcher (Melcher). Melcher is an expert in the area of accident reconstruction with over 25 years of professional experience in the field. Mr. Melcher reviewed the relevant data, images, reports, photographs, and videos documenting the crash that killed Banner. Melcher gave the following opinions:

1. The emergence of the tractor trailer created an immediate clear and present danger that required the Tesla to slow or stop to avoid the collision.
2. That, based on the physical evidence, Wood had the best opportunity to avoid the crash, followed by the "Autopilot" system of the Tesla, followed by Banner himself.

Melcher stated that his opinion was based on the physical evidence of the crash as well as an understanding of the human visual and cognitive processing. Melcher also relied upon the stopping data provided by Tesla engineers in offering opinions in the form of hypotheticals.

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J. **Testimony of William Vigilante**

The Plaintiff presented the testimony of Dr. William Vigilante (Vigilante), Ph.D. Vigilante is an expert in the area of human factors-ergonomics with 24 years' experience in evaluating and designing consumer and commercial products and equipment, warnings systems and instructional materials. Vigilante provided his opinions by way of an extensive enumerated outline as well as deposition testimony. Vigilante opined that Tesla conflicting messages between their marketing materials their manual led to driver's developing a trust and overreliance on the system. Vigilante opined it was foreseeable that driver would relinquish control to the autonomous features leading to an increased crash risk.

LEGAL STANDARDS

A. **Generally**

In general, leave of court to amend or supplement a pleading shall be given freely "when justice so requires." Fla. R. Civ. P. 1.190(a). "Florida courts follow a liberal policy with regard to the amendment of pleadings so that claims may be determined on their merits. Mender v. Kauderer, 143 So. 3d 1011, 1013-14 (Fla. 3d DCA 2014). "Refusal to allow an amendment is an abuse of . . . discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.'" Impulsora de Productos Sustentables v. Garcia, 347 So.3d 470, 471 (Fla. 3d DCA 2022).

A claim for punitive damages shall make a ***reasonable showing*** by record evidence ***or proffered evidence*** that provides a ***reasonable basis*** for recovery of such damages. Fla. R. Civ. P. 1.190(f); Fla. Stat. s. 768.72(1). A defendant may be held liable for punitive damages only if the trier of fact finds by clear and convincing evidence that the Defendant was personally guilty of intentional misconduct or gross negligence. Fla. Stat. s. 768.72(2). A review of whether a trial court has departed from the essential requirements of law in granting a motion to amend for punitive damages in limited to whether the court complied with

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Florida Statute section 768.72. Bulk Express Transport Inc. v. Diaz, 343 So. 3d 646, 647 (Fla. 3d DCA 2022) Citing Levin v. Pritchard, 258 So. 3d 545, 547 (Fla. 3d DCA 2018). Once there is a showing of any evidence to support entitlement to an award of punitive damages, the matter should be left for the jury to decide, even if the court believes that the preponderance of the evidence weighs against the Plaintiff. Id. Citing Otey v. Florida Power & Light Co., 400 So. 2d 1289, 1291 (Fla. 5th DCA 1981). See also Doral Country Club, Inc. v. Lindgren Plumbing Co., 175 So. 2d 570 (Fla. 3d DCA 1965). The evidence and any interpretations on the evidence shall be viewed in the light most favorable to the plaintiff. Haynes v. Alabama, 192 So. 3d 546 (Fla. 5th DCA 2016) (quoting Wakenhut Corp. v. Canty, 359 So. 2d 430, 435-36 (Fla. 1978).

For the court to allow an amendment to plead punitive damages, the plain unambiguous language of Florida Statute section 768.72 requires a ***"reasonable showing"*** by evidence in the record or proffered by the claimant which would provide a ***"reasonable basis"*** for the recovery of such damages. Fla. Stat. 768.72(1). The statute is clear that the showing may be made by evidence at a hearing, or by way of a proffer made by the claimant. An evidentiary hearing is not necessary. Solis v. Calvo, 689 So. 2d 366, 269 (Fla. 3d DCA 1997); Strasser v. Yalamanchi, 677 So. 2d 22, 23 (Fla. 4th DCA 1996); Will v. Systems Eng'g Consultants, Inc., 554 So. 2d 591 (Fla. 3d DCA 1989).

