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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D23-1472
L.T. CASE NO. 2020-002305-CA-01

THE RIVER FRONT MASTER ASSOCIATION, INC.,
a Florida Not-for-Profit Corporation,

Appellant,

v.

NORTH INVESTMENT GROUP, LLC, a Florida Limited Liability Company, and CWV REALTY GROUP, LLC,
a Florida Limited Liability Company,

Appellees.

ON APPEAL FROM A NONFINAL ORDER OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT THE RIVER FRONT MASTER ASSOCIATION, INC.

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INTRODUCTION

Appellant-Defendant THE RIVER FRONT MASTER ASSOCIATION, INC. ("RIVER FRONT") and Appellees-Plaintiffs North Investment Group, LLC ("NORTH") and CWV Realty Group, LLC ("CWV") are referred to as quoted above or by their position below.

Documents in the Initial and Reply Briefs' Appendices are referenced by the symbols "A." and "R.A.", respectively, and the corresponding PDF Page Number(s).

References to Plaintiffs' Amended Answer Brief and Appendix thereto are designated by the symbols "A.B." and "A.B. App.", respectively, and the corresponding page number(s).

REPLY STATEMENT OF THE CASE AND FACTS

RIVER FRONT had every right to initiate this appeal and is a proper Appellant, contrary to Plaintiffs' erroneous contention in footnote 1 of their Brief.

Plaintiffs *never* timely submitted record evidence or proffered evidence identifying *who* ordered and/or authorized the at-issue removal of CWV's signs and displays, and the application of a frost-like film to the exterior of CWV's storefront glass panes, much less *who* carried out those acts. [A. 35-357, 358-594].

While Plaintiffs mention that they deposed RIVER FRONT's Vice President and The IVY's President, and that Defendants deposed Plaintiffs' "principal," Plaintiffs *never* filed any of those depositions with their June 8, 2023 proffer. [A. 35-357, 358-594; A.B. 25-26].

The eight pages Plaintiffs devote to facts concerning their March 16, 2023 Motion for Leave to Seek Punitive Damages provide an irrelevant and "Much Ado About Nothing" historical account. [A.B. 26-34]. The trial court ultimately "VACATED" the portion of the April 28, 2023 Order that granted Plaintiffs' said Motion and "[a]ll allegations regarding punitive damages in the Plaintiffs' Fourth

Amended Complaint, submitted on April 18, 2023," were "STRICKEN." [A. 595, 621]. The irrelevance and mootness of Plaintiffs' said procedural history is further demonstrated by the trial court's unequivocal statement at the June 29, 2023 Hearing on Plaintiffs' Restated Motion to Amend ("Restated Motion"):

> THE COURT: ***[W]e are doing this anew, so you've got to do your pro[ffer] all over again*** regardless of what I may have said previously, ***and the defense will have an opportunity to make whatever arguments they want to make anew, and I will consider the matter anew***.

[A. 757 (emphasis added)].

Furthermore, certain aspects of Plaintiffs' pre-June 8, 2023 historical statements are also misleading. Because the trial court abruptly changed the hearing date on Plaintiffs' *first* Motion to Amend several times and completely deprived RIVER FRONT of due process by having Plaintiffs serve a Notice of Hearing on April 20, 2023, at 4:10:54 p.m., for a 30-minute hearing the next morning at 10 a.m., thus giving RIVER FRONT *less than 18 hours notice*, RIVER FRONT did *not* have time to prepare and file defensive responses or motions before the next morning's hearing. [A.B. App. 1171-1173, 1174-1175]. Moreover, RIVER FRONT was *not* expecting that

Motion to be heard until April 27th (one week later) per the April 13, 2023 Notice. [A.B. App. 1171-1173]. To make matters worse, Plaintiffs filed a "revised" proposed Fourth Amended Complaint on April 18, 2023, *less than three days before* the April 21st hearing. [A. 37-87]. Despite that one-two punch bordering on a "gotcha" tactic by Plaintiffs and the trial court, RIVER FRONT filed a Motion to Strike on April 23, 2023, five days before the April 28th Order. [A.B. App. 1176-1307].

