IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
SECOND DISTRICT

AQUATECH POOLS, G.C., INC.,

Appellant/Defendant,

CASE NO: 2D24-1956
L.T. Case No. 23-CA-5685 NC

v.

MARK HOLFORD.,

Appellee/Plaintiff.

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
In and for Sarasota County, Florida

ANSWER BRIEF

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INTRODUCTION

This case presents precisely the type of outrageous, malicious, and deliberately oppressive misconduct that punitive damages are intended to punish and deter others from committing. Appellant fired Appellee because he suffers from multiple sclerosis, refused to pay him his final paycheck based on fabricated "theft" and "embezzlement" accusations, and then filed a false criminal report against him to use as leverage to try to extort him into dropping his demands for his unpaid wages, while repeatedly making defamatory *per se* statements about him. The trial judge carefully considered these facts, the substantial record evidence supporting them, and the controlling law before finding that Appellant's company president (and others) directly participated in, ratified, directed, and approved Appellant's heinous mistreatment of a man suffering from a debilitating neurological disorder. The decision to grant Appellee leave to amend to seek punitive damages pursuant to section 768.72, *Florida Statutes*, was correct and should be quickly affirmed.

STATEMENT OF THE CASE AND FACTS

A party invoking this Court's jurisdiction has a duty to acknowledge and fairly present **all** the facts when claiming a trial judge committed reversible error, but the Initial Brief appears to take a different route. *Sabawi v. Carpentier*, 767 So.2d 585, 586 (Fla. 5th DCA 2000) (parties' briefs should not improperly "color the facts in [their] favor"); *Hutchins v. Hutchins*, 501 So.2d 722, 723 (Fla. 5th DCA 1987) (briefs submitted to this Court, upon which it must rely so heavily in the discharge of its appellate function, must "be truthful and fair in all respects"). Instead, Appellant presents a slanted, incomplete version of the facts and completely ignores the trial court's July 31, 2024 oral ruling [Appx. 1893-1901] at issue in this appeal. Therefore, Appellee is providing the facts Appellant omitted, beginning with the substance of the ruling the Initial Brief never addresses.

A. The Ruling

On July 31, 2024, following an hour-long hearing on Appellee's motion brought under section 768.72, the trial judge orally announced findings and a well-reasoned decision explaining why and how Appellee presented sufficient evidence of intentional misconduct

and corporate liability to warrant a claim for punitive damages against Appellant (the "**Ruling**"). [Appx. 1893-1900]

The trial judge began the Ruling by discussing his familiarity with the law governing punitive damages and motions brought under section 768.72, including this Court's opinions *Omega Title Naples, LLC v. Butschky*, 327 So. 3d 424 (Fla. 2d DCA 2021) and *Wiendle v. Wiendle*, 371 So. 3d 964 (Fla. 2d DCA 2023). [Appx. 1893-1898] As part of this discussion, the trial judge noted disagreements amongst Florida's appellate courts concerning the required findings and quantum of proof governing such motions [Appx. 1893-1898], and expressed his belief (consistent with Judge Northcutt's concurring opinion in *Omega Title*[1]) that "I do not believe I have to make factual findings, nor do I believe I have to make factual findings to the clear and convincing evidence to allow for claim punitive damages." [Appx. 1898] After noting that the trend in the case law requiring findings under section 768.72 appears to have emanated from decisions involving the nursing homes punitive damages statute

[1] *Omega Title Naples, LLC*, 327 So.3d at 427 ("Neither the applicable statute nor the associated rule of procedure require a court to announce specific findings beyond granting or denying a plaintiff's motion to add a punitive damages claim")

(section 400.0237, *Florida Statutes*, which contains much different evidentiary requirements), the trial judge expressed hope that the appellate courts would examine and resolve this apparent discrepancy. [Appx. 1195-1196].

Nevertheless, the trial judge recognized that in an abundance of caution findings should be made on Appellee's motion

> I do agree, though, that there has to be evidence that shows 768.72 when we're talking about a corporate entity, that the provisions of sub 2 have to apply where the defendant was personally guilty of intentional misconduct or gross negligence, and then that's defined. And the sub 3 talks about the employer principal corporation or other legal entity.
>
> So I agree that those findings have to be made relative to a defendant such as Aquatech in this particular case because it is a corporate entity being accused of punitive damages.

[Appx. 1898]

The trial judge then made these findings, including adopting Appellee's Statement of Facts [Appx. 1198-1238] filed in support of his motion and finding that Appellee's supporting evidence made a reasonable showing that Appellant's misconduct supported corporate liability for punitive damages under section 768.72(3):

Now, even though I don't believe factual findings are necessary, I am going to make them because it does seem like, rightly or wrongly, that that is a trend in the appellate case law, changing the historic interpretation of the statute, which is fine, but let's just hopefully come out a little bit more clear on how I'm supposed to interpret the statute. I believe in this particular case that the assertions of fact in the motions at DIN 61 [Appx. 121-152] and the pinpoint citations at DIN 65 [Appx. 1198-1238] are supported by the record, and therefore the Court will make those findings for purposes of punitive damage motion. So I am adopting and I'm making those findings that are set forth in DIN 61/DIN 65.

I acknowledge that the defendant contends that some of that information is disputed and that the corporate president in this case may not have said exactly verbatim what the implication of the evidence is. But again, I go back to, "Is this a summary judgment motion?" It's not a summary judgment motion.

It's just whether there's evidence in the record. And the evidence in the record supports the factual findings that are set forth in DIN 61 and DIN 65, which I'm adopting as the Court's own. I would say that the conduct alleged here of the president, Ms. Gustin, singularly is enough for the Court to come to the conclusion that punitive damage, ability to go after the corporation on Counts 2, 3, and 5, are appropriate.

Thus, I don't have to -- even if some reviewing court or appellate court ever concluded that the other office employees that were discussing with the president, who have been labeled as bookkeepers, if they are not ultimately

> determined to be high-level management employees sufficient to put the corporation on the hook for punitive damage, it's immaterial in this particular case because factually, in this particular case, Ms. Gustin participated in a number of these, she made a number of these statements.
>
> She knew about them and then ratified them on behalf of the company. So I am going to find that the plaintiff has met its or his burden to show entitlement to seek leave for punitive damages as to Counts 2, 3, and 5. I will allow the plaintiff to file a amended complaint with claims of punitive damages.

[Appx. 1898-1900] As instructed by the trial court [Appx. 1900], Appellee's counsel submitted a proposed written order granting Appellee's motion under section 768.72 for the reasons stated in open court [Appx. 7-8].

B. The Facts Upon Which the Ruling is Based

The following facts are derived from Appellee's Statement of Material Facts ("**SMF**") (referenced in the Ruling [Appx. 1899] as "DIN 65" [Appx. 1198-1238]), which the trial judge found to be supported by the record evidence and therefore adopted [Appx. 1899]. As noted by the trial court, every paragraph of the SMF contains pinpoint citations to the supporting deposition testimony and documentary evidence Appellee filed in support.

Overview of the Parties

Appellant, Mark Holford ("**Holford**"), is 52-years-old and was first diagnosed with multiple sclerosis in October 2019. [Appx. 1199, 1201 (SMF ¶ 1)] He worked in the pool construction industry for over 20 years, including for as a "field laborer" for Appellant from March 2019 through September 1, 2022. [Appx. 1199 (SMF ¶¶ 1-2)]

While working for Appellant, Holford performed grueling construction work on pools, such as trim-outs, mixing concrete, setting pool equipment, and draining pools. [Appx. 1199 (SMF ¶ 2)] Despite suffering from multiple sclerosis, he still worked diligently and was known to be a hard worker, knowledgeable in the pool industry, and good at his job. [Appx. 1201 (SMF at ¶ 13)] Even as Holford's health noticeably began to deteriorate, he continued diligently performing his assigned work despite often being left alone to work on job sites in the sweltering heat. [Appx. 1202-1203 (ASMF at ¶¶ 20-21)] He frequently requested helpers on jobs which Appellant largely failed to provide. [Appx. 1203-1204 (ASMF at ¶ 22)] Because of his medical condition, Holford hoped to be promoted to a superintendent position so that he would not need to perform as

much physical labor—but he was consistently passed over for less qualified people. [Appx. 1204 (ASMF at ¶ 23)]

In his only formal performance review by Appellant, Holford received exemplary scores and was described as being a "team player, great with customers, willing to go over and above, and respectful with coworkers," and a "great communicator, hardworking, respectful." [Appx. 1201 (ASMF at ¶ 15)] Until Appellant fired him on September 1, 2022, Holford did not receive any written warnings, suspensions or disciplinary actions. [Appx. 1202 (ASMF at ¶ 16)].

