No.: 4D2024-1262

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CHENEY BROTHERS, INC., AND RICHARD AZURIN,

Defendants / Appellants,

v.

CHADLEY CHERILUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM FRANCOIS,

Plaintiff / Appellee.

Appeal from a Non-Final Order Granting Leave to Add Punitive Damages Claims entered by the Fifteenth Judicial Circuit, Case No.: 2022-CA-007537-XXXX-MB

INITIAL BRIEF OF APPELLANT CHENEY BROS., INC.

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INTRODUCTION

This is an appeal of a non-final order granting Plaintiff leave to amend to add claims for punitive damages against Cheney Brothers, Inc., the owner of a tractor-trailer, and its employee-driver, Richard Azurin, who collided with the allegedly stationary vehicle of William Francois on I-95, resulting in Mr. Francois' death. Undoubtedly, this is a tragic case; however, the facts do not support punitive damages. This case did not involve a driver who was speeding, intoxicated or impaired; and there is no evidence that a managing agent of Cheney Bros. validated Mr. Azurin's actions which, at worst, constitute negligence. The Court should reverse the order because Plaintiff failed to establish a reasonable basis for pleading punitive damages.

STATEMENT OF THE CASE AND FACTS

The Facts

On July 19, 2022, Mr. Francois' vehicle was allegedly stationary and disabled on southbound I-95 in Delray Beach in the outside travel lane. It was 5:17 am, dark outside, and his hazard lights were on. *See* A.1057, 1059, 1064, 1067, 1070, 1071, 1076, 1078. Numerous witnesses observed Mr. Francois' stationary vehicle

minutes before the accident. A.1070-72; A.328 [Dep. Kinzler at 13, 14].

In the seconds before the collision, Mr. Azurin was traveling southbound on I-95 in the outside lane in a tractor-trailer registered to Cheney Bros. A.1057, 1061, 1078. According to Plaintiff, Mr. Azurin rear-ended Mr. Francois without stopping, slowing, or taking any evasive action. A.229 ¶ 1; A.421 ¶ 7(g), (i).

Mr. Azurin testified that Mr. Francois abruptly changed lanes into Mr. Azurin's path of travel. A.1065. Mr. Azurin stated: "The incident happened when the other vehicle pulled into my lane just before the impact and came to a near stop or stop. I did not notice the vehicle until it pulled into my lane just before impact. Because of the sudden entry into my lane, there was nothing that I could do to avoid the impact." *See* A.1208 (Ans. to Interrog. No. 6); *see also* A.1452, 1453, 1455, 1475.[1]

[1] Because Plaintiff filed condensed versions of depositions as part of his proffer, Defendants refiled some as full versions. Cheney Bros. also filed its employment file for Mr. Azurin because Plaintiff filed a mostly illegible version. *See* A.743-99.

Mr. Laguerre, the only witness to the accident, corroborated Mr. Azurin's testimony. *See* A.1095. Mr. Laguerre testified that immediately before the accident he observed Mr. Francois's vehicle moving away from the safety of the shoulder on the opposite side of the road back to the opposite travel lane. *See* A.1097-98, 1110, 1115-18, 1122, 1124, 1126, 1129, 1162, 1164-65. Consistent with Mr. Azurin and Mr. Laguerre's testimony, it is plausible that Mr. Francois was stopped in the travel lane as observed by the other witnesses, attempted to move to the safety of the opposite shoulder, reconsidered, and then cut off Mr. Azurin as he was returning to the right travel lane when Mr. Azurin's truck struck his vehicle.

The impact caused Mr. Francois' vehicle to catch fire, and he died at the scene from his injuries. *See* A.1057, 1078. Mr. Francois' vehicle, a 2002 Jeep Liberty, was the subject of a 2013 recall due to the risk of a fuel leak in rear-end collisions leading to an underbody fire. A.1062; A.2151 ¶¶ (E), (F). Defendants' experts found that there was a manufacturing defect with Mr. Francois' vehicle and that, but for this defect, the injuries sustained would have been dramatically different, and he likely would have survived. A.2151 ¶¶ (I), (J)].

At the time of the accident, Mr. Azurin was not intoxicated or impaired, and Plaintiff proffered no evidence that he was texting or talking on the phone, or otherwise distracted. *See* A.1062, 1063, 1077, 1434-38, 1439, 1441, 1447. He was driving at least 10 m.p.h. *under* the posted speed limit of 65 m.p.h. A.1060, 1065, 1076, 1434-36. Plaintiff also proffered no evidence that Mr. Azurin was driving erratically before the accident.

Mr. Azurin also was not in violation of the hours-of-service rules, had satisfactory daily logs, his truck's brakes were in satisfactory condition, and all tire treads followed NHTSA recommendations. A.1068-69. In short, Mr. Azurin's truck was in good repair with no reported mechanical issues and his vehicle had passed every inspection the week preceding the accident. *See* A.1566-67.

The traffic homicide investigator concluded: "[Mr. Francois's] actions contributed with this fatal traffic crash, damages to [Mr. Azurin's and his own vehicle and] his own death." A.1073. Mr. Azurin was not cited for "reckless driving," *see* § 316.192(1)(a), Fla. Stat., which is defined as "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." *Id.* The traffic

homicide investigator found that Mr. Azurin "failed [to] use due care to the present circumstances, contributing to this traffic crash, causing extensive damage to both vehicles and contributed to [Mr. Francois's] death." *Id.* The traffic cash investigator concluded that "both drivers contributed to this fatal traffic crash." A.1078.

The Case

On August 2, 2022, Plaintiff Chadley Cherilus, as the personal representative of the Estate of Mr. Francois, sued Cheney Bros. and Richard Azurin alleging negligence against Mr. Azurin and vicarious liability against Cheney Bros. A.10-18. On October 11, 2023, the trial court granted Plaintiff leave to amend his Complaint to add three Cheney employees as defendants: Marla Nairn, the manager of recruitment and leave administration; Norris Knight, the risk and safety training coordinator, and Dave Rawicz, the safety and risk director. A.27-40 (motion); A.216-17 (order). The Amended Complaint alleged the following five causes of action:

Count 1: Negligence Against Azurin
Count 2: Vicarious Liability Against Cheney Bros. (*for Azurin's negligence*)
Count 3: Negligent Hiring Against Cheney Bros. Employee Marla Nairn

Count 4: Negligent Retention & Entrustment Against Cheney Bros. Employee Norris Knight

Count 5: Negligent Retention & Entrustment Against Cheney Bros. Employee Dave Rawicz

The Amended Complaint did not allege a claim against Cheney Bros. for negligent hiring, retention, and entrustment and there was no claim that Cheney Bros. was vicariously liable for the negligence of its employees Marla Nairn, Norris Knight, and Dave Rawicz. The Cheney employees moved to dismiss the claims against them because, among other things, they did not owe any personal duties to Mr. Francois apart from their general administrative responsibilities and were not personally involved in the alleged tortious act that caused Mr. Francois' death. A.220-222, 224-226. The trial court denied the motion to dismiss. A.2141-42.

On August 29, 2023, Plaintiff first moved for leave to amend his Amended Complaint to add claims for punitive damages against Mr. Azurin and Cheney Bros. A.136-84. On February 2, 2024, Plaintiff filed an amended motion for leave to amend to add claims for punitive damages and proffered his supporting evidence. A.229-290 (am. mot.); A.319-1015 (proffer). The proposed Second Amended Complaint attached to the amended motion alleges the same claims

as the Amended Complaint and adds two claims for punitive damages against Mr. Azurin (Count 6) and Cheney Bros. (Count 7). A.292-318.

After a hearing, the trial court granted Plaintiff leave to add the punitive damages claims based, in part, on its "review" of the Amended Motion, Defendants' response, and "the proffered evidence from both sides." A.2154. The trial court based its ruling against Cheney Bros. on its "failing to conduct the most elementary investigation into Mr. Azurin's qualifications as a driver of a commercial tractor trailer, and/or his ability to safely operate a commercial vehicle." A.2159.[2] The order did not identify a managing agent that condoned, ratified, or consented to Mr. Azurin's conduct or the conduct of a managing agent that constituted gross negligence. *See* § 768.72(3)(b), (c), Fla. Stat.