Notwithstanding Plaintiffs' inaccurate representations, their June 8th Restated Motion and Notices of Filing *never* specifically identified or described what Exhibits A through Z were or contained; *never* specifically outlined the evidence being proffered; did *not* contain a detailed table of contents; *never* included the description of Exhibits A to Z that Plaintiffs provided in their Brief[1]; and *never* "clearly delineated the evidence being proffered," contrary to Plaintiffs' statements. [A. 12-34, 35-36, 358-359; R.A. 4-5, 6-7; A.B. 35-39, 50]. The Notices merely stated, in pertinent part, that

[1] Plaintiffs' current descriptions of Exhibits M, N and T as photographs depicting scene(s) as it/they "appeared" on specific dates, [A.B. 37, 38], are *not* corroborated by Mr. Rinaldi's Affidavit or those *undated* pictures. [A. 300-313, 514, 515-517, 533].

"Exhibits A though G" and "Exhibits H though Z to the Motion, which Plaintiffs intend to use at hearing on the Motion and at trial, are attached hereto."[2] [A. 35, 358; R.A. 4, 6].

Only Plaintiffs insisted that their Restated Motion be heard on June 29th or 30th. [A.B. App. 1453-1457]. The trial court *simply* stated the hearing "may not be held before the 20-day requirement" of Rule 1.190(f). [A. 622].

[2] The second Notice's footnote *only* stated "that Exhibits 'N,' 'Q,' 'R,' and 'U' contain both video files and photos." [A. 358; R.A. 6].

ARGUMENT

The July 17, 2023 Order permitting Plaintiffs to assert a *never-pled* "intentional misconduct" *direct* corporate liability punitive damages claim against RIVER FRONT, predicated upon a storefront signage dispute, should be reversed due to procedural *and* substantive errors. The recent decision in *Phoenix Management Services, Inc. v. Waterchase Homeowners' Association, Inc.*, 2024 WL 253323 (Fla. 4th DCA Jan. 24, 2024), is instructive. In *Phoenix*, the district court reversed an order granting the plaintiff HOA's motion for leave to add a punitive damages claim because plaintiff did not present evidence of the corporate defendant's "intentional" misconduct regarding its refusal to return the HOA's records. *Id.* at *2. Judge Gross's following closing observations are quite apropos here and support this Court's reversal.

> ***The record does not justify elevating this skirmish over the custody of business records to the World War II invasion of Normandy. Tort and contract causes of action are adequate remedies for the conduct alleged to have occurred in this case.***

Id. at *2 (emphasis added).

I.

THE TRIAL COURT FAILED TO IDENTIFY EVIDENCE PRESENTED THAT SATISFIED PLAINTIFFS' EVIDENTIARY BURDEN.

Plaintiffs do not deny the fact that the trial court's July 17, 2023 Order *failed to specifically identify* evidence presented and proffered by them which the court perceived satisfied the required evidentiary showing. Pursuant to this District's decision in *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019), a trial court must, either during the course of the hearing or in its order, make "***findings identifying the evidence it considered sufficient to provide a statutory 'reasonable basis***' for granting the motion to amend." (emphasis added). Similarly in *East Bay NC, LLC v. Reddish*, 306 So. 3d 1225, 1227 (Fla. 2d DCA 2020), the Second District stated that "the trial court ***must identify*** the admissible ***evidence proffered*** by the plaintiff on the record within the order ***and/or articulate*** on the record ***how the evidence supports a reasonable basis***" for the recovery of punitive damages. (emphasis added).

Recently, the orders under review in *Federal Insurance Co. v. Perlmutter*, 376 So. 3d 24, 29 (Fla. 4th DCA 2023), consistent with

Cat Cay, described the movants' "proffered evidence in detail" and "detailed the proffered evidence." The *Perlmutter* court observed that without those express findings "appellate courts will be significantly hampered in their review of whether the trial court properly performed its gatekeeping function." *Id.* at 30 n.3.