Appellant, AquaTech Pools G.C., Inc. ("**AquaTech**"), is a pool builder operating in the Sarasota, Florida area. [Appx. 1199 (SMF ¶ 3)] AquaTech is a relatively small company captained by its president, Annete Gustin ("**Gustin**"), and a small management team consisting of Sue Say ("**Say**"), Tracey Clarenson ("**Clarenson**"), Jason Crumbacher ("**Crumbacher**"), and Jason Savage ("**Savage**") (collectively, the "**Managing Agents**"). [Appx. 1199-1200 (SMF ¶¶ 4-8)] Say and Clarenson are called "bookkeepers" but have primary day-to-day responsibility for managing AquaTech's administrative and financial operations, such as accounts receivable, accounts payable, payroll, billing, estimates, contracts, and H/R. [Appx. 1199-

1200 (SMF ¶¶ 5-6)] On the construction side, Crumbacher serves as AquaTech's Operations Manager and Savage was AquaTech's Superintendent under Crumbacher while Holford was employed. [Appx. 1200 (SMF ¶¶ 7-8)]

Several members of the Euart family worked for AquaTech while Holford was employed and provided critical, credible testimony about the mistreatment Holford endured and torts committed against him. Andreau Euart was AquaTech's Retail Manager. [Appx. 1200 (SMF ¶ 9)] His brother, Aaron Euart, handled start-ups on new construction pools. [Appx. 1200 (SMF ¶ 11)] Jackson Euart worked in AquaTech's retail department at the front counter testing water and selling merchandise while Holford was employed. [Appx. 1201 (SMF ¶ 12)] The Euart family worked in close proximity to Gustin and her Managing Agents and had a front-row seat to their mistreatment of Holford. [Appx. 1201 (SMF ¶ 12)]

AquaTech's Mistreatment and Pretextual Firing of Holford Because he Suffers from Multiple Sclerosis

AquaTech was well-aware[2] of Holford's multiple sclerosis diagnosis and the resulting impacts it had on his health and physical limitations. [Appx. 1202 (SMF ¶ 18)] Several of AquaTech's Managing Agents and employees they controlled mocked and made jokes about Holford because of his medical condition. [Appx. 1204-1208 (SMF ¶ 24)]. By the fall of 2022, AquaTech did not want to continue dealing with Holford's medical condition and was "looking for a reason to fire him." [Appx. 1208 (SMF ¶ 25)]

On August 30, 2022, Gustin decided to fire Holford and personally filled out his "Discipline Action Form," including notations that Holford had committed "theft" and "embezzlement" and "falsified time records." [Appx. 1209-1210(SMF ¶¶ 26, 28-29)] *After* deciding to fire Holford and filling out this form, Gustin instructed Say and Clarenson to compile information to use to support the false claims

[2] As confirmed by Andreau Euart, "It's no secret that Mark had MS. Everybody there knew he has MS. It was a known thing. Mark himself would say, hey, I got MS, some things are harder for me to do." [Appx. 1201 (SMF ¶ 19)]

that Holford was stealing time and money from AquaTech. [Appx. 1209-1210 (SMF ¶¶ 26-31)]

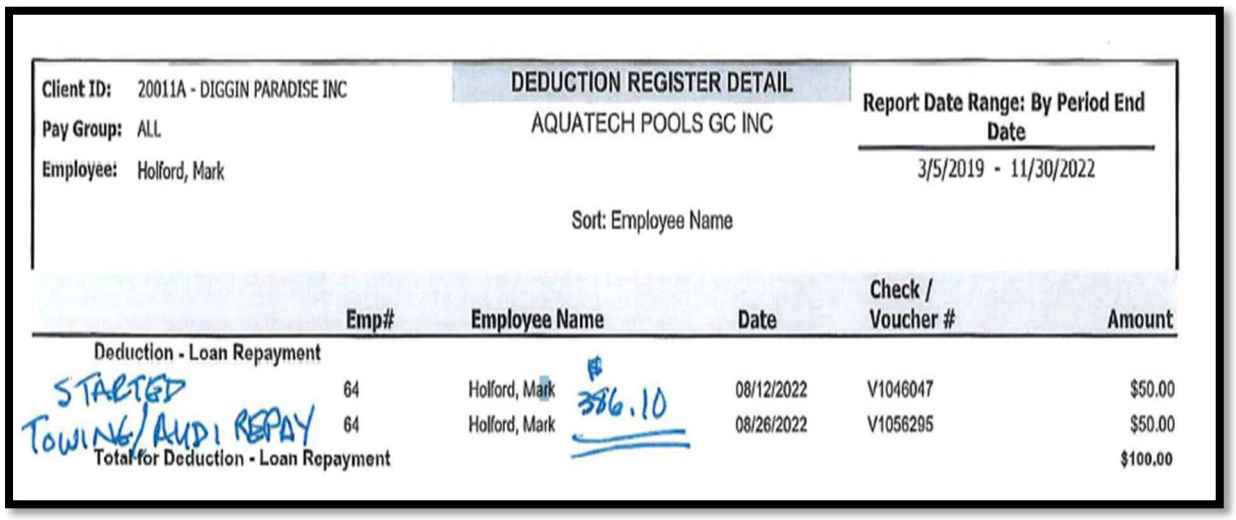
AquaTech subsequently claimed that *supposed* customer complaints sparked the investigation of Holford, but Holford did not actually have any customer complaints before AquaTech decided to fire him. [Appx. 1209 (SMF ¶ 27)] Rather, AquaTech elicited a "complaint" from a customer *after* it had already decided to fire Holford—and the evidence showed that this customer had complained about someone else (Dan Clement) and problems with her pool's screen enclosure, not Holford. [Appx. 1209 (SMF ¶¶ 26-27)]

Gustin directed Clarenson and Say to manufacture evidence of Holford's supposed "theft" using Holford's GPS records and credit card usage. [Appx. 1210 (SMF ¶ 31)] AquaTech work trucks were equipped with GPS monitoring that tracked, among other things, when trucks were "idling," so AquaTech falsely accused Holford of "stealing" wages by claiming he was not working every time his truck was idling. [Appx. 1210-1211 (SMF ¶ 32)] AquaTech admittedly has no proof to support this claim and, regardless, AquaTech employees (including Holford) were encouraged (including at safety meetings) to

take breaks in their work trucks with them idling and AquaTech's written policies provide for paid breaks and permit personal stops in company trucks. [Appx. 1211-1212 (SMF ¶¶ 33-35)]

AquaTech's second fabricated reason for terminating Holford was supposed credit card "theft" based on false accusations that Holford secretly used his company credit card to purchase two cell phones and a car battery and AquaTech's towing account to have his car towed. [Appx. 1212 (SMF ¶ 36)] However, AquaTech already knew about Holford's two cell phone purchases, which not only occurred months prior to his termination (on 11/8/2021 and 4/2/2022) but also were timely disclosed to and approved by Gustin (as reflected in an email exchange on May 27, 2022). [Appx.1212-1213 (SMF ¶¶ 37-38)] Holford used AquaTech's towing account to have his personal vehicle towed twice (on 12/21/2021 and 6/17/2022), but also timely told AquaTech he was doing this and agreed to repay the towing bills. [Appx. 1213 (SMF ¶ 39)] On July 9, 2022, Holford mistakenly used his AquaTech credit card to purchase a car battery, but promptly notified AquaTech of the mistake and agreed to repay the charge through $50 deductions from his paycheck every two weeks. [Appx. 1213 (SMF ¶ 40)] The agreement

between AquaTech and Holford to repay the towing and car battery charges is memorialized in AquaTech's "Deduction Register," which also establishes that $50 payroll deductions commenced August 12, 2022:



Client ID: 20011A - DIGGIN PARADISE INC
Pay Group: ALL
Employee: Holford, Mark

DEDUCTION REGISTER DETAIL
AQUATECH POOLS GC INC
Sort: Employee Name

Report Date Range: By Period End Date
3/5/2019 - 11/30/2022

	Emp#	Employee Name	Date	Check / Voucher #	Amount
Deduction - Loan Repayment					
STARTED TOWING/AUDI REPAY	64	Holford, Mark	08/12/2022	V1046047	$50.00
386.10	64	Holford, Mark	08/26/2022	V1056295	$50.00
Total for Deduction - Loan Repayment					$100.00

[Appx. 1213-1214 (SMF ¶ 40)]

On September 1, 2022, Gustin, Crumbacher, Savage, and Colton Gustin met with Holford in Gustin's office to fire Holford. [Appx. 1214 (SMF ¶ 42)] Holford was understandably upset and emotional, but never threatened anyone. [Appx. 1214 (SMF ¶¶ 42-44)] Gustin *supposedly* felt "threatened" and told Clarenson to call 911, but after a Sarasota County Sheriff's Office ("**SCSO**") deputy arrived AquaTech did not tell the responding deputy that Holford made any threats to Gustin; and the deputy escorted Holford while

he retrieved his personal belongings from the AquaTech truck he was using and left AquaTech's property. [Appx. 1215, 1236-1237 (SMF ¶¶ 45, 86)] AquaTech later searched the truck Holford had been using and started spreading lies about finding weapons, drugs, and drug paraphernalia. [Appx. 1216 (SMF ¶ 46)]

