

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM
BEACH, FL 33401

Case No. 4D23-1746
Lower Tribunal Case No. 50-2022-CC-011994

PHOENIX MANAGEMENT SERVICES, INC. and ADAM GOLDBERG,
Appellants,

vs.

WATERCHASE HOMEOWNERS' ASSOCIATION, INC.,
Appellee.

ON APPEAL FROM THE COUNTY COURT
FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This Answer Brief is filed on behalf of the Appellee, WATERCHASE HOMEOWNERS' ASSOCIATION, INC., the Plaintiff in the county court, and will be referred to as "Appellee", "ASSOCIATION" and/or "WATERCHASE" herein.

The Appellants, PHOENIX MANAGEMENT SERVICES, INC. ("PHOENIX") and ADAM GOLDBERG ("GOLDBERG") (collectively, "Appellants"), are the Defendants in the county court.

The Order Granting Plaintiff's Motion for Leave of Court to File First Amended Complaint, rendered June 20, 2023, is the subject of this appeal and is referred to as the "ORDER."

The symbol "App._____" will designate references to the Appendix Supporting Appellants' Initial Brief and then followed by the appropriate page designation in Appellants' Appendix.

The symbol "IB._____" will designate references to Appellants' Initial Brief and then followed by the appropriate page designation in Appellant's Initial Brief.

STATEMENT OF THE CASE AND THE FACTS

On or about October 12, 2022, WATERCHASE filed its Verified Complaint for Emergency Injunctive Relief and Other Relief, stating claims for Emergency Injunctive Relief (Count I – against PHOENIX and GOLDBERG); Conversion (Count II – against PHOENIX and GOLDBERG); Breach of Fiduciary Duty (Count III – against GOLDBERG); Breach of Contract (Count IV – against PHOENIX); and Negligence (Count V – against PHOENIX and GOLDBERG). (App.9-63). On or about December 9, 2022 Appellants filed their Answer to Plaintiff’s Complaint. (App.177-191). On or about March 23, 2023 WATERCHASE filed its Motion for Leave of Court to File First Amended Complaint, adding claims for punitive damages against PHOENIX and GOLDBERG to Counts II, III and V. (App.216-290).

On May 5, 2023, WATERCHASE filed its Notice of Taking Deposition Duces Tecum of Adam Goldberg, to occur on June 8, 2023 at 10:00am, following the agreement of the parties. (App.6, See [DE 35], App.294-298).

A hearing on Plaintiff’s Motion for Leave to Amend was originally agreed upon by the parties and was noticed to be heard on May 24, 2023 at 2pm. (App.6, See [DE 28]). However, right before the start of the May 24, 2023 hearing, counsel for Appellants contacted the undersigned to advise that the computer servers in their office were down and that

Appellants were unable to adequately participate in the May 24, 2023 hearing. Based upon Appellants' counsel's representations, the parties agreed to show up to the May 24, 2023 hearing and advise the court of the issue, so that the hearing may be reset. On May 24, 2023, the trial court agreed and entered an Order Setting Hearing for Plaintiff's Motion for Leave of Court to File First Amended Complaint and Defendants' Verified Motion to Dissolve Temporary Injunction, to occur on June 15, 2023. (App.6, See [DE 39]).

On June 8, 2023 the parties participated in the deposition of Adam Goldberg, which had been agreed upon and notice more than one (1) month earlier. (App.517-693). Both parties ordered the deposition transcript. (App.654). Following GOLDBERG's deposition, on June 13, 2023, Plaintiff filed its Notice of Filing Deposition Transcript of Adam Goldberg. (App. 515-693).

On June 15, 2023, the parties attended the hearing on Plaintiff's Motion to Amend Complaint and Defendants' Motion to Dissolve Temporary Injunction, during which both parties utilized GOLDBERG's June 8, 2023 deposition transcript to argue their points to the trial court as to why the trial court should or should not grant Plaintiff's Motion for Leave of Court to File First Amended Complaint. (App.705-772, specifically

App.755-759, where Appellants' counsel utilizes GOLDBERG's deposition transcript to argue against the trial court granting Plaintiff's Motion for Leave to File First Amended Complaint, adding claims for punitive damages).

The Emails

Attached as Exhibit "D" to WATERCHASE's Complaint and Amended Complaint is an August 30, 2022 2:07pm email from GOLDBERG, to Margaret Pittman (Board President of WATERCHASE), copying Shelly Goldberg (President and co-owner of PHOENIX) and Debbie Cassablanca (PHOENIX's office manager), acknowledging that GOLDBERG was informed that WATERCHASE intended to terminate its management agreement with PHOENIX. (App.55). GOLDBERG tells Pittman that PHOENIX "will continue to be your management company until such time as [PHOENIX] receive[s] [a cancellation/termination notice and liquidated damages]." (App.55). GOLDBERG further advises Pittman to "notify both Victory and the 'new' management company that they will NOT be starting on Thursday, unless they feel like being sued for tortious interference with my existing and valid contract." (App.55).

Three (3) minutes later at 2:10pm on August 30, 2022, Pittman forwarded this email to WATERCHASE's attorney, Cory Kravit, Esq.

(App.55). Forty-three (43) minutes after receiving the email from Pittman, at 2:53pm, Kravit emailed GOLDBERG (copying only Pittman), advising GOLDBERG that “Margaret forwarded [Kravit] [GOLDBERG’s] email below” and providing GOLDBERG with a copy of the termination notice, which had been mailed on August 26, 2022. (App.58).

Six (6) minutes after receiving Kravit’s email with WATERCHASE’s termination notice, at 2:59pm, GOLDBERG responds to Kravit, copying Pittman, Shelly Goldberg and Debbie Cassablanca, advising that “the ‘professional’ thing for you and your client to do is to pay us per the contract or rescind any termination” and stating defiantly that “we (PHOENIX) are still the management company and will be honoring our legally-binding contract . . . until December 31, 2022.” (App.59).

The following day at 11:35am, Kravit responds to all parties copied on GOLDBERG’s email acknowledging the contractual dispute between PHOENIX and WATERCHASE but reminding GOLDBERG to “please remember that the withholding of the Association’s records in excess of 10 days after the Association’s notice of termination and records request would be a violation of the Standards of Professional Conduct for community association managers.” (App.60). On August 31, 2022, Kravit and GOLDBERG continue to exchange emails, with all parties copied.

(App.60-61). At 2:15pm on August 31, 2022, GOLDBERG accuses Kravit of “aiding and abetting [WATERCHASE] in this willful breach” while continuing to allege “tortious interference”. (App.61). At 2:58pm on August 31, 2022, Kravit makes his first plea to GOLDBERG suggesting that “[GOLDBERG] seek advice from your legal counsel” regarding GOLDBERG’s and PHOENIX’s position. (App.61). At 3:14pm, GOLDBERG responds to Kravit stating “Why do I need to pay an attorney to say exactly what I just said?” (App.61).