Plaintiffs' reliance on *Levin v. Prichard*, 258 So. 3d 545 (Fla. 3d DCA 2018), in an effort to avoid *Cat Cay* and excuse the trial court's omission is misplaced because *Levin* is factually distinguishable. Unlike Plaintiffs' June 8th Restated Motion and Notices of Filing, the plaintiff's motion in *Levin* "contained a ***detailed table outlining the record evidence and sworn declarations*** that provided the basis for his punitive damages claim." *Id.* at 547 (emphasis added).

Here, Plaintiffs' Restated Motion and Notices did *not* specifically identify or describe what Exhibits A through Z were or contained; did *not* provide a fact-specific outline of the evidence being proffered; did *not* contain a detailed table of contents; did *not* include the barebones description of Exhibits A to Z set forth in the Answer Brief; and, moreover, did *not* "clearly delineate[] the evidence being proffered," contrary to Plaintiffs' representations. [A.

12-34, 35-36, 358-359; R.A. 4-5, 6-7; A.B. 35-39, 50]. The Notices *only* stated that "Exhibits A though G" and "H though Z", "which Plaintiffs intend to use at hearing on the Motion and at trial, are attached hereto." [A. 35, 358; R.A. 4, 6]. These Notices were a veritable "drop box" production of 560 pages of unidentified materials labeled Exhibits A to Z, comparable to the " 'whole box' of documents" this District disapproved of in *Cat Cay, supra* at 1074. [A. 35-357, 358-594]. Plaintiffs' Notices *failed* to clearly delineate anything.

Plaintiffs' attempt to distinguish *East Bay* similarly fails. The fact that *East Bay* dealt with a Chapter 400 nursing home lawsuit is a distinction without a difference, especially since the *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637 (Fla. 5th DCA 2005), decision Plaintiffs heavily rely on arose in the same context. Additionally, Plaintiffs incorrectly focus on the type of evidence required by Section 400.0237 ("admissible evidence") versus Section 768.72(1) ("evidence in the record or proffered") in order to misdirect this Court's attention. The critical at-issue requirement is that a trial court, regardless of the type of evidence needed, "must identify" the evidence it determined provides a "reasonable basis"

for the recovery of punitive damages. *East Bay*, *supra* at 1227; *see Cat Cay, supra* at 1075.

Moreover, specifically identifying the evidence deemed sufficient to plead punitive damages is necessary given the game-changing consequences of such a claim. The trial court's failure to comply with *Cat Cay*'s mandated express "findings identifying evidence" and *East Bay*'s synonymous "must identify ... evidence" thus means that the trial court did *not* fulfill its gatekeeping obligations. *See Perlmutter*, *supra* at 30 n.3.

Accordingly, the July 17th Order must be reversed.

II.

PLAINTIFFS NEVER FILED THE REQUIRED PROPOSED *FIFTH* AMENDED COMPLAINT.

Plaintiffs' Rule 1.190(a) predicament is the product of their mad rush to file the Restated Motion with attached April 18, 2023 Revised Fourth Amended Complaint so that Judge Thomas would hear the Restated Motion before he was transferred to another division. Those June 8th filings occurred a mere 3.5 hours after this District relinquished jurisdiction in the first appeal and *well before*

anyone definitively knew the outcome of the requested rehearing. [A. 7-10, 11, 12-34, 37-87, 297-299].

Because Plaintiffs jumped the gun and prematurely moved to amend, they failed to realize that as of the June 14th hearing *all* punitive damages allegations and claims were stricken from their proposed amended complaint. [A. 11, 616-617, 621-623]. Only the stripped Fourth Amended Complaint, *completely devoid of any punitive damages allegations and claims*, remained for consideration with Plaintiffs' Restated Motion. That version of the "proposed" pleading was legally insufficient under Rule 1.190(a)'s caselaw because RIVER FRONT had the right "to address the amended complaint in the specific form the movant actually intends to file if leave to amend is granted" and the stripped proposed amended complaint was *not* in that form after June 14th. *Fetlar, LLC v. Suarez*, 230 So. 3d 97, 99 (Fla. 3d DCA 2017).

As a result of the June 14th hearing, it was incumbent upon Plaintiffs to cancel the June 29th Hearing, file a proposed *Fifth* Amended Complaint containing the punitive damages claims they sought to add, and schedule a hearing on their Restated Motion for at least 20 days after the new proposed complaint was filed, as

required by Rule 1.190(a). Plaintiffs nevertheless chose to disregard that Rule's mandates because Judge Thomas would be in another division by the rescheduled hearing date.