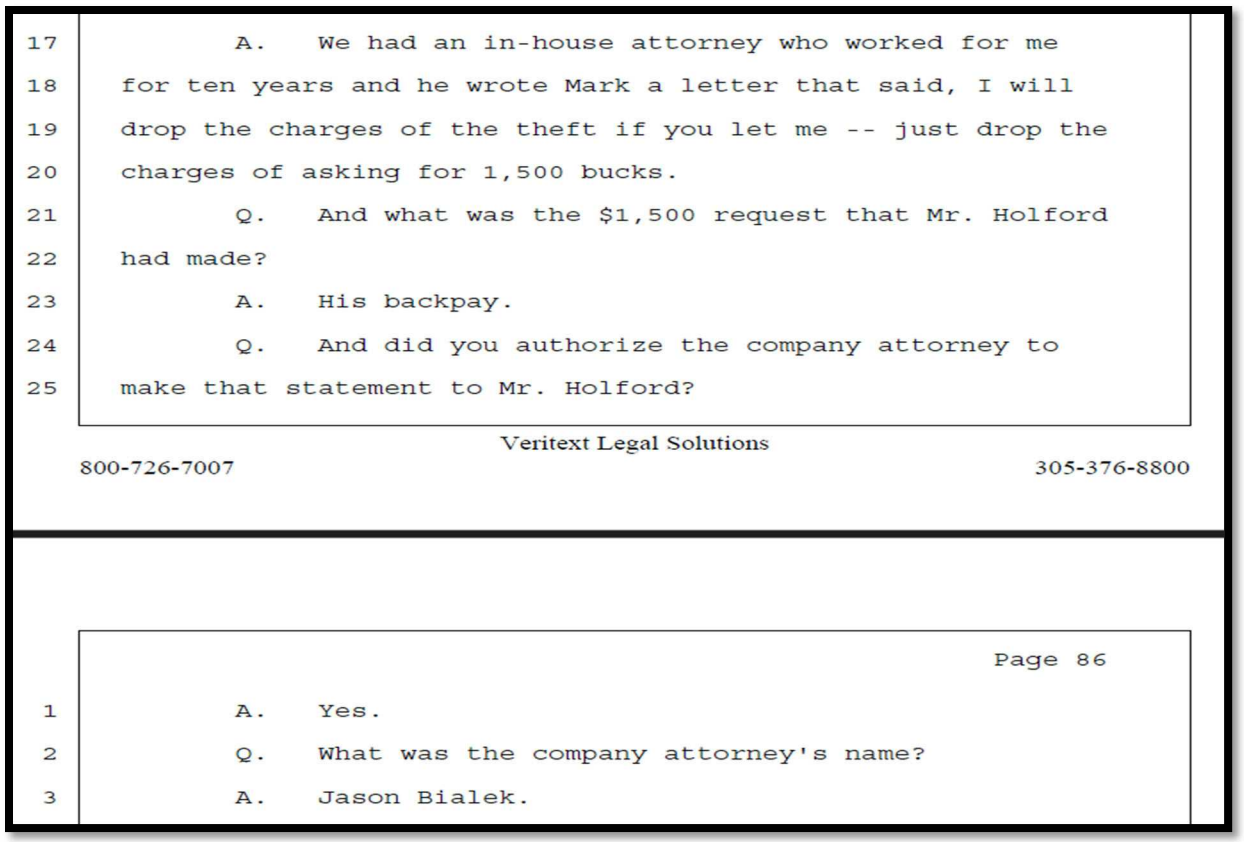
AquaTech's Refusal to Pay Holford's Final Check

AquaTech refused to pay Holford the wages he is due for the work he performed from August 20, 2022 through September 1, 2022; including 68.40 hours at a rate of $21.00 per hour, plus 6 hours of overtime at a rate of $31.50 per hour—totaling $1835.40, despite receiving Holford's written demands to be paid. [Appx. 1218-1219 (SMF ¶¶ 47-48, 51)] This led Holford to picket outside AquaTech's business, while everyone inside laughed at and mocked him, called law enforcement to try to have him arrested, stole his picketing signs, and turned the sprinklers on him. [Appx. 1218-1220 (SMF ¶¶ 49-50)] Facing Holford's demands for payment, and well after he was fired, AquaTech prepared a list of *supposed* amounts Holford owed AquaTech, but admits he never agreed to pay and is not responsible for paying these supposed charges. [Appx. 1220-1221(SMF ¶¶ 54-55)]

AquaTech's False and Extortionate SCSO Report

Instead of paying Holford the wages he is owed, and angry over his demands for payment and picketing [Appx. 1221 (SMF ¶ 56)], Gustin decided on September 9, 2022—which was payday at AquaTech—to send Holford an extortionate letter written by its *alleged* "in-house counsel" (Jason Bialek[3]) and to file a false SCSO report against him for theft [Appx. 1223-1224 ¶¶ 59-60]. The September 9, 2022 letter [Appx. 1115-1116] threatened to "pursue justifiable remediation via any and all law enforcement and civil authorities" and stated that AquaTech "remains steadfast and resolved to engage such law enforcement and civil agencies." Gustin admitted the extortionate purpose of this September 9, 2022 letter at her deposition:

[3] Jason Bialek was not even a lawyer—he worked as a pool cleaner for AquaTech. [Appx. 1221 (SMF ¶ 57 n.1.)]



17 A. We had an in-house attorney who worked for me
18 for ten years and he wrote Mark a letter that said, I will
19 drop the charges of the theft if you let me -- just drop the
20 charges of asking for 1,500 bucks.
21 Q. And what was the $1,500 request that Mr. Holford
22 had made?
23 A. His backpay.
24 Q. And did you authorize the company attorney to
25 make that statement to Mr. Holford?

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1 A. Yes.
2 Q. What was the company attorney's name?
3 A. Jason Bialek.

[Appx. 1221-1223 (SMF ¶ 57-58)] Section 836.05, *Florida Statutes*, defines extortion as follows:

> (1) Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, commits a felony of the second degree,

> punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

See § 836.05(1), *Fla. Stat.*; *see also Peterson v. Mayo*, 65 So.2d 48 (Fla. 1953).

To carry out her extortionate threat, Gustin personally filed a false criminal report against Holford with the SCSO on September 9, 2022 (the "**Defamatory SCSO Report**");falsely accusing Holford of theft by making unauthorized charges on his company credit card based on the two cell phone purchases [that were approved by AquaTech] and the car battery purchase [which Holford had already been making payments toward per his agreement with AquaTech and deductions from his paychecks since August 12, 2022], and further stated that AquaTech "*wishes to pursue criminal prosecution against Holford*." [Appx. 1223-1224 (SMF ¶¶ 59-60)]

Det. Louis Ojeda was assigned to investigate AquaTech's theft claims against Holford. [Appx. 1224 (SMF ¶ 61)] On May 23, 2023, Det. Ojeda surreptitiously recorded a conversation with Holford at his residence, during which Holford stated that AquaTech knew about and approved his cell phone purchases and that his use of the company credit card to purchase a car battery was a mistake that

was immediately disclosed to AquaTech and already subject to an agreement to be repaid through $50 payroll deductions. [Appx. 1225 (SMF ¶ 62)]

On May 24, 2023, Det. Ojeda conducted a sworn interview of Say, during which she falsely stated that Holford's use of the company card was never approved; that Holford was never given an opportunity to pay back the charges because they were not discovered until *after he was fired* as part of an "audit;" that Holford's $50 paycheck deductions were only for the towing charges—not the car battery charge; and that Holford was not fired because of the credit card charges.[4] [Appx. 1225-1226 (SMF ¶ 63)]

Det. Ojeda specifically asked Say if there was an agreement with Holford to repay the credit card charges because he was trying to validate what Holford said during his questioning the day prior. [Appx. 1226 (SMF ¶ 64)] However, AquaTech lied and deliberately failed to disclose its agreement with Holford to make these payments and its approval of his cell phone purchases, and also deliberately

[4] As noted above, AquaTech supposedly fired Holford because of the credit card charges and clearly knew about them long before September 9, 2022. [Appx. 1227 (SMF ¶ 67)]

failed to provide a copy of or disclose the May 27, 2022 email string between Gustin and Clarenson discussing the approval of Holford's cell phone purchases. [Appx. 1226-1227 (SMF ¶ 65)]

AquaTech also never told Det. Ojeda that the day it filed the report against Holford (9/9/2022) was payday and that Holford was demanding to be paid his unpaid wages. [Appx. 1228 (SMF ¶ 69)] AquaTech never disclosed to Det. Ojeda it was extorting Holford (*i.e.*, that it told Holford that if he dropped his unpaid wages claim they would not press charges) and never told Det. Ojeda about its September 9, 2022 extortionate letter to Holford. [Appx. 1228 (SMF ¶¶ 68, 70)] AquaTech also never told Det. Ojeda about the agreement it made with Holford over *a month prior to the report being filed* (in August 2022) for Holford to pay for the car battery charge through $50 deductions from his paychecks. [Appx. 1229 (SMF ¶ 71)] Instead, AquaTech told Det. Ojeda that Holford had only agreed to pay for the towing charges. [Appx. 1229 (SMF ¶ 72)]

