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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

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

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INTRODUCTION

Appellant THE RIVER FRONT MASTER ASSOCIATION, INC. ("RIVER FRONT"), one of two Defendants below, seeks review of the trial court's erroneous July 17, 2023 nonfinal Order granting Plaintiffs/Appellees North Investment Group, LLC's ("NORTH") and CWV Realty Group, LLC's ("CWV") June 8, 2023 Motion for Leave to Amend Complaint to Seek Punitive Damages ("Motion to Amend"). [A. 5-6, 818-823]. The parties in this appeal will be referred to by proper name, as specifically referenced above, or by their position at the trial court level.

The appealed Order also permits Plaintiffs to seek punitive damages against Defendant The Ivy Condominium Association, Inc. ("IVY"), whose separate appeal with this Court is styled *The Ivy Condominium Association, Inc. v. North Investment Group, LLC, et al.*, Case No. 3D2023-1396.

RIVER FRONT is contemporaneously filing an Appendix containing the relevant portions of the Record necessary to an understanding of the issues presented. References to documents in the Appendix are designated by the symbol "A." followed by the corresponding PDF Page Number(s) (i.e., "A. 5-6").

STATEMENT OF THE CASE AND FACTS

I. THE UNDERLYING DISPUTE AND LITIGATION

This case arises from a 2017 signage dispute involving the owner (Plaintiff NORTH) and tenant (Plaintiff CWV) of Commercial Unit No. 5 at The Ivy Condominium *and* Defendants IVY (local Condominium Association) and RIVER FRONT (Master Association). [A. 12, 625]. Plaintiffs deliberately refused to comply with the rules and regulations governing storefront signage and displays which they never judicially challenged. [A. 23 (¶¶14-16); 304 (¶¶24-26); 625]. The goal of the Storefront Guidelines is "to provide a clean, neat and professional look to the community." [A. 625, 661].

In March of 2017 and less than one month after CWV's non-compliant signs, displays, etc., were allegedly removed at night by a *to-date unidentified and unknown person*, CWV's Real Estate Broker Florencia Yagodnik expressly agreed to comply with the Storefront Guidelines; Ms. Yagodnik selected the compliant signage, screens, and logos that CWV preferred; Ms. Yagodnik requested that her name be placed on the front "door to avoid any DBPR fine"; and RIVER FRONT paid all expenses associated with the new signs, etc., which were installed around March 3, 2017. [A. 659-663]. The

"clean, neat and professional look" was not being achieved when CWV's signs and display failed to comply with the Storefront Guidelines, as evidenced by the "before" photographs with paper listings affixed to and covering roughly half of each storefront glass pane. [A. 481, 482, 485, 487, 499, 510, 661].[1]

Plaintiffs nevertheless sued RIVER FRONT and IVY three years later via Miami-Dade County Circuit Court Case No. 2020-002305-CA-01. [A. 5, 12].

II. PLAINTIFFS' MOTION TO AMEND AND PROFFER

Over six years since the alleged February 8, 2017 signage-removal incident, after more than three years of litigation, and on the eve of the July 3, 2023 trial, Plaintiffs filed their June 8, 2023 Motion to Amend. [A. 12-34, 600]. The Motion to Amend never, however, specified whether the proposed punitive damages claim against RIVER FRONT, a corporate entity, was predicated upon a *direct* or *vicarious* theory of liability. [A. 12-34].

---

[1] The numbers Plaintiffs' counsel used when referring to the proffered Exhibits during the June 29, 2023 Hearing on the Motion to Amend do not correspond with the letter-designations used in the Motion to Amend and Plaintiffs' June 8, 2023 Notices of Filing. [A. 12-34, 35-357, 358-594, 753-811]. RIVER FRONT is using the letter-designations for consistency with Plaintiffs' June 8th filings.

Plaintiffs likewise never submitted a "Fifth" Amended Complaint, which was required after all punitive damages claims and allegations in their Fourth Amended Complaint, the relied-upon operative pleading, were stricken at the June 14, 2023 Hearing. [A. 12-34, 35-357, 358-594, 598-620, 621-623].

Moreover, virtually all of Plaintiffs' proffered Exhibits were irrelevant and/or not properly authenticated and none of them provided a reasonable evidentiary basis supporting a *direct* or *vicarious liability* claim for punitive damages. [A. 35-357, 358-594]. Plaintiffs' Exhibits did not, for example, indicate who at RIVER FRONT was the owner, managing agent, officer, or high-ranking policymaker that committed the alleged "intentional misconduct" – for *direct liability* purposes. [A. 35-357, 358-594]. The Exhibits also did not identify an employee or agent of RIVER FRONT whose purported acts rose to the requisite level of "intentional misconduct" – for *vicarious liability* purposes. [A. 35-357, 358-594]. Plaintiffs' Exhibits further failed to identify anyone within RIVER FRONT's corporate management or who was in control of RIVER FRONT that purportedly "actively and knowingly participated in" or "knowingly condoned, ratified, or consented to" the unidentified employee's or

agent's purported "intentional misconduct," as required by Section 768.72(3)(a-b). [A. 35-357, 358-594].

Plaintiffs' proffered Exhibits include the following:[2]

> Exhibit A: April 18, 2023 Fourth Amended Complaint. [A. 37-87]. {This pleading's claims and allegations regarding punitive damages were stricken at the June 14, 2023 Hearing.}
>
> Exhibit E: Affidavit of Humberto Rinaldi, Plaintiffs' "duly authorized agent and corporate representative." [A. 300-313]. {This Affidavit, Plaintiffs' only sworn proffer of evidence, lacks facts supporting *direct* or *vicarious liability* for punitive damages.}
>
> Exhibit F: Aerial photograph of the River Front development. [A. 314].
>
> Exhibit G: Declaration of the IVY. [A. 315-357].
>
> Exhibit H: Amended and Restated Declaration of RIVER FRONT. [A. 360-478].
>
> Exhibit I: Sept. 2015 and Feb. 2017 emails between Mr. Rinaldi, RIVER FRONT, and/or IVY regarding CWV's signage at The Ivy. [A. 479-499].

[2] The pictures and videos Plaintiffs filed (Exhibits F, K, L, M, N, Q, R, T and U) were not authenticated by day and time taken, and/or regarding whether they accurately depict what was photographed or videotaped. [A. 314, 510-511, 512-513, 514, 515-517, 525, 526, 533, 534-537]. Plaintiffs also failed to establish who took the photographs and videos marked as Exhibits F and U. [A. 310 (¶ 62)].

Exhibit J: Invoices for CWV's signs, etc. [A. 500-509].

Exhibit K: Pictures of CWV's storefront with and without sheets of real estate listings affixed to the glass panes. [A. 510-511].

Exhibit L: Pictures of CWV's logo sign on the ground. [A. 512-513].

Exhibit M: Picture of CWV's storefront with frosted glass panes. [A. 514].

Exhibit Q: Picture and video of the interior of One River Point's sales gallery. [A. 525].

Exhibit S: Nov. 28, 2016 email attaching and the Storefront Guidelines governing commercial units at The Ivy. [A. 527-532].

Exhibit T: Picture of CWV's storefront without property lisitings on the glass panes. [A. 533].

III. THE JUNE 7 & 14, 2023 HEARINGS, *AND* CORRESPONDING JUNE 12 & 21, 2023 ORDERS

The April 18, 2023 Fourth Amended Complaint filed with Plaintiffs' Motion to Amend was originally filed in support of Plaintiffs' March 16, 2023 Motion for Leave to add punitive damages which the trial court granted via its (now-vacated) April 28, 2023 Order. [A. 37-87, 297-299, 595-597, 621-623]. RIVER FRONT appealed that Order and the trial court realized, at the June 7, 2023 Hearing on Defendants' motions for stay pending appeal, that it had not ruled on Defendants' May 3, 2023 Motion for Rehearing.

[A. 7-10]. Moreover, after a thorough exchange with counsel regarding the procedural and substantive infirmities that the April 28th Order suffered from, the trial court stated it would grant the Motion for Rehearing and vacate the April 28th Order once it had jurisdiction to do so. [A. 7-10]. RIVER FRONT immediately filed a Motion to Relinquish Jurisdiction with this District which was granted on June 8, 2023, a mere 3.50 hours before Plaintiffs filed their Motion to Amend. [A. 7-10, 11, 12-34].