Finally and contrary to Plaintiffs' suggestion, Plaintiffs *never* argued at the June 29th Hearing that they would file the unstripped version of their Revised Fourth Amended Complaint if granted leave to amend. [A. 753-811].

III.

THE TRIAL COURT REVERSIBLY ERRED BY GRANTING THE RESTATED MOTION.

Plaintiffs utterly failed to make the statutorily-required "reasonable showing by evidence in the record or proffered by" them that "would provide a reasonable basis" for the recovery of punitive damages under the never-pled *direct liability* "intentional misconduct" theory.[3] § 768.72(1),(2)(a), Fla. Stat. The trial court likewise *never* announced at the June 29th Hearing that Plaintiffs

[3] Plaintiffs' Answer Brief states they are *only* pursing a "direct corporate liability" theory of punitive damages. [A.B. 45]. However, Plaintiffs' Restated Motion and Revised Fourth Amended Complaint *never* asserted that theory. [A. 12-34, 37-87]. The trial court therefore also erred by allowing Plaintiffs to seek punitive damages via an *unpled* legal basis.

established a "reasonable basis" to impose *direct* corporate liability against RIVER FRONT for punitive damages simply because its Board approved new Storefront Guidelines, as Plaintiffs' Brief insinuates on page 66. [A. 753-811].

The Plaintiffs' June 8th proffer consisted of 26 Exhibits, most of which were irrelevant and/or not properly authenticated.[4] [A. 35-357, 358-594]. Furthermore, none of those Exhibits established that RIVER FRONT had the requisite "actual knowledge" of "wrongfulness" and "high probability" of damages to Plaintiffs plus the specific intent to constitute "intentional misconduct." *Id.*

The insufficiency of Plaintiffs' proffer is confirmed by the recent affirmation of Section 768.72's requirements in *Perlmutter*, including that Plaintiffs' "pretrial evidentiary showing" and proffer of "timely filed documents" had to demonstrate that "a rational trier of fact could find that [RIVER FRONT] ***specifically intended*** to

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[4] *See Greenspire Global, Inc. v. Sarasota Green Group, LLC*, 363 So. 3d 1150, 1152 (Fla. 2d DCA 2023) ("unauthenticated attachments . . . lacked any evidentiary weight"); *Marder v. Mueller*, 358 So. 3d 1242, 1246-1247 (Fla. 4th DCA 2023) (irrelevant evidence did not support request to plead punitive damages); *Eco-Tradition, LLC v. Pennzoil-Quaker State Co.*, 137 So. 3d 495, 496 (Fla. 4th DCA 2014) (unsworn complaint and unauthenticated attachments had no evidentiary value).

engage in intentional . . . misconduct that was outrageous and reprehensible enough to merit punishment." 376 So. 3d at 33-34 (emphasis added).[5] Stated differently, "section 768.72(2) requires an evidentiary showing of specific intent, not general intent, to knowingly engage in wrongful conduct." *Id.* at 35 (underlining in original). *See Selz v. McKagen*, 2024 WL 358033, at *4 (Fla. 4th DCA Jan. 31, 2024) ("Punitive damages liability based on a 'should have known' standard does not meet the specific intent requirement for intentional misconduct[.]"); *Hospital Specialists, P.A. v. Deen*, 373 So. 3d 1283, 1290 (Fla. 5th DCA 2023) (noting as to actual

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[5] Contrary to Plaintiffs' arguments, the required "pretrial evidentiary showing" consists of "sworn statements and authenticated records" and the proffered evidence "'refers only to timely filed documents and excludes oral representations of additional evidence made during the hearing.'" *Perlmutter*, at 33, n.6 (citation omitted); *see White v. Boire*, 320 So. 3d 814, 816-817 (Fla. 2d DCA 2021).