All the above information that AquaTech misrepresented to and concealed from Det. Ojeda was "material" to his investigation. [Appx. 1229 (SMF ¶ 73)] And the above information that AquaTech misrepresented to and concealed from Det. Ojeda, if it had been

provided, would have validated what Holford told Det. Ojeda. [Appx. 1229 (SMF ¶ 74)]

Because AquaTech misrepresented and concealed this material information from Det. Ojeda, on October 18, 2023, he executed a Probable Cause Affidavit for criminal charges against Holford for a scheme to defraud in violation of section 817.034, *Florida Statutes*—a felony. [Appx. 1229 (SMF ¶ 75)] In preparing this affidavit, Det. Ojeda relied on the information AquaTech provided, believed it was true, and believed that AquaTech had provided all material information. [Appx. 1230 (SMF ¶ 76)] However, Det. Ojeda testified that if AquaTech had told him the truth and provided all the material facts about the situation he would not have recommended for Holford to be prosecuted or prepared the PC Affidavit. [Appx. 1230-1231 (SMF ¶ 77)]

AquaTech's Slander *Per Se* of Holford

On numerous occasions after Holford was fired, Gustin, several of AquaTech's Managing Agents, and other employees they controlled made the same false and defamatory *per se* statements that Holford was violent, "stealing" and committed "theft," had a gun, knife, and drugs in the company truck he was using, and threatened to shoot

and stab Gustin (the "**Defamatory Per Se Statements**"). [Appx. 1231-1236 (SMF ¶¶ 78-84)] Jackson Euart personally observed and recorded Gustin in AquaTech's public showroom warning Veronica Manes (a customer/former employee) about Holford and stating that AquaTech found a gun in Holford's truck and a spoon with burn marks and a straw. [Appx. 1232-1233 (SMF ¶¶ 80-81)] Say corroborated this conversation about a "gun". [Appx. 1234 (SMF ¶ 82)] Say and Clarenson were also witnessed stating that Holford pulled a knife on Gustin, which other employees parroted. [Appx. 1234-1235 (SMF ¶¶ 83-84)]

These false and defamatory statements were made in AquaTech's public showroom and other areas of AquaTech's facility that are open to the public and were not made as part of any warnings about Holford to employees. [Appx. 1237 (SMF ¶¶ 85, 87)] Even though (as noted above) law enforcement was present when Holford was terminated on September 1, 2022, they did not find any drugs or a gun in the company truck Holford was using and AquaTech never reported to law enforcement that it found drugs or a gun in Holford's company truck, nor that he threatened to shoot or

stab anyone; and it never turned over any drugs or a gun or knife discovered in said truck to law enforcement. [Appx. 1237 (SMF ¶ 86)]

C. The Motion Upon which the Ruling is Based

After extensive discovery and depositions, Holford filed his motion under section 768.295 seeking leave to assert punitive damages claims against AquaTech [Appx. 118-201], including an incorporated statement of facts with pinpoint citations to the record evidence filed to support the motion [Appx. 121-152] and a proposed Second Amended Complaint [Appx. 175-201]. Holford also separately filed his SMF [Appx. 1198-1238] to provide the trial court with citations to the DIN (docket entry numbers) where the pinpoint cited record evidence could be found. Holford's motion identified all the elements of his intentional tort claims and record evidence establishing each of those elements and AquaTech's malicious intent. [Appx. 155-161]

The record evidence upon which Holford's motion relied included the deposition transcripts of AquaTech's current and former agents (Gustin [Appx. 207-385], Say [Appx. 387-501], Clarenson [Appx. 503-571], Savage [Appx. 658-737], Aaron Euart [Appx. 826-911], Andreu Euart [Appx. 913-1030], and Jackson Euart

[Appx. 739-824]), AquaTech's own business records [Appx. 1074-1083, 1085-1100, 1106-1195], Det. Ojeda's deposition transcript [Appx. 575-656], the SCSO's criminal investigative file [Appx. 1048-1073], the video of Gustin's defamatory *per se* statement [Appx. 1084], and Holford's demands for his unpaid wages [Appx. 1103-1105].

AquaTech filed a written opposition [Appx. 1239-1270] and evidence limited to Holford's deposition [Appx. 1272-1524] and a declaration by Say trying to explain certain of her statements to Det. Ojeda [Appx. 1525-1527]. Notably, AquaTech did not file any additional evidence or new testimony from Gustin denying or trying to clarify any of her deposition testimony.

D. The July 31, 2024 Hearing upon which the Ruling is Based

On July 31, 2024, the trial court conducted an hour-long hearing on Holford's motion. [Appx. 1849-1901] During the hearing, the trial judge peppered counsel for both sides with pointed questions about the evidence associated with AquaTech's corporate liability under section 768.72, such as the nature and size of AquaTech's business [Appx. 1859-1860], Gustin's personal involvement in the acts upon which Holford's tort claims are based [Appx. 1862-1863,

1879-1882, 1886-1887], the roles of the Management Team had in making statements about Holford [Appx. 1862, 1883-1884], the falsity of the statements made about Holford [Appx. 1889], the facts and law establishing Holford's intentional infliction of emotional distress claim [Appx. 1865-1868], and evidence demonstrating malice [Appx. 1868-1872].

Plaintiff's argument specifically addressed several cases, including *Lashley v. Bowman*, 561 So.2d 406 (Fla. 5th DCA 1990) [Appx. 1866-1868], *Asinmaz v. Semaru*, 42 So.3d 955 (Fla. 4th DCA 2010) [Appx. 1869-1870], *Rety v. Green*, 546 So.2d 410 (Fla. 3d DCA 1989) [Appx. 1892-1893]; and *Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158 (Fla. 1995) [Appx. 1893], involving employer liability, malice, and punitive damages in defamation and intentional infliction of emotional distress cases. The Initial Brief does not address any of these cases, which are also addressed in Holford's motion and an Argument Outline [Appx. 1528-1585] provided to the trial court at the hearing [Appx. 1875].

At the conclusion of the hearing, the trial judge orally announced the well-reasoned findings supporting the decision to grant Holford's motion (*see* section A, above) and directed counsel to

prepare a written order adopting those findings [Appx. 1900]. At that time, this case was set for trial in October 2024. After AquaTech appealed the Ruling and this Court denied Holford's motion to expedite the appeal [see 9/12/2024 Order], the trial court re-set the trial for a three-week docket running from January 27, 2025 to February 14, 2025. [Supp. Appx. 001-010] On November 27, 2024, the parties executed and filed and the trial court entered a Stipulated Pretrial Order for the January 27, 2025—February 14, 2025 trial period. [Supp. Appx. 011-019]

SUMMARY OF ARGUMENT

Holford's motion and supporting evidence made a reasonable showing that there is a reasonable basis for Holford to recover punitive damages against AquaTech on his intentional tort claims. The trial court correctly applied controlling law and appropriately found that the record evidence sufficiently demonstrated "that the conduct alleged here of the president, Ms. Gustin, singularly is enough for the Court to come to the conclusion that punitive damage, ability to go after the corporation on Counts 2, 3, and 5, are appropriate" and that "Ms. Gustin participated in a number of these, she made a number of these statements…She knew about them and then ratified them on behalf of the company" and that Holford met his burden to show entitlement to seek leave for punitive damages." [Appx. 1898-1900] AquaTech's arguments to the contrary contradict the standards governing motions under section 768.72, are based on a slanted and incomplete presentation of the evidence, and fail to address the Ruling itself or explain why the unrefuted evidence upon which it is based was in any way factually or legally insufficient. The Ruling is correct and should be affirmed.

ARGUMENT

I. Holford Filed Substantial Record Evidence Establishing a "Reasonable Basis" to Recover Punitive Damages

Through the SMF [Appx. 1198-1238], which the trial court found to be supported by substantial record evidence and therefore adopted [Appx. 1899], Holford made a reasonable showing that there is a reasonable basis for the recovery of punitive damages against AquaTech. *See* § 768.72(1), *Fla. Stat.*; *Fla. R. Civ. P.* 1.190(f) ("motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages"). AquaTech does discuss the Ruling, let alone prove that the trial court erred in finding Holford's SMF is supported by the record, and therefore waived and abandoned any argument that the Ruling is a basis for reversal. See, *J.A.B. Enters. v. Gibbons*, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992) ("an issue not raised in an initial brief is deemed abandoned"); *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So.3d 866, 868-869 (Fla. 4th DCA 2012) (same).