On June 12, 2023, the trial court entered an Order granting rehearing and vacating the April 28th Order. [A. 595-597]. However, all other rulings in the April 28th Order "remain[ed] undisturbed." [A. 595].

At the June 14, 2023 Hearing, RIVER FRONT *ore-tenuously* sought clarification of the June 12th Order because, among other reasons, despite vacating the April 28th Order it inconsistently failed to vacate Plaintiffs' Fourth Amended Complaint, which the court deemed filed as of April 21, 2023. [A. 605-606]. The trial court agreed that "we want to be consistent here," "vacated" the portion of its Order deeming the Fourth Amended Complaint filed, and indicated it was "not treating" that complaint as the "operative"

pleading. [A. 606-607]. However, Plaintiffs' counsel disagreed with the court and insisted that the Fourth Amended Complaint should be deemed filed and operative "as to everything except" punitive damages. [A. 607]. Counsel also stated: "As a matter of fact, if punitive [damages go] away we can go to trial in a week." [A. 611]. Ultimately, the court concluded:

> [W]hat I am going to do to be consistent, and I appreciate the defense bringing it to my attention, I will, ***to the extent that the Fourth Amended Complaint contains any allegations relating to punitive damages, those allegations are stricken*** without prejudice until the Court hears the motion on its merits.

[A. 616-617 (emphasis added)].

The court's corresponding June 21, 2023 Order granted Defendants' Motion for Rehearing, "VACATED" the portion of the April 28th Order granting Plaintiffs' March 16th Motion for Leave, and struck

> [a]ll allegations regarding punitive damages in the Plaintiffs' Fourth Amended Complaint, . . . specifically consisting of the demands for punitive damages within the WHEREFORE clauses of Counts I through XII; Counts XIII, XIV, and XV for Punitive Damages, in their entirety; Paragraph J. of the Prayer for Relief section requesting punitive damages; and any

> mention of the phrase "punitive damages" elsewhere in the Fourth Amended Complaint[.]

[A. 621].

IV. RIVER FRONT'S RESPONSE IN OPPOSITION

RIVER FRONT's Response to Plaintiffs' Motion to Amend argued that the Motion should be denied because it did not specify whether the proposed punitive damages claim was based on *direct* or *vicarious liability*; Plaintiffs did not file a proposed "Fifth" Amended Complaint, which was necessary after the June 14th Hearing and June 21st Order; nothing Plaintiffs proffered satisfied the legal and evidentiary requirements for pleading and imposing *direct* or *vicarious liability* for punitive damages against a corporation; and Plaintiffs' proffer did not provide a "reasonable showing by evidence" for establishing the purported "intentional misconduct." [A. 624-752].

The Response also set forth the following uncontested facts which Plaintiffs conveniently ignored:

> 2. On March 1, 2017, at 5:28 PM, Florencia Yagodnik emailed RIVER FRONT's property manager, Michael Dubas, and advised him she had "already removed the hanging displays." [Exhibit 1: p. 4]. Ms. Yagodnik stated she preferred "the signage CWV Realty in every window as Keller Williams," whose unit is next to CWV, has.

[Exhibit 1: p. 4]. Ms. Yagodnik also requested removal of the window frosted film installed on the outside of the windows. [Exhibit 1: p. 4]. She further indicated she preferred "a screen that allows the light to come thru" for the top window panels. [Exhibit 1: p. 4]. Lastly, Ms. Yagodnik stated: "Don't forget to put my name on the door to avoid any DBPR fine." [Exhibit 1: p. 4].

3. Mr. Dubas responded on March 2, 2017, at 11:13 AM. [Exhibit 1: p. 2]. Mr. Dubas advised Ms. Yagodnik that he was having the sign company come later that day and that it was his "intention to have the frost removed from the exterior and [the CWV] logos installed no later than end of day" on March 3, 2017. [Exhibit 1: p. 2]. He also thanked Ms. Yagodnik "again ***for helping to resolve this issue***." [Exhibit 1: p. 2 (emphasis added)]. Moreover, Mr. Dubas stated: "***It is our intention to provide a clean, neat and professional look to the community and your participation in that is greatly appreciated***." [Exhibit 1: p. 2 (emphasis added)].

4. Less than six-and-a-half hours later, at 5:31 PM on March 2, 2017, Mr. Dubas emailed Ms. Yagodnik and advised her that he had confirmed the availability of the sign installer for March 3, 2017 between 1:00 and 2:00 PM. [Exhibit 1: p. 1]. He also informed Ms. Yagodnik that

> the installer will be removing the frost material from the outside and installing [the CWV] logos on the two doors and the windows center windows to the side of each door. The hours, broker information and contact will also be installed on the doors as per the attached design.
>
> The additional logos will need to be ordered and I will follow up with you on this as soon as I have additional information. ***Thank you again for your cooperation and assistance***

> ***to complete this important transformation of River Front Park.***

[Exhibit 1: p. 1 (emphasis added)].

5. Ms. Yagodnik quickly emailed Mr. Dubas and said "***thanks***." [Exhibit 1: p. 1 (emphasis added)]. She also reminded Mr. Dubas to ask about the "screens" for the superior/top panel windows when he ordered the additional logos. [Exhibit 1: p. 1].

6. Another piece of evidence which Plaintiffs have not provided this Court with is the March 7, 2017 letter sent in response to their attorney John Cruz's March 2, 2017 letter. [Exhibit 2 (3/7/2017 letter)]. The response letter was authored by the attorney representing RIVER FRONT at the time, Eduardo J. Valdes with the law firm of Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars, and Sobel. [Exhibit 2].

7. Consistent with the foregoing email exchange, Mr. Valdez stated:

> Your letter dated March 2, 2017 comes as a surprise as ***the issues concerning CWV Realty Group, LLC's ("CWV") violations are in essence resolved. The Master Association's property manager, Michael Dubas, has been communicating with the managing member of CWV, Florencia Yagodnik, who agreed to comply with the pertinent rules and regulations and accepted the Master Association's offer to install the approved logos and signage. The installation process is nearly complete. Additionally, yesterday morning two board members met with Octavio Rinaldi, a member of CWV, where the parties discussed the rules and regulations and the community's need for uniformity.***

> ***It was explained to Mr. Rinaldi that all owners at The River Front were equally subject to the subject rules and standards. The meeting concluded with a productive discussion on how best CWV could achieve its desired marketing goals without violation the Master Association's rules, regulations and community standards*.**
>
> * * *
>
> ***CWV is subject to the Master Association's Declaration of Covenants, the Rules and Regulations, and any amendments thereto which requires it to strictly comply with the terms and restrictions therein at all times. As you are well aware, Florida law recognizes that these Governing Documents are a community's constitution, stringently governing the relationships among unit owners and the associations. Unit owners like CWV purchased a unit subject to the provisions of the Governing Documents. The law provides that each owner assumes title knowing and accepting the restrictions to be imposed, including any amendments thereto, and is inextricably bound by them. CWV is no exception.***

[Exhibit 2: pp. 1-2 (emphasis added)].

[A. 628-631].

Additionally, RIVER FRONT cited to and quoted the various sections of its Declaration which Plaintiffs self-servingly overlooked because they negate Plaintiffs' claims, namely Sections 8.5, 8.15, 9.2, 10.12, and 11.3. [A. 631-633].

V. THE JUNE 29, 2023 HEARING

At the June 29th Hearing on Plaintiffs' Motion to Amend, the trial court quickly halted Plaintiffs' attempt to have the court simply re-enter its April 28th Order.

> THE COURT: I am just going to stop you . . . because . . . ***we 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)]. Plaintiffs' presentation tracked their Motion and discussed several of their filed Exhibits. [A. 757-784]. RIVER FRONT's arguments included procedural and substantive grounds for denying the Motion to Amend. [A. 784-805, 807]. The court thereafter stated that counsel did not "have to do anything further" and "the Court will issue its own order." [A. 811].

VI. THE JULY 17, 2023 ORDER AND THIS APPEAL

On July 17, 2023, the trial court rendered an Order granting Plaintiffs' Motion to Amend. [A. 5-6]. The court concluded, <u>without</u> expressly identifying any Exhibits or proffered evidence[3], that

[3] RIVER FRONT moved for rehearing based on this omission. [A. 812-817].