On September 16, 2022 at 3:27pm, Kravit resumes communicating with GOLDBERG, Shelly Goldberg, Debbie Cassablanca, and Pittman through the previously utilized email chain advising that:

As a result of your refusal to provide Waterchase and its new management company the Association’s official records, the Association filed a complaint against Phoenix Management with the DBPR for violating 61E14-2.001(3)(a) Standards of Professional Conduct which I have reproduced for you below for your ease of reference. Again, the Association requests your immediate cooperation in providing the records to the new management company (Carolina Management/Victory Accounting. –cbk

(3) Records. During the performance of community association management services pursuant to a contract with a community association, a licensee shall not:

(a) Withhold possession of the association’s official records, in violation of Section 718.111(12), 719.104(2) or 720.303(5), F.S., or original books, records, accounts, funds, or other property of a community association when requested by the association to deliver same to the association upon

reasonable notice. Reasonable notice shall extend no later than 10 business days after termination of any management or employment agreement and receipt of a written request from the association. The manager may retain those records necessary for up to 20 days to complete an ending financial statement or report. Failure of the association to provide access or retention of accounting records to prepare the statement or report shall relieve the manager of any further responsibility or liability for preparation of the statement or report. The provisions of this rule apply regardless of any contractual or other dispute between the licensee and the association.

(App.62). At 3:46pm GOLDBERG responds to Kravit (with all parties still copied, including Pittman) by threatening the WATERCHASE board of directors, stating, “Does the Board really wish to end up with mechanics liens on their homes so they are unable to sell or refinance their homes? Do they want to spend more than they owe me on legal fees...?” (App.62). During this continued exchange, GOLDBERG remains obstinate, insisting that PHOENIX was still WATERCHASE’s management company. (App.63). At 4:14pm, Kravit, again, advises GOLDBERG that he “would strongly suggest consulting with your legal counsel.” (App.63).

During the August 30, 2022 through September 16, 2022 email exchange GOLDBERG, despite receiving WATERCHASE’s termination notice, states no less than a dozen times that PHOENIX will continue managing WATERCHASE until they pay PHOENIX “liquidated damages” in the amount of \$15,388.00. (App.55-63).

Deposition of Adam Goldberg

On June 8, 2023, GOLDBERG was deposed. (App.515). During the deposition, GOLDBERG testified to the following facts:

- GOLDBERG admitted that he is a licensed community association manager (license number CAM38132). (App.528).
- GOLDBERG testified that a CAM license is required to be a community association manager in the State of Florida. (App.528).
- GOLDBERG testified that there are standards of professional conduct that CAMs are required to adhere to. (App.528).
- GOLDBERG testified that to become a licensed community association manager he was required to attend a multi-day course, be fingerprinted by the State and pass the State exam for CAMs. (App.529).
- GOLDBERG testified that CAMs are required to take continuing education hours every two (2) years to keep his license with the State. (App.530).
- GOLDBERG testified that he is the Vice President of PHOENIX. (App.531).
- GOLDBERG testified that he has an ownership interest in PHOENIX. (App.531).

- GOLDBERG testified that Sheldon Goldberg is his father. (App.534).
- GOLDBERG testified that, David Rosenthal, who was previously one of the owners of PHOENIX, left the company at the end of 2021 and beginning in 2022, GOLDBERG and Sheldon Goldberg were the owners of PHOENIX. (App.532-534; App.567).
- GOLDBERG testified that his association clients are at risk of being sued if the Association is unable to pay its vendors, if Association funds are mishandled. (App.536-537).
- GOLDBERG admitted receiving WATERCHASE's termination notice. (App.590).
- GOLDBERG testified that he only turned WATERCHASE's official records over to the Association "[a]fter a judge told me I had to" (App.593) and that had the judge not required PHOENIX to turn over WATERCHASE's official records that PHOENIX would have retained those records until December 31, 2022 (App.638).
- GOLDBERG admitted that he made the decision to withhold WATERCHASE's possession of their official records (App.601).
- GOLDBERG testified that Florida Statute 468.4334 governs the professional standards and liabilities of CAMs in Florida (App.602).

- GOLDBERG testified that Rule 61E14-2.001, Florida Administrative Code also governs the standards of professional conduct for CAMs. (App.603).
- GOLDBERG admitted to sending and receiving all of the emails between Pittman, Kravit and GOLDBERG from August 30, 2022 through September 16, 2022. (App.605-632)
- GOLDBERG testified that at no point during August 30, 2022 through September 16, 2022 emails did Sheldon Goldberg advise him that he disagreed with GOLDBERG withholding WATERCHASE's official records. (App.614, 619, 623, 626, 629, 635-636).
- GOLDBERG testified that he made the decision to withhold transferring WATERCHASE's official records (App.614, 619, 623, 626, 628, 629, 631)
- GOLDBERG testified that he made the decision not to consult with an attorney. (App.621-622, 626, 630).
- GOLDBERG admits that PHOENIX has never directed anyone to file mechanics' liens against board members since he became a member of the company in 2010. (App.634-635).

- GOLDBERG testified that he, as Vice President of PHOENIX, is authorized to make the decision not to transition an association's official records and that no one else was required to be involved with that type of decision. (App.635).
- GOLDBERG testified that he directed employees of PHOENIX not to transition WATERCHASE's books and financials without his authorization. (App. 637).
- GOLDBERG testified that he became a member of PHOENIX's Board of Directors somewhere around 2017 (App.640).
- GOLDBERG testified that he withheld WATERCHASE's records for approximately 2 ½ months, until being ordered to turn them over by the trial court (App.647).

The Hearing and Trial Court Order

On June 15, 2023 the trial court heard WATERCHASE's Motion for Leave of Court to File First Amended Complaint, adding punitive damages claims and Appellants' Motion to Dissolve Temporary Injunction. (App.512, 705-772). WATERCHASE began the hearing by reviewing the requirements of Section 768.72, F.S., with Judge Silver. (App.711). WATERCHASE then walked the court through its

evidentiary proffer. (App.713-732). The record evidence in this case shows:

- PHOENIX is a licensed community association management firm holding license number CAB2919. (App.714, App.178 – Admitted in paragraph 6 of Defendants’ Answer).
- GOLDBERG is a licensed community association manager holding license number CAM38132. (App.714; App.178 – Admitted in paragraph 7 of Defendants’ Answer).
- Florida Statute 468.4334 governs the professional practice standards for community association managers. (App.715).
- Florida Administrative Code Rule 61E14-2.001 also governs the standards of professional conduct for licensed community association managers and management firms. (App.716).
- Rule 61E14-2.001(3)(a) governs community association managers and management firms and their handling of an association’s records. (App.716). Rule 61E14-2.001(3)(a) states, in pertinent part,
 - o (3) Records. During the performance of community association management services pursuant to a contract with a community association, a licensee shall not: (a) Withhold possession of the association’s official records, in violation of Section 718.111(12), 719.104(2) or 720.303(5), F.S., or original books, records, accounts, funds, or other

property of a community association when requested by the association to deliver same to the association upon reasonable notice. Reasonable notice shall extend no later than 10 business days after termination of any management or employment agreement and receipt of a written request from the association. . . The provisions of this rule apply regardless of any contractual or other dispute between the licensee and the association. (App.716-717).

- WATERCHASE presented the August 30, 2022 through September 16, 2022 email exchange between GOLDBERG and Kravit (with Pittman, Sheldon Goldberg and Debbie Cassablanca copied) to the trial court and walked through the following facts:
 - GOLDBERG and PHOENIX received WATERCHASE's termination notice. (App.717).
 - GOLDBERG, in his emails to Kravit, states numerous times that PHOENIX will continue managing WATERCHASE, despite WATERCHASE's termination of PHOENIX, until WATERCHASE pays PHOENIX \$15,388 in "liquidated damages." (App.718-719).
 - GOLDBERG demands payment of these "liquidated damages" no less than a dozen times. (App.718-719).
 - Kravit implores GOLDBERG on multiple occasions to consult with an attorney because he is willfully violating Rule 61E14-2.001. (App.719).

