

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D2023-2237

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CABLE NEWS NETWORK, INC.,

Appellant,

v.

ZACHARY YOUNG and NEMEX  
ENTERPRISES INC.,

Appellees.

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On appeal from the Circuit Court for Bay County.  
William Scott Henry, Judge.

June 12, 2024

ROBERTS, J.

Defendant/Appellant, Cable News Network, Inc. (CNN), appeals a nonfinal order granting Plaintiffs/Appellees, Zachary Young and Nemex Enterprises, Inc., leave to amend a defamation and trade libel complaint to assert claims for punitive damages. CNN argues the trial court erred in holding: (1) Appellees made a sufficient preliminary evidentiary showing of actual malice; (2) Appellees made a sufficient preliminary evidentiary showing of express malice; and (3) Appellees made a sufficient showing that CNN's conduct rose to the level necessary to permit an award of punitive damages. We affirm because the trial court properly granted leave to amend.

## *Background*

Young is a U.S. Navy Veteran and former U.S. government operative who operates a private security consulting practice through his company, Nemex Enterprises, Inc. (collectively, “Young”). Part of Young’s work involved evacuating Afghan citizens during the United States withdrawal from Afghanistan.

On November 11, 2021, CNN’s “The Lead with Jake Tapper” aired a video segment by reporter Alex Marquardt about Afghans attempting to flee the Taliban via private evacuation operators like Young. Over the next few days, Marquardt’s reporting was republished on another CNN program, disseminated on Facebook and Twitter, and repackaged into a digital article on CNN’s website.

## *Procedural History*

Young sued CNN for defamation per se, defamation by implication, and trade libel, arguing CNN destroyed his reputation and business by branding him an illegal profiteer who exploited desperate Afghans. Specifically, Young alleged CNN repeatedly accused him of operating in a “black market” and mischaracterized his work as exploitative because he charged “exorbitant” fees Afghan citizens could not pay. Young claimed he was particularly harmed because he was the only private evacuator profiled in the reporting.

Young then moved for leave to amend to add claims for punitive damages. The motion attached a proposed amended complaint and was supported by a proffer of evidence that included, among other things, internal CNN communications; messages Young had exchanged with Marquardt and another CNN employee; and invoices showing Young had coordinated evacuations for Afghan citizens through corporate and nonprofit sponsors.

After a hearing, the trial court entered an order granting Young’s motion. The order concluded Young had proffered sufficient evidence of CNN’s intentional misconduct or gross negligence to assert claims for punitive damages under section 786.72, Florida Statutes. This appeal followed.

### *Standard of Review*

We have jurisdiction to review the nonfinal order. Fla. R. App. P. 9.130(a)(3)(G). Our review is *de novo*. *701 Palafox, LLC v. Scuba Shack, Inc.*, 367 So. 3d 624, 627 (Fla. 1st DCA 2023). We view the evidence in the light most favorable to Young, but need not take Young’s allegations “at face value.” *Id.*

### *Analysis*

Section 768.72, Florida Statutes, and Florida Rule of Civil Procedure 1.190 require court approval before a claimant may plead entitlement to punitive damages. *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24, 30 (Fla. 4th DCA 2023) (en banc). Before granting leave to amend, the trial court must determine the claimant has made “a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.” § 768.72(1), Fla. Stat. The trial court acts as a “gatekeeper,” both to ensure the claimant has shown a reasonable evidentiary basis to recover punitive damages and to protect the other party from unfounded punitive damage claims. *See Hosp. Specialists, P.A. v. Deen*, 373 So. 3d 1283, 1287 (Fla. 5th DCA 2023) (first citing *Varnedore v. Copeland*, 210 So. 3d 741, 745 (Fla. 5th DCA 2017); then citing *Bistline v. Rogers*, 215 So. 3d 607, 611 (Fla. 4th DCA 2017)). A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds the defendant guilty of intentional misconduct or gross negligence. § 768.72(2), Fla. Stat.

Young’s request for punitive damages must be viewed in context with the defamation and trade libel claims.<sup>1</sup> *See Varnedore*, 210 So. 3d at 745 (“In order to perform its function as a gatekeeper, the trial court must understand the specific claim proposed by the plaintiff that may justify an award of punitive damages.”).

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<sup>1</sup> CNN treats defamation and trade libel interchangeably because the same showing is necessary to recover punitive damages for each. This opinion will do the same.