Plaintiffs "made a reasonable showing by evidence and proffered testimony sufficient for a jury to find by clear and convincing evidence that punitive damages are warranted in this case."[4] [A. 5].

RIVER FRONT timely appealed the July 17th Order on August 14, 2023. [A. 818-823].

[4] Importantly, Plaintiffs never filed or submitted a proffer of "testimony" in accordance with Rule 1.190(f). [A. 12-34, 35-357, 358-594]. It thus appears that the trial court used a boiler-plate form.

STANDARD OF REVIEW

The trial court's challenged legal determination that Plaintiffs "made a reasonable showing by evidence and proffered testimony" permitting Plaintiffs to assert a punitive damages claim against RIVER FRONT is subject to the *de novo* standard of review. [A. 5]. *Manheimer v. Florida Power & Light Co.*, No. 3D22-1534, 2023 WL 4919540, at *2 (Fla. 3d DCA Aug. 2, 2023); *Grove Isle Ass'n, Inc. v. Lindzon*, 350 So. 3d 826, 829 (Fla. 3d DCA 2022); *Napleton's North Palm Auto Park, Inc. v. Agosto*, No. 4D22-2507, 2023 WL 4095777, at *2 (Fla. 4th DCA June 21, 2023); *HRB Tax Group, Inc. v. Florida Investigation Bureau, Inc.*, 360 So. 3d 1159, 1161 (Fla. 4th DCA 2023); *Marder v. Mueller*, 358 So. 3d 1242, 1245 (Fla. 4th DCA 2023); *Cleveland Clinic Florida Health System Nonprofit Corp. v. Oriolo,* 357 So. 3d 703, 705 (Fla. 4th DCA 2023). To quote this District, a "trial court's determination as to whether a plaintiff has made a 'reasonable showing' under section 768.72 for a recovery of punitive damages, 'is similar to determining whether a complaint states a cause of action, or the record supports a summary judgment, both of which are reviewed de novo.' " *Grove Isle*, 350 So. 3d at 830 (citation omitted)

SUMMARY OF THE ARGUMENT

The trial court erroneously allowed Plaintiffs to pursue a punitive damages claim against RIVER FRONT where Plaintiffs failed to allege the requisite facts and make the required evidentiary presentation or proffer demonstrating that RIVER FRONT, a corporation, was probably *directly* or *vicariously* liable for punitive damages.

As a threshold matter, the trial court and its July 17, 2023 Order failed to specifically identify (as required by this District) evidence the Plaintiffs presented or proffered which the court determined provided the statutorily-mandated "reasonable basis" for allowing a punitive damages claim to be pled against RIVER FRONT. [A. 5-6].

Procedurally, Plaintiffs violated Florida Rule of Civil Procedure 1.190(a) by never attaching a proposed "Fifth" Amended Complaint, much less serving it at least 20 days before the June 29, 2023 Hearing on their Motion to Amend. *See* Fla. R. Civ. P. 1.190(a),(f). Serving a proposed "Fifth" Amended Complaint, instead of relying on their Fourth Amended Complaint, was absolutely necessary because all punitive damages claims and allegations in the Fourth

Amended Complaint were stricken and it remained the "operative" pleading pursuant to Plaintiffs' insistence at the June 14, 2023 Hearing and the consequent June 21, 2023 Amended Order. [A. 37-87, 607-611, 616-617, 621-623].

Plaintiffs also ignored the applicable substantive law and woefully failed to satisfy their Section 768.72 evidentiary obligations for the imposition of corporate *direct* or *vicarious* punitive damages liability. [A. 12-34, 35-357, 358-594]. Specifically, Plaintiffs failed to provide a "reasonable showing by evidence" for establishing Section 768.72(2)(a)'s "intentional misconduct" and satisfying the decisional and statutory requirements to add a punitive damages claim against a corporation based on a theory of *direct* or *vicarious* liability. [A. 35-357, 358-594].

Given the foregoing, this Court should reverse the trial court's July 17, 2023 Order.

ARGUMENT

This case essentially concerns a contract-related dispute for economic damages that does not rise to the level of extreme conduct or jeopardize the public as a whole. *See BDO Seidman, LLP v. Banco Espirito Santo Intern.,* 38 So. 3d 874, 876 (Fla. 3d DCA 2010) ("Punitive damages are a form of extraordinary relief for acts and omissions so egregious as to jeopardize not only the particular plaintiff in the lawsuit, but the public as a whole[.]"). Stated differently, the trial court erred by permitting Plaintiffs to assert a factually and legally unsupported claim for punitive damages against RIVER FRONT, a corporation, arising from Plaintiffs' intentional violation of the Storefront Guidelines governing their commercial condominium unit. The trial court's July 17, 2023 Order is contrary to Section 768.72's procedural and substantive requirements, the law on *direct* and *vicarious* corporate liability for punitive damages,[5] and should therefore be reversed, as more thoroughly addressed below.

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[5] Like the plaintiff in *Grove Isle*, 350 So. 3d at 831, Plaintiffs' Motion to Amend and operative Fourth Amended Complaint <u>never</u> specified whether their proposed/striken claim for punitive damages was based on *direct* or *vicarious liability*. [A. 12-34, 37-87].

I.

THE JULY 17, 2023 ORDER DOES NOT SPECIFICALLY IDENTIFY EVIDENCE THAT THE TRIAL COURT DETERMINED WAS SUFFICIENT TO ESTABLISH THE MANDATED "REASONABLE BASIS" FOR PUNITIVE DAMAGES AND THE ORDER SHOULD THEREFORE BE REVERSED.

This Court should reverse the July 17th Order because the trial court failed to identify the evidence Plaintiffs presented and/or proffered which it deemed sufficient to provide the requisite reasonable evidentiary basis permitting the assertion of a claim for punitive damages.

In *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071 (Fla. 3d DCA 2019), this District held that 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." *Id.* at 1075 (emphasis added). The failure to do so, like here, is "a departure from applicable law." *Id.*

The Second District in *East Bay NC, LLC v. Reddish*, 306 So. 3d 1225 (Fla. 2d DCA 2020), likewise held that when a trial court grants leave to amend a complaint to add a claim for punitive

damages, the 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 to believe the claimant can demonstrate by clear and convincing evidence that recovery of punitive damages is warranted." *Id.* at 1227 (emphasis added). Thus, "[a]bsent oral findings in the record which establish entitlement to plead punitive damages, ***[an] order that parrots the provisions of the statute without identifying the admissible evidence adduced at the evidentiary hearing is insufficient***." *Id.* (emphasis added).

The Fourth and Fifth District Courts of Appeal are in accord. *See Varnedore v. Copeland*, 210 So. 3d 741, 747-748 (Fla 5th DCA 2017) ("[T]he trial court, serving as a gatekeeper, is required to make an affirmative finding that plaintiff has made a 'reasonable showing by evidence,' which would provide a 'reasonable evidentiary basis for recovering such damages' if the motion to amend is granted."); *Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, Inc.*, 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015) (quashing order granting leave to assert punitive damages claim where "neither the court's verbal comments nor written order indicate whether it found

that CCM demonstrated a reasonable basis for seeking punitive damages").

Here, the July 17, 2023 Order is utterly silent, as was the trial court during the June 29th Hearing, as to what specific record evidence Plaintiffs presented or proffered that warranted the granting of Plaintiffs' requested permission to seek punitive damages against RIVER FRONT. [A. 5-6, 753-811]. The trial court's said omissions therefore require reversal of its July 17th Order.

II.

PLAINTIFFS NEVER ATTACHED A PROPOSED "FIFTH" AMENDED COMPLAINT TO THEIR MOTION TO AMEND, MUCH LESS SERVED A PROPOSED "FIFTH" AMENDED COMPLAINT AT LEAST 20 DAYS BEFORE THE HEARING ON THEIR MOTION.