- GOLDBERG repeatedly refuses to consult with an attorney. (App.720).
- GOLDBERG threatens WATERCHASE (its Board Members), Kravit Law and WATERCHASE's new management company. (App.720-721).
 - GOLDBERG threatens to place mechanic's liens against the WATERCHASE Board Members homes so that they are unable to sell or refinance. (App.720).
 - GOLDBERG implies that he is going to sue Kravit Law for "aiding and abetting the association with breaching the management agreement. (App.720-721).
 - GOLDBERG threatens to sue Carolina Management and Victory Accounting with tortious interference. (App.721).
- WATERCHASE then presented the trial court with the facts and evidence developed during GOLDBERG's deposition, including:
 - GOLDBERG (as vice president of PHOENIX) had authority to decide, on behalf of PHOENIX, whether or not to transfer WATERCHASE's official records. (App721-722).

- GOLDBERG admitted that he is the current Vice President of PHOENIX, an Owner of PHOENIX and a member of PHOENIX's Board of Directors. (App.722-723).
- GOLDBERG acknowledged that he was aware that an association can be sued if their bills are not paid or if funds are mishandled. (App.723).
- GOLDBERG admitted that he only turned over WATERCHASE's official records as a result of the trial court's October 20, 2022 Order Granting Emergency Motion for Entry of Temporary Injunction (App.723-724).
- GOLDBERG admitted that he would have continued to retain possession of WATERCHASE's official records, in violation of the statute and rule, until at least December 31, 2022 (more than four (4) months after termination). (App.724-725).
- GOLDBERG admitted withholding possession of WATERCHASE's official records for approximately 2 ½ months (App.725-726).
- GOLDBERG admitted that if WATERCHASE had paid PHOENIX the \$15,388 in "liquidated damages" that PHOENIX would have been paid for four months' worth of

management services that PHOENIX did not provide to WATERCHASE. (App.726).

- WATERCHASE argued that GOLDBERG owed WATERCHASE a statutory fiduciary duty to act in WATERCHASE's best in best interest. (App.727).
- WATERCHASE argued that GOLDBERG, as owner/vice president/board member of PHOENIX made a conscious decision to violate Florida law and his professional practice standards in an attempt to extort \$15,388 in unearned management fees from WATERCHASE before he was willing to turn over the official records. (App.728).
- GOLDBERG did not just breach his statutorily imposed duty, he did so in an egregious manner by threatening anyone who disagreed with him with mechanics liens and lawsuits. (App.728).
- GOLDBERG's unlawful decision to violate Rule 61E14-2.001 affected the rights and property of the 270 members of WATERCHASE and WATERCHASE's ability to operate on behalf of its members. (App.728).

- GOLDBERG's decision to breach his fiduciary duty was solely motivated by the unreasonable financial gain of PHOENIX's unearned management fees. (App.728).

At this point in the hearing, the trial court asked Appellants' counsel for his response. Rather than focusing Appellants' response to the issues presented by WATERCHASE, Appellants' counsel chose to argue Appellants' Motion to Dissolve the Injunction. (App.732-737). After the court denied Appellants' Motion to Dissolve the Injunction (App.747), Appellants then turned its focus back to the issues presented in WATERCHASE's Motion to Amend Complaint (App.749).

Appellants' counsel advises the trial court that "nothing in our motion – in our argument is presenting new evidence for you to consider." *Id.* (emphasis added). Appellants argued that WATERCHASE's termination of the management agreement was improper, because WATERCHASE did not provide the liquidated damages to PHOENIX. (App.749-751). Appellants argued three (3) reasons why the trial court should deny the motion to amend: 1) that WATERCHASE has no underlying damages; 2) that WATERCHASE had not shown intentional misconduct or gross negligence by GOLDBERG or PHOENIX; and 3) that Appellants did not act out of malice, and willingly complied with the court's injunction. (App.752).

Appellants' counsel argues that email evidence provided by WATERCHASE "only shows defendants' intention to abide by its management agreement." (App.755). Appellants also argued that "defendants had a legitimate objective in not providing the documents because it was trying to continue to provide services under the management agreement until it was properly terminated." (App.755-756). Appellants utilized GOLDBERG's deposition testimony to attempt to present this argument. (App.755, lines 7-23). Finally, Appellants argued that GOLDBERG's actions should not be impugned onto PHOENIX, because WATERCHASE did not meet its burden of proof to establish that PHOENIX was vicariously liable for GOLDBERG's actions. (App.759).

Throughout the entirety of the hearing the judge was engaged, asking questions and reviewing evidence, case law, and statutory/rule authority provided by the parties. (App.707-771). Ultimately, the court determined that "a reasonable jury could credit or could find plaintiff is entitled to the punitive damages based on either intentional misconduct or gross negligence" deeming the evidentiary proffer provided by plaintiff to be sufficient to satisfy the statutory requirements of Section 786.72(1), F.S. (App.768-769).

SUMMARY OF ARGUMENT

The facts of this case are simple and unrefuted. GOLDBERG and PHOENIX unlawfully withheld WATERCHASE's official records after receiving WATERCHASE's termination notice in violation of Sec. 468.4334, F.S. and Rule 61E14-2.001(3)(a), F.A.C. GOLDBERG, as Co-Owner, Vice President and a member of the Board of Directors for PHOENIX made this decision to violate his fiduciary duty to WATERCHASE by willfully violating the professional practice standards of community association managers in Florida.

As a licensee, GOLDBERG had passed a licensure test by the State of Florida, participated in continuing education courses and was even fingerprinted by the state to engage in activities as a CAM. GOLDBERG, well aware of his responsibilities, made the conscious decision to violate these laws in an egregious and malicious fashion, threatening members of WATERCHASE's board of directors, WATERCHASE's attorney and WATERCHASE's new management and accounting companies with lawsuits.

GOLDBERG directed his staff not to transition WATERCHASE's official records. GOLDBERG's father, Sheldon Goldberg, copied on all email communication regarding these issues silently acquiesced to his son

and business partner's decision, a decision which GOLDBERG had authority to make on behalf of PHOENIX. GOLDBERG withheld possession of WATERCHASE's official records for more than 2 ½ months (long in excess of the statutorily mandated 10 business days), with knowledge of the damages and liabilities which WATERCHASE would likely suffer in an attempt to extort \$15,388 in unearned management fees, while holding WATERCHASE's official records hostage. GOLDBERG only turned over WATERCHASE's official records when ordered to do so by the trial court, and he admitted that he and PHOENIX would have continued to unlawfully possess WATERCHASE's official records for at least two (2) more months, had the trial court not acted. This decision affected WATERCHASE and its 270 homeowners, and these actions by GOLDBERG and PHOENIX also affect the thousands of unit owners and homeowners of the communities that PHOENIX manages.