Additionally, allegations in an unverified complaint like Plaintiffs' "are not evidence." *DeSanto v. Grahn*, 362 So. 3d 247, 249 (Fla 4th DCA 2023); *see Greenspire*, 363 So. 3d at 1152 ("unverified complaint was not evidence"); *Cat Cay*, *supra* at 1075 ("Bare allegations are insufficient to support a punitive damages claim."). *DeSanto*, *supra* at 250, also rejected a contention virtually identical to Plaintiffs' that "the statute requires only a representation of anticipated evidence" because it "would leave the court with no effective way to act as a gatekeeper," rendering Section 768.72(1) "virtually meaningless."

knowledge of "high probability" of injury: "[i]t is not enough that such a result *could* or might *occur*") (italics in original).[6] Plaintiffs therefore needed to provide an evidentiary basis that RIVER FRONT's "***conduct, knowledge, and intent reached the level of 'intentional misconduct***'" before Plaintiffs could be allowed to plead punitive damages. *Greenspire*, 363 So. 3d at 1152 (emphasis added). Regardless of how phrased, Plaintiffs did *not* satisfy Section 768.72's evidentiary predicate via their June 8, 2023 proffers.[7] [A. 35-357, 358-594].

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[6] *See also CCP Harbour Island, LLC v. Manor at Harbour Island, LLC*, 373 So. 3d 18, 28 (Fla. 2d DCA 2023) ("One cannot negligently – or even grossly negligently – *intend* to do something wrong.") (italics in original).

[7] Rule 1.190(f) governs the timeliness of proffered evidence. This District in *Bentley Condominium Ass'n, Inc. v. Bennett*, 321 So. 3d 315, 316-317 (Fla. 3d DCA 2021), found that "Rule 1.190(f) provides a clear line of demarcation" and stated: "We read this rather unambiguous rule as requiring that . . . any evidence supporting a punitive damage claim be filed and served no later than twenty days before the scheduled hearing on the motion." *See Fetlar, supra* at 99 (plaintiffs "failed to file and serve [a proffered] deposition transcript[] at least twenty days before the hearing"); *Varnedore v. Copeland*, 210 So. 3d 741, 747 (Fla. 5th DCA 2017) (Rule 1.190(f) requires "'the supporting evidence or proffer to be served on all parties at least twenty days before the hearing.'" . . . "***Neither the movant nor the opponent may rely upon any evidence, even if already on file, unless it was identified in its timely filed notice***.") (emphasis added); *see also Perlmutter, supra*

Specifically, nothing within Plaintiffs' self-proclaimed "myriad" and "mountain" of Exhibits, including Mr. Rinaldi's self-serving and conclusory Affidavit,[8] provided the "reasonable showing" of specific

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at 33, n.6. (agreeing with *Varnedore* that Rule 1.190(f) "'refers only to timely filed documents and ***excludes*** oral representations of additional evidence made during the hearing'" and that "'the trial court ***cannot properly consider*** plaintiff's counsel's ***oral or other proffers*** of evidence which are ***first presented during the hearing***'") (emphasis added).

Here, *none* of the documents assigned Tab Nos. 2, 5, 7-12, 14, 16, 28, 35, 38-41 in Plaintiffs' Amended Appendix were "timely filed" as part of Plaintiffs' June 8th proffer. The Court therefore should *not* consider those documents in deciding this appeal. *See Bentley Condo.*, *supra* at 317; *Fetlar, supra*; *Perlmutter*, *supra*; *Varnedore*, *supra*. Notably, Plaintiffs did *not* include the documents with Tab Nos. 39-41 in their stricken Appendix.

[8] Mr. Rinaldi's Affidavit was legally insufficient because he *never* made the necessary disclosure of how he had/could have personal knowledge of the factually-baseless statements and personal opinions that both "Defendants" had "actual knowledge of the wrongfulness of [their] conduct . . . and of high probability of injury and damage to the Plaintiffs." [A. 307-308]. *See Greenspire*, *supra* at 1152 (affiant "failed to disclose how he could have personal knowledge of Greenspire's intent [and] mere belief that Greenspire intentionally misrepresented … and otherwise behaved fraudulently was not evidence that they did so"); *Tilton v. Wrobel*, 198 So. 3d 909, 911 (Fla. 4th DCA 2016) ("self-serving affidavit . . . legally insufficient to show [defendants'] knowledge [that] alleged defamatory statement" was false); *West Edge II v. Kunderas*, 910 So. 2d 953, 954-955 (Fla. 2d DCA 2005) (affiant "could not have had personal knowledge of what [other organization] knew or did not know" and her personal opinion was legally insufficient); *Fla. Dep't of Fin. Servs. v. Associated Indus. Ins. Co.*, 868 So. 2d 600, 602 (Fla.