Regardless, Holford's SMF is well-supported by legally sufficient record evidence, including the deposition testimony of AquaTech's current and former agents with personal knowledge of the underlying facts, AquaTech's own business records, the deposition testimony of Det. Ojeda, and the SCSO investigative file for AquaTech's false criminal complaint [*see* section C., above].[5] *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 642 (Fla. 5th DCA 2005) (a "reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions"); *see also* Appx. 1881-1882 (7/31/2024 Transcript discussing hearsay exception for admissions of a party opponent).

A proffer of evidence supporting a punitive damages claim "is merely a representation of what evidence the [party] proposes to present and is not actual evidence." *Cook v. Florida Peninsula Ins. Co.,* 371 So.3d 958, 961 (Fla. 5th DCA 2023) (citing *Est. of Despain,* 900 So. 2d at 644). The evidence does not have to prove punitive misconduct, but rather it must make a sufficient showing to

[5] AquaTech did not argue below nor in its Initial Brief that any of the documentary exhibits Holford filed in support of his motion were legally insufficient or "inadmissible."

"establish a *reasonable basis* for it to ultimately be found that the defendant engaged in the wrongful conduct." *Id.* at 962. "It is the plaintiff's burden to submit evidence and make a 'reasonable showing' that establishes a reasonable basis for recovering punitive damages." *Deaterly v. Jacobson*, 313 So.3d 798, 801 (Fla. 2d DCA 2021) (citing *Varnedore v. Copeland*, 210 So. 3d 741, 747-48 (Fla. 5th DCA 2017).

Throughout its Initial Brief, AquaTech incorrectly argues that evidence filed or proffered under section 768.72 must be "admissible." This false proposition is based solely on dicta in *Brevard Achievement Center v. Camp*, 254 So.3d 1135, 1137 n.2 (Fla. 5th DCA 2018) [Initial Brief p. 16]; a clearly distinguishable case involving punitive damages under section 768.735 (which expressly states that sections 768.72(2)-(4) do not apply to child abuse and elderly abuse claims). As noted by the trial judge [Appx. 1895], the "admissible" evidence requirement is unique to punitive damages claims brought under the Nursing Homes statute, section 400.0237, *Florida Statutes*. *See* § 400.0237(1), *Fla. Stat.* (a "claim for punitive damages may not be brought under this part unless there is a showing by ***admissible evidence*** that has been submitted by the

parties that provides a reasonable basis for recovery of such damages…") (emphasis added); § 400.0237(1)(b), *Fla. Stat.* ("The court shall conduct a hearing to determine whether there is sufficient ***admissible evidence*** submitted by the parties to ensure that there is a reasonable basis to believe that the claimant, at trial, will be able to demonstrate by clear and convincing evidence that the recovery of such damages is warranted…") (emphasis added).

Section 768.72(1) noticeably lacks any "admissible evidence" requirement. § 768.72(1), *Fla. Stat.* ("no claim for punitive damages shall be permitted unless there is a reasonable showing ***by evidence in the record*** or proffered by the claimant which would provide a reasonable basis for recovery of such damages" (emphasis added). "By allowing a punitive damages claimant to satisfy his initial burden by means of a proffer, section 768.72 contemplates that a claimant might obtain admissible evidence or cure existing admissibility issues through subsequent discovery." *Cook*, 371 So.3d at 961 (citation omitted). The moving party is also entitled to rely upon documents that have not yet been authenticated when making the proffer. *Despain*, 900 So.2d at 642 (Fla. 5th DCA 2005); *Holmes v.*

Bridgestone/Firestone, Inc., 891 So.2d 1188, 1190–91 (Fla. 4th DCA 2005).

Section 768.82 also does not require an adjudication of the veracity of any evidence. *Estate of Despain*, 900 So.2d at 642. In fact, the Initial Brief acknowledges that the "trial court is not called upon to evaluate and weigh testimony and evidence." *See* Initial Brief p. 14 (citing *John Knox Village of Cent. Fla., Inc. v. Estate of Lawrence ex rel. Castleman*, 379 So.3d 1205, 1209 (Fla. 5th DCA 2024)); *see also Federal Insurance Co. v. Perlmutter*, 376 So.3d 24, 34 (Fla. 4th DCA 2023) ("stress[ing] that the preliminary determination of whether the movant made a reasonable showing by evidence of a reasonable basis for allowing a punitive damages claim is to be made without weighing evidence or witness credibility"); *Est. of Despain*, 900 So. 2d at 645 ("[w]hether [the claimant] will be able to prove entitlement to an award will depend on the jury's view of the evidence submitted"); *Jonat Properties Inc. v. Gateman*, 226 So. 2d 703, 705 (Fla. 3d DCA 1969) (providing that even if the court may be of the opinion that the evidence could support an alternate conclusion, "[i]f there is any evidence tending to show that punitive damages could

be properly inflicted . . . the Court should leave the question to the jury.")

Nevertheless, AquaTech seems to be taking the position that the evidence Holford submitted should have been taken or even factually adjudicated in its favor and consistent with its self-serving view of what the evidence showed. But the law is clear in that "[i]n evaluating the sufficiency of the evidence proffered in support of a punitive damages claim, the evidence is viewed in a light favorable to the moving party." *Case v. Newman*, 154 So.3d 1151, 1157 (Fla. 1st DCA 2014) (quoting *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1009 (Fla. 1st DCA 2009); *CCP Harbour Island, LLC v. Manor at Harbour Island, LLC*, 373 So.3d 18, 27 (Fla. 2d DCA 2023) (quoting *Case*, 154 So. 3d at 1157 (Fla. 1st DCA 2014)). This requirement includes drawing reasonable inferences from the evidence in the moving party's favor. *Perlmutter*, 376 So.3d at 34 (explaining that trial court must "view[ ] the ***totality of proffered evidence*** in the light most favorable to the movant" and "give[ ] the movant the benefit of ***all reasonable inferences***") (emphasis added); *Varnedore*, 210 So.3d at 747 (same); *Estate of Williams ex rel. Williams v. Tandem Health Care of Florida*, 899 So.2d

369, 377 (Fla. 1st DCA 2005) ("When a claim for punitive damages is made, the trial court must decide, after the submission of evidence, whether there is a legal basis for the recovery of punitive damages ***shown by any interpretation of the evidence favorable to the plaintiff***." (emphasis added).

The controlling standard is "whether a reasonable jury could infer from the proffer that defendant's conduct satisfies the criteria for punitive damages." *Warner Enterprises, Inc. v. Mendez*, 312 So.3d 278, 281-282 (Fla. 5th DCA 2023). The determination as to whether a "reasonable showing" has been made is "similar to determining whether a complaint states a cause of action." *Id.* at 281-282; see also *Grove Isle Ass'n v. Lindzon*, 350 So. 3d 826, 830 (Fla. 3d DCA 2022); *Despain*, 900 So. 2d at 644 (Fla. 5th DCA 2005) (citing *Holmes v. Bridgestone/Firestone, Inc.,* 891 So.2d 1188, 1191 (Fla. 4th DCA 2005)).

As noted by the trial judge, recent appellate opinions seem to require trial courts to identify the evidence proffered by the plaintiff either within a written order or—as the trial court did here—to articulate on the record how the evidence supports a reasonable basis to believe the claimant can demonstrate that the recovery of

punitive damages is warranted. *Omega Title Naples, LLC v. Butschky*, 327 So.3d 424,425-426 (Fla. 2d DCA 2021); *E. Bay NC, LLC v. Reddish*, 306 So.3d 1225, 1227 (Fla. 2d DCA 2020); *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So.3d 1071, 1076 (Fla. 3d DCA 2019). This Court does not require trial courts to apply the clear and convincing burden of proof when making such findings (*Deaterly*, 313 So.3d at 801; *Wiendl*, 371 So.3d at 966), but other District Courts do. *Perlmutter*, 376 So.3d at 34; *Cook*, 371 So.3d at 961-962; *Selz v. McKagan*, 386 So.3d 933 (Fla. 4th DCA 2024), 2024 WL 948894 (Fla. 4th DCA Mar. 6, 2024) (certifying conflict).

Here, the trial judge was keenly aware of and appropriately applied the controlling standards under section 768.72, asked pointed questions of counsel concerning those standards at the July 31, 2024 hearing, and made all the findings required to grant leave to amend to assert a claim for punitive damages against a corporate defendant. The July 31, 2024 Ruling properly adopted Holford's SMF because it is supported by substantial record evidence and also found that Gustin directly participated in and knowingly ratified and approved the tortious acts upon which Holford's claims are based. [Appx. 11898-1900].

Without addressing the Ruling itself, AquaTech baldly asserts that Holford's evidence was "woefully inadequate," failed to meet the "extraordinarily high" burden[6] required to recover punitive damages, and was "devoid of the necessary admissible evidence" to establish his defamation and intentional infliction of emotional distress claims [Initial Brief p. 21]. However, Appellant never explains why the facts included in the SMF or the record evidence pinpoint cited in support of them is in any way legally insufficient under the standards discussed above. And it is not.