The trial court based its ruling against Mr. Azurin on two findings: (1) in his job application to Cheney Bros., "Mr. Azurin engaged in a pattern of outright falsification and deception as it relates to his driving record, experience in operating a commercial tractor trailer, his educational background and training, and as it

[2] The trial court did not find that Cheney Bros' conduct in retaining and supervising Mr. Azurin warranted punitive damages.

relates to his employment history and history of poor performance in similar roles"; and (2) "based on the video evidence alone, that the Defendant crashed into the rear end of the plaintiff's [sic] vehicle without stopping, slowing or taking any evasive action." A.2156, 2158.

SUMMARY OF ARGUMENT

Plaintiff's claim for punitive damages against Cheney Bros. was both legally and factually deficient. First, Plaintiff proffered no evidence that a managing agent of Cheney Bros. "condoned, ratified or consented" to Mr. Azurin's conduct that proximately caused the accident and there was no evidence that a managing agent of Cheney Bros. "engaged in conduct that constituted gross negligence and that contributed" to the death of Mr. Francois. *See* § 768.72(3)(b), (c). Even assuming Plaintiff proffered evidence of a managing agent, Cheney Bros.' conduct in hiring Mr. Azurin did not constitute gross negligence – the evidence showed that Cheney Bros. did not flout its legal duty to investigate Mr. Azurin's driving skills before he was hired and, while errors occurred during its investigation, Cheney Bros. did not exhibit willful or wanton conduct meriting punitive damages. At the time of the hearing, Plaintiff had deposed only two Cheney Bros.' employees who were not managing agents and did not testify about the conduct of a managing agent.

Second, even assuming Plaintiff had proffered managing agent conduct, Cheney Bros.' conduct in hiring Mr. Azurin did not constitute gross negligence that proximately caused Mr. Francois'

death. Cheney Bros. did not flout it duty to conduct a background investigation of Mr. Azurin, did not have actual knowledge of his numerous traffic citations and his driving record with a prior employer, and extensively vetted his qualifications as a commercial truck driver. While Cheney Bros. made some mistakes in its investigation, they do not warrant punitive damages.

Third, because a claim for punitive damages is not an independent tort, the Cheney Bros.' alleged conduct underlying the claim for punitive damages must coincide with the alleged conduct giving rise to Plaintiff's *underlying* claim for liability against Cheney Bros. In this case, there was no underlying liability claim alleged against Cheney Bros. for negligent hiring to support Plaintiff's claim for punitive damages.

Plaintiff also did not establish a reasonable basis for the recovery of punitive damages against Mr. Azurin. If the Court were to accept as true Plaintiff's version of the accident, this case involves a driver who failed to see a stopped vehicle in a travel lane on I-95 before sunrise and rear-ended the stopped vehicle. At most, this conduct constitutes ordinary negligence with substantial comparative fault by Mr. Francois. Mr. Azurin was traveling at least

10 m.p.h. under the speed limit; he was not traveling too fast for the conditions; he was not impaired; he was not asleep or dozing; he was not using his phone. And per Plaintiff, Mr. Francois' vehicle was stopped in a traffic lane, within the flow of highway traffic.

Mr. Azurin's misstatements in his job application also do not provide a basis for punitive damages. Those misstatements were not the proximate cause of Mr. Francois' death. The trial court's conclusion – that Mr. Azurin knew he was unfit to drive a tractor-trailer and concealed his driving record so he would get hired – was not supported by Plaintiff's proffer or the record evidence. On the contrary, the evidence showed that Mr. Azurin was qualified to drive a tractor-trailer before the accident occurred.

Finally, the trial court erred by misapplying the standards for pleading punitive damages. It did not consider the proffer of Cheney Bros. which showed due diligence in the hiring of Mr. Azurin and accepted Plaintiff's proffer as true. For example, Cheney Bros. ran Mr. Azurin's motor vehicle and criminal record, checked the validity of his license and medical card, asked about prior accidents and citations on his application, obtained his employment history, attempted to obtain DOT information from prior employers,

interviewed Mr. Azurin twice and gave him a road test. The Court should reverse the order granting leave to amend to pursue punitive damages.

STANDARD OF REVIEW

Review of an order granting a motion for leave to amend a complaint to a claim for punitive damages is *de novo*. *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005).

ARGUMENT

I. THE TRIAL COURT ERRED BY MISAPPLYING THE STANDARDS FOR GRANTING LEAVE TO AMEND TO ADD CLAIMS FOR PUNITIVE DAMAGES WHEN IT FAILED TO CONSIDER DEFENDANTS' COUNTER-PROFFER AND ACCEPTED PLAINTIFF'S PROFFER AS TRUE

A. The Standards for Pleading Punitive Damages

A defendant has 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." *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995). Therefore, Florida law therefore requires a plaintiff to make a "reasonable showing by evidence in the record or proffered" which "would provide a reasonable basis for recovery of such damages." *See* § 768.72(1), Fla. Stat. (2023); *see also* Fla. R. Civ. P. 1.190(f).

In this regard, "[s]ection 768.72 'requires the trial court to act as a gatekeeper,' which means that the trial court cannot 'simply accept[ ] the allegations in a complaint or motion to amend as true.'" *Napleton's N. Palm Auto Park, Inc. v. Agosto*, 364 So. 3d 1103, 1104 (Fla. 4th DCA 2023) (quoting *Bistline v. Rogers*, 215 So. 3d 607, 610–11 (Fla. 4th DCA 2017)). The trial court does not weigh the evidence

or witness credibility. *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023) (*en banc*); *but see Agosto*, 364 So. 3d at 1104 ("A trial court's inquiry under section 768.72 is more intensive than at summary judgment because the statute 'necessarily ***requires the court to weigh the evidence and act as a factfinder***.'" (emphasis added) (quoting *KIS Grp., LLC v. Moquin*, 263 So. 3d 63, 66 (Fla. 4th DCA 2019)); *see also Fla. Hosp. Med. Servs., LLC v. Newsholme*, 255 So. 3d 348, 350–51 (Fla. 4th DCA 2018) (quashing order that "failed to adequately consider whether the proffer was sufficient to establish a reasonable evidentiary basis for recovery of punitive damages, and simply accepted Plaintiffs' allegations as true"); *Marder v. Mueller*, 358 So. 3d 1242, 1246 n.1 (Fla. 4th DCA 2023) (stating that the trial court must "consider the movant's proffer . . . [and] weigh the other side's showing when determining whether a reasonable evidentiary basis exists . . .."). The trial court must "make a preliminary determination of whether a reasonable jury, viewing the totality of proffered evidence in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are

warranted." *Perlmutter*, 376 So. 3d at 34.[3]

The Florida Supreme Court has emphasized that punitive damages are a remedy for "quasi-criminal" conduct when "private injuries inflicted partake of public wrongs." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1279 (Fla. 2006); *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1042-43 (Fla. 1982); *accord Tiger Pt. Golf & Country Club v. Hipple*, 977 So. 2d 608, 611 n.4 (Fla. 1st DCA 2007) (punitive damages must be sufficiently "outrageous," including "some element of outrage similar to that usually found in crime").