There is nothing magical or strict in the requirement of a "proffer" as contemplated by the statute. As defined in the jurisprudence, a "proffer" connotes merely an "offer" of evidence. Estate of Despain v. Avante Group, Inc., 900 So. 2d 637, 642 (Fla. 5th DCA 2005). It is simply a representation of what evidence the [claimant] proposes to present, it is not actual evidence. Id. Citing Grim v. State, 841 So. 2d 455, 462 (Fla. 2003); Lamarca v. State, 785 So. 2d 1209, 1216 (Fla. 2001).

B. **The Role of the Trial Court**

It is the role and duty of the trial court to act as the gatekeeper in

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determining whether to permit the plaintiff to plead punitive damages. The Plaintiff should be forbidden to plead punitive damages unless and until there has been a determination that there is a reasonable evidentiary basis for recovery of punitive damages. Globe Newspaper Co. v. King, 658 So. 2d 518 (Fla. 1995); see also Taylor v. Gunter Trucking Co. Inc., 520 So. 2d 624 (Fla. 1st DCA 1988) (holding the trial court's duty is to determine whether punitive damages could be properly awarded by a jury). Florida Statute section 768.72 created 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 such a recovery. Bristline v. Rogers, 215 So. 3d 607 (Fla. 4th DCA 2017). The Court should view the evidence and interpretation of the evidence ***in the light most favorable to the plaintiff***. Haynes v. Arman, 192 So. 3d 546 (Fla. 5th DCA 2016).

The trial court must consider evidentiary showings by both sides. Fed. Ins. Comp. v. Perlmutter, 2023 WL 6278887 *5 (Fla. 4th DCA Sept. 27, 2023) Citing Werner Enters., Inc. v. Mendez, 362 So. 3d 278, 282 (Fla. 5th DCA 2023). Further, the law is clear that the Court shall make a determination of the pretrial evidentiary showing without weighing evidence or witness credibility and shall consider ***all reasonable inferences***. Id at *6 citing Manheimer v. Fla. Power & Light Co., 48 Fla. L. Weekly D2495 WL 4919540, at *3 (Fla. 3d DCA Aug. 2, 2023).

C. **Standards for Pleading Punitive Damages**

The primary foundational requirement under both Florida Statute 768.72(1) and Florida Rule of Civil Procedure 1.190(f) is a "reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for the recovery of such damages." Fla. Stat. s. 768.72(1); Fla. R. Civ. P. 1.190(f).

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. Section 768.72 pertinently

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provides:

(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. As used in this section, the term:

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

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

Fla. Stat. s. 768.72(1) & (2). Rule 1.190(f) similarly provides as follows:

(f) Claims for Punitive Damages. 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. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing.

It is therefore very clear there is a difference in the burden of proof at the pleading stage and the proof required at the trial stage. The legislature is clear that the required showing at the pleading stage is a reasonable showing, as opposed to clear and convincing evidence at the trial stage. Deaterly v. Jacobson, 313 So. 3d 798 (Fla. 2d DCA 2021). While the trial Court certainly remains mindful of the standard at trial, the standard at the pleading stage is without

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question a lower hurdle.

Further, there are different requirements as to the type of evidence required for a plaintiff to proceed under a punitive damages theory of intentional misconduct as opposed to gross negligence. The plain language of Florida Statute section 768.72 is clear and unambiguous as to the type and degree of proof required.

> To merit leave to plead punitive damages under a theory of intentional misconduct, the proffer need only 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." Fla. Stat. 768.72(2) (a); Bric McMann Industries v. Regatta Beach Club Condo. Ass'n, Inc., No. 2D22-2454, 2023 WL 5986432, at *2 (Fla. 2d DCA Sept. 15, 2023).