Pursuant to Rule 1.190(a), "[i]f a party files a motion to amend a pleading, the party ***shall attach the proposed amended pleading to the motion***." Fla. R. Civ. P. 1.190(a) (emphasis added). Additionally, Rule 1.190(f) requires the motion to amend and the attached proposed amended pleading to "be ***served*** on all parties ***at least 20 days before the hearing***." Fla. R. Civ. P. 1.190(f) (emphasis added). The Plaintiffs fatally failed to comply with both of

these requirements. Specifically, Plaintiffs never attached to their Motion to Amend, much less served at least 20 days before the June 29th Hearing, a proposed "Fifth" Amended Complaint. [A. 12-34, 35-357, 358-594]. A new proposed pleading was an absolute prerequisite because of Plaintiffs' express demand, at the June 14th Hearing, that their operative pleading be the Fourth Amended Complaint with all punitive damages allegations and claims removed/stricken. [A. 607-611, 616-617, 621-623]. The July 17th Order must therefore be reversed.

This District in *Fetlar, LLC v. Suarez*, 230 So. 3d 97 (Fla. 3d DCA 2017), interpreted and applied both subdivisions of Rule 1.190 to a request for leave to assert a punitive damages claim, stating the following:

> Rule 1.190(f) . . . allows the ***motion to amend*** (***attaching, as Rule 1.190(a) requires, the proposed amended pleading***) to be filed separately from the evidence or proffer asserted to satisfy the statutory requirements of section 768.72. ***Rule 1.190(f) does not waive or dispense with the requirement to attach the proposed amended pleading to the motion to amend***.

Id. at 99 (emphasis added). Consistent therewith, the *Fetlar* court quashed the trial court's order granting plaintiffs leave to amend to

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plead punitive damages because plaintiffs failed to, among other things, comply with Rule 1.190(a) by not attaching the proposed amended pleading adding punitive damages to the motion to amend.

Florida's Fourth and Fifth District Courts of Appeal have also held that the party seeking to add a punitive damages claim must attach the proposed amended pleading to the motion requesting that relief. *See Leinberger v. Magee*, 226 So. 3d 899, 900 (Fla. 4th DCA 2017) (reversing order granting leave to amend where aproposed amended pleading was not attached to the motion); *Varnedore*, 210 So. 3d at 745 ("[F]iling the proposed amended complaint with the motion to amend is an ***essential legal requirement*** of moving to amend to add claims for punitive damages.") (emphasis added).

At bar, Plaintiffs did not attach a proposed "Fifth" Amended Complaint with a claim for punitive damages to their Motion to Amend. [A. 12-34, 35-357, 358-594]. Plaintiffs did not even serve said proposed "Fifth" Amended Complaint at least 20 days before the June 29th Hearing. [A. 12-34, 35-357, 358-594]. While Plaintiffs did attach their Fourth Amended Complaint, it was

stripped of all claims for and allegations regarding punitive damages, and became the "operative" complaint as a result of Plaintiffs' adamant refusal, during the June 14th Hearing, to allow their Third Amended Complaint to revert to being the operative pleading and the trial court's consequent June 21, 2023 Amended Order. [A. 607-611, 616-617, 621-623]. Since, as Plaintiffs insisted, their "operative" complaint was and is the Fourth Amended Complaint minus all the punitive damages claims and allegations, Rule 1.190(a) required Plaintiffs to attach a proposed "Fifth" Amended Complaint to their Motion to Amend. Rule 1.190(f) simultaneously required Plaintiffs to serve their Motion to Amend and a proposed new amended pleading at least 20 days prior to the hearing on their Motion. Plaintiffs did not comply with either requirement much less both prongs of Rule 1.190. [A. 12-34, 35-357, 358-594]. This Court should therefore reverse the July 17th Order based on Plaintiffs' undeniable failure to comply with Rule 1.190(a) and (f).

III.

THE TRIAL COURT REVERSIBLY ERRED IN GRANTING PLAINTIFFS' JUNE 8, 2023 MOTION TO AMEND COMPLAINT TO SEEK PUNITIVE DAMAGES.

A. Legal Standards That Must Be Satisfied In Order To Be Allowed To Plead Punitive Damages.

Since 1986, Section 768.72 of the Florida Statutes has required a "reasonable showing" of evidence providing a "reasonable basis" for the recovery of punitive damages before such a claim may be asserted. § 768.72(1), Fla. Stat.[6] The burden to show that there is a reasonable basis for the recovery of punitive damages is on the plaintiff. *See Will v. Sys. Eng'g Consultants*, 554 So. 2d 591, 592 (Fla. 3d DCA 1989). As a result, Section 768.72(1) "created a substantive legal right ***not*** to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages."

[6] Section 768.72(1) provides, in pertinent part, as follows:

> 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 the recovery of such damages***.

§ 768.72(1), Fla. Stat. (emphasis added).

Globe Newspaper v. King, 658 So. 2d 518, 519 (Fla. 1995) (emphasis added); *see Bistline v. Rogers*, 215 So. 3d 607, 611 (Fla. 4th DCA 2017) (trial court must determine "whether [plaintiff] established a reasonable evidentiary basis to recover punitive damages against [defendants] based on 'intentional misconduct,' as defined in the statute, and whether there is a reasonable evidentiary showing that the conduct rises to a level of culpability sufficient to support punishment"). "***The statutory procedure must be followed and cannot be circumvented***." *Espirito Santo Bank v. Rego*, 990 So. 2d 1088, 1090 (Fla. 3d DCA 2007) (emphasis added).

The statutorily-mandated evidentiary prerequisite was established because punitive damages "are reserved for truly culpable behavior and are intended to 'express society's collective outrage.' " *Manheimer,* 2023 WL 4919540, *2 (citations omitted). Moreover, because permitting a plaintiff to assert a punitive damages claim is a "game changer," the trial court must act as a gatekeeper by weighing the evidence and making a legal determination that the plaintiff can potentially prove a claim for punitive damages. *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194

So. 3d 516, 520 n.5 (Fla. 3d DCA 2016) ("Allowing a plaintiff to proceed with a punitive damages claim subjects the defendant to financial discovery that would otherwise be off limits ... and potentially subjects the defendant to uninsured losses."). *See Manheimer*, *supra* at *4 ("Pursuant to the plain language of section 768.72, the legislature enacted the section to require a more rigorous assessment of punitive damages claims and prevent gamesmanship."); *Osechas v. Arcila,* 271 So. 3d 65, 66 (Fla. 3d DCA 2019) (allowing punitive damages claim "materially alter[s] the course of civil litigation") (Scales, J., specially concurring); *Varnedore*, 210 So. 3d at 743 ("Claims for punitive damages can have significant, multi-faceted impacts on litigation and litigants.").[7]

Florida's Legislature included a "clear and convincing" burden of proof component under Section 768.72(2). § 768.72(2), Fla. Stat. ("[D]efendant may be held liable for punitive damages ***only if*** the

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[7] *See also KIS Group, LLC v. Moquin*, 263 So. 3d 63, 65-66 (Fla. 4th DCA 2019) ("[T]he statute requires the trial court to act as a gatekeeper and precludes a claim for punitive damages where there is no reasonable evidentiary basis for recovery."); *Bistline*, 215 So. 3d at 611 (same); *cf. Varnedore*, *supra* 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.").

trier of fact, ***based on clear and convincing evidence***, finds that the defendant was personally guilty of intentional misconduct or gross negligence.") (emphasis added). This proof requirement has been viewed as initially impacting the amendment process by "[n]ecessarily requir[ing] the trial court to evaluate the case more closely than it would on a motion to dismiss, even at the motion to amend stage." Philip Moring, Tom Dukes, "*A Pound of Flesh: A Primer on Punitive Damages Claims and Defenses Thereto*," 32 No. 1 Trial Advoc. Q. 4, 6 (2013).

Moreover, the evidentiary "protection of this statute requires more than mere allegations." *Bistline*, 215 So. 3d at 610. This District in *Cat Cay Yacht Club* accordingly stated: "***Bare allegations are insufficient*** to support a punitive damages claim. . . . The statutory procedure ***obligates a trial court to do more than just accept allegations as true***." 264 So. 3d at 1075-1076 (emphasis added). Stated differently, "an evaluation of the evidentiary showing required by section 768.72 does not contemplate the trial court simply accepting the allegations in a complaint or motion to amend as true." *Bistline*, *supra*; *see Desanto v. Grahn*, 362 So. 3d 247, 249 (Fla. 4th DCA 2023) ("It is well

settled that allegations are not evidence, and pleadings alone are not an evidentiary basis for punitive damages."); *Fla. Hosp. Med. Servs. v. Newsholme*, 255 So. 3d 348, 351 (Fla. 4th DCA 2018) (quashing order permitting addition of punitive damage claim where trial court "simply accepted Plaintiff's allegations as true").[8] The evidentiary standard is therefore significantly heightened and far from lenient. *See Kohl's Dept. Store, Inc. v. Young*, 335 So. 3d 210, 212 (Fla. 5th DCA 2022) (motion for leave to add punitive damages claim is subject to "more stringent, detailed requirements"); *Bistline*, 215 So. 3d at 610.