And while punitive damages are sometimes appropriate with intentional torts, the circumstances that justify punitive damages in negligence cases are narrow. Specifically, the character of negligence

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[3] *Perlmutter* is pending for review before the Florida Supreme Court based on certified conflict with the Second and Fifth District Courts of Appeal and a question certified to be of great public importance. *See Perlmutter v. Federated Ins. Co.*, No. SC2024-0058 (awaiting order granting or denying review). The conflict issues involve: (1) whether the trial court must view the totality of the evidence identified in support of or in opposition to the motion for leave to amend; and (2) whether the clear and convincing evidence standard applies to the trial court's preliminary determination. Contrary to *Perlmutter*, Plaintiff argued below that he "[does not] have to establish anything by clear and convincing evidence." A.2087.

must be tantamount to that necessary to sustain a criminal conviction for manslaughter:

> The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

Carraway v. Revell, 116 So. 2d 16, 20 n.12 (Fla. 1959) (internal quotations omitted). *Carraway* has repeatedly been approved and reaffirmed as the standard for imposing punitive damages in Florida.[4] In short, "punitive damages are reserved for truly culpable behavior and are intended to express society's collective outrage." *DeSanto v. Grahn*, 362 So. 3d 247, 248 (Fla. 4th DCA 2023) (internal quotations omitted); *see also Marder*, 358 So. 3d at 1245 ("The conduct must be so outrageous in character, and so extreme in degree . . . [that] the facts [of the case] to an average member of the community would

[4] *See e.g., White Constr. Co. v. Dupont, Inc.*, 455 So. 2d 1026, 1028 (Fla. 1984), *receded from on other grounds, Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000); *Tiger Point*, 977 So. 2d at 610; *Estate of Williams v. Tandem Health Care of Fla., Inc.*, 899 So. 2d 369, 376-79 (Fla. 1st DCA 2005).

arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!" (internal quotations omitted)); *Perlmutter*, 376 So. 3d at 36 (same).

In *Jeep Corp. v. Walker*, 528 So. 2d 1203 (Fla. 4th DCA 1988), this Court reaffirmed *Carraway* and stated:

> Punitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct. They are not intended as a means by which a plaintiff can recover extra damages. Thus, punitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong. Therefore, the question that must be answered utilizing the *Carraway* [*v. Revell*, 116 So. 2d 16 (Fla.1959)] standard is whether [the defendant] exhibited *a reckless disregard for human life equivalent to manslaughter*.

Id. at 1206 (citations omitted & emphasis in original) (quoting *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986)); *see also Perlmutter*, 376 So. 3d at 36 ("[L]ong-established precedent dictates that actions which deserve punitive sanctions involve outrageous conduct, malicious motive, or wrongful intention."); *Marder*, 358 So. 3d at 1245 ("Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a

wanton disregard for the rights and safety of others.").

The Florida Supreme Court "has repeatedly emphasized that the twin purposes of punitive damages—punishment of the offender and deterrence of others who might otherwise act similarly—are only served when the defendant's behavior transcends the level of simple negligence and enters the realm of wanton intentionality, exaggerated recklessness, or such an extreme degree of negligence as to parallel an intentional and reprehensible act." *Am. Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1986) (citations omitted).

Section 768.72(2), Florida Statutes lays out the standards for pleading punitive damages against an individual like Mr. Azurin:

> A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.

Plaintiff alleged that Mr. Azurin's conduct constituted gross negligence, *see* A.243 ¶ 15, which is defined to mean that "the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." § 768.72(2)(b), Fla. Stat.

To amend a complaint to add a claim for punitive damages against a corporate defendant, like Cheney Bros, a plaintiff must show culpable conduct at both the employee level and the corporate level. *Agosto*, 364 So. 3d at 1106 (citing § 768.72(3)(c), Fla. Stat. (2022)).

B. The Trial Court Erred in Applying the Standards for Pleading Punitive Damages

The trial court erred in applying the foregoing standards as to both Mr. Azurin and Cheney Bros. in two significant respects. While the trial court wrote that it reviewed . . . the proffered evidence from both sides" and viewed "the totality of the entire evidence," *see* A.2154, 2158, 2159, the trial court does not discuss or reference any evidence proffered by Defendants.

For example, with respect to how the accident occurred, the trial court ignored the testimony of Mr. Azurin and the only witness to the accident and, instead, based his finding as to how the accident occurred "on the video evidence *alone*." A.2158 (emphasis added). The trial court also ignored Mr. Francois' comparative fault by allegedly stopping his vehicle in a lane of travel on a busy highway

before sunrise which law enforcement found to be a contributing cause of the accident.

The trial court also considered that Cheney Bros. failed to conduct "the most elementary investigation into Mr. Azurin's qualifications a driver," *see* A.2159, but this flies in the face of voluminous evidence contained in Mr. Azurin's employment file which shows that Cheney Bros. extensively vetted Mr. Azurin (the entire file was proffered by Plaintiff). This finding also shows that the trial court improperly accepted as true Plaintiff's proffer which selected only the evidence from the employment file that supported his claim.

The trial court also found that Cheney Bros. did not obtain Mr. Azurin's history of DUI, *see* A.2159, but it was undisputed that Cheney Bros. learned about this seven-year-old DUI during its vetting process, interrogated Mr. Azurin regarding it, and escalated it to its HR Director, but it did not impact its hiring decision. *See* A.1664, 1707-08, 1717, 1313, 1597; *see also* A.1758 (resp. to req. for admission no. 11). Additionally, it is undisputed that Mr. Azurin was not impaired, so a seven-year-old DUI is irrelevant. The trial

court's failure to follow the pleading standards for punitive damages claims warrants reversal.

II. THE TRIAL COURT ERRED BECAUSE PLAINTIFF DID NOT MAKE A REASONABLE SHOWING FOR ALLEGING A PUNITIVE DAMAGES CLAIM AGAINST CHENEY BROS.

Section 768.72(3), Florida Statutes sets forth the corporate conduct that may allow a plaintiff to seek punitive damages against a corporate entity. "To show corporate culpable conduct, the plaintiff must present evidence that the corporation itself is directly liable." *Agosto*, 364 So. 3d at 1106. "[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." *Id.* (internal quotations omitted). In this case, Plaintiff relied on subsections (b) and (c) which provide:

> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct;
>
> (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***.

(Emphasis added); *see* A.267, 287. A plaintiff must proffer conduct of a managing agent to support punitive damages under both these

subsections. *See Perlmutter*, 376 So. 3d at 37; *Pinnacle Prop. Mgmt. Servs., LLC v. Forde*, 372 So. 3d 292, 297 (Fla. 4th DCA 2023); *Agosto*, 364 So. 3d at 1106.

As discussed below, Plaintiff did not establish a reasonable basis for the recovery of punitive damages at the corporate level against Cheney Bros. because: **(A)** he proffered no evidence that a managing agent of Cheney Bros. knowingly condoned, ratified or consented to Mr. Azurin's misconduct or that a managing agent engaged in gross negligence that contributed to the death of Mr. Francois; **(B)** even assuming Plaintiff had proffered managing agent conduct, Cheney Bros.' conduct in hiring Mr. Azurin did not constitute gross negligence that proximately caused Mr. Francois' death; and **(C)** there is no underlying liability claim alleged against Cheney Bros. for negligent hiring to support Plaintiff's claim for punitive damages.

A. The Trial Court Erred in Allowing a Claim for Punitive Damages Against Cheney Bros. When Plaintiff Proffered No Evidence of Conduct by a Managing Agent of Cheney Bros.

Plaintiff did not proffer any testimony or evidence that any managing agent of Cheney Bros. knowingly condoned, ratified or

consented to Mr. Azurin's alleged misconduct or that any managing agent engaged in gross negligence that contributed to the death of Mr. Francois.[5] The omission of this critical element for a punitive damages claim against a corporate defendant requires reversal.

As stated by this Court in *Agosto*: "A managing agent must be more than a mid-level employee who has some, but limited, managerial authority. 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**." 364 So. 3d at 1106-07 (emphasis added, citations & internal quotations omitted). Quoting from *FPL v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019), this Court expounded on this principle:

> [A managing agent] is more than just a manager or midlevel employee. *See Ryder Truck Rental, Inc. v. Partington*, 710 So. 2d 575, 576 (Fla. 4th DCA 1998) ("[A] job foreman is not, as required for imposing direct liability, a managing agent of the company."); *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994) (citing *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985)) (holding that one of several bank vice presidents, who was not on the board of directors or the loan committee, did not qualify as a managing agent); *Pier*

[5] Plaintiff argued below that he was not required to proffer any managing agent evidence under § 768.72(3). A.2093-94. He did not address the contrary law as stated in *Agosto* and its progeny and cited no cases to support his position.