The trial court properly determined, after the presentation of evidence (including the emails and GOLDBERG's deposition testimony) that WATERCHASE made a reasonable showing by evidence which would provide a reasonable basis for the recovery of punitive damages. GOLDBERG is a "managing agent" of PHOENIX, motivated solely by unreasonable financial gain, who knowingly, fraudulently, maliciously, in a

deliberately oppressive manner, with wanton disregard for the rights and safety of WATERCHASE and its 270 members, decided to breach his fiduciary duty and his state mandated professional practice standards. GOLDBERG took these actions in the spirit of mischief and/or criminal indifference to his civil obligations.

STANDARD OF REVIEW

Appellate courts review the trial court's purely legal ruling that WATERCHASE made a reasonable showing under section 768.72, F.S. to recover punitive damages under the *de novo* standard of review. *Marder v. Mueller*, 358 So.3d 1242, 1245 (Fla. 4th DCA 2023).

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLEE MADE A REASONABLE SHOWING, BY EVIDENCE IN THE RECORD OR PROFFERED BY APPELLEE, WHICH PROVIDE A REASONABLE BASIS FOR THE RECOVERY OF PUNITIVE DAMAGES FROM APPELLANTS

“Section 768.72(1), Florida Statutes, does not permit punitive damages without ‘a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.’” *Id.* “Subsection (2) adds that ‘[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds the defendant was personally guilty of

intentional misconduct or gross negligence. *Id.* “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.” *Id.* (quoting *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So.2d 483, 486 (Fla. 1999)).

“When a trial court is determining if a plaintiff has made a “reasonable showing” under section 768.72 for recovery of punitive damages, it is similar to determining whether a complaint states a cause of action, or the record supports a summary judgment. . .” *Holmes v. Bridgestone/Firestone Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005); *Bistline v. Rogers*, 215 So.3d 607, 610 (Fla. 4th DCA 2017); “In 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.” *Wayne Frier Home Center of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1009 (Fla. 1st DCA 2009); see also, *Estate of Williams ex rel. Williams v. Tandem Health Care of Florida*, 899 So.2d 369, 376 (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.”).¹ The Florida Supreme Court has stated that

[t]he 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. *Valladares v. Bank of Am. Corp.*, 197 So.3d 1, 11 (Fla. 2016).

¹ Appellant’s misrepresent/misapply the *KIS*, *Scialabba* and *Hughes* decisions when arguing that “[a] court cannot weigh the evidence presented and then take the evidence as true and view that evidence in a light most favorable to one of the parties.” (IB.23). This is not the case in the *KIS* decision, wherein this Court found that the trial court’s reliance on the decision in *First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536 (Fla. 1987) was in error as the *Ablanedo* case did “not stand for the proposition that a trial court’s denial of a motion for summary judgment on a fraud claim is the functional equivalent of a determination by the court that there is a reasonable evidentiary basis for punitive damages.” *KIS Grp., LLC v. Moquin*, 263 So.3d 63, 66 (Fla. 4th DCA 2019). In *Scialabba*, this Court ruled that a trial court cannot weigh evidence in ruling on a *motion for involuntary dismissal* by weighing and judging the credibility of the evidence, citing to *McCabe v. Hanley*, 886 So.2d 1053, 1056 (Fla. 4th DCA 2004). *Citigroup Mortg. Loan Trust Inc. v. Scialabba*, 238 So.3d 317, 321 (Fla. 4th DCA 2018). The instant matter does not involve a motion for involuntary dismissal. Lastly, in *Hughes*, the 2nd DCA determined that “[t]he trial court cannot judge the credibility of the witnesses or weigh the evidence when ruling on [a *motion for directed verdict*].” *Hughes v. Slomka*, 807 So.2d 98, 100 (Fla. 2d DCA 2002) (emphasis added). The instant matter does not involve a motion for directed verdict.

As the Fifth District Court of Appeal stated in *Werner Enters. V. Mendez*, No. 5D23-235, page 13 (Fla. 5th DCA 2023), “[a]t the leave to amend stage, it is not for us to definitively forecast which view [of the evidence] a jury will take, but only to determine if there is a reasonable view of the evidence that supports the plaintiff’s position.” See also *Varnedore v. Copeland*, 210 So.3d 741 (Fla. 5th DCA 2017) (observing that when deciding if a proffer is successful, the court asks whether a reasonable jury could infer from the proffer that the defendant’s conduct satisfies the statutory basis for punitive damages). “If there is evidence tending to show intentional, wanton and malicious disregard for laws designed to protect people’s rights, the issue of punitive damages would be properly one for the jury. *Genesis Publications, Inc. v. Goss*, 437 So.2d 169, 170 (Fla. 3d DCA 1983).

Allegations of a breach of the standard of care, without more, cannot form the basis of a punitive damages claim simply by labeling those actions as “grossly negligent.” *Marder*, 358 So.3d at 1245 (citing *Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo for Estate of Sasso*, 357 So.3d 703, 706-707 (Fla. 4th DCA 2023)). Appellants seem to misrepresent/misapply multiple court decisions in Appellants’ Initial Brief, wherein Appellants attempt to compare WATERCHASE’s evidentiary

proffer, consisting of authenticated emails and GOLDBERG's deposition testimony, to case decisions wherein the trial courts simply accepted a plaintiff's allegations as true, without requiring evidence and without weighing the evidence presented by the parties to the factfinder. (IB.19-21)².

² In *Marder* the Patient's proffer, including expert testimony, did not provide the "more" needed to show that the allegations of the Doctor's breach of the standard of care satisfied the punitive damages standard, the Patient did not proffer anything to suggest that the Doctor knew his treatment plan for the Patient was unnecessary or likely to cause serious injury, and the Patient did not provide the court with a link between either the Doctor's billing practices with other patients or his interference in an unrelated criminal healthcare investigation with any improper motivation for prescribing radiation treatment for the Patient. *Marder*, 358 So.3d at 1245 - 1246.

In *Bistline*, 215, So.3d at 610, this Court found that the trial court had applied the incorrect legal standard (misapplying the *Holmes* decision) when the trial court focused its analysis on the plaintiff's allegations (rather than any actual evidence) and simply accepted plaintiff's allegations as true (stating that plaintiff did "not need to provide evidence of [plaintiff's] allegations").

In *Kis Grp., LLC*, 263 So.3d at 66, this Court found that the trial court's reliance on the decision in *First Interstate Development Corp. v. Ablanado*, 511 So.2d 536 (Fla. 1987) was in error as the *Ablanado* case did "not stand for the proposition that a trial court's denial of a motion for summary judgment on a fraud claim is the functional equivalent of a determination by the court that there is a reasonable evidentiary basis for punitive damages."

In *Napleton's N. Palm Auto Park, Inc. v. Agosto*, No. 4D22-2507, 2023 WL 4095777 (Fla. 4th DCA 2023), the trial court improperly believed that it had

Here, the trial court carefully reviewed and weighed the evidence presented by both parties and made an affirmative finding that WATERCHASE has made a reasonable showing by evidence that “a reasonable jury could credit or could find plaintiff is entitled to the punitive damages based on either intentional misconduct or gross negligence.” (App.768) See *Varnedore*, 210 So.3d 741. WATERCHASE’s evidence presented to the trial court showed that:

1) PHOENIX is a licensed community association management firm holding license number CAB2919. (App.714, App.178 – Admitted in paragraph 6 of Defendants’ Answer);

to accept Agosto’s proffer, including an employee’s DUI conviction twelve years before the dealership hired the employee, dealership’s discipline of employee in January 2020 based on another employee’s suspicion that employee was intoxicated while on the clock and the assistant service manager’s observation that employee was acting “off” and “loopy” on another occasion, as true, without providing actual evidence that the employee was intoxicated during work hours.