Here, Plaintiffs' unverified Motion to Amend and their proffer of unsworn and/or unauthenticated documents, photographs and videos (the majority of which were irrelevant) did not establish the requisite evidentiary basis for a finding of "intentional misconduct" in general, much less for the imposition of *direct* or *vicarious liability* for punitive damages against corporate Defendant RIVER

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[8] A proffer consisting solely of the oral representations of plaintiff's counsel without any supporting evidence is likewise legally insufficient, as Plaintiffs' counsel occasionally interjected at the June 29th Hearing. [A. 753-811]. *See White v. Boire*, 320 So. 3d 814, 816-817 (Fla. 2d DCA 2021).

FRONT (as discussed in Sections III.B., III. C., *infra*). [A. 12-34, 35-357, 358-594].

(1) ***Mr. Rinaldi's Self-Serving and Conclusory Affidavit was Legally Insufficient to Provide the Requisite Reasonable Evidentiary Basis.***

The self-serving and factually-unsupported Affidavit of Plaintiffs' "authorized agent and corporate representative" Mr. Humberto Rinaldi – an essentially reworded and restructured "affidavit" version of Plaintiffs' Motion to Amend – also fell far short of providing a reasonable evidentiary basis enabling Plaintiffs to assert a punitive damages claim against RIVER FRONT. [A. 300-313].

In *Tilton v. Wrobel*, 198 So. 3d 909 (Fla. 4th DCA 2016), the district court rejected plaintiff's attempt to satisfy the requisite evidentiary basis for adding a punitive damages claim via his self-serving affidavit.

> The [plaintiff's] ***self-serving affidavit***, asserting that he did not steal money from the company, ***was legally insufficient*** to show the [defendants'] knowledge of the falsity of the alleged defamatory statement.

Tilton, 198 So. 3d at 911 (emphasis added).[9]

Mr. Rinaldi's self-serving Affidavit was similarly "legally insufficient." *Id.*

(2) The Buzz-Words in the Motion to Amend and Affidavit of Mr. Rinaldi did not Render them Legally Sufficient.

The use of conclusory "magic" or "buzz" words in Plaintiffs' Motion to Amend and Mr. Rinaldi's Affidavit (who is not even an "expert" witness) – such as "outrageous intentional acts" or "egregious behavior" to then conclude that there was "intentional misconduct" by "the Associations" – was likewise legally insufficient to establish the requisite reasonable evidentiary basis subjecting RIVER FRONT to a punitive damages claim. [A. 37-87, 300-313].

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[9] Numerous decisions demonstrate the impropriety of conclusory allegations and witnesses giving legal conclusions. *See Kohl's*, 335 So. 3d at 213 (Edwards, J., concurring specially) ("Conclusory allegations . . . that Kohl's conduct was outrageous and either intentional or grossly negligent do not suffice."); *see also SDS-IC v. Florida Concentrates Int'l, LLC*, 157 So. 3d 389, 392 (Fla. 2d DCA 2015) (conclusory affidavit stating a "legal opinion was not competent evidence"); *Estate of Murray v. Delta Health Group, Inc.*, 30 So. 3d 576, 578 (Fla. 2d DCA 2010) (reversing due to improper expert testimony that nursing home was "not negligent" in care of decedent); *County of Volusia v. Kemp*, 764 So. 2d 770, 773 (Fla. 5th DCA 2000) (error to admit expert's opinion that defendant's conduct was unconstitutional); *Smith v. Martin*, 707 So. 2d 924, 925 (Fla. 4th DCA 1998) (court erroneously allowed plaintiff's expert to opine that defendant acted with "gross negligence").

See Marder v. Mueller, 358 So. 3d 1242, 1245 (Fla. 4th DCA 2023) ("***labeling***" the challenged actions as intentional misconduct or gross negligence "***cannot*** form the basis of a punitive damages claim") (emphasis added); *Cleveland Clinic Florida Health System Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 706 (Fla. 4th DCA 2023) ("Allegations of misfeasance or malfeasance . . . cannot without more be converted into a claim for punitive damages simply by labelling them as 'grossly' negligent.").[10]

As substantively addressed in greater detail below, Plaintiffs failed to meet the pleading and proof requirements permitting the assertion of a *direct* or *vicarious liability* claim for punitive damages against RIVER FRONT. [A. 12-34, 35-357, 358-594, 753-811].

B. Plaintiffs Did Not Satisfy The Evidentiary Standards Governing The Never-Pled Theory Of Corporate *Direct Liability* For Punitive Damages.

The July 17th Order should be reversed because Plaintiffs failed to make a "reasonable showing by evidence in the record or proffered . . . which would provide a reasonable basis" allowing

[10] Moreover, the statements of purported misconduct in the Motion to Amend and Mr. Rinaldi's Affidavit improperly lumped together the "Defendants"/"Associations" and failed to differentiate between them. [A. 12-34, 300-313]. *See Fetlar*, 230 So. 3d at 99-100.

them to assert a *direct liability* claim for punitive damages against RIVER FRONT. § 768.72(1), Fla. Stat. Plaintiffs also conveniently ignored the legal principle that a corporation like RIVER FRONT can only act through its employees or agents. *See Jacksonville Am. Pub. Co. v. Jacksonville Paper Co.*, 197 So. 672, 677 (Fla. 1940).

Pursuant to Florida's common law, corporate liability for punitive damages under the *direct liability* theory depends on a finding that the tortfeasor was a high-ranking employee or agent of the corporation with real policymaking authority on behalf of the company as a whole. The Florida Supreme Court's opinion in *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995), establishes that the individual tortfeasor must be a "primary owner" of the corporation or "a managing agent or holds a policymaking position" in order for there to be direct corporate liability for punitive damages. *Id.* at 1160-1161. *See Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205-1206 (Fla. 2d DCA 2019) ("[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.' ") (citation omitted).

The Fourth District in *Napleton's*, 2023 WL 4095777, recently confirmed that a "managing agent 'must be "***more than*** a mid-level employee who has some, but limited, managerial authority." ' " *Id.* at *3 (citations omitted) (emphasis added). In other words, "[a] managing agent 'must be an individual of such seniority and stature within the corporation or business to have **ultimate decision-making authority for the company**.' " *Id.* (emphasis in original) (citations omitted). *See Wells Fargo Bank, N.A. v. Electronic Funds Transfer Corp.*, 326 So. 3d 753, 757 (Fla. 5th DCA 2021) (managing agent is "an individual such as a president, primary owner, or other individual who holds 'a position with the corporation which might result in his acts being deemed the acts of the corporation.' ") (citations omitted).[11]

Despite the foregoing well established legal principles and requirements, Plaintiffs' head-in-the-sand view of the law resulted in their undeniable failure to specifically identify an owner or managing agent of RIVER FRONT, much less proffer any evidence

[11] *See also P.V. Constr. Corp. v. Atlas Pools, Inc.*, 510 So. 2d 318 (Fla. 4th DCA 1987) (president and chief operating officer of company was its managing agent).

that said individual was guilty of the requisite intentional misconduct. [A. 12-34, 35-357, 358-594, 753-811].

Section 768.72(2) of the Florida Statutes addresses the wrongdoing aspect of Plaintiffs' unpled *direct liability* claim. "Intentional misconduct" is defined it as follows:

> (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.

§ 768.72(2)(a), Fla. Stat. *See Bistline*, 215 So. 3d at 609-10 (punitive damages reserved for intentional tort claims committed in such an "outrageous manner" so as to "express society's collective outrage"); *cf. Cleveland Clinic*, 357 So. 3d at 706 ("[P]unitive damages are reserved for truly 'culpable conduct,' and the requisite level of negligence for those damages . . . must be 'so outrageous in character, and so extreme in degree ... [that] to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" ' ") (citations omitted).