> *66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th DCA 1989) (holding that a hotel manager was not a managing agent of the corporation that owned the hotel). Rather, a managing agent is an individual like a "president [or] primary owner" who holds a "position with the corporation which might result in his acts being deemed the acts of the corporation." *Taylor v. Gunter Trucking Co., Inc.*, 520 So. 2d 624, 625 (Fla. 1st DCA 1988).

Agosto, 364 So. 3d at 1107 (second & third alterations in original).

In this case, Plaintiff proffered no evidence that a managing agent of Cheney Bros. knowingly condoned, ratified or consented to Mr. Azurin's conduct[6] or engaged in gross negligence. At the time of the hearing, Plaintiff had deposed only two Cheney Bros. employees, Marla Nairn and Gary Simpson, who are not managing agents and did not testify about the conduct of a managing agent. Ms. Nairn was the recruiting and leave manager for Cheney Bros from July 2011 to July 2023 and is currently a human resources manager at a location where Mr. Azurin does not work. *See* A.1634-35, 1639, 1728-29. Mr. Simpson was the director of transportation in 2021. *See* A.1667-68, 1938-39, 1963. Neither had the power to terminate. A.1668, 1942-

[6] The only relevant conduct would be negligent driving by Mr. Azurin. During his ten months driving for Cheney Bros, Mr. Azurin was not disciplined for improper driving or cited for any traffic violations. *See* A.1395, 1975-76, 1987, 1988-89.

43. Plaintiff did not proffer any portion of these depositions to support his claim for punitive damages against Cheney Bros. *See Perlmutter*, 376 So. 3d at 33 n.6 (noting that the term "proffer" for purposes of Rule 1.190(f) "refers only to timely filed documents and excludes oral representations of additional evidence made during the hearing").

Regardless, Plaintiff did not proffer any evidence that they had ultimate decision-making authority for the company or that their acts were deemed to be the acts of the corporation. On the contrary, Plaintiff offered only the following that is insufficient to meet *his* burden under section 768.72(3): "As far as whether these employees were high enough to constitute a managing [agent], I think at this point, at the amend stage, *it's not clear that they wouldn't meet that threshold*." A.2094 (emphasis added).

B. Even Assuming Marla Nairn Was a Managing Agent, Her Conduct in Hiring Mr. Azurin Did Not Constitute Gross Negligence that Proximately Caused the Decedent's Death[7]

The trial court found that punitive damages were warranted against Cheney Bros. because it "fail[ed] to conduct *the most elementary* investigation into Mr. Azurin's qualifications as a driver of a commercial tractor trailer, and/or his ability to safely operate a commercial vehicle." A.2159 (emphasis added).[8] This finding is at odds with the contents of Mr. Azurin's employment file (proffered by Plaintiff), which showed that Cheney Bros. extensively vetted Mr. Azurin's driving abilities and qualifications before hiring him.

Moreover, although Cheney Bros. made some mistakes in investigating Mr. Azurin's background, they were not "quasi-criminal" and did not evince a reckless disregard for human life. They also did not exhibit any of the hallmarks for punitive damages.

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[7] Because the trial court did not find that Cheney Bros' conduct in retaining and supervising Mr. Azurin supported the imposition of punitive damages and Plaintiff has not cross-appealed that ruling, we limit our discussion to Ms. Nairn's alleged gross negligence in hiring Mr. Azurin.

[8] By citing to *Stearns & Culver Lumber Co. v. Cawthon*, 56 So. 555, 558 (Fla. 1911), the trial court also implied that Cheney Bros. did not make the "slightest effort" to investigate Mr. Azurin's background. *See* A.2159.

Cheney Bros. did not have actual knowledge of Mr. Azurin's numerous traffic citations or his driving record with a prior employer, Sysco, during the hiring process and did not flout its legal duty to check Mr. Azurin's driving record. *See Meyer v. Trux Transp., Inc.*, No. CIV A 105CV-02686, 2006 WL 3246685, at *9 (N.D. Ga. Nov. 8, 2006) (finding that a plaintiff can present evidence to support an award for punitive damages claim for negligent hiring "only by showing that an employer had actual knowledge of numerous and serious violations on its driver's record, or, at the very least, when the employer has flouted a legal duty to check a record showing such violations."). Moreover, where there is evidence that employers complied with federal regulations in investigating the background of their drivers, as in this case, courts have granted summary judgment on claims for punitive damages for negligent hiring, retention, training, and supervision. *See, e.g., Hutcherson v. Progressive Corp.,* 984 F.2d 1152, 1155-56 (11th Cir. 1993); *Bartja v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.,* 463 S.E.2d 358, 362 (Ga. Ct. App. 1995).

The decision in *Clooney v. Geeting*, 352 So. 2d 1216, 1218 (Fla. 2d DCA 1977), which involved a passenger suing a truck driver and the truck driver's employer (among others) for injuries he sustained

in a collision with the truck driver is very instructive. There, a car passenger sought punitive damages on the basis that the truck driver's employer "knew that [the truck driver] was neither physically nor mentally able to properly drive the truck, and that its safety manager had pointed this out prior to the accident." *Id.* at 1219. The trial court struck the passenger's punitive damages claim, which was upheld on appeal. The court found these allegations "insufficient to show the necessary malice or the wanton, willful, or outrageous conduct required to support a claim for punitive damages." *Id.*

Here, Plaintiff's punitive damages claim against Cheney Bros. for its hiring of Mr. Azurin does not rest on its actual knowledge of Mr. Azurin's driving record; rather, Plaintiff alleges that *had Cheney Bros.' conducted an adequate background check* it would have disclosed his driving record. If actual knowledge in *Clooney* was not enough to allege punitive damages, then a claim based on an employer's failure to disclose the employee's driving record surely falls short of meeting the standard for alleging punitive damages.

Cheney Bros. argues below additional grounds warranting reversal.

1. Due Diligence

The trial court inexplicably found that Cheney Bros. did not conduct the "most elementary investigation" and implied that Cheney Bros. was "willfully ignorant." A.2159. But Mr. Azurin's employment file proffered by Plaintiff contained unrebutted evidence that Cheney Bros. exercised due diligence in vetting Mr. Azurin as a driver during the application process.

Cheney Bros. hired Mr. Azurin in November 2021. *See* A.1750 (ans. to interrog. no. 3). On September 30, 2021, Mr. Azurin completed his application to be a Class A CDL Driver for Cheney Brothers. *See* A.1578, 1669. Cheney Bros.' decision to hire Mr. Azurin was not just based on his employment history; it was also based on his two interviews with the transportation department; his application which he certified as accurate; his motor vehicle record, and his road test, *see* A.1700, 1730, and the following vetting process:

(1) Cheney Bros. verified that Mr. Azurin had been issued a CDL license with a "Safe Driver" designation pursuant to section 322.121, Florida Statutes. *See* A.1570; *see also* A.1757 (resp. to req. for admission no. 6).

(2) A medical professional certified that Mr. Azurin was physically qualified to drive pursuant to the Federal Motor Carrier Safety Regulations (FMCSR). *See* A.1575.

(3) In his application, Mr. Azurin denied any felony convictions, denied ever having a license, permit or privilege suspended or revoked, denied any accidents or traffic convictions in any commercial or personal vehicle in the past three years, and noted that he was currently employed as a truck driver, and detailed his driving experience. A.1581, 1584-85.

(4) Cheney Bros. ordered a background screening report on Mr. Azurin from Atlantic Employee Screening. *See* A.1597. The criminal records search showed a DUI conviction on June 9, 2014. *Id.* The search also showed that Mr. Azurin had a valid Class A Commercial Driver's License. A.1599. The report documented that Mr. Azurin had passed the following fifteen exams over the years: vision; road sign; road rules; driving; CDL vision; general knowledge; air brakes; combined vehicle; double triples; tanker; hazardous material; passenger transport; inspection; skills; and basic skills. A.1600-01. Based on the foregoing, Atlantic Employee Screening

concluded that Mr. Azurin was a "SAFE DRIVER" which corroborated the designation on his commercial driver's license. A.1601.