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To merit an award of punitive damages under a gross negligence theory, the defendant's conduct must be egregious and sufficiently reprehensible to rise to the level of truly culpable behavior. Bristline, 215 So. 3d at 607. The behavior must be made in "an outrageous manner or with fraud, malice, wantonness or oppression." Winn & Lovett Grocery Co. v. Arthur, 17 So. 214 (Fla. 1936); see also Lee Cnty. Bank v. Wilson, 444 So. 2d 469, 463 (Fla. 2d DCA 1983). It requires the type of proof which has been described as the equivalent to criminal manslaughter. Valladares v. Bank of Am. Corp., 197 So. 3d 1, 11 (Fla. 2016). However, Courts have found that the question of punitive damages is a question for the jury in products liability cases involving automobile defects when the evidence showed that the defendant had knowledge of design defects and in wanton disregard for the safety of the purchasing public continued to market the product without correction, and the defects resulted in death. Toyota Motor Co., Ltd. v. Moll, 438 So. 2d 192 (Fla. 4th DCA 1983).

Because the type of proof required to plead an award for punitive damages under a gross negligence theory has been described as the type of evidence required to prove criminal manslaughter, this Court believes that an examination of the standards in a criminal case are warranted.

Similar to the filing of a complaint in a civil matter, every criminal

prosecution begins with the filing of a charging document (either an Information or an Indictment), which is based on a finding of probable cause. A showing of probable cause is more than just mere suspicion but less than proof beyond a reasonable doubt and indeed, less than a preponderance of the evidence (the standard of proof in a civil matter). J.J. v. State, 312 So. 3d 116, 121 (Fla. 3d DCA 2020) citing United States v. Burnett, 827 F. 3d 1108, 1114 (D.C. Cir. 2016). Probable cause doesn't require proof that something is more likely true than false. It only requires a fair probability, a standard understood to mean something more than a bare suspicion but less than a preponderance of the evidence at hand. United States v. Denson, 775 F. 3d 1214, 1217 (10th Cir. 2014). As explained by Chief Justice Canady

"[t]he probable cause standard merely requires the facts available to the officers would warrant a man of reasonable caution in the belief that evidence of a crime may be found. It does not demand any showing that such a belief be correct or even more likely true than false."

Harris v. State, 71 So. 3d 756, 776 (Fla. 2011).

Probable cause exists where the facts and circumstances, as analyzed, from the officer's knowledge, special training and practical experience, and of which he has ***reasonable*** trustworthy information, are sufficient themselves to warrant a ***reasonable*** man to reach the conclusion that an offense has been committed. Robinson v. State, 556 So. 2d 450 (Fla. 1st DCA 1990).

Thus, the question of burden of proof for the purposes of pleading punitive damages is a two part analysis. The first part being ***how much*** evidence is required and the second being, ***what kind*** of evidence is required.

The answer to the first question is (1) a "reasonable showing" on which the trier of fact could "reasonably return a verdict for punitive damages" under (2) either an "intentional misconduct" or a "gross negligence" theory. This is the plain and unambiguous language of section 768.72. The Court reads this standard as analogous to the probable cause standard in criminal law, which uses similar

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language to describe the burden. Both burdens of proof use the touchstone of "reasonableness" as the bench mark for the initiation of a case or charge. Probable cause is one of the lowest standards in the criminal justice system and it is the standard upon which cases are started by way of an arrest, Information or Indictment. This is true no matter the gravity of the offense (i.e. from Retail Theft to First Degree Murder). In both the criminal and civil context, it is a lesser standard than that required at jury trial.

The second question is what type of evidence is required to plead punitive damages. With respect to a theory of intentional misconduct, that standard is knowledge and high probability of injury as outlined in section 768.72(1) (a). With respect to a theory of gross negligence, the answer is evidence of "wantonness," "reckless disregard for the lives and safety of those exposed to your behavior." The type of evidence changes neither from civil law to criminal law nor from arrest to conviction. The kind of evidence is always at the level of being either "intentional" or "grossly negligent." The only burden that changes is the level of that burden (i.e. in criminal law from probable cause to beyond a reasonable doubt.) At the pleading stage it is reasonableness (under either a civil or criminal standard) while at the trial it is much higher in both.