evidence establishing that RIVER FRONT, through an *unidentified/unknown/unnamed* primary owner or high-ranking managing agent with real policymaking authority (i) *removed* the at-issue storefront signage; (ii) had "actual knowledge of the wrongfulness of the conduct" it's accused of undertaking "and the high probability that injury or damage to [Plaintiffs] would result"; and (iii) that *despite* said *unproven* "actual knowledge," RIVER FRONT "intentionally pursued that course of conduct, resulting in injury or damage."[9] § 768.72(1),(2)(a), Fla. Stat.[10] [A. 35-357, 358-594]. Plaintiffs' proffer, stated differently, did *not* contain a scintilla of evidence demonstrating that RIVER FRONT *specifically intended* "to knowingly engage in wrongful conduct." *Perlmutter*, *supra* at 35.

1st DCA 2004) (affiant's "understanding" and "opinion" were not based on personal knowledge and required striking of affidavit).

[9] Plaintiffs' "summarized" facts fair no better. [A.B. 60-64].

[10] The first two lines on page 60 of Plaintiffs' Brief confuse and commingle the requirements of *direct* corporate liability with those of *vicarious* liability under Section 768.72(3), a theory which Plaintiffs stressed they are *not* pursing. [A.B. 45, 60]. Plaintiffs immediately thereafter misconstrue this District's holding in *Coronado Condominium Ass'n Inc. v. La Corte*, 103 So. 3d 239, 240-241 (Fla. 3d DCA 2012), and mispresent that the *Coronado* court "specifically determined" the issue of "intentional misconduct" when that case actually involved Section 768.72(3) and plaintiff's failure to make an evidentiary showing supporting *vicarious* liability for punitive damages. [A.B. 60].

This case therefore does *not* present the "anomalously transgressive conduct that is 'outrageous in character' and 'extreme in degree'" or "'is fraudulent, malicious, deliberately violent or oppressive'" for which "punitive damages are reserved" and "appropriate." *CCP*, 373 So. 3d at 31 (citations omitted).

The following recent decisions reversing orders granting leave to add punitive damages illustrate that Plaintiffs' failure to satisfy their statutorily-mandated evidentiary showing requires this Court to reverse the appealed Order. *E.g.*, *Selz*, *supra* at *3 (no evidentiary showing of "actual knowledge" of wrongfulness of alleged conduct); *Phoenix*, *supra* at *2 (plaintiff failed to present any evidence of "intentional . . . misconduct"); *Perlmutter*, *supra* at 35 (ambiguous evidence as to "specific intent to intentionally engage in wrongdoing" rendered movants' "evidentiary showing . . . insufficient"); *McGlothin v. McDonald*, 2023 WL 8482979, at *1 (Fla. 5th DCA Dec. 8, 2023) (plaintiff's proffer failed to establish defendant had requisite "actual knowledge"); *Hospital Specialists, supra* at 1290 (insufficient evidence of "actual knowledge"); *CCP*, *supra* at 30 (no evidence showing "actual knowledge" of wrongfulness regarding abuse of process); *Wiendl v. Wiendl*, 371 So.

3d 964, 967-968 (Fla. 2d DCA 2023) (no reasonable showing that former wife filed domestic violence petition wrongfully and based on "intentional misconduct").

Plaintiffs' misguided arguments on pages 58, 59 and 70 of their Brief regarding the required evidentiary proffer are based on Plaintiffs' reliance on nonbinding federal trial court decisions that are *not* subject to Section 768.72(1)'s pleading and evidentiary requirements. *See Cohen v. Office Depot, Inc.,* 184 F.3d 1292, 1299 (11th Cir. 1999) ("[T]he pleading requirements of . . . § 768.72 are inapplicable in federal diversity cases."), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000); *Primerica Fin. Servs., Inc. v. Mitchell,* 48 F.Supp.2d 1363, 1371 (S.D. Fla. 1999) (requiring evidence proffer at pleadings stage conflicts with Federal Rules 8 and 9(g)).