(5) Cheney Bros. administered a road test which examined Mr. Azurin's competency in 117 different areas. *See* A.1603-04, 1374-75. His performance was found to be "satisfactory" — the only positive grade — in every applicable area. *Id.* The examiner certified after about ten miles of driving that Mr. Azurin "possesses sufficient driving skill to operate safely" a commercial motor vehicle.[9] A.1605.

(6) Cheney Bros. required Mr. Azurin to complete safety training which included viewing a HAZMAT Security Awareness training DVD and assorted topics were covered including classification, documentation, packaging and hazard identification, handling and transport, Hazmat incidents, the FMCSR, and fatigue driving. *See* A.1594, 1360-61, 1363-64,

[9] Plaintiff's conclusory allegation that Cheney Bros. placed Mr. Azurin on the road with "only entry level driving training" was belied by this evidence. A.283 ¶ 61. Plus, Mr. Azurin had been driving commercial vehicles for over 20 years and did not need "entry level" training. A.1670-71.

1366. Cheney Bros. certified that Mr. Azurin completed the training requirements in the FMCSR in accordance with 49 C.F.R. § 380.503. A.1595.

(7) Cheney Bros. queried the Drug & Alcohol Clearinghouse of the FMCSA and learned on December 26, 2021, that Mr. Azurin was not prohibited from driving. *See* A.1576-77.

(8) Cheney Bros. obtained a certification from Mr. Azurin that he had never tested positive on any pre-employment drug or alcohol test in the past two years. A.1617.

(9) Cheney Bros. obtained from the FMCSA Pre-Employment Screening Program (PSP) Mr. Azurin's commercial driving safety record for the past five years and his safety inspection history for the past three years which yielded no positive hits (*i.e.*, no crash activity and no negative inspection history). *See* A.1618-20. Because Cheney Bros. inputted the incorrect driver's license number for Mr. Azurin (off by one digit), no crash or inspection results were found in the PSP. *See* A.277 ¶ 55; A.1727. Plaintiff claims that the lack of records was a "red flag" that should have been "investigated by Cheney." *Id.* But Marla Nairn, a human resources manager for Cheney

Bros., testified to the opposite. *See* A.1658-59, 1727, 1728, 1729, 1732-33 (testifying that it is not a "red flag" when "nothing comes up" on the PSP Report "[b]ecause that happens all the time" and even for a 20-year driver it happens "often" and it is not "unusual" not to see any driver inspections).

(10) Mr. Azurin certified that he had not been convicted or forfeited bond or collateral in the past twelve months for any traffic violation. A.1623.

(11) Cheney Bros. required Mr. Azurin to take a drug test which was negative. A.1624.

(12) Cheney Bros. screened Mr. Azurin for forty-four different medical conditions to assess his ability to drive. A.1040.

(13) On November 4, 2021, Cheney Bros. requested by fax from Mr. Azurin's last employer, Sysco, its safety performance history records. *See* A.1606-07, 1610-11. Cheney Bros. repeated this request on November 10, 2021, November 19, 2021, and December 2, 2021, but received no responses. A.1608-10, 1689, 1692, 1696. Cheney Bros. did the same for Werner by email on November 4, 2021, November 10, 2021, and

November 19, 2021, but also received no response.[10] *See* A.1612-13, 1686-87. This was not a "red flag" for Cheney Bros. because it "happens often." A.1687. The trial court found that Cheney Bros. "fail[ed] to verify [Mr. Azurin's] employment," *see* A.2159, but as shown above, Cheney Bros. did attempt to verify Mr. Azurin's prior employment. Its conduct does not exhibit any willful or wanton conduct which would substantiate a claim for punitive damages.

(14) Cheney Bros. gave Mr. Azurin the FMCSR Pocketbook, and he agreed to familiarize himself with the FMSCR. *See* A.1596.

Plaintiff contended that had Cheney Bros. obtained Mr. Azurin's employment file with this prior employer, Sysco, that it would not have hired him. But that is not correct. Mr. Azurin was employed from Sysco from December 18, 2017, through December 17, 2020. *See* A.1761, 1816. During those three years, he only had one accident; it did not involve a collision with another vehicle but related to driving over a curb on Sysco property at a top speed of 13 m.p.h.

[10] Cheney Bros. had initially checked the online system of Werner Enterprises (a trucking company) and determined that he was not employed there but realized that it had checked the wrong Werner entity. A.1685-86.

A.1852-53. Sysco promoted Mr. Azurin on October 13, 2019. A.1827-34, 1915-17. Finally, Sysco did not terminate Mr. Azurin because of any driving issues; he was terminated because of dereliction of duty. A.1762.

Similarly, Plaintiff claimed that had Cheney Bros. conducted a "simple interview" of Mr. Azurin it would have allegedly "dispelled any desire" to hire him because it would have disclosed that he: (a) was unable to state how far ahead on the road he is supposed to be looking pursuant to the Florida CDL handbook; (b) was unaware of the legal blood alcohol content limit; (c) was unable to describe what a roadway hazard was. A.280 ¶ 60. This conclusory assertion is not accurate. As noted above, Cheney Bros. thoroughly vetted Mr. Azurin's driving skills and ability and none of the foregoing would have changed its decision to hire Mr. Azurin. Mr. Azurin underwent an "interview process" with the Cheney Bros.' management team which included at least two interviews and, after he was hired, a three-hour on-boarding process. A.1642, 1649, 1662, 1675-76, 1678-79, 1967. He was interviewed, in part, to assess whether he was competent and qualified for the job. A.1945-46, 1949. He was

questioned about hooking-up, trip inspections, the hours he reported on his previous jobs, and safety meetings he attended. A.1952-53.

2. Mr. Azurin's Driving Record

The trial court found that Cheney Bros' "alleged failure to obtain a basic driving history" of Mr. Azurin warranted punitive damages. A.2159. As noted above, this failure was due to an honest mistake – typing in Mr. Azurin's driver's license number with one number wrong in the PSP – and Sysco's failure to respond to Cheney Bros' multiple requests for information. Plaintiff suggested that Cheney Bros. should have also searched court dockets to find prior traffic citations. They cited to no regulation, rule, or case to support this duty under the trucking regulations. Perhaps more importantly, even if Cheney Bros' had disclosed these citations, none would have been relevant as a matter of law under the Federal Motor Carrier Safety Act (FMCSA) to its hiring decision and they are inadmissible charging documents, not adjudications of guilt.

Under the FMCSA regulations, only "accidents" in the prior three years are deemed relevant to an employer's hiring decision of a driver. *See* 49 C.F.R. § 391.23(k)(1) ("The prospective motor carrier must use the information described in paragraphs (d) [three-year

accident history] and (e) [three-year drug and controlled substance violations] of this section only ***as part of deciding whether to hire the driver***." (emphasis added)). "Accident" is narrowly defined to mean: "an occurrence involving a commercial motor vehicle operating *on a highway* in interstate or intrastate commerce which results in: (i) A fatality; (ii) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or (iii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle(s) to be transported away from the scene by a tow truck or other motor vehicle." 49 C.F.R. § 390.5.

Plaintiff referred to incidents and citations in 2009, 2012, 2015, 2016, 2018, 2020 that Cheney Bros. did not discover during its background investigation.[11] A.274-75 ¶ 49. But the incidents in 2009, 2012, 2015, 2016, and 2018 are more than three years before

[11] Plaintiff claimed that these "all . . . are easily found on th[e] [trial] [c]ourt's docket search," A.275 ¶ 50, but at least eight involve internal discipline by a prior employer with no corresponding evidence of a law enforcement citation. Cheney Bros. checked Mr. Azurin's motor vehicle record using Atlantic Screening and these additional citations did not show up, so it "would have no reason" to check it again. *See* A.1660-61.