Holford Filed Substantial Evidence of Direct Participation and Condonation, Ratification, and Consent to "Intentional Misconduct"

AquaTech incorrectly argues that even if "underling employees" engaged in "intentional misconduct," the trial court erred in finding that AquaTech ratified or condoned that misconduct. [Initial Brief pp. 21-22] In support, AquaTech contends Holford "did not carry [his] burden" of showing that "officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly

[6] AquaTech's discussion of the "very high burden" cites to a bankruptcy case involving a decision about punitive damages at the summary judgment stage. *See* Initial Brief p. 20 (citing *In re Leli*, 420 B.R. 568 (M.D. Fla. 2009).

condoned, ratified, or consented to such conduct" [Initial Brief p. 22-23] and supposedly failed to show culpable conduct at both the employee level and corporate level [Brief p. 26]. This conclusory argument lacks any meaningful support or explanation and simply ignores the trial court's July 31, 2024 Ruling, including the trial court's findings that Gustin both personally participated in and ratified and approved intentional torts committed against Holford.

While making this argument, AquaTech concedes that direct evidence in the record that Gustin personally participated in, directed, ratified, condoned, or consented to intentional misconduct satisfies section 768.72(3)(a)-(b) [Brief p. 26]. However, Appellant simply refuses to accept that the trial court adopted and found that such evidence was presented [Appx. 1898-1900] and never explains why or establishes that the evidence Holford submitted was insufficient to support the trial court's findings about Gustin's personal and direct involvement.

This is not surprising because, as laid out in section B, above, and in the SMF, Holford's evidence showed that Gustin directly participated in firing Holford based on false "theft" accusations because he suffered from multiple sclerosis [Appx. 1202-1214],

refusing to pay his final paycheck [Appx. 1218-1221], making the False SCSO report [Appx. 1221-1224], making defamatory per se statements about Holford [Appx. 1231-1236], and trying to extort Holford [Appx. 1221-1224]. This direct participation was sufficient, in and of itself, to support punitive damages against AquaTech under section 768.72(3)(a).

Holford's evidence also sufficiently demonstrated that Gustin and her Management Team knowingly condoned, ratified, and consented to the intentional misconduct committed against Holford, thus satisfying section 768.72(3)(b). **Everyone** with managerial responsibilities at AquaTech personally participated in and had knowledge of the wrongful acts that were committed against Holford, all of which Gustin was also personally involved in or directed. See *Sultan v. Walgreen Co.*, 324 So.3d 363, 364 (Fla. 3d DCA 2021) (evidencing supporting the conclusion that the corporate defendant was aware of defamation yet failed to take meaningful action about established a jury issue on punitive damages).

Unable to address Holford's evidence head-on, AquaTech tries to shift the focus solely to acts committed by low-level employees and cases such as *Napleton's North Palm Auto Park, Inc. v. Agosto*,

364 So.3d 1103 (Fla. 4th DCA 2023), *Tallahassee Mem'l Healthcare, Inc. v. Dukes*, 272 So.3d 824 (Fla. 1st DCA 2019), *Coronado Condo. Ass'n v. LaCorte*, 103 So.3d 239 (Fla. 3d DCA 2012), *Fetlar, LLC v. Suarez*, 230 So.3d 97 (Fla. 3d DCA 2017), and *Florida Power & Light Co. v. Dominguez*, 295 So.3d 1202 (Fla. 2d DCA 2019) [Initial Brief pp. 23-28]. However, these cases are irrelevant to the facts of *this* case—in which the trial court found that AquaTech's company president was directly involved in and directed, ratified, and condoned the torts committed against Holford [Appx. 1898-1900]. *Rety*, 546 So.2d at 245 ("wholly reasonable" for the jury to conclude that company president sent defamatory letter for business purpose and corporation was "plainly" vicariously responsible for the defamatory letter sued upon, and, "inasmuch as Green was the corporation's president rather than a lower echelon employee, the corporation was liable for punitive damages.") Likewise, Gustin undeniably qualifies as a "managing agent" for purposes of punitive damages.

The unrefuted evidence also shows that the deliberate and outrageous mistreatment of Holford permeated AquaTech's entire business from top to bottom over an extended period. Evidence of

such a company-wide practice is also sufficient to support punitive damages under section 768.72(3)(a) and (b). *Wayne Frier Home Center of Pensacola, Inc.*, 16 So.3d at 1009.

AquaTech tries to claim that there is no "admissible evidence that Gustin/AquaTech knowingly condoned, ratified or consented to [the] alleged conduct" of other AquaTech employees [Initial Brief p. 30], but this is yet another unsupported position that simply ignores the evidence Holford submitted. As noted above, Holford's evidence showed that Gustin not only participated in but knew about and directed others involved in fabricating "theft" accusations used as the pretext to fire Holford because he suffered from multiple sclerosis [Appx. 1202-1214], directed that his final paycheck not be paid [Appx. 1218-1221], knew about and approved others making false statements in support of the False SCSO report [Appx. 1221-1231], knew about and approved others making defamatory per se statements about Holford [Appx. 1231-1236], and directed others involved in trying to extort Holford [Appx. 1221-1225].

AquaTech's contention that "Holford failed to offer evidence or proffer any evidence of a reasonable showing of actual knowledge of the wrongfulness of the conduct" [Initial Brief p. 31] is legally flawed

and factually wrong, and also begs the question—in what world would a person not know that making false felony accusations about, refusing to pay, and trying to extort a man suffering from multiple sclerosis is not both wrong and highly likely to cause injury or harm?

Holford was not required to submit "medical admissible testimony" to establish the wrongfulness of this conduct or its likelihood of causing harm [Brief p. 31]. Wrongfulness refers to conduct that is "contrary to conscience, morality, or law." *CCP Harbour Island, LLC*, 373 So.3d at 30. The conduct upon which Holford's claims are based clearly qualifies, and the law presumes knowledge of wrongfulness and the likelihood of substantial injury where people falsely accuse others of crimes and conduct incompatible with their chosen profession to try to extort them. *Lawnwood Med. Ctr., Inc. v. Sadow*, 43 So. 3d 710, 729 (Fla. 4th DCA 2010) ("[W]hen the claim is defamation per se, liability itself creates a conclusive legal presumption of loss or damage and is alone sufficient for the jury to consider punitive damages."). *Per se* defamatory statements are "so obviously defamatory" and "damaging to reputation" that their publication "gives rise to an absolute presumption of malice and damage." *Wolfson v. Kirk*,

273 So.2d 774, 776 (Fla 4th DCA 1973); *Lashley*, 561 So.2d at 409-410. Malice and an intent to harm can also be presumed from the "unreasonableness of the defendant's conduct in accusing" the plaintiff of crimes. *Asinmaz*, 42 So.3d at 959.

"It is not necessary to prove actual malice or an intent to cause the particular injury sustained; the requisite malice or evil intent may be inferred from the defendant's having willfully pursued a course of action in wanton disregard of the potential harm likely to result as a consequence of that wrongful conduct." *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 247 (Fla. 1st DCA 1984). A defendant need not intend to have caused the emotional distress because it is sufficient that the defendant "intended [its] specific behavior and knew or should have known that the distress would follow." *Dominguez v. Equitable Life Assur. Soc. of U.S.*, 438 So. 2d 58, 59 (Fla. 3d DCA 1983), approved, 467 So. 2d 281 (Fla. 1985). Thus, "describing the tort as 'the intentional infliction of severe mental or emotional distress' is somewhat misleading…[because it]…erroneously suggests that the defendant intended to inflict severe mental or emotional distress when, in fact, all that need by shown is that he intended his specific behavior and knew or should have

known that the distress would follow." *Id.* at 59 n.1 (citing *Ford Motor Credit Co. v. Sheehan,* 373 So.2d 956 (Fla. 1st DCA 1979) and Restatement (Second) of Torts § 46 (1965)).

AquaTech's attempt to downplay its heinous acts by mischaracterizing them as merely "calling out an employee on misfeasance and malfeasance regarding job performance" [Initial Brief p. 32] is yet another self-serving interpretation and mischaracterization of the evidence that violates the standards governing motions under section 768.72 requiring the "*totality of proffered evidence"* to be viewed in the light most favorable to Holford and "*all reasonable inferences*" to be drawn in his favor. *Case*, 154 So.3d at 1157; *Wayne Frier Home Ctr. of Pensacola, Inc.*, 16 So.3d at 1009 *CCP Harbour Island, LLC*, 373 So.3d at 27; *Perlmutter*, 376 So.3d at 34; *Varnedore*, 210 So.3d at 747; *Estate of Williams ex rel. Williams*, 899 So.2d at 377.