(1) ***No Evidence or Proffer of Intentional Misconduct by a Primary Owner, Managing Agent, or Policymaker.***

Plaintiffs' Motion to Amend and proffer never specifically identified a purported individual tortfeasor who is a "primary owner" or "managing agent" of RIVER FRONT for *direct liability* purposes. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs also failed to identify an alleged tortfeasor with real policymaking authority on behalf of RIVER FRONT as a whole or a purported tortfeasor with a high degree of corporate responsibility at RIVER FRONT. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs did not, moreover, point to any high-ranking individual whose acts or omissions might render RIVER FRONT *directly* liable for punitive damages. [A. 12-34, 35-357, 358-594, 753-811].

Likewise utterly absent from Plaintiffs' Motion to Amend and proffer was any indication of who actually ordered and/or authorized the at-issue February 8, 2017 removal of Plaintiff CWV's signs and displays, and the application of a frost-like film to the exterior of the glass panes on CWV's storefront. [A. 12-34, 35-357, 358-594, 753-811].

Moreover, Plaintiffs' Motion to Amend and proffer were fatally devoid of an evidentiary basis indicating that the not-identified individual tortfeasor had the statutorily-required "***actual knowledge*** of the wrongfulness of the conduct and the high probability that injury or damage" would occur and that he/she nevertheless "***intentionally pursued*** that course of conduct, resulting in injury or damage." § 768.72(2)(a), Fla. Stat. (emphasis added). [A. 12-34, 35-357, 358-594, 753-811]. In fact, since Plaintiffs failed to specifically identify a particular person, they obviously could not and did not establish that unknown person's knowledge and intent. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs' Motion to Amend and proffer, simply put, utterly failed to provide the requisite proof establishing "intentional misconduct" on the part of an officer, owner or managing agent of RIVER FRONT who could potentially expose RIVER FRONT to *direct liability* for punitive damages. [A. 12-34, 35-357, 358-594, 753-811]. The Plaintiffs consequently did not satisfy their evidentiary burden of establishing a "reasonable basis" to hold RIVER FRONT *directly liable* for punitive damages under Florida law and the trial court's July 17th Order must be reversed.

The legal insufficiency and inadequacy of Plaintiffs' unpled attempt to seek punitive damages via the *direct liability* theory is illustrated by decisions from this District which have rejected similar efforts.

Last year, this District in *Grove Isle*, 350 So. 3d at 831, held that the trial court erred in granting plaintiff's motion to add a punitive damages claim against the defendant condominium association based on direct liability. The plaintiff was a unit owner at Grove Isle Condominium whose unit sustained severe water damage supposedly due to a failing roof assembly. When plaintiff's complaints were allegedly ignored by the association, he sued it for violation of the Declaration of Condominium and failing to maintain the common elements. Based on newly discovered damage, plaintiff moved to amend the complaint and add counts for negligence and fraudulent misrepresentation, and sought punitive damages. However, the amended complaint did not contain "separate, independent allegations . . . setting forth any actions taken by an Association officer, director or managing member." *Id.* The instant Plaintiffs similarly failed to assert such allegations, much less offer

any evidence in support thereof. [A. 12-34, 35-357, 358-594, 753-811].

In *Coronado Condominium Ass'n Inc. v. La Corte*, 103 So. 3d 239 (Fla. 3d DCA 2012), this District quashed the order granting plaintiff's motion for leave to amend to plead punitive damages. Plaintiff alleged numerous misrepresentations, acts, and omissions by employees serving as property managers for the defendant condominium association and by employees of the contractor working at the condominium. The *Coronado* court reasoned, in part, that the proposed amended complaint and motion incorrectly assumed "that the alleged misconduct of the individual property managers and construction workers—who were not, on the record before us, officers or members of the board of directors of the Association—is, without more, misconduct of the Association for purposes of section 768.72. That is contrary to the plain language of the statute." *Id.* at 240-241. Moreover, while plaintiff's counsel at the hearing "referred repeatedly to alleged misconduct by 'Veronica, the defendant's manager,' " the record established that said individual was simply a property manager, "not a controlling officer,

director, or 'manager' of the Association as a corporate entity." *Id.* at 241.

This District in *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994), held that a bank loan officer, who was one of several vice presidents, was not a managing agent or primary owner of the defendant bank. The bank thus was not directly liable for punitive damage, as a matter of law, since its loan officer was not even on the board of directors or loan committee. *Id. See McArthur Dairy, Inc. v. Original Kielbs, Inc.*, 481 So. 2d 535, 536 (Fla. 3d DCA 1986) (driver-salesman was "nonmanagerial" employee).

Florida's other district courts have likewise strictly adhered to the requirement that an individual be an owner, a managing agent, have a high degree of corporate responsibility, and/or be a policymaker before his/her acts or omissions expose the corporate entity to *direct liability* for punitive damages.

Most recently, the Fourth District in *Napleton's* reversed an order allowing the plaintiff to add a punitive damages claim against the defendant car dealership whose employee, while allegedly intoxicated during his shift, hit plaintiff's parked vehicle. Plaintiff's claims were based on the conduct of three of the dealership's

managers: the platform manager, the employee's service manager, and the employee's assistant service manager who directly supervised him. The district court concluded that plaintiff failed to show that any of the three managers were actually a "managing agent" of the dealership and thus the dealership could not be held to have "committed culpable corporate conduct." 2023 WL 4095777, at *3-*4.

Similarly, the bank in *Wells Fargo*, 326 So. 3d at 758, could not be held directly liable for punitive damages because the bank's alleged tortfeasor employee was not a "managing agent" and did not hold a policymaking position at the bank. Instead, the identified employee "was a mid-level employee with limited managerial authority" and he did not participate "in the formation of company policy." *Id.*

In *FPL v. Dominguez*, 295 So. 3d at 1205-1206, the Second District concluded that a "regional vegetation manager" did "not qualify as a managing agent of FPL" for purposes of imposing direct liability for punitive damages. Instead, the vegetation manager was "at best a midlevel employee" as opposed to "a corporate officer or official who could represent FPL as a whole." *Id.* at 1206.

The Fourth District in *Ryder Truck Rental, Inc. v. Partington*, 710 So. 2d 575 (Fla. 4th DCA 1998), and *Partington v. Metallic Engineering Co., Inc.*, 792 So. 2d 498 (Fla. 4th DCA 2001), did not deem the job foremen in question to be managing agents of the defendant companies. In *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989), the at-issue acts were committed by the sales director and president/manager of a hotel, as well as a staff attorney of the corporation that owned the hotel. The *Pier 66* court held that, as a matter of law, none of those persons, including the hotel president, qualified as managing agents of the hotel owner. *Id.* at 381. *See Taylor v. Gunter Trucking Co.*, 520 So. 2d 624, 625 (Fla. 1st DCA 1988) (employee truck driver not a managing agent).

Similarly, the Eleventh Circuit in *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1524 (11th Cir. 1990), held that a manager who was an assistant vice president and director of furniture credit for a Barclay's office was not a managing agent of Barclays. That manager was one of 20 assistant vice presidents, was subordinate to 30 vice presidents and senior vice presidents, and did not participate in the formation of company policy. *Id.*

In the instant case and regarding the not-specifically-pled, much less proven, theory of *direct liability* for punitive damages, the four corners of Plaintiffs' Motion to Amend and the proffered Exhibits clearly and unambiguously establish that Plaintiffs did not specifically identify/name an individual tortfeasor guilty of "intentional misconduct" who is a "primary owner" or "managing agent" of RIVER FRONT. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs also failed to identify/name a purported individual tortfeasor guilty of "intentional misconduct" with real policymaking authority on behalf of RIVER FRONT or who had a high degree of corporate responsibility at RIVER FRONT. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs never, stated differently, expressly identified/named a "managing agent" or high-ranking individual whose acts or omissions might render RIVER FRONT *directly liable* for punitive damages. [A. 12-34, 35-357, 358-594, 753-811]. Moreover, Plaintiffs failed to proffer a reasonable evidentiary basis indicating that the not-identified owner, "managing agent," or high-ranking policymaker had the statutorily-mandated "***actual knowledge*** of the wrongfulness of the conduct and the high probability that injury or damage" would result and that he/she

nevertheless "***intentionally pursued*** that course of conduct, resulting in injury or damage." § 768.72(2)(a), Fla. Stat. (emphasis added). [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs' Motion to Amend and proffer were thus fatally devoid of the requisite proof of "intentional misconduct" on the part of an owner, managing agent, or officer of RIVER FRONT who could potentially expose RIVER FRONT to *direct liability* for punitive damages. [A. 12-34, 35-357, 358-594, 753-811]. This Court should therefore reverse the July 17th Order to the extent it permits Plaintiffs to assert a punitive damages claim against RIVER FRONT based on the not-pled theory of *direct liability*.