Thus the Court must consider whether there has been a reasonable showing of evidence from which the trier of fact could reasonably return in favor of the plaintiffs on the issue of punitive damages, and that the evidence considered is of the type that would warrant an award of punitive damages. In assessing whether "a reasonable evidentiary basis exists for the recovery of punitive damages," the trial court must consider both the movants proffer of evidence as well as "the other side's showing." Napleton's North Palm Auto Park, Inc. v. Agosto , 364 So. 3d 1103, 1105-06 (Fla. 4th DCA 2023) citing Marder v. Mueller, 358 So. 3d 1242, 1246 (Fla. 4th DCA 2023); see also Perlmutter supra at *5. A legal basis for punitive damages is established in a products liability case where the manufacturer is shown to have knowledge that it's product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death but nevertheless continues to market the product without making feasible

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modifications to eliminate the dangers or making adequate disclosure and warning of such danger. Chrysler Corp v. Wolmer, 499 So. 2d 823 (Fla. 1986) citing Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984).

D. Admissibility of Evidence Under the Florida Evidence Code

1. Admissions by a Party Opponent

Admissions by a party opponent are admissible as substantive evidence. Fla. Stat. s. 90.803(18). Admissions by a party opponent include not only statements made by the adverse party, but also admissions by silence, adoptive admissions and admissions by agents. Florida Statute section 90.803(18)(d) provides that an agent or employee may make admission, which is admissible against his employer if it concerns a matter within the scope of the agency or employment and is made during the existence of the relationship. Hunt v. Seaboard Coast Line R. Co., 327 So. 2d 193, 195 (Fla. 1976); Troya v. Miami Beach Health Care Group, Inc., 780 So. 2d 288, 229-30 (Fla. 3d DCA 2001); Wright Fruit Co., Inc. v. Morrison, 309 So. 2d 54, 55 (Fla. 2d DCA 1975) (A statement by an employee that they informed the president of a company about a defective condition was admissible.) Further, when the conduct of an adverse party circumstantially indicates that party's assent to the truth of the statement made by another person, it may be attributable to that adverse party. Philip Morris USA Inc. v. Pollari, 228 So. 3d 115, 123-24 (Fla. 4th DCA 2017). The fact that admissions are made by way of the internet or social media does not, by itself, alter their admissibility. United States v. Browne, 834 F. 3d 403 (3d Cir. 2016) (Statements made on Facebook chats were admissible against the Defendant).

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2. The Effect on the Listener

An out of court statement that may be otherwise prohibited as hearsay may be admissible as evidence not for the truth of the matter asserted, but for the effect or to show the state of mind of the listener. Fla. Stat. 90.801; Dorsey v. Reddy, 931 So. 2d 259, 267 (Fla. 5th DCA 2006); Dade County Police Benev. Ass'n v.

Town of Surfside, 721 So. 2d 746, 747 (Fla. 3d DCA 1998).

3. **Evidence of Other Substantially Similar Events as Evidence of Knowledge**

Similar fact evidence involving "substantially similar" incidents may be admissible to prove an entitlement to punitive damages. Fla. Stat. 90.404(2) (a); Ford Motor Co. v. Hall-Edwards, 971 So. 2d 854, 856 (Fla. 3d DCA 2007); Long Term Care Foundation, Inc. v. Martin, 778 So. 2d 1100 (Fla. 5th DCA 2001).

4. **Use of Inadmissible Evidence by an Expert Witness**

An expert may rely on facts or data that have not been admitted, or are not even admissible, when those facts are the type reasonably relied upon by experts in the subject to support their opinions. Fla. Stat. 90.704; Coddington v. Nunez, 151 So. 3d 445, 447-8 (Fla. 2d. DCA 2013) (Error to prohibit expert from using calculations from a video simulation of an accident that was itself ruled inadmissible). See also Houghton v. Bond, 680 So. 2d 514, 522 (Fla. 1st DCA 1996).