Mr. Azurin was hired so they would not have been legally relevant to Cheney Bros.' hiring decision. The incidents in 2020 did not involve "accidents" so they also would not have been relevant. *See* A.1843 (cited by prior employer for being sleepy/dozing/loafing on Jan. 14, 16, and 17, 2020); A.1842 (cited by prior employer for leaving a trailer full of goods in a loading dock on June 18, 2020); A.832 (cited by prior employer for sitting in a parking lot for 4 hours and claimed that he was waiting for fuel).

Many incidents and citations occurring before 2020 also did not involve "accidents" under the FMCSR so they were not legally relevant to Cheney Bros.' hiring decision. A.801 (cited for leaving the scene of a crash involving only property damage and improper backing on Mar. 2, 2009);[12] A.803 (cited for careless driving with only property damage on Dec. 30, 2009); A.806 (cited for running a red light in his personal vehicle on Sept. 4, 2012);[13] A.60 (cited for a rear-end crash in his personal vehicle only involving property damage on Dec. 16,

[12] Mr. Azurin was not adjudicated guilty for this citation because he agreed to perform community service and complete a defensive driving class. *See* A.1331, 2006.

[13] This citation was dismissed. A.1208 (ans. to interrog. no. 2).

2015);[14] A.820 (cited for having a tag light out on his personal vehicle on Aug. 23, 2017); A.823 (cited by his prior employer for following too closely on Apr. 14, 2018); A.825 (cited by his prior employer for not paying attention); A.828 (cited by his prior employer for being drowsy on Oct. 30, 2018).

The trial court's order also found that Cheney Bros. failed to disclose Mr. Azurin's "history of driving under the influence." A.2159. But it was undisputed that Cheney Bros. knew about this incident, interrogated Mr. Azurin regarding the specifics, escalated it to its director of human resources, but it did not impact its hiring decision because it had occurred seven years before he was hired, and this one offense did not show a pattern of driving while impaired. *See* A.1313, 1664, 1707-08, 1717; *see also* A.1758 (resp. to req. for admission no. 11). The accident in this case was not caused because Mr. Azurin was impaired by alcohol or drugs.

Finally, it is axiomatic that a proffer must be based on evidence admissible at trial. *See Brevard Achievement Ctr., Inc. v. Camp*, 254

[14] This citation was dismissed, *see* A.1208 (ans. to interrog. no. 2), and also was not filed as part of the proffer.

So. 3d 1135, 1137 n.2 (Fla. 5th DCA 2018). A traffic citation is nothing more than a charging document containing the observations and impressions of a law enforcement officer. *Estate of Wallace v. Fisher*, 567 So. 2d 505, 508 (Fla. 5th DCA 1990); Fla. H.R. Comm. on Transp., HB 1697 (2005) Staff Analysis 19 (final Apr. 22, 2005) (hereinafter "Staff Analysis"). Florida law therefore bars the admissibility of any traffic citation at "any trial." *See* § 316.650(9), Fla. Stat. ("Such citations shall not be admissible evidence in any trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation."); *Fisher*, 567 So. 2d at 508 ("Evidence that an officer either issued, or did not issue, a traffic citation is not admissible to show that the defendant did or did not violate a particular traffic ordinance or evidence that the defendant either did, or did not do any particular act.").[15] The statute reflects that "as a matter of public policy . . . the prejudicial effect of the

[15] The exceptions relate to the falsification, forgery, uttering, fraud, or perjury of the traffic citation itself which are not relevant here. *See Maddox v. State*, 923 So. 2d 442, 447-48 (Fla. 2006); *see also* Staff Analysis 19.

citation as evidence outweighs it probative value." Staff Analysis 18-19. Because these traffic citations were inadmissible and were not adjudications of guilt, they could not be used to support Plaintiff's claim for punitive damages against Cheney Bros.

Plaintiff argued below that because the citations were not being admitted to prove that Mr. Azurin was negligent but were being used to show that that Cheney Bros. did not uncover them in its background investigation that they should be admissible. A.2078, 2083-84. But § 316.650(9) contains no such exception and suggesting that the statute "would be inapplicable" because its purpose would not be defeated by admitting the citations is unavailing. *See Bouie v. State,* 292 So. 3d 471, 478 (Fla. 2d DCA 2020) (stating that "broad appeals to purpose do not permit [courts] to ignore the unambiguous language of a statute[.]"); *see also Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, 192 So. 3d 498, 507 (Fla. 2d DCA 2016) (stating that an "appeal to the legislature's assumed purpose as an aid to statutory construction is irrelevant" when the text of a statute is unambiguous"). Even assuming § 316.650(9) did not apply to this situation, the probative value of admitting the citations against Cheney Bros. would be substantially outweighed by

the danger of unfair prejudice to Mr. Azurin. *See* § 90.403, Fla. Stat.; Staff Analysis 18-19.

3. Mr. Azurin's Application Misstatements

Plaintiff claimed that had Cheney Bros. "reviewed" Mr. Azurin's application it "would have discovered" numerous misrepresentations that would have precluded him from employment as a driver. A.277 ¶ 56. But Plaintiff cannot explain how this would support a claim for punitive damages. An employer's failure to ferret out a prospective employee's application misstatements which the employee certifies as accurate does not exhibit willful and wanton behavior that shows a reckless disregard for the welfare of others. There is no rule, statute or case that requires an employer to fact-check every piece of information in a prospective employee's application. More to the point, Cheney Bros. vetted Mr. Azurin's driving knowledge, skills, and ability before hiring him. So, the misstatements relating to his driving record would not have had any bearing on its decision to hire him.

Moreover, a potential employer is entitled to rely on an applicant's ostensibly truthful answers in an employment application. *See Jenkins v. Milliken*, 498 So. 2d 495, 496 (Fla. 2d DCA 1986) (explaining that an employer may rely on an employee's job

application and need not independently investigate the employee's background when the job entails only incidental contact with others). Mr. Azurin certified that his answers were truthful by signing the application. A.1583. Therefore, Cheney Bros.' failure to discover Mr. Azurin's dishonesty before it hired him does not constitute even ordinary negligence.

4. Mr. Azurin's Employment History

Plaintiff claims that had Cheney Bros. "investigat[ed]" Mr. Azurin's employment history, it would have discovered numerous facts, but fails to explain how this amounts to willful and wanton conduct. A.279 ¶ 57. As discussed above, Cheney Bros. did not flout its obligation to conduct a background investigation. It attempted to obtain Mr. Azurin's employment history from Sysco and Werner but did not get a response from either after multiple requests.

C. The Trial Court Erred in Allowing a Claim for Punitive Damages Against Cheney Bros. Because There Was No Underlying Liability Claim Against Cheney Bros. for Negligent Hiring

"Given the nature of the applicable statute and rule, the court must consider both the pleading component and the evidentiary component of each motion to amend to assert punitive damage

claims." *Perlmutter*, 376 So. 3d at 32 (emphasis in original). "Thus, once the trial court determines the proposed amended complaint states sufficient allegations to plead a proper punitive damages claim, the trial court must next determine whether the movant has established a reasonable factual basis for its punitive damages claim consistent with the allegations in the amended complaint." *Id.* "If the evidentiary showing does not match the amended complaint's allegations, the trial court should not permit the punitive damages claim." *Id.* As discussed below, because the Second Amended Complaint contained no underlying liability claim against Cheney Bros. for negligent hiring, the claim for punitive damages against Cheney Bros. for its hiring conduct was legally deficient.

"[A] demand for punitive damages is not a separate and distinct cause of action; rather it is auxiliary to, and dependent upon, the existence of an underlying claim." *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016) (internal quotations omitted). "As such, any award of punitive damages can only be entered *after awarding damages in conjunction with an underlying and successful claim for actual damages*." *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 456 (Fla. 3d DCA 2003) (emphasis added), *decision approved in part,*

quashed in part on other grounds, 945 So. 2d 1246 (Fla. 2006); *see also Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 355 (Fla. 2d DCA 2013) (stating that "punitive damages are merely a remedy that must be asserted in conjunction with a substantive claim"). Stated another way, because a claim for punitive damages is not an independent tort, the alleged acts of the defendant that underlie the claim for punitive damages must coincide with the acts of the defendant that give rise to the moving party's underlying claim for liability against that defendant.