C. Plaintiffs Did Not Satisfy The Evidentiary Standards Governing The Never-Pled Theory Of Corporate *Vicarious Liability* For Punitive Damages.

The Plaintiffs never pled much less provided a reasonable evidentiary basis to establish the statutorily-required "intentional misconduct" or "gross negligence" on the part of an employee or agent of RIVER FRONT. [A. 12-34, 35-357, 358-594, 753-811]. Plaintiffs equally failed to plead and proffer evidence satisfying any of Section 768.72(3)'s three requirements for the imposition of corporate *vicarious liability* for punitive damages. [A. 12-34, 35-357,

358-594, 753-811]. The July 17th Order therefore cannot survive appellate review to the extent it permits Plaintiffs to assert a *vicarious liability* punitive damages claim against RIVER FRONT.

Section 768.72(3) specifies the criteria for the imposition of *vicarious liability* for punitive damages against a corporate entity and provides as follows:

> (3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent ***only if the conduct of the employee or agent meets the criteria specified in subsection (2) and***:
>
> (a) The employer, principal, ***corporation***, or other legal entity ***actively and knowingly participated in such conduct***;
>
> (b) The ***officers, directors, or managers of the*** employer, principal, ***corporation***, or other legal entity ***knowingly condoned, ratified, or consented to such conduct***; or
>
> (c) The employer, principal, ***corporation***, or other legal entity ***engaged in conduct that constituted gross negligence*** and that contributed to the loss, damages, or injury suffered by the claimant.

§ 768.72(3)(a-c), Fla. Stat. (emphasis added).

In enacting the 1999 Tort Reform measures, Florida's Legislature clearly intended to restrict and limit the circumstances

in which a corporation would be held liable to those situations where the corporation itself was truly culpable. *See Napleton's*, 2023 WL 4095777, at *4. Accordingly, the unambiguous language used in Section 768.72(3) makes it clear that a very specific type of fault is required on the part of both an employee/agent and a corporation to warrant punishing the corporation for the conduct of the employee/agent. In particular, the employee/agent must be guilty of the "intentional misconduct" or "gross negligence" that would render him/her personally liable for punitive damages under Section 768.72(2). *See Napleton's*, 2023 WL 4095777, at *2 ("At the employee level, the plaintiff must show 'the conduct of the employee or agent meets the criteria specified in subsection (2)' of section 768.72."). Section 768.72(3) further requires that the corporation must have either "actively and knowingly participated" in the employee's/agent's conduct or engaged in conduct which satisfies the statute's definition of "gross negligence"; *or* the corporation's officers, directors, or managers must have "knowingly condoned, ratified, or consented" to the conduct of the employee/agent. § 768.72(3)(a-c), Fla. Stat.

The instant Plaintiffs never, however, specifically identified an employee or agent of RIVER FRONT whose purported actions rise to the requisite level of "intentional misconduct" or "gross negligence." [A. 12-34, 35-357, 358-594, 753-811]. The trial court therefore should have summarily refused to permit Plaintiffs to assert a *vicarious liability* claim for punitive damages against RIVER FRONT. Equally fatal to the *vicarious liability* theory is Plaintiffs' failure to plead any facts and prove the necessary evidentiary basis establishing that, for example, RIVER FRONT's ownership or management "actively and knowingly participated in" or "knowingly condoned, ratified, or consented to" the unidentified and unknown employee's/agent's "intentional misconduct" or "gross negligence." § 768.72(2), (3), Fla. Stat. [A. 12-34, 35-357, 358-594, 753-811].

Florida's district courts interpreting Section 768.72(3) have uniformly rejected efforts to impose vicarious liability for punitive damages in the absence of proffered or record evidence satisfying Section 768.72(3)'s heightened requirements. Such evidentiary basis is likewise fatally missing in the instant case.

This District in *Grove Isle* held that the plaintiff's amended complaint further failed "to satisfy any of the three alternative

requirements of" Section 768.72(3)(a-c). *Grove Isle*, 350 So. 3d at 831. "[T]he absence of any allegations or record evidence showing even simple negligence on the part of the Association compels the conclusion that [plaintiff] has failed to meet the heightened evidentiary standard for imposition of punitive damages on an employer." *Id.* at 832.

In *Fetlar*, 230 So. 3d 97, this District quashed an order granting the plaintiffs leave to amend to plead punitive damages. The *Fetlar* court reasoned as follows:

> The plaintiffs assume that the alleged misconduct of the individual construction managers, superintendents, construction workers—who were not, on the record before us, officers or managing members of the limited liability companies—is, without more, misconduct of the four corporate petitioner/defendants for purposes of section 768.72. ***But that is contrary to the plain language of the statute***.

Id. at 100 (emphasis added). *See SCI Funeral Services of Florida, Inc. v. Munoz*, 146 So. 3d 1273, 1275 (Fla. 3d DCA 2014) (quashed order granting leave to amend to add punitive damages claim where plaintiffs "failed to proffer evidence satisfying any of the three categories of corporate involvement established in section

768.72(3)(a), (b), or (c), as required to subject [the corporate defendant] to a punitive damages claim"); *Coronado Condo. Ass'n*, 103 So. 3d at 241 (quashing order permitting plaintiff unit owner to add claim for punitive damages against association where third amended complaint referenced "a single, unnamed 'Association board member,' but those references ***do not allege*** the Association's active, knowing participation in, or consent to, misconduct by the property management or contractor's employees"; Section 768.72(3)(b) refers to "***those in control of the entity*** (not, as here, those in control of the management of the condominium property under a contract with the association)") (emphasis added).

The Fourth District in *HRB Tax Group*, 360 So. 3d at 1162, recently reversed an order granting leave to assert a vicarious liability claim for punitive damages. "[T]he proffered evidence . . . failed to demonstrate that the defendant and/or its officers, directors, or managers *knowingly* participated in or condoned, ratified, or consented to the employee's conduct, or that the defendant engaged in conduct constituting gross negligence." *Id.* (emphasis in original).

Earlier this year, the Fourth District in *Cleveland Clinic*, 357 So. 3d at 706-707, similarly reversed an order granting plaintiff's motion to amend her wrongful death medical malpractice complaint to add a punitive damages claim against the employers of healthcare providers. The plaintiff did not proffer any evidence establishing that the health care providers' conduct amounted to "gross negligence" and she failed to demonstrate that the employers ratified or condoned any negligence by the providers. *Id.* *See HCA Health Servs. of Fla., Inc. v. Byers–McPheeters*, 201 So. 3d 669, 670 (Fla. 4th DCA 2016) (stating that "[u]nder section 768.72(3), the legislature established a heightened standard for imposing punitive damages on an employer rather than adopting the common law rules of agency and vicarious liability" and holding that trial court erred "in allowing [plaintiffs] to plead a punitive damages claim without first determining whether the heightened requirements of section 768.72(3) were met").

The First District in *Tallahassee Memorial Healthcare, Inc. v. Dukes*, 272 So. 3d 824 (Fla. 1st DCA 2019), quashed the trial court's order granting plaintiff's motion to add a punitive damages

claim against her former employer based upon the conduct of the emergency room's "director."

> What is missing from Ms. Dukes's motion and proffer . . . is an allegation or evidence that corporate management knowingly condoned, ratified or consented to the alleged misconduct. Ms. Dukes didn't allege that the emergency room employee had a role in corporate management. Nor did she allege or provide evidence that corporate management knew about the alleged defamatory conduct by its emergency room director. . . . Under these circumstances, Ms. Dukes's ***motion to add the punitive damages claim fails on its face to comport with the statute's requirements.***

Id. at 826 (emphasis added). *See also Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1344 (11th Cir. 2005) (airline could not be liable for punitive damages under Florida law where neither the airline nor its management participated in, ratified, condoned, or consented to the employees' alleged misconduct).