In *Fla. Hosp. Med. Servs., LLC v. Newsholme*, 255 So.3d 348, 350-51 (Fla. 4th DCA 2018), the trial court repeated three times that it was bound by *Holmes* to take plaintiff’s allegations that WPB Group was Petitioners’ agent, that Petitioners exercised complete control over WPB Group, and that Petitioners knowingly condoned, ratified, and consented to WPB Group’s actions, where the plaintiff failed to provide any actual evidence of these allegations.

None of these cases are analogous to the matter before this Court.

2) GOLDBERG is a licensed community association manager holding license number CAM38132. (App.714; App.178 – Admitted in paragraph 7 of Defendants’ Answer);

3) Florida Statute 468.4334 governs the professional practice standards for community association managers. (App.715);

4) Florida Administrative Code Rule 61E14-2.001 also governs the standards of professional conduct for licensed community association managers and management firms. (App.716);

5) Rule 61E14-2.001(3)(a) governs community association managers and management firms and their handling of an association’s records. (App.716);

6) GOLDBERG and PHOENIX received WATERCHASE’s termination notice. (App.717);

7) GOLDBERG, in his emails to Kravit, states numerous times that PHOENIX will continue managing WATERCHASE, despite WATERCHASE’s termination of PHOENIX, until WATERCHASE pays PHOENIX \$15,388 in “liquidated damages.” (App.718-719);

8) GOLDBERG demands payment of these “liquidated damages” no less than a dozen times. *Id*;

9) Kravit asked GOLDBERG on multiple occasions to consult with an attorney because he is willfully violating Rule 61E14-2.001. (App.719);

10) GOLDBERG repeatedly refuses to consult with an attorney. (App.720);

11) GOLDBERG threatens WATERCHASE (its Board Members), with the fraudulent and malicious threat to place mechanic's liens against the WATERCHASE Board Members' homes so that they are unable to sell or refinance. (App.720);

12) GOLDBERG (as vice president of PHOENIX) had authority to decide, on behalf of PHOENIX, whether or not to transfer WATERCHASE's official records. (App721-722);

13) GOLDBERG admitted that he is the current Vice President of PHOENIX, an Owner of PHOENIX and a member of PHOENIX's Board of Directors. (App.722-723);

14) GOLDBERG acknowledged that he was aware that an association can be sued if their bills are not paid or if funds are mishandled. (App.723);

15) GOLDBERG admitted that he only turned over WATERCHASE's official records as a result of the trial court's October 20, 2022 Order

Granting Emergency Motion for Entry of Temporary Injunction (App.723-724);

16) GOLDBERG admitted that he would have continued to retain possession of WATERCHASE's official records, in violation of the statute and rule, until at least December 31, 2022 (more than four (4) months after termination). (App.724-725);

17) GOLDBERG admitted withholding possession of WATERCHASE's official records for approximately 2 ½ months (App.725-726); and,

18) GOLDBERG admitted that if WATERCHASE had paid PHOENIX the \$15,388 in "liquidated damages" that PHOENIX would have been paid for four months' worth of management services that PHOENIX did not provide to WATERCHASE. (App.726).

This evidence (which is not mere allegations) shows that PHOENIX and GOLDBERG owed a statutory fiduciary duty to WATERCHASE, that PHOENIX and GOLDBERG were statutorily required to turn over WATERCHASE's official records within ten (10) business days of receiving WATERCHASE's termination notice, regardless of any contractual or other dispute between PHOENIX/GOLDBERG and WATERCHASE, that GOLDBERG, despite his knowledge that WATERCHASE would likely

suffer damages as a result of PHOENIX and GOLDBERG withholding WATERCHASE's official records made the conscious and voluntary act to withhold such official records, and that GOLDBERG took such actions in a fraudulent, malicious and deliberately oppressive manner showing a wanton disregard or indifference to the rights and safety of WATERCHASE and its 270 members. This evidence provided the trial court with the "more" needed to elevate GOLDBERG's and PHOENIX's breach of its standard of care to the level required to satisfy the punitive damages standard.

Contrary to Appellants' contention that "the trial court, by admission, accepted what WATERCHASE argued as true" (IB.24), or that "[t]he trial court accepted WATERCHASE's citation to *State of Wisconsin Investment Board v. Plantation Square Associates, Ltd.*, 761 F. Supp. 1569 (S.D. Fla. 1991) for the proposition that the trial court is only allowed to consider the evidence proffered by the moving party" (Id.), Appellants wholly fail to direct this Court to a single portion of the record supporting these claims, because no such citation in the record or statement made by the trial court supporting these claims exists. In fact, the only evidence that was presented to the trial court was WATERCHASE's evidence. Appellants counsel advised the trial court that "nothing in our (PHOENIX/GOLDBERG) motion - - in our argument is presenting new evidence for you to consider."

(App.749). How could the trial court have committed error in “not considering Appellants’ evidence, when Appellants advised the trial court that they would not be presenting any evidence?”³

Ultimately here, *could* a jury determine that GOLDBERG and PHOENIX were only trying “to abide by its management agreement”? (App.755). Sure. *Could* a jury determine that GOLDBERG and PHOENIX “had a legitimate objective in not providing the documents because it was trying to continue to provide services under the management agreement until it was properly terminated”? (App.755-756). Maybe. But, based on these facts, is it possible that the trier of fact could determine that clear and convincing evidence exists that GOLDBERG/PHOENIX intentionally (with actual knowledge of the wrongfulness of the conduct), or with such reckless conduct, wanting of care (constituting a conscious disregard or indifference to the safety and/or rights of WATERCHASE and its members), breached a state mandated fiduciary duty to WATERCHASE and withheld WATERCHASE’s official records, in violation of Sec. 468.4334, F.S. and Rule 61E14-2.001(3)(a), F.A.C., with knowledge that a high probability that

³ At best, this would qualify as “harmless error” as there is no reasonable possibility, reviewing the hearing transcript that the alleged error complained of contributed to the trial court granting WATERCHASE’s motion to amend. *See Special v. W. Boca Med. Ctr.*, 160 So.3d 1251 (Fla. 2014).

injury or damage to WATERCHASE would result, and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage? **ABSOLUTELY!**

Here, a review of the June 15, 2023 hearing transcript (App.705-772) evidences that the trial court carefully considered and weighed the evidence presented and the arguments of the parties, in accordance with the trial court's obligation as the gatekeeper and determined that WATERCHASE made a reasonable showing by evidence in the record which would provide a reasonable basis for the recovery of punitive damages. This Court should affirm.

II. APPELLEE SUBMITTED EVIDENCE SUFFICIENT TO ESTABLISH A REASONABLE SHOWING OF "INTENTIONAL MISCONDUCT" NECESSARY TO SUPPORT A CLAIM FOR PUNITIVE DAMAGES

Pursuant to Section 768.72(2)(a), F.S., "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result, and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." "If there [is] evidence tending to show intentional, wanton and malicious disregard for laws designed to protect people's rights, the issue of punitive damages would properly be one for the jury." *Genesis*, 437 So.2d at 170. "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 wanton disregard for the rights and safety of others.” *Owens-Corning*, 749 So.2d at 486. “Malice ... is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or criminal indifference to civil obligations.” *Genesis*, 437 So.2d at 170.