AquaTech also cannot side-step the facts or the law through unsupported assertions that the "trial court improperly believed that it had to accept [Holford's] proffer as true," failed to consider "the other side's showing" and did not "carefully vet[]" Holford's evidence and AquaTech's response submissions [Initial Brief p. 24]. This

unsubstantiated attack on the trial judge ignores that AquaTech did not submit any countervailing evidence to refute Gustin's sworn admissions at her deposition nor the mountain of other testimonial and documentary evidence laid out in Holford's SMF. This baseless attack also ignores that the trial judge did, indeed, carefully consider and vet the evidence—as demonstrated by the pointed questions posed to counsel at the July 31, 2024 hearing concerning AquaTech's corporate liability under section 768.72; [Appx. 1859-1860, 1862-1872, 1879-1884, 1886-1887, 1889].

AquaTech's assertion that Holford's SMF is "argumentative, conclusory and 'spin[s]' the underlying facts to infer and imply the necessary 'intentional misconduct'" [Initial Brief p. 25] is meritless. Holford's SMF lays out in detail with pinpoint record evidence citations (and even images of deposition testimony and documents) precisely what the evidence shows. The fact that AquaTech dislikes that evidence, believes it may be able to prove something different at trial, or may try to claim the testimony of its own agents was "mistaken" does not make Holford's evidence "argumentative" or "conclusory."

AquaTech's suggestion that it is improper to "infer" intent from the evidence Holford presented [Initial Brief p. 25] is contrary to the law. All reasonable inferences from the evidence were required to be drawn in Holford's favor. *Perlmutter*, 376 So.3d at 34; *Varnedore*, 210 So.3d at 747; *Estate of Williams ex rel. Williams*, 899 So.2d at 377. Moreover, because tortfeasors such as AquaTech rarely exclaim their intent to injure, the law recognizes a plaintiff's ability to prove intent through circumstantial evidence and inferences. As explained in *Asinmaz*:

> Proof of malice in fact involves production of evidence from which the jury could conclude that the challenged statement was motivated by ill will and the desire to harm. Such proof may be established indirectly, i.e., "by proving a series of acts which, in their context or in light of the totality of surrounding circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive." *Southern Bell Telephone & Telegraph Company v. Roper*, 482 So.2d 538, 539 (Fla. 3d DCA 1986); 29 Am.Jur.2d Evidence, s. 361….Or, as the court explained in Brown v. Fawcett Publications, Inc., 196 So.2d 465, 473 (Fla. 2d DCA 1967), with reference to express malice sufficient to award punitive damages: If malice necessary to warrant exemplary damages had to be express, such as 'I hate you', or 'I'm going to ruin your character even if I have

> to lie about you to do it', it would reduce the law of punitive damages in libel actions to a farce and mockery. People just don't advertise their libels in advance.

*Asinmaz***,** 42 So.3d at 958-959. Thus, malice can be demonstrated through evidence showing " a series of acts which, in their context or in light of the totality of surrounding circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive." *Id.* It can also be established through evidence of unjustified accusations and accusations based on unfounded beliefs, and even inferred from the "unreasonableness of the defendant's conduct in accusing" the plaintiff. *Id.* at 959. Holford presented such evidence.

AquaTech also incorrectly suggests that the trial court accepted *allegations* in Holford's proposed complaint and motion to amend as true [Brief pp. 25-26], but the trial court did no such thing. The trial court based its decision on Holford's SMF and its determination that the facts stated therein are supported by record evidence that reasonably showed Holford could demonstrate to a reasonable jury

that AquaTech is liable for intentional torts committed with punitive intent.

Evidence of Gustin's Misconduct Satisfying § 768.72(3)(a) is NOT "Lacking"

AquaTech's contention that "there is no substantial evidence proffered in this case of willful and malicious action on the part of Annete Gustin directed to or against Mark Holford" is meritless for all the same reasons. AquaTech cannot claim the evidence is "lacking" by distorting and ignoring the substantial evidence of Gustin's direct participation and involvement. Moreover, as discussed above, this argument fails because malice and intent to harm are presumed as matter of law from the totality of the evidence Holford submitted and Holford is entitled to all inferences drawn from such evidence, from which punitive intent is clearly established. *Perlmutter*, 376 So.3d at 34; *Varnedore*, 210 So.3d at 747; *Estate of Williams ex rel. Williams*, 899 So.2d at 377; *Asinmaz***,** 42 So.3d at 958-959; *Lashley*, 561 So.2d at 408-409.

Among other misconduct, Gustin unequivocally testified that she directed AquaTech's fake lawyer to send the September 9, 2022 letter [Appx. 1115-1116] threatening to "pursue justifiable

remediation via any and all law enforcement and civil authorities" and that AquaTech "remains steadfast and resolved to engage such law enforcement and civil agencies" with the intent to extort Holford [Appx. 1221-1223] No amount of spin [Initial Brief pp. 33-34] can change this testimony establishing Gustin's intent for the letter to be extortionate, particularly given that Gustin directed it to be sent to Holford on payday and personally made the false SCSO complaint against Holford the same day to carry out the extortionate threat. [Appx. 1221-1225] AquaTech's claim that Gustin's testimony merely reflects a "misunderstanding " of her own intent in sending the letter [Brief p. 34] lacks any evidentiary support and no more than improper argument of counsel.

AquaTech's final attempt to downplay the unrefuted evidence of Gustin's direct role in filing and pursuing the false criminal complaint against Holford as part of the effort to extort him consists of an attempt to mischaracterize it as a legitimate effort to "enforc[e] [AquaTech's] legal rights" [Initial Brief p. 35]. This argument is unavailing because there is no legal right or qualified privilege to knowingly make false criminal accusations against someone to use to extort them. *Asinmaz***,** 42 So.3d at 958-959; *Lashley*, 561 So.2d

at 408-409; *Valladares v. Bank of America Corp.*, 197 So.3d 1, 11 (Fla. 2016) ("[W]e hold that a cause of action for negligent reporting arises when there I incorrect reporting plus conduct on the part of the reporting party that rises to the level of punitive conduct.").

"When the conduct in connection with reporting suspected criminal activity evinces a reckless disregard of the safety and rights of others—or as in this case—the parties involved wither knew or should have known that their conduct was likely to cause harm, the qualified privilege cannot provide immunity for such behavior." *Valladares*, 197 So.3d at 12; *Arison Shipping Co. v. Smith*, 311 So.2d 739, 741 (Fla. 3d DCA 1975) (defamation actionable where communications were not made in good faith and made to "lower echelon employees" having no corresponding interest in them, that they were not warranted, not made upon a proper occasion and made for the express purpose of injuring the plaintiff); *Lewis v. Evans*, 406 So.2d 489, 492 (Fla. 2d DCA 1981) ("It is called a qualified or conditional privilege, because the libelous statement must be made in good faith, that is, with a good motive, and not for the purpose of harming the subject of the defamation.").

Here, the evidence presented demonstrated that Gustin knew the criminal charges she brought against Holford were false before she personally asked the SCSO to criminally prosecute Holford for theft. [Appx. 1212-1214, 1221-12241226-1229] In fact, the trial judge specifically asked counsel questions about Gustin's knowledge of the falsity of her accusations at the July 31, 2024 hearing [Appx. 1888-1889]

II. Holford Demonstrated Outrageous Conduct and Intent to Harm

AquaTech argues that the "tort of outrage" was not established by "admissible evidence showing a reasonable basis for the imposition of punitive damages" based on (1) case law standing for the unremarkable proposition that "outrageousness" is determined by an objective standard and not a plaintiff's subjective response [Initial Brief p. 37], (2) another legally improper attempt to convince the Court that its slanted, incomplete version of the fabricated pretext for Holford's firing should be accepted as true [Initial Brief p. 40], and (3) mischaracterizations of Holford's evidence as consisting only of showing "a couple of low-level employees did not

like Mr. Holford" and "idle gossip and joking" that "is not actionable and "commonplace in a complex society" [Initial brief p. 40].

In determining whether conduct is "extreme and outrageous," the facts must be viewed in the light most favorable to the plaintiff. *Williams v. City of Minneola*, 575 So.2d 683, 692 (Fla. 5th DCA 1991) (*citing Mallock v. Southern Memorial Park, Inc..*, 561 So.2d 330, 332 (Fla. 3d DCA 1990)*; Dependable Life Insurance Company v. Harris,* 510 So.2d 985, 986 (Fla. 5th DCA 1987). Whether conduct is outrageous enough to rise to the required level may be decided as a question of law only when the facts of a case can under no conceivable interpretation support the tort. *Williams*, 575 So.2d at 692. Where significant facts are disputed, or where differing inferences could reasonably be derived from undisputed facts, the question of outrageousness is for the jury to decide. *Id.*

Conduct sufficient to support the intentional infliction tort has been described as "intentionally harmful conduct which would otherwise go unpunished, and which, in cause and effect, can hardly be distinguished from other intentional torts such as assault." *Metropolitan Life Ins. Co. v. McCarson*, 429 So.2d 1287 (Fla. 4th DCA 1983), *approved in part, quashed in part*, 467 So.2d 277 (Fla. 1985).