5. **Use of Deposition Testimony in a Trial**

The deposition of any witness, whether or not a party, may be used by any party for any purpose if the court finds that: (A) the witness is dead; (B) the witness is at a greater distances than 100 miles from the place of the trial or out of the state, unless the absence was procured by the person offering the deposition as testimony; (C) the witness is unable to attend due to illness, age, infirmity or imprisonment; (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) there are exceptional circumstances that make it desirable, in the interest of fairness and justice to allow the deposition to be used; and (F) the witness is an expert witness. Fla. R. Civ. P. 1.330(a) (3); Fla. Stat. s. 90.803(22) & 90.804.

EVIDENCE PROFFERED BY THE PLAINTIFF AND ANALYSIS

As previously stated, a plaintiff may move to plead for an award of punitive damages either under a theory of "intentional misconduct" or "gross

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negligence." In the present case, the Plaintiff has alleged in their motion that the Defendant is guilty intentional misconduct and gross negligence. Because the Plaintiff alleges that the Defendant's conduct qualifies as potentially both intentional misconduct and gross negligence, the conduct must be examined under both standards. Specifically, the Plaintiff alleges the following:

1. That Tesla through its officers, employees and agents knew the vehicle at issue had a defective autopilot system and allowed the vehicle with the system to be driven on roads not suitable for said technology.
2. That Tesla, despite knowing these deficiencies, marketed the vehicle in a way that greatly overestimated its capabilities and hid its deficiencies.
3. That Tesla, having knowledge of a substantially similar accident involving similar circumstances, made no efforts to correct the defective product.

The Court finds that the Plaintiff has sufficiently presented a "reasonable showing" of proffered evidence which could provide a "reasonable basis" for the recovery punitive damages such to permit her to amend the complaint and seek punitive damages at jury trial.

A. **Standard**

The Court finds based on an analysis of the plain language of Florida Statute section 768.72(1) (a) that what is required is a "reasonable" showing of evidence from which a jury could "reasonably" award punitive damages. This is not the level of proof required at trial, however this is the pleading stage. The standard is on par with that in the criminal system for the initiation of a prosecution. It is the starting point, not the conclusion. It is the standard for allowing the Plaintiff to make a showing of evidence for the jury's ultimate determination based on a higher standard. While the Court understands that it opens the door for a more extensive discovery inquiry, such is the case in a First Degree Murder in which the State is seeking the ultimate penalty. The potential outcome at the end of the trial doesn't change the plain language of the statute articulating the pleading burden. For these reasons, the Court reads the plain language of Florida Statute section 768.72(1) (a) as it is written, requiring a

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reasonable showing.

B. **Intentional Misconduct**

First, the Court finds based on the totality of the above proffered evidence that there is reasonable evidence from which the finder of fact could conclude that Tesla through its officers, employees and agents knew the vehicle at issue had a defective Autopilot system and allowed the vehicle with the system to be driven in areas not safe for that technology. The Court bases it finding on the prior fatal crash involving Joshua Brown, the testimony of Tesla Autopilot systems engineers specifically Mr. Adam Gustafsson and the testimony of Dr. Cummings. The Court finds that all of the evidence articulated in this order and presented by the Plaintiff would likely be admissible under various evidentiary theories outlined above. The statements by Musk, Tesla, and Tesla engineers would be admissible as admissions. The Joshua Brown fatality would be admissible as similar fact evidence. Even if a particular piece of evidence were to be ruled inadmissible, an expert (Dr. Cummings) may be able to rely on that evidence in rendering an expert opinion.

The fatal crash of Brown and Banner are eerily similar in that both involve a failure of the Autopilot system to detect cross traffic and both involve a fatality of a Tesla vehicle traveling underneath a tractor trailer at a high rate of speed. The evidence proffered was that Tesla admitted that a failure of the "Autopilot" system led to the crash. Further, Mr. Gustafsson was the investigator on both crashes and was a systems engineer who according to his testimony the "Autopilot" in both Banner's case and Brown's case failed to detect the semi-tractor and stop the vehicle. This demonstrates that Tesla as an organization was certainly aware of a problem with the "Autopilot" programming. Gustafsson testified that there were no changes made to the cross traffic detection warning system from the date of Brown's crash until Banner's crash to account for cross traffic. It is reasonable based on Gustafson's testimony that engineers within the "Autopilot" program were aware of the issue that led to the death of Brown. Further, based on the proffered testimony of the other Tesla engineers specifically that Mr. Musk was intimately involved in the "Autopilot" development program it

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would be reasonable to conclude that the Defendant Tesla through its CEO and engineers was acutely aware of the problem with the "Autopilot" failing to detect cross traffic.