In *Bailey v. St. Louis*, 196 So.3d 375, 376 (Fla. 2d DCA 2016), “the plaintiff’s complaint alleged claims for, *inter alia*, breach of fiduciary duty, civil conspiracy, and tortious interference.” The facts of *Bailey* showed that the plaintiff business had approached the defendant business about the possibility of securing a loan. *Id.* at 380. As part of the underwriting process, the plaintiff business provided confidential financial records. *Id.* After conducting due diligence, the defendant business did not offer a loan, but instead offered to buy a majority stake in the plaintiff business. *Id.* An agent of the defendant business told an agent of the plaintiff business that “you’re going to accept this offer or we’re going to take your doctors and we’re going to take your company.” *Id.* When the plaintiff business refused, the defendant business “made good on its threat” by: 1) falsely misleading some members of the plaintiff business to believe their colleagues were

misappropriating corporate asset; 2) conspiring with those members; 3) using plaintiff business's confidential documents, customer leads and key personnel to the benefit of defendant business; 4) paying members of plaintiff business not to work or inciting others to quit their jobs; and 5) fraudulently inducing customers to unwittingly become customers of the defendant business. *Id.* at 380-381. The Second District Court found that plaintiff business had established a factual basis for punitive damages. *Id.* at 379, 382.

Recently, the Fifth District Court decided *Werner Enters., Inc. v. Mendez*, No. 5D23-235 (Fla. 5th DCA June 2, 2023). In *Werner*, the court found that where two of Werner's employees (Mendez and Stallings) conspired with Werner's competitor (AJC Logistics, LLC) a reasonable view of the evidence could support a jury awarding plaintiff punitive damages where Mendez and Stallings conspired with AJC to solicit several of Werner's Jacksonville employees to move to AJC to undermine Werner's business by establishing a new AJC office in Jacksonville, staffed by experienced Werner employees and servicing Werner's customers. *Id.* at 2-3. Werner, in support of its motion for leave to amend, proffered numerous email and text message conversations involving Mendez, Stallings and senior AJC officers. *Id.* at 3-6. The evidence showed that Mendez and

Stallings provided AJC with a “90 Day Roll Out” plan for “Project Satellite” which involved “recruiting seven of Werner’s ‘core’ employees and included a projection of revenue for AJC in the first year.” *Id.* at 3. AJC’s controller asked Stallings and Mendez to disclose which of Werner’s clients they would be bringing with them to AJC (Stalling and Mendez provided a list of thirteen of Werner’s clients). *Id.* at 4. Stallings and Mendez provided AJC with revenue, margin, and volume figures from Werner’s Jacksonville operation. *Id.* at 5. AJC also “added some contingent legal fees” to the project’s budget, “just in case Werner decides to make this an issue.” *Id.*

The *Bailey* and *Werner Enters.* cases are analogous to the instant action in that all three cases involve situations where the defendants owed a fiduciary duty to the plaintiffs and despite that duty engaged in intentional acts to breach that duty, damaging the plaintiffs.⁴ Here, GOLDBERG owed a fiduciary duty to WATERCHASE, pursuant to Sec. 468.4334, F.S.

⁴ Additionally, this Court found in *Holmes* that information contained in a plaintiff’s motion to amend complaint to add punitive damages, which came entirely from the website of “Public Citizen” and described the contents of Ford and Firestone memos and letters, as well as actions taken by governmental agencies, reflected facts from which it could be found that Firestone knew about the tread separation problem long before its tires were recalled, but delayed warning the public in order to protect its own financial interests, which would support an award of punitive damages. *Holmes*, 891 So.2d at 1191-92.

PHOENIX and GOLDBERG had to obtain state licensure from the DBPR and were required to “discharge duties performed on behalf of the association as authorized by this chapter loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.” Sec. 468.4334(1)(a), F.S.

GOLDBERG and PHOENIX were well aware that WATERCHASE could not properly function on behalf of its 270 members without access to its official records, and this failure to properly function would likely result in lawsuits from WATERCHASE’s vendors and/or owners. (App.536-53). Kravit provided GOLDBERG with the specific language of Rule 61E14-2.001(3)(a), F.A.C. and implored him on multiple occasions to consult with an attorney regarding his actions (GOLDBERG refused). (App.57-63). GOLDBERG, despite receiving WATERCHASE’s termination notice, told WATERCHASE that PHOENIX would continue to serve as WATERCHASE’s property management company (whether WATERCHASE liked it or not), unless and until WATERCHASE paid PHOENIX \$15,388 in unearned property management fees (App.57-63). GOLDBERG threatened WATERCHASE’s Board Members with placing

“mechanics liens on their homes so they are unable to sell or refinance their homes.” (App.62).

GOLDBERG testified that he only turned WATERCHASE’s official records over to the Association “[a]fter a judge told me I had to” (App.593) and that had the judge not required PHOENIX to turn over WATERCHASE’s official records that PHOENIX would have continued to unlawfully retain those records until December 31, 2022 (App.638). GOLDBERG, as an owner, officer, and member of the board of directors for PHOENIX was authorized to make this type of decision on behalf of PHOENIX. (App.635).

Could a reasonable jury, based on these facts, infer that the Appellants acted maliciously and fraudulently, in the spirit of mischief or criminal indifference to GOLDBERG’s and PHOENIX’s civil obligations? **100%**! GOLDBERG knew of the wrongfulness of his conduct (by virtue of his licensure as a CAM and by being provided with Rule 61E14-2.001(3)(a), F.A.C. by Kravit) and the high probability that such conduct would result in harm to WATERCHASE, but nevertheless intentionally pursued that course of conduct, resulting in harm to WATERCHASE. See *Werner Enters.*, No.5D23-235 at 9. Could a reasonable jury determine that the evidence only shows “a disagreement between GOLDBERG and

WATERCHASE's legal counsel, regarding the interpretation of the 2021 Agreement's provision relating to termination of the contract with the effect of Rule 61E14-2.001, Florida Administrative Code." (IB.28). It's possible. However, "[a]t the leave to amend stage, it is not for [this Court] to definitively forecast which view a jury will take, but only to determine if there is a reasonable view of the evidence that supports [WATERCHASE's] position." *Id.* at 13 (citing *Varnedore*, 210 So.3d at 747). "At the leave to amend stage, a court should view this conflict in a light most favorable to the plaintiff." *Id.* (citing *Est. of Despain v. Avante Grp., Inc.*, 900 So.2d 637, 644 (Fla. 5th DCA 2005)).

Here, a review of the June 15, 2023 hearing transcript (App.705-772) evidences that, viewing the evidence presented in a light most favorable to WATERCHASE, WATERCHASE has made a reasonable showing by evidence in the record which would provide a reasonable basis for the recovery of punitive damages as a result of GOLDBERG's (and PHOENIX's) intentional misconduct, taken with actual knowledge of the wrongfulness of the conduct and the high probability that it would harm WATERCHASE. This Court should affirm.