In this case, the Second Amended Complaint alleges no claims against Cheney Bros. for negligent hiring. It only alleges three individual claims against Cheney Bros' employees. Because there is no underlying liability claim against Cheney Bros. for negligent hiring, there is no basis for the recovery of punitive damages against Cheney Bros. based on its negligent hiring of Mr. Azurin. *See Echols v. R.J. Reynolds Tobacco Co.*, No. 2:13-CV-14215, 2014 WL 5305633, at *6 (S.D. Fla. Oct. 15, 2014) (dismissing plaintiffs' punitive damages claim after the court dismissed all counts in the complaint).

III. THE TRIAL COURT ERRED IN FINDING PLAINTIFF ESTABLISHED A REASONABLE BASIS FOR ALLEGING PUNITIVE DAMAGES AGAINST CHENEY BROS. BECAUSE MR. AZURIN'S DRIVING DID NOT CONSTITUTE GROSS NEGLIGENCE, AND HIS UNTRUTHFULNESS ON HIS JOB APPLICATION DID NOT PROXIMATELY CAUSE THE HARM SUFFERED

A. Plaintiff Did Not Proffer Clear and Convincing Evidence that Mr. Azurin's Operation of the Cheney Bros.' Tractor-Trailer Constituted Gross Negligence

As discussed above, Plaintiff did not make a reasonable showing at the corporate level to entitle him to allege a claim for punitive damages against Cheney Bros. Plaintiff also failed to make the requisite showing at the employee level by showing "that [Mr. Azurin] was personally guilty of intentional misconduct or gross negligence." *Agosto*, 364 So. 3d at 1106 (citing § 768.72(2), Fla. Stat.). It is axiomatic that "[a]llegations of misfeasance or malfeasance, or breaches of a professional standard of care, cannot without more be converted into a claim for punitive damages simply by labeling them as 'grossly' negligent." *Ebsary Found. Co. v. Servinsky*, 378 So. 3d 625, 627 (Fla. 4th DCA 2023).

Accepting as true Plaintiff's version of the accident, this case involves a driver who failed to see a stopped vehicle in a travel lane on I-95 before sunrise and rear-ended the stopped vehicle. *See* A.256

¶ 37 (stating that the conduct at issue in this case is Mr. Azurin's "failure to observe/pay attention/see the roadway"). The trial court found that this warrants punitive damages, *see* A.2158, but did not cite one case to support its finding. At most, this conduct constitutes ordinary negligence with substantial comparative fault on the part of Mr. Francois.[16] *See* A.244 ¶ 16 (alleging Mr. Azurin's "*complete* disregard for the safety of others" rather than a "*reckless* disregard for the safety of others" (emphasis added)).[17] It lacks any character of outrage that would warrant punitive damages.

There are also no facts that would elevate Mr. Azurin's negligence into gross negligence. Mr. Azurin was not speeding but traveling at least 10 m.p.h. under the speed limit; he was not traveling too fast for the conditions; he was not impaired; he was not asleep or dozing; he was not texting; and he was not on the phone or

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[16] Plaintiffs Original and Amended Complaints did not allege that Mr. Azurin's conduct constituted gross negligence or that he engaged in intentional misconduct; rather, both complaints alleged simple negligence claims. *See* A.11 ¶ 1; A.14-15 ¶¶ 22-26; A.120 ¶ 1; A.123-24 ¶¶ 31-34.

[17] While it would be inadmissible, Mr. Azurin was cited for failing to render assistance, *see* § 316.0629(1), Fla. Stat., but he feared for his safety in approaching the burning vehicle after it had exploded. *See* A.1301, 1456, 1459, 1476.

distracted. *See* A.1062, 1063, 1077; *see also* A.251 ¶ 32 ("Whether Azurin was distracted, simply not paying attention, fatigued, or was a combination of all three, ***we will never know for certain***." (emphasis added)). There was also no proffered evidence that Mr. Azurin was driving erratically shortly before the collision.

Moreover, should this Court find that traffic citations are admissible, Mr. Azurin was charged only with careless driving, *not* "reckless driving," which is defined as "willful and wanton disregard for the safety of persons or property." *See* § 316.192, Fla. Stat.; A.1073-74. FHP also found that Mr. Francois' actions contributed to the traffic crash. A.1073. *Cf. Westray v. Wright*, 834 N.E.2d 173 (Ind. Ct. App. 2005) (holding that evidence in injured motorists' negligence action against semi-truck driver and his employer, which arose out of a rear-end accident near intersection, failed to establish that driver acted purposefully, with malice, or with gross negligence, so as to support award of punitive damages when driver was not speeding at the time of the accident, he was alone and was not listening to the radio or a CD, he had been driving for just over four hours prior to the accident, and there was no evidence that he was drowsy, intoxicated, or otherwise affected by any foreign substance); *Oaks v.*

Wiley Sanders Truck Lines, Inc., No. CIV.A. 07-45, 2008 WL 2859021, at *2 (E.D. Ky. July 22, 2008) (granting partial summary judgment in favor of tractor-trailer driver and its owner on punitive damages claims when driver failed to stop or slow at traffic light which he did not see and struck plaintiff's vehicle when driver was not intoxicated, was not speeding, and was driving his truck safely immediately before the accident occurred even though driver had a history of traffic law violations, and an unprofessional and unsafe attitude toward his job as a tractor-trailer truck driver).

B. Mr. Azurin's Misstatements in His Cheney Bros.' Job Application Do Not Provide a Basis for Punitive Damages

The trial court found that Mr. Azurin's "pattern of outright falsification and deception as it relates to his driving record," educational background and employment history in his job application with Cheney Bros. warranted punitive damages. A.2156-58. These misstatements, however, do not provide a basis for punitive damages.

First, only conduct *by Mr. Azurin* that *proximately caused* Mr. Francois' death was relevant to Plaintiff's punitive damages claim against Mr. Azurin. *See Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla.

1976) (reiterating that one of the "traditional elements for punitive liability" is "proximate causation"); Fla. Std. Jury Instr. (Civ.) 503.1(b)(3). Stated another way, punitive damages must be grounded on conduct that harmed the injured party. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409–10 (2003) (stating that "conduct must have a nexus to the specific harm suffered by the plaintiff" to support an award of punitive damages). Similarly, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 422–23; *see, e.g., Philip Morris USA, Inc. v. Rintoul*, 342 So. 3d 656, 664-65 (Fla. 4th DCA 2022) (endorsing *Campbell* and holding that defendant's parent company's youth marketing of e-cigarettes could not justify award of punitive damages when the specific conduct which led to the smoker's death was his addiction to *tobacco* cigarettes, not e-cigarettes).

Numerous cases have enforced this bedrock principle of punitive damages jurisprudence with facts remarkably similar to this case. In *M.T. v. Saum*, plaintiffs, who were passengers on a

commercial charter bus, were injured when the bus driver allegedly rounded a curve at a high rate of speed, while driving one-handed, and lost control of the bus, causing it to overturn. 3 F. Supp. 3d 617, 621 (W.D. Ky. 2014). Plaintiffs claimed that the driver's omission on his job application that he was an insulin-dependent diabetic – which rendered him unqualified to drive a bus under the FMCSR – justified punitive damages. *Id.* at 625. The district court found, however, that under *Campbell* "these assertions play no role in the Court's punitive damages analysis" because "Plaintiffs have not demonstrated the requisite causal nexus between [the driver's] diabetes and his negligent driving and loss of control." *Id.* In short, "there [was] no proximate relationship between the Kentucky accident and [the driver's] failure to accurately report his entire medical history . . . ." *Id.* at 626.