Knowing that the "Autopilot" system had previously failed, had limitations and according to Gustafson had not been modified, Tesla still permitted the "Autopilot" system to be engaged on roads that encountered areas of cross traffic. Dr. Cummings also provided evidence by way of her proffered testimony as to the negligence in the Defendant failing to retrain the computer systems following Brown's fatal crash. Further, as evidenced by the repeated statements of Musk and the Tesla "Autopilot" marketing strategy, the Defendant pursued a course of conduct that led to the vehicle in this case being equipped with the same technology and operating in similar traffic conditions. Further, the Defendant continued the same marketing strategy prior to Banner's death. The consistent message has been, that Tesla vehicles are "autonomous." This is evident in the naming of the technology as "Autopilot," from the continuous narrative from the Defendant that "'autonomous driving' was 'basically a solved problem' and that they were 'two years away from complete autonomy.' Tesla cars would include all hardware needed for 'full self-driving.'" It is noteworthy that these statements were made more than two years before Banner's death. It is also evident from the "Autopilot" video that remains on the Tesla website. It would reasonable to conclude that the Defendant dismissed the information it had available in favor of its marketing campaign for the purpose of selling vehicles under the label of being autonomous.

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When viewed in the light most favorable to the plaintiff and taking into consideration the totality of the circumstances, it is reasonable to conclude that a jury could find that Defendant had actual knowledge of the defect and nevertheless allowed the "Autopilot" feature to be used without intervention. The proffered evidence also provides a reasonable showing from which a jury could reasonably determine that the Defendant continued its marketing strategy after Brown's death, continuing up to the present. Further given the fatal result of the Brown crash, it was reasonable for the Defendant to believe that allowing the "Autopilot" feature to be used in such a way would lead to harmful and potentially fatal results. The

Court finds that it this is a reasonable showing, at the pleading stage, of proffered evidence from which a reasonable finder of fact could conclude that Tesla's acts rise to the level of either "intentional misconduct."

C. **Gross Negligence**

Relying on the same aforementioned evidence, the Court finds that the Plaintiff has proffered a reasonable showing of evidence from which a reasonable person could find that the Defendant's conduct was so reckless and wanting of care that it constituted a conscious disregard or indifference to the life, safety or rights of person exposed to such conduct.

Again, there is a reasonable showing that the Defendant had actual and constructive knowledge that their products, Tesla vehicle and "Autopilot" technology, were flawed in that it could not effectively operate in conditions that contained cross traffic. This is evidenced by the investigation and findings of the Brown fatality which occurred years prior to the crash in this case. During that time the Defendant made strong public statements and engaged in a marketing strategy that painted the products as autonomous. The range of the Defendant's reach with its "voice" and marketing is important. Given some of the statements were made by the CEO of the company and that the Tesla product is extremely popular and profitable, it is reasonable to conclude that the narrative had a significant effect on the belief about the capabilities of the products. Such statements or admissions could be considered by their potential effects on their audience. While the Defendant argues that it's manual and the "clickwrap" agreement sufficiently warned owners of their products of the limitations of the "Autopilot," that is an arguable issue for the trier of fact. It is an issue that is disputed by the Plaintiff's experts Dr. Cummings and Dr. Vigilante. The Plaintiff has made a reasonable showing that a reasonable person could find that the warnings were inadequate and that the Defendant's aggressive strategy was grossly negligent given the totality of the circumstances.

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[1] www.tesla.com/autopilot

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ORDERED AND ADJUDGED that the Plaintiff's Motion for Leave to Amend to Plead Punitive Damages is GRANTED.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida.

50-2019-CA-009962-XXXX-MB 11/17/2023
Reid P. Scott Judge
ADMINISTRATIVE OFFICE OF THE COURT

50-2019-CA-009962-XXXX-MB 11/17/2023
Reid P. Scott
Judge

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