III. APPELLEE SUBMITTED EVIDENCE SUFFICIENT TO ESTABLISH A REASONABLE SHOWING OF "GROSS NEGLIGENCE" NECESSARY TO SUPPORT A CLAIM FOR PUNITIVE DAMAGES

While the majority of the acts complained of by WATERCHASE in its proposed amended complaint (“PAC”), as argued during the June 15, 2023 hearing, primarily consist of intentional actions taken by GOLDBERG and PHOENIX, WATERCHASE contends that the PAC does contain allegations that Appellants’ actions constituted “gross negligence”, pursuant to Sec. 768.72(2)(b), F.S. “Gross negligence’ means 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.” Sec. 768.72(2)(b), F.S. WATERCHASE’s PAC alleges, amongst other things, that:

31) WATERCHASE cannot operate without the abovementioned records and PHOENIX is acting in wanton and reckless disregard of the Association, Chapter 468, F.S., Chapter 720, F.S., Rule 61E14, F.A.C. and the duties imposed upon PHOENIX and/or GOLDBERG as licensed community association managers (App.237 @ ¶ 31);

76) GOLDBERG continues to act with reckless disregard for WATERCHASE’s statutory right to possess its records and other property, and GOLDBERG is failing to act with even a minimal standard of care, let alone the highest standard of care that a fiduciary duty requires (App.244 @ ¶ 76);

98) PHOENIX, GOLDBERG and PHOENIX’s agent and/or employee, Mr. Mazzeo, breached their duty of reasonable care to WATERCHASE on numerous occasions, including GOLDBERG’s continued refusal to provide WATERCHASE with its records (App.249 @ ¶ 98).

These allegations, contained in the PAC establish claims for “gross negligence” against GOLDBERG and PHOENIX.

Punitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct. *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981). 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. *Arab Termite & Pest Control, Inc. v. Jenkins*, 409 So.2d 1039 (Fla. 1982). In *Carraway v. Revell*, the Florida Supreme Court stated:

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 the equivalent to an intentional violation of them. 116 So.2d 16, 20 (Fla. 1959) (See n. 12); See also, *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984).

“Hence, 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.” *Owens-Corning*, 749 So.2d at 486 (citing *White Constr. Co.*, 455 So.2d at 1028-29).

“[T]o establish a case submissible to a trier of fact there must be a prima facie showing of a composite of circumstances, which, together, constitute a clear and present danger; there must be a prima facie showing of an awareness of such danger; and there must be a prima facie showing of a conscious, voluntary act or omission in the face thereof which is likely to result in injury.” *Glaab v. Caudill*, 236 So.2d 180 (Fla. 2nd DCA 1970). “[I]f the course of conduct is such that the likelihood of injury to other persons or property is known by the actor to be imminent or ‘clear and present’ that negligence is gross.” *Weller v. Reitz*, 419 So.2d 739, 741 (Fla. 5th DCA 1982) (citing *Carraway*).

Here, GOLDBERG’s actions evince his reckless disregard for WATERCHASE and its ability to operate (including its ability to operate its life safety systems) on behalf of its 270 members. GOLDBERG was consciously indifferent to his statutorily mandated obligations as a licensee under Chapter 468, F.S., Chapter 720, F.S. and Rule 61E14, F.A.C. GOLDBERG didn’t care that his actions were prohibited by the agency (DBPR) overseeing his CAM license. GOLDBERG knew that WATERCHASE and its 270 would likely suffer damages as a result of his

wrongful and unlawful withholding of WATERCHASE's official records. (App.536-553, 723). Despite this knowledge and despite his state mandated duty, GOLDBERG withheld WATERCHASE's official records for more than 2 ½ months (App.647), only provided WATERCHASE with its official records after the trial court required Appellants to turn over the records (App.638) and admitted that he would have retained possession until December 31, 2022 (2+ additional months) unless the trial court acted (App.638). GOLDBERG took these actions in an effort to extort \$15,388 in unearned management fees from WATERCHASE. (App.726). GOLDBERG engaged in wanton disregard for the rights of the members of WATERCHASE's board of directors when he threatened to place "mechanics liens on their homes so they are unable to sell or refinance their homes". (App.229).

GOLDBERG's actions evidence an entire want of care for WATERCHASE, its 270 members and the thousands of other homeowners (the public) whose associations utilize PHOENIX as their property management company. These actions "transcend[] the level of simple negligence, and even gross 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).

Here, a review of the June 15, 2023 hearing transcript (App.705-772) evidences that, viewing the evidence presented in a light most favorable to WATERCHASE, WATERCHASE has made a reasonable showing by evidence in the record which would provide a reasonable basis for the recovery of punitive damages as a result of GOLDBERG’s (and PHOENIX’s) “gross negligence,” for conduct which was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety and rights of WATERCHASE and its 270 members. This Court should affirm.

IV APPELLEE SUBMITTED SUFFICIENT EVIDENCE TO ESTABLISH A REASONABLE BASIS TO HOLD PHOENIX LIABLE FOR THE ACTIONS OF GOLDBERG

Pursuant to Sec. 768.72(3), F.S.,

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

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

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross

negligence and that contributed to the loss, damages, or injury suffered by the claimant.

In Florida, there are two methods for establishing a claim for punitive damages against a corporation: “(1) vicarious liability based on the willful and malicious actions of an employee with a finding of independent negligent conduct by the corporation; or (2) direct liability based on the willful and malicious actions of managing agents of the corporation.” *Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158, 1159 (Fla. 1995).

Direct Liability

In order to prevail on a direct liability theory WATERCHASE is required to establish that GOLDBERG is/was a “managing agent” of PHOENIX or held a policy-making position at PHOENIX. See *id.* at 1161. “A ‘managing agent’ is an individual such as a president, primary owner, or other individual who holds ‘a position with the corporation which might result in his acts being deemed the acts of the corporation.’” *Wells Fargo Bank, N.A. v. Elec. Funds Transfer Corp.*, 326 So.3d 753, 757 (Fla. 5th DCA 2021) (citing *Fla. Power & Light Co. v. Dominguez*, 295 So.3d 1202, 1205 (Fla. 2d DCA 2019). “A managing agent must be ‘more than a mid-level employee who has some, but limited, managerial authority.’” *Id.*;

In *Cap. Bank v. MVB, Inc.*, the Third District held that a bank vice president was not managing agent of bank for purposes of punitive

damages because he was one of several vice presidents, was not member of board or directors or loan committee, and was required to request loan committee approval of loans over his limit. 644 So.2d 515, 521 (Fla. 3d DCA 1994). However, in *Kent Ins. Co. v. Schroeder*, the Fifth District found that “by virtue of his position as corporate president of Gags and the manager of the bar owned by Gags, the acts of McElfish are indistinguishable from the acts of the corporation itself.” 469 So.2d 209, 210 (Fla. 5th DCA 1985).

Here, the facts and evidence dictate that GOLDBERG is a “managing agent” of PHOENIX. GOLDBERG is a member of PHOENIX’s board of directors. (App.640, lines 7-8 GOLDBERG Deposition Transcript, “I joined the board several year ago for Phoenix.”). GOLDBERG is the vice president (not one of many vice presidents, the only one) of PHOENIX. (App.531, lines 17-18 GOLDBERG Deposition Transcript, “Q. And what is your title at Phoenix Management? A. Vice President”). GOLDBERG is an owner of PHOENIX. (App.531, lines 19-20 GOLDBERG Deposition Transcript, “Q. Do you have an ownership interest [in Phoenix]? A. Yes.”)⁵.