Defamation of a private person has five elements: “(1) publication; (2) falsity; (3) actor must act . . . at least negligently on a matter concerning a private person; (4) actual damages; and (5) [the] statement must be defamatory.” *Cable News Network, Inc. v. Black*, 374 So. 3d 811, 816 (Fla. 4th DCA 2023) (quoting *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008)). To recover punitive damages in a defamation claim against a media defendant, a plaintiff must show actual malice. *Id.* at 812 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)). So Young had to proffer evidence providing a reasonable basis that CNN published with actual malice, that is with knowledge of the falsity of its reporting or with reckless disregard for its probable falsity. *See id.*

The totality of Young’s proffered evidence met this burden. CNN chose to use language like “black market,” “exploit,” “exorbitant,” and “desperate Afghans” on television and online. When introducing Alex Marquardt’s segment, Jake Tapper stated:

In our world today, the U.S. government, the Biden administration says that as of last week it had assisted in the departure of at least 377 U.S. citizens and 279 lawful permanent residents of the U.S. from Afghanistan since August 31st. Still, many Afghans, Afghans who desperately want to flee Taliban rule and Afghans who say their lives are at stake, they remain behind. As CNN’s Alex Marquardt has discovered, Afghans trying to get out of the country, face a black market full of promises, demands of exorbitant fees, and no guarantee of safety or success.

Marquardt’s segment continued in the same tone and tenor, with visual emphasis from a conspicuous chyron<sup>2</sup> that read: “CNN Investigation: Afghans trying to flee Taliban face black markets,

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<sup>2</sup> “A caption superimposed over usually the lower part of a video image (as during a news broadcast).” *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/chyron> (last visited Apr. 12, 2024).

exorbitant fees, no guarantee of safety or success” (“the Black Market Chyron”). The overall gist of CNN’s reporting was that of an investigative report to uncover bad actors preying upon desperate people at a chaotic time. *See Black*, 374 So. 3d at 818 (recognizing the “gist” of a story as a whole should be evaluated in a defamation claim (citing *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1999))). While language like “exorbitant” could, perhaps, be a matter of opinion, we agree with Young that there is no doubt the term “black market” implies illegality.

Young proffered CNN messages and emails that showed internal concern about the completeness and veracity of the reporting—the story is “a mess,” “incomplete,” not “fleshed out for digital,” “the story is 80% emotion, 20% obscured fact,” and “full of holes like Swiss cheese.” Yet, the Triad<sup>3</sup> approved publication. Young also proffered a message exchange he had with Marquardt just hours before publication where he advised there were factual inaccuracies in the reporting. CNN published anyway.

After setting the scene of “a black market full of promises, demands of exorbitant fees, and no guarantee of safety or success,” CNN chose to display only Young’s name and picture onscreen above the Black Market Chyron. Young was the only operator profiled on television and online.

Young proffered internal communication showing, at minimum, CNN employees had little regard for him. In those messages, CNN employees called him a “shitbag” and “a-hole” and remarked they were “going to nail this Zachary Young mfucker.” Marquardt referred to him as “fucking Young” and quipped, “it’s your funeral bucko.”

On appeal, CNN argues it did not intend to harm; its language was either opinion or ambiguous; and the internal communications were journalistic bravado that reflected a sincere belief in the reporting. These arguments are for the fact finder in determining

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<sup>3</sup> CNN describes “the Triad” as three independent CNN departments (legal, standards & practice, and editorial) that provide pre-publication review of certain reporting.

entitlement. The issue on appeal involves proper pleading, not ultimate proof. *See Black*, 374 So.3d at 819 (Warner, J., dissenting). We must consider whether Young made a reasonable evidentiary proffer to provide a reasonable basis for recovery of punitive damages at this stage. After reviewing the totality of the proffered evidence in the light most favorable to Young, we conclude that he did. Young sufficiently proffered evidence of actual malice, express malice, and a level of conduct outrageous enough to open the door for him to seek punitive damages. Whether Young can ultimately prevail is not the issue before us. The trial court properly exercised its gatekeeping role and granted Young's motion to amend. The order on appeal is

AFFIRMED.

WINOKUR and LONG, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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Deanna Kendall Shullman, Allison Lovelady, Minch Minchin, Sarah Papadelias, and Rachel Elise Fugate of Shullman Fugate PLLC, West Palm Beach; Charles D. Tobin, Washington D.C., for Appellant.

Devin Freedman of Freedman Normand Friedland LLP, Miami, for Appellees.