The decision in *Estate of Embry v. GEO Transp. of Indiana, Inc.* is also illustrative. 478 F. Supp. 2d 914, 922 (E.D. Ky. 2007). In *Embry,* the plaintiffs were injured when the driver of a tractor-trailer choked on coffee, passed out, crossed the median, and hit the plaintiffs' oncoming vehicle in 2002. *Id.* at 916-17. The plaintiffs, like Plaintiff here, took a broad view on what was relevant to their punitive

damages claim—arguing that the court should consider the driver's "course of conduct" before the accident. *Id.* at 922. Specifically, the plaintiffs offered "voluminous evidence dating back as far as 1975 of various physical ailments and illnesses suffered by [the driver]" that the driver "fraudulently omitted" from his job application. *Id.* The district court, however, found that this evidence did not support the punitive damages claim because there was no "proximate 'nexus'" between the accident and the driver's failure to accurately report his medical history to his employers.[18] *Id.* at 923.

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[18] *See also Cayne v. Washington Tr. Bank*, No. 2:12-CV-00584, 2015 WL 7185433, at *2 (D. Idaho Nov. 13, 2015) (denying, in part, plaintiffs' motion for leave to add a claim for punitive damages because "[m]uch of the alleged 'bad conduct' . . . relied upon by Plaintiffs stems from" a 2004 loan which "is not the act upon which liability in this case is premised"); *Meherg v. Pope*, No. 1:10-CV-00185, 2013 WL 5934143, at *10 (W.D. Ky. Nov. 5, 2013) (finding that truck driver's failure to seek medical recertification following hospitalization for a COPD exacerbation did not support claim for punitive damages because there was no "correlation" between the alleged failure to seek medical recertification and the subject accident which occurred when the tractor-trailer rear-ended a stopped vehicle); *Destefano v. Children's Nat'l Med. Ctr.*, 121 A.3d 59, 67-68 (D.C. 2015) (affirming trial court's refusal to submit punitive damages claim to jury in case involving injuries caused when minor fell down parking garage air shaft when garage operator forged employee signatures on safety inspection checklists before accident because operator's attempt to cover up its failure to inspect "was not the tortious act that caused harm to plaintiffs").

The district court also rejected a "but for" theory for the nexus requirement—*i.e.*, the driver would never have been driving his truck on the day in question but for the fact that he obtained his commercial driver's license based on his fraudulently misrepresented medical history:

> The fact that extra-territorial acts or omissions, even wrongful ones, result in a defendant being in a place where he otherwise would not have been—a place where he ultimately causes harm to another person—is insufficient to justify punitive damages where the extra-territorial conduct is independent of, and not proximately related to, the acts upon which liability is premised. *State Farm,* 538 U.S. at 422, 123 S. Ct. 1513.
>
> The requirement of proximate rather than mere "but for" causation between the extraterritorial conduct and the plaintiff's injury is consistent with the purpose of punitive damages, which is to allow a state to punish and deter conduct that is of such nature that the tortfeasor, either intentionally or in a grossly negligent manner, exposes the plaintiff to harm that foreseeably flows from his conduct. *See BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) (citations omitted). Absent some degree of foreseeability, no deterrent purpose would be served because a defendant who has no reason to suspect that his conduct would lead to the type of harm suffered by the plaintiff would not take such possible harm into account in structuring his conduct.

Id. at 922-23.

Plaintiff pointed to eleven different misstatements in Mr. Azurin's job application to support punitive damages: (1) his years of experience at a prior employer, Sysco, *see* A.1230, 1235; (2) the reason for his termination from Sysco (*i.e.*, dereliction of duty), *see* A.1231-32, 1283, 1285; (3) that he was previously employed by Werner, *see* A.1235-36, 1270; (4) that someone else completed his Cheney Bros.' job application, *see* A.1236-37; (5) that Lenny Lochard was his supervisor at Werner, *see* A.1238; (6) that his driver's license was never suspended, *see* A.1239, 1240; (7) that he attended Lake Worth High School in Florida, *see* A.1242, 1244, 1245; (8) that he had 20+ years of driving without an accident, *see* A.1585; A.1248-49, 1250];[19] (9) that he did not have any accidents in the three years

[19] The traffic citations proffered by Plaintiff to show Mr. Azurin concealed his accident history were inadmissible. *See* § 316.650(9), Fla. Stat. They were also inadmissible other bad acts evidence and do not fit within the "knowledge" exception. *See* § 90.404(2)(a), Fla. Stat.; *see also Dade Cnty. v. Carucci*, 349 So. 2d 734, 735 (Fla. 3d DCA 1977) ("Ordinarily, the evidence of a defendant's past driving record should not be made a part of the jury's considerations."). The citations are also merely charging documents that do not adjudicate guilt. Therefore, they do not support Plaintiff's claim that Mr. Azurin concealed that he was an unfit driver even if they were admissible. Even if the traffic citations were admissible, they would not be relevant if Mr. Azurin and Mr. Laguerre's version of the accident were accepted. In that version, Mr. Francois cut him off and prevented Mr.

before he was hired by Cheney Bros., *see* A.1251-52; (10) that he did not have any prior back problems, *see* A.1254-55, 1257; and (11) that he was driving trucks in the year following his DUI license suspension, *see* A.1325.[20] None of these misstatements, however, relate to his driving on the day of the accident or have any nexus to the harm suffered by Mr. Francois. Even assuming Plaintiff could satisfy proximate cause, this conduct still does not support punitive damages because it is not malicious, deliberately violent, oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.

Azurin from taking any action to avoid the accident. Therefore, his driving ability was not the proximate cause of the accident.

[20] Plaintiff contended that Mr. Azurin represented to Cheney Bros. that he was driving trucks in the year of and following his DUI but testified otherwise at his deposition. *See* A.1325. Mr. Azurin was cited for DUI on January 6, 2014, more than 8½ years before the accident. A.808. He indicated on his job application that he worked for Sysco between 2010 and 2020. Plaintiff assumes that Mr. Azurin was driving during his period of license suspension. During his license suspension he was not working for Sysco – he was not hired until December 18, 2017. *See* A.1761. It is not clear that Mr. Azurin was employed during his license suspension, but even if he was, it is very possible that he was placed on desk duty during the suspension period or assigned as a "yard jockey." *See* A.1701-02.

Moreover, if Plaintiff were to argue "but for" causation — that Cheney Bros. would not have hired him had he been truthful on his application — that also would not be the *proximate* cause of Mr. Francois' death. *See Saum*, 3 F. Supp. 3d at 625-26; *Embry*, 478 F. Supp. 2d at 922.

Second, the trial court's conclusion rests on an unsupportable premise – that Mr. Azurin knew he was unfit to drive a tractor-trailer and hid his driving record from Cheney Bros. so he would get hired. Plaintiff proffered no evidence to support this speculation. To the contrary, the evidence showed that Mr. Azurin was fit to drive a tractor-trailer before this accident occurred. He had a safe-driver designation on his driver's license, and, over the years, he had passed the following fifteen exams: vision; road sign; road rules; driving; CDL vision; general knowledge; air brakes; combined vehicle; double triples; tanker; hazardous material; passenger transport; inspection; skills; and basic skills. *See* A.1600-01. Based on these test results, an independent vendor concluded that Mr. Azurin was a "SAFE DRIVER." A.1601. Mr. Azurin also passed a road test that examined his competency in 117 different areas. A.1603-04. The road test examiner certified after about ten miles of driving with him that Mr.

Azurin "possesses sufficient driving skill to operate safely" a commercial motor vehicle. A.1605. Most importantly, during his ten-month tenure with Cheney Bros. before the accident, Mr. Azurin had a clean driving record with no traffic citations and no internal discipline for driving misconduct. *See* A.1395, 1975-76, 1987, 1988-89. The claim that he was a bad driver because of his driving history was unsupported by the record.

CONCLUSION

Based on the foregoing, Defendant Cheney Bros. respectfully requests this Court to reverse the order allowing Plaintiff to plead a punitive damages claim against Cheney Bros. and to remand the case to the trial court for proceedings consistent herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B), counsel for hereby certifies that this brief complies with the applicable font and word count requirements because it is written in 14-point Bookman Old Style font and is 11,383 words, excluding those parts omitted from the word count by Florida Rule of Appellate Procedure 9.045(e).

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