⁵ GOLDBERG is one of two (2) owners of PHOENIX, not three (3) owners, as Appellants contend (IB.37). David Rosenthal, who was a third owner of PHOENIX left the company at the end of 2021, before any of the actions complained of in WATERCHASE’s Complaint occurred. (App.533, lines 3-

GOLDBERG did not need the approval or authorization from anyone else in PHOENIX to make the decision to withhold WATERCHASE's official records in violation of Rule 61E14-2.001(3)(a), F.A.C. (App.635, lines 3-19 GOLDBERG Deposition Transcript, "Q. So when we went through the emails between yourself and Mr. Kravit and I asked questions about who made the decision to not transition the records and you said many times that you made the decision yourself, as vice president, are you authorized to make that type of decision on behalf of Phoenix? A. Yes." . . . "Q. So my last question was was anyone else required to be involved in the decision to not transition the records on behalf of Phoenix? A. No."). GOLDBERG also indicated that he is involved in the formation of PHOENIX company policies. (App.635, lines 21-22 GOLDBERG Deposition Transcript, "I don't have a written policy on that.").

Drawing every possible reasonable inference in favor of WATERCHASE, based on a theory of direct liability, the facts in the present case indicate that GOLDBERG is/was a "managing agent" of PHOENIX (and not merely a mid-level employee with limited managerial authority) and that his willful and malicious actions of unlawfully withholding

6, "David was our former partner who ran the north office."; App.533, lines 17-18, "Q. And when did David leave? A. At the end of '20 - - end of '21.")

WATERCHASE's official records for 2 ½ months, in violation of his state mandated fiduciary duties and statutory obligations found in Chapter 468, F.S., Chapter 720, F.S. and Rule 61E14, F.A.C., while threatening members of the WATERCHASE board of directors with unauthorized "mechanics liens on their homes so they are unable to sell or refinance their homes", in an effort to extort \$15,388 in unearned management fees subject PHOENIX to direct liability. See *Halum v. ZF Passive Safety Sys. U.S., Inc.*, 48 Fla. L. Weekly D647a, 2023 WL 2669090 (Fla. 4th DCA March 29, 2023).

Vicarious Liability

While here the facts support WATERCHASE's position that GOLDBERG is/was a "managing agent" of PHOENIX, such that PHOENIX should be directly liable to WATERCHASE for punitive damages for GOLDBERG's actions, PHOENIX may also be liable through the theory of vicarious liability. "In order to hold a corporation liable for vicarious liability for punitive damages, there must be a willful and malicious act on the part of an employee as well as a finding of independent negligent conduct by the corporation." *Partington v. Metallic Engineering Co., Inc.*, 792 So.2d 498, 501 (Fla. 4th DCA 2001) (citing *Schropp*, 654 So.2d at 1159). Corporations will typically not be held vicariously liable for its employees

actions unless there is evidence that the corporation (through its managing agents) knew or should have known of its employee's harmful course of conduct. See *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981); see also, *Life Ins. Co. of N. Am. v. Del Aguila*, 417 So.2d 651 (Fla. 1982); *Horizon Leasing v. Leefmans*, 568 So.2d 73 (Fla. 4th DCA 1990).

Here, PHOENIX and its president, Shelly Goldberg, knew of the actions being taken by GOLDBERG. During the August 30, 2022 through September 16, 2022 email exchange between the parties, Kravit initially sent his response on behalf of WATERCHASE to GOLDBERG, copying only Pittman. (App.450, Aug 30, 2022 at 2:53 PM email from Kravit to GOLDBERG). However, six (6) minutes later, GOLDBERG responds to Kravit's email, adding Shelly Goldberg and Debbie Casablanca (Phoenix's office manager) to the email communication. (App.451). Shelly Goldberg remained on the email chain between Kravit and GOLDBERG through all remaining communications between the parties. (App.451-455). Shelly Goldberg ratified GOLDBERG's actions through his willful ignorance, choosing to remain silent during the emails, which spanned more than two (2) weeks. (App.613, lines 5-10, "Q. Now again, the president of the company, Mr. Goldberg, is copied on this email. At any point in time did Mr. Goldberg advise you that he disagreed with how you were handling the

correspondence with Mr. Kravit? A. Not that I can recall.”); See *Kearney v. Kearney*, 129 So.3d 381, 387 n. 10 (Fla. 1st DCA 2014).

In fact, this specific type of willful and malicious behavior by GOLDBERG has been previously perpetrated by Shelly Goldberg in the not so distant past. In 2017, PHOENIX and Shelly Goldberg were sued by Meadowbrook Towers Condominium G in case number COCE-17-020687 (53), in the County Court of the 17th Judicial Circuit in and for Broward County, Florida, for failing and refusing to transition Meadowbrook Towers Condominium G’s official records. (App.640-641, lines 9-6). This type of willful and malicious behavior appears to be a company policy at PHOENIX, for when a client wishes to terminate PHOENIX as its property management company.

The facts of this case dictate that PHOENIX should be held directly liable for GOLDBERG’s actions, as GOLDBERG is a “managing agent” of PHOENIX, holding a position in PHOENIX which might result in his actions being deemed the acts of PHOENIX. See *Taylor v. Gunter Trucking Co., Inc.*, 520 So.2d 624, 625 (Fla. 1st DCA 1988). Alternatively, the facts here dictate that PHOENIX can and should be held vicariously liable for GOLDBERG’s actions, in the event that this Court determines that GOLDBERG is not a “managing agent” of PHOENIX, as a result of Shelly

Goldberg's ratification and consent of GOLDBERG's actions through his willful ignorance, purposefully refraining from seeking information. *Oxford Lake Line v. First Nat'l Bank*, 40 Fla. 349, 24 So. 480, 483 (Fla. 1898).

Here, a review of the June 15, 2023 hearing transcript (App.705-772) evidences that, viewing the evidence presented in a light most favorable to WATERCHASE, WATERCHASE has made a reasonable showing by evidence in the record which would provide a reasonable basis for the recovery of punitive damages from PHOENIX through a theory of direct liability (or vicarious liability) as a result of GOLDBERG's (and PHOENIX's) "intentional misconduct" and/or "gross negligence", taken by GOLDBERG in his role as co-owner, vice president and member of the PHOENIX board of directors, with full authority from PHOENIX to withhold WATERCHASE's official records. This Court should affirm.

CONCLUSION

WHEREFORE, Appellee, WATERCHASE, respectfully requests that this Honorable Court enter its ruling affirming the trial court's June 20, 2023 Order Granting Plaintiff's Motion for Leave of Court to File First Amended Complaint, awarding Appellee, WATERCHASE, its prevailing party appellate attorneys' fees and costs and award any further relief that this Court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that, on this 21st day of September, 2023, a true and correct copy hereof was electronically filed and furnished pursuant to Fla. R. Jud. Admin. 2.516 via e-mail at the following addresses:

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY**, pursuant to Rule 9.045(b), Florida Rules of Appellate Procedure that this brief was prepared using Arial 14-point typeface, a font that is proportionally spaced and contains 10,086 words.

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