The outrageousness requirement has been met in situations involving vicious verbal attacks. *Dependable Life Insurance Co.*, 510 So.2d 985 (Fla. 5th DCA 1987).

Importantly, AquaTech's misconduct was committed with full knowledge of Holford's multiple sclerosis, and a "defendant's knowledge that the plaintiff is especially sensitive, susceptible, or vulnerable to injury caused by mental distress…enhance[es] the outrageousness of a defendant's conduct." *Dependable Life Ins. Co.,* 510 So.2d at 988. Conduct may become "heartless, flagrant, and outrageous" where a defendant acts despite knowledge of a plaintiff's emotional vulnerability. *Id.* (citing *Restatement (Second) Torts* § 46).

A "heightened degree of outrageousness" can also be supplied by the "unequal positions of the parties in a relationship which gives rise to the tort, where one asserts and has the power to severely damage the other." *Dependable Life Ins. Co.,* 510 So.2d at 988. "The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests." *Id.* Here, AquaTech undeniably had such power.

Labeling AquaTech's misconduct as "outrageous" and "extreme" and "going beyond all possible bounds of decency," is probably an understatement. Firing someone because they suffer from multiple sclerosis, refusing to pay their final paycheck based on fabricated "theft" and "embezzlement" accusations, and filing a false criminal report against them to use as leverage to try to extort them into dropping demands for their unpaid wages, while also falsely accusing them of having a gun and drugs and threatening to shoot and stab their boss clearly is sufficient to support a claim for intentional infliction of emotional distress.

AquaTech's entire course of conduct directed at Holford—not just "gossip" between low-level employees—comprises the factual basis for his intentional infliction of emotional distress claim. And conduct far less "outrageous" has been found to be sufficient. *Lashley*, 261 So.2d at 410 ("When the conduct smacks of extortion, this tort is likely to be present."). Just as in *Lashley*, the facts Holford presented—including AquaTech's knowledge of the falsity of its criminal accusations and contacting police to "coerce" Holford into dropping his unpaid wages demands—"could sustain a finding that

[AquaTech's] intent was to cause [Holford] emotional distress." *Id.* at 408-409.

AquaTech's arguments concerning Holford's defamation claim are likewise lacking—both factually and legally. The contention that "there is no claim for slander *per se*" because Holford relies only on the deposition testimony of Aaron, Andreau, and Jackson Euart [Initial Brief p. 41] is factually inaccurate and legally irrelevant. The Euart's are eye-witnesses who personally observed Gustin and members of her Management Team making false and defamatory *per se* statements about Holford. [Appx. 1231-1237] The fact that Gustin, Say, and Clarenson may have denied making or witnessing others make these statements [Initial Brief p. 41] is immaterial.

It is also well established that defamation can occur in intra-corporation communications and that corporations are vicariously liable for employees' defamatory statements, including for punitive damages. *Southern Bell Tel. & Tel. Co. v. Barnes*, 443 So.2d 1085, 1086 (Fla. 3d DCA 1984); *Walter v. Jet Aviation Flight Services, Inc.*, 2016 WL 7116641, *1, n.1 (S.D. Fla. Dec. 7, 2016); *Rety*, 546 So.2d at 425-526; *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 430 F.2d 38, 48 (5th Cir. 1970) ("It is well settled in Florida, as

elsewhere, that a corporation, just as an individual, may be held liable for defamation by its employees.").

Likewise, "publication" for defamation purposes includes participating, taking part in, directing, procuring, and encouraging others to publish. *Doe v. America Online, Inc.*, 783 So.2d 1010, 1017 (Fla. 2001) ("Everyone who takes part in the publication…is charged with publication."); *Restatement (Second) of Torts* § 577 (a defendant "is liable for the publication of defamation by a third person whom as his servant, agent, or otherwise he directs or procures to publish defamatory matter"); *Della Donna v. Nova Univ., Inc.*, 512 So.2d 1051, 1056 (Fla. 4th DCA 1987) (recognizing liability for taking part in and procuring the publication of statements).

Defamatory *per se* statements—those accusing another of a criminal offense amounting to a felony, of engaging in conduct incompatible with the proper exercise of their lawful business, trade, profession, or office, or tending to subject one to hatred, distrust, ridicule, contempt, or disgrace—are presumptively injurious and malicious. *Perry v. Cosgrove*, 464 So. 2d 664, 666 (Fla. 2d DCA 1985) ("Generally, a publication is libelous per se if, when considered alone without innuendo, it tends to subject a person to hatred, distrust,

ridicule, contempt, or disgrace, or tends to injure [them] in [their] trade or profession, or if it imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of [their] lawful business, trade, profession, or office."); *Shafran v. Parrish*, 787 So.2d 177, 179 (Fla. 2d DCA 2001) (same); *Drennen v. Westinghouse Elec. Corp.,* 328 So.2d 52, 54 (Fla. 1st DCA 1976) (finding published statement actionable per se where it imputed offense that, under the circumstances, could only indicate stealing or misappropriation of employer's property); *Wolfson*, 273 So.2d at 778 (concluding defamatory statement was actionable per se because it characterized plaintiff as a "person with whom commercial relations were undesirable," and as such, was incompatible with plaintiff's ability to conduct a lawful business); *Axelrod v. Califano*, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978); *Spears v. Albertsons, Inc.*, 848 So.2d 1176, 1179 (Fla. 1st DCA 2003). *Bobenhausen v. Cassat Ave. Mobile Homes, Inc.,* 344 So.2d 279, 283 (Fla. 1st DCA 1977) (holding statement made by plaintiff's former employer to another that plaintiff was a "thief and a crook" who "stole him blind" was slander per se, if false).

Here, all the statements AquaTech made about Holford qualify as defamatory *per se*. They charge him with criminal acts, conduct incompatible with his job, and tend to subject him to hatred, distrust, ridicule, contempt, and disgrace. Gustin's admittedly false statement about Holford having a gun drugs was part of warning to a customer about Holford clearly qualifies. *See* Appx. 1232-1233 (SMF ¶¶ 80-81); Initial Brief p. 41 ("afraid for [herself] and a single mom [Manes] with two young kids that lives across the street from us.")

As noted above, such statements give rise to a presumption of reputational harm and support the imposition of punitive damages. *Lawnwood Med. Ctr. Inc.*, 43 So. 3d at 728 (Fla. 4th DCA 2010) ("The history of Florida law makes clear that liability alone for intentionally malicious defamation *per se* will support substantial punishment in punitive damages."); *see also id.* at 729 ("But when the claim is defamation *per se*, liability itself creates a conclusive legal presumption of loss or damage and is alone sufficient for the jury to consider punitive damages."); *Sultan*, 324 So. 3d at 564 (same); *Lundquist v. Alewine*, 397 So. 2d 1148, 1150 (Fla. 5th DCA 1981) (same). This is because *per se* defamatory statements are "so obviously defamatory" and "damaging to reputation" that their

publication "gives rise to an absolute presumption of malice and damage." *Wolfson*, 273 So.2d at 776; *see also Rety*, 546 So.2d at 425.

As noted above, defamatory *per se* statements amongst employees (even supposed "gossip") are actionable and are not protected by a qualified privilege—particularly where officers and managers are involved or aware of them. *Spears*, 848 So.2d at 1179; *Glynn v. City of Kissimmee*, 383 So.2d 774, 775-776 (Fla. 5th DCA 1980); *Johnston v. Borders*, 2018 WL 8244336, *5 (M.D. Fla. Jun. 19, 2028); *Bobenhausen,* 344 So.2d at 283; *Barnes*, 443 So.2d at 1086; *Arison Shipping Co.*, 311 So.2d at 741 (defamation actionable where communications were not made in good faith and were made to "lower echelon employees" having no corresponding interest in them, that they were not warranted, not made upon a proper occasion and made for the express purpose of injuring the plaintiff).

As a whole, Holford's evidence demonstrated that the misconduct at issue in this case is reprehensible and that AquaTech's actions were intentional, gravely deplorable, deserving of severe condemnation, and harmful to Holford's basic interests beyond purely economic loss—even more so because AquaTech engaged in its tortious acts with full knowledge that Holford suffers

from multiple sclerosis. *Lawnwood*, 43 So.3d at 725–26; *Rety*, 546 So.2d at 419-420. AquaTech's actions were odious, past moral bounds, outrageous, and a "grave offense against right or decency," which is deserving of "the harshest punitive damages" and "avowedly strong and severe" disapproval under Florida law. *Id.*

CONCLUSION

Based on the foregoing, Appellee/Plaintiff, Mark Holford, respectfully requests that the trial Court's Ruling [Appx. 1893-1901] and Order [Appx. 7-8] be affirmed.

Dated: December 5, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2024, I caused a true and correct copy of the foregoing to be served via the Florida Court's E-Filing Portal upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2). It was prepared using Bookman Old Style 14-point font and contains 10,890 words.

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