Furthermore, Plaintiffs' contention that they satisfied their evidentiary burden via the unsworn statement of defense counsel at a hearing *more than three months earlier* on Plaintiffs' *original* Motion to Amend fails for several reasons. First, the trial court explicitly advised Plaintiffs they had to start their proffer from scratch at the June 29th Hearing. [A. 757]. Secondly, attorneys'

"***unsworn statements*** [or, here, non-statements] ***do not establish facts in the absence of stipulation***." *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) (emphasis added); *see AT&T Mobility, LLC v. Rigney*, 2023 WL 5731791, at *12 (Fla. 3d DCA Sept. 6, 2023) (Artau, J., concurring in part) (quoting and agreeing with *Leon Shaffer*); *Jaffe v. Jaffe*, 147 So. 3d 578, 582 (Fla. 3d DCA 2014) (same). Third, the federal decisions on "judicial admissions" which Plaintiffs cite are not binding precedent and are distinguishable because they involved clear, unambiguous, and unequivocal admissions of fact in answers/court filings. [A.B. 66, n.4]. Moreover, the Middle District in *Starbuck v. J.R. Reynolds Tobacco Co.*, 349 F.Supp.3d 1223, 1233 (M.D. Fla. 2018), cautioned against construing an attorney's statements as judicial admissions to avoid court proceedings and trials from becoming "minefields" for lawyers.

Lastly and to quote Plaintiffs, "whether by ignorance or intent" Plaintiffs rely on two tortious interference cases that involved trials, despite criticizing RIVER FRONT for citing tried cases concerning conduct more egregious than what Plaintiffs alleged – but which was held legally insufficient to warrant punitive damages. [A.B. 69-

70]. Additionally, Plaintiffs' contention that *American Medical International, Inc. v. Scheller*, 590 So. 2d 947 (Fla. 4th DCA 1991), and *Bailey v. St. Louis*, 196 So. 3d 375 (Fla. 2d DCA 2016), support punitive damages under their intentional interference claim ignores those cases' patently distinguishable facts and that *American Medical* pre-dates Section 768.72's 1999 Amendments.

CONCLUSION

Based on the foregoing arguments and facts, in addition to those set forth in the Initial Brief, this Court should reverse the trial court's July 17, 2023 Order and remand with instructions that it be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of April 2024, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Courts using the Florida Courts E-Filing Portal and served on this day via transmission of Notices of Electronic Filing generated by the Florida Courts E-Filing Portal on: *Jorge L. Cruz, Esq., Jeremy C. Daniels, Esq.,* and *Vincent Edward Halloran, Esq.,* Daniels, Rodriguez, Berkeley, Daniels & Cruz, jcruz@drbdc-law.com, service-jlc@drbdc-law.com, eligonzalez @drbdc-law.com, jdaniels@drbdc-law.com, service-jcd@drbdc-law.com, dortiz@drbdc-law.com, vhalloran@drbdc-law.com, service-vh@drbdc-law.com, eligonzalez@drbdc-law.com, *Counsel for Appellees North Investment Group, LLC* and *CWV Realty Group, LLC*; *John Cody German, Esq.*, *Justin Maya, Esq.*, and *Justin Lawrence Schiff, Esq.,* Cole Scott & Kissane, cody.german@csklegal.com, justin.maya@csklegal.com, justin.schiff@csklegal.com, *Counsel for Defendant The IVY Condominium Association, Inc.*

/s/ Esther E. Galicia
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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Reply Brief (i) was prepared using Bookman Old Style 14-point proportionally spaced font in accordance with Florida Rule of Appellate Procedure 9.045(b); and, (ii) has 3,966 words and thus complies with and does not exceed the 4,000 word count limit set forth in Florida Rule of Appellate Procedure 9.210(a)(2)(B), as calculated by the word-processing system used to prepare the Reply Brief.

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