In the instant case, Plaintiffs <u>never</u> <u>identified</u> an employee or agent of RIVER FRONT whose purported acts rise to the requisite level of "intentional misconduct" or "gross negligence." § 768.72(2), Fla. Stat. [A. 12-34, 35-357, 358-594, 753-811]. Moreover, Plaintiffs fatally <u>failed</u> to identify, much less make a reasonable showing

establishing that, anyone within RIVER FRONT's corporate management or who was in control of RIVER FRONT that purportedly "actively and knowingly participated in" or "knowingly condoned, ratified, or consented to" the unknown employee's or agent's purported "intentional misconduct" or "gross negligence." § 768.72(2),(3)(a-b), Fla. Stat. [A. 12-34, 35-357, 358-594, 753-811]. This Court should therefore also reverse the July 17, 2023 Order to the extent it allows Plaintiffs to pursue a *vicarious liability* claim for punitive damages against RIVER FRONT.

D. Florida's Case Law Regarding Claims For Punitive Damages Where Intentional Interference Was Alleged Do Not Permit The Granted Leave To Amend.

To merit punitive damages, an intentional interference claim must be based on conduct that is so "egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment." *Bistline*, 215 So. 3d at 609. "Merely pleading a facially sufficient claim for an intentional business tort is ***not*** sufficient to claim punitive damages." *Id.* at 611 (emphasis added).

Furthermore, the Fourth District in *Lawnwood Medical Center, Inc. v. Sadow*, 43 So. 3d 710, 730 (Fla. 4th DCA 2010), observed that economic cases which do not involve physical injuries/harm

provide a low "disapproval quotient," are missing the enormity factor, and reprehensibility is dubious at best for purposes of awarding punitive damages. *Lawnwood* thus stated that when dealing with non-personal injury cases, the misconduct must

> ***be gravely deplorable, deserving of severe condemnation, even threatening basic interests of an individual beyond purely economic loss***. Conduct deserving the harshest punitive damages would be ***odious***. It would pass moral bounds, be ***wicked or outrageous, and constitute a grave offense against right or decency***."

Id. at 726-727 (emphasis added).

The instant dispute concerning Plaintiffs' storefront signs and displays at their commercial condominium unit is "almost trivial" and pales in comparison and significance to the tortious conduct described in *Lawnwood* which justifies a punitive damages claim. Therefore, the following intentional interference cases decided before and after *Lawnwood* support reversing the trial court's July 17th Order.

In *Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc.*, 987 So. 2d 706, 708 (Fla. 4th DCA 2008), the defendant cruise ship operator was sued by a duty-free shop ("WDF") at Port

Everglades for tortious interference with the shop's contractual or business relationship with Broward County. The cruise line had sought to prevent WDF from competing with its sale of duty-free goods and the county ultimately terminated WDF's contract. In holding that the cruise line's "***conduct [was] not sufficiently egregious***" to warrant punitive damages, the Fourth District reasoned as follows:

> . . . ***Imperial barricaded and prevented its passengers from shopping at WDF's store.*** The trial court found that Imperial's 'actions were calculated, predatory, and excessive'; ***however, such conduct fails to rise to the degree of reprehensibility required for a punitive damages award***. Although Imperial's interference was not justified, ***the nature, extent, and enormity of the wrong warrant against punitive damage***s. (citation omitted). ***Imperial's conduct did not rise to truly culpable behavior, for which damages are tenable to "express society's collective outrage."***

Id. at 708 (emphasis added). The district court accordingly reversed the lower court's punitive damages award after a bench trial. *Id.*

Other decisions which illustrate that Plaintiffs' intentional interference claim does not merit punitive damages include: *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 77-78 (Fla.

4th DCA 2010) (evidence that competitor allowed former radio broadcaster to go on the air at competitor's station the same day she left former radio station, and that competitor launched an aggressive advertising campaign did not rise to requisite level of gross and flagrant behavior sufficient for a punitive damages award against competitor; harm was economic, not physical, and tortious conduct alleged did not evince an indifference or reckless disregard of health or safety); *Air Ambulance Professionals, Inc. v. Thin Air*, 809 So. 2d 28, 31 (Fla. 4th DCA 2002) (although jury found president breached fiduciary duty to corporation by interfering with its business contract with another corporation separately owned by him, there was no evidence of "illicit scheme" to put corporation out of business, or evidence of "fraud or malice" or "other type of behavior which would justify punitive damages"); *Hospital Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559, 564-565 (Fla. 4th DCA 1986) (hospital's alleged tortious interference with physician's business relationship did not rise to level of wantonness to support award of punitive damages where hospital's termination of physician's exclusive contract and hospital privileges was not motivated out of malice, and methods employed were not

sufficiently outrageous to activate society's collective outrage; "Obviously, intentional interference with a business relationship and culpable behavior tantamount to manslaughter are ***not*** synonymous.") (emphasis added).[12]

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[12] The decisions Plaintiffs cited below, *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), are factually distinguishable.

CONCLUSION

Section 768.72(3) represents the determination of Florida's Legislature that the policies of punishment and deterrence are not properly advanced by claims for punitive damages against corporations except under those expressly defined and narrowly tailored circumstances which ensure that the corporation itself has been culpable in a significant and outrageous way which contributed to the plaintiff's alleged harm. Plaintiffs NORTH and CWV, however, conveniently chose to ignore the statutory and common law requirements for the imposition of punitive damages against a corporation based on *direct* or *vicarious liability* and failed to present a "reasonable showing by evidence" supporting either theory.

Moreover, "punitive damages are warranted only where the egregious wrongdoing of the defendant . . . constitutes a public wrong." *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986); *see Manheimer*, 2023 WL 4919540, at *2 (punitive damages intended to prevent " 'acts and omissions so egregious as to jeopardize not only the particular plaintiff in the lawsuit, but the public as a whole' ") (citation omitted). Punitive damages "are

imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct." *Chrysler Corp., supra.* Much to Plaintiffs' dismay, punitive damages "are ***not*** intended as a means by which a plaintiff can recover extra damages." *Chrysler Corp., supra* (emphasis added); *see Manheimer, supra.* Stated differently, punitive damages "are reserved for truly culpable behavior and are intended to 'express society's collective outrage.' " *Manheimer, supra* (citations omitted). "If, as the [Florida Supreme Court] concluded in [*White Construction Co. v. Dupont*, 455 So. 2d 1026, 1028-29 (Fla. 1984)] . . . , causing permanent injuries or fatalities by knowingly operating trucks with defective brakes does ***not*** merit punitive damages," *Tiger Point Golf and Country Club v. Hipple*, 977 So. 2d 608, 611 (Fla. 1st DCA 2007) (emphasis added), Plaintiffs' non-personal injury claims for purely economic damages arising from the purported removal of exterior signage at their retail condominium unit therefore do <u>not</u> evince the culpability required for punitive damages. *See Imperial Majesty Cruise Line*, 987 So. 2d at 708 ("Imperial barricaded and prevented its passengers from shopping at WDF's store. . . . [S]uch conduct fails

to rise to the degree of reprehensibility required for a punitive damages award.”).

This Court should accordingly reverse the trial court’s July 17, 2023 Order and remand with instructions that the Order be vacated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of August 2023, 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., Vincent Edward Halloran, Esq., and Yazen Alami, Esq., Counsel for Plaintiffs North Investment Group, LLC* and *CWV Realty Group, LLC*, jcruz@drbdc-law.com; vhalloran@drbdc-law.com; yalami@drbdc-law.com; *John Cody German, Esq.*, *Justin Maya, Esq.*, and *Justin Lawrence Schiff, Esq.,* Cole Scott & Kissane, P.A., *Counsel for Defendant The IVY Condominium Association, Inc.*, cody.german@csklegal.com; justin.maya@csklegal.com; justin.schiff @csklegal.com.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Initial 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 10,883 words and thus complies with and does not exceed the 13,000 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 Initial Brief.

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