

CASE NO. 5D2024-1855
L.T. No.: 2022-CA-001835

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

**UNITED LAND SERVICES OPERATING, LLC, JENA RODGERS,
CHRISTOPHER MARQUESS, AND MATTHEW STINSON,**

Appellants,

v.

**SEASONS SERVICE SELECT, LLC
and SSS DOWN TO EARTH OPCO, LLC,**

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellees shall use the same party references as proposed by Appellants in the Preliminary Statement of their Initial Brief. More specifically, United Land Services Operating LLC shall be referred to herein as “ULS,” and each individual Appellant shall be referred to by his or her last name (Marquess, Rodgers, and/or Stinson). Collectively, Marquess, Rodgers, and Stinson together shall be referred to as the “Individual Appellants.” ULS and the individual Appellants collectively shall be referred to as the “Appellants.” Appellee Seasons Service Select, LLC is referred to in this Brief as “SSS,” and Appellee Down to Earth Opco LLC shall be referred to separately as “DTE.” Collectively, SSS and DTE shall be referred to as the “Appellees.” References to the Duval County Circuit, and Duval County Circuit Court Judge Michael S. Sharrit, shall be to the “Trial Court,” and references to the Appendix attached to the Initial Brief shall be made to “IB Appx.” followed by the page and line number as appropriate.

STATEMENT OF THE CASE AND FACTS

I. NATURE OF THE CASE

Appellants filed this direct appeal of the Trial Court's Order Granting Appellees' Motion for Leave to Amend their Complaint to add claims for punitive damages (the "Order"). The question presented on appeal is whether the Trial Court erred in entering the Order in light of the requirements of Florida Statute §786.72.¹

II. STATEMENT OF THE CASE AND FACTS

This appeal arises from a dispute pertaining to non-competition and non-solicitation agreements. DTE operates a landscape maintenance business across the State of Florida. ULS and DTE are competitors in this industry, including, with relevance to this action, the area of east-central and northeast Florida, between Orlando and Jacksonville.

¹ Appellees disagree with the "narrow issues presented in this appeal" as stated by the Appellants on page 2 of their Initial Brief. The "narrow issues" as described therein misstate or distort the extremely narrow issue for this Court to decide on appeal. This is not a post-trial appeal of an award of punitive damages; the sole issue for this appeal is whether the Trial Court erred in granting leave to Appellees to amend their Complaint to add a claim for punitive damages in accordance with Florida Statutes, Section 768.72.

Rodgers, Stinson and Marquess all were employed by DTE in this region. All three worked as part of DTE's business development team. All three had executed non-solicitation and non-competition agreements in favor of both SSS and DTE.

In a short period of time, ULS's officers and management team targeted all three employees to leave DTE and work for ULS. In one case, ULS officers directed one such employee, Stinson, to violate his employee non-solicitation by attending an interview to solicit Rodgers to join him at ULS. As to all three employees, their contractual promises were made known to ULS before they were hired.

Despite such knowledge, ULS hired them all anyway and formed, out of whole cloth, a new "business development team" consisting solely of these former DTE employees, in the same geographic area that they worked for DTE. ULS, with full knowledge of its officers, then used these employees for the purposes of soliciting DTE customers with whom these employees had contact, and for projects about which the employees had intimate knowledge. ULS ultimately succeeded in taking such business.

ULS' actions here reflect a purposeful, willful, and wanton scheme to interfere with Appellees' contractual and business

relationships for the purpose of financial gain. The actions taken herein were done with the full knowledge and active participation of ULS's management and officers. At a bare minimum, they were condoned and ratified by ULS management. There is more than enough evidence to meet the requirements of Fla. Stat. § 768.72, and allow the amendment to plead punitive damages as permitted by the Trial Court. The relevant factual background is set forth in detail below.

1. DTE's Employment of Individual Appellants

As of summer 2021, Stinson, Rodgers, and Marquess all worked for DTE in various capacities. Rodgers was a business developer at DTE's corporate office in Maitland, Florida. She would "find and qualify leads", i.e., prospective customers, and then hand them over to the operations team, which consisted of the branch manager and estimating department. (IB Appx. 214:1-9). The operations team consisted of Marquess, among others, (IB Appx. 216:33-217:7), who was one of the branch managers with whom Rodgers worked. (IB Appx. 212:9-20). Rodgers testified she worked "side by side" with Marquess in this capacity. *Id.* The operations team would handle

pricing and staffing for proposals issued by DTE to customers or prospective customers. (IB Appx. 215:12-19).

The branch manager, in this case Marquess, was the one who made the decision regarding the potential lead. (IB Appx. 216:22-217:2). Rodgers would then receive the full proposal with pricing and staffing information, and finalize it to be sent to DTE's customer, and thus she had full access to such sensitive and proprietary information. (IB Appx. 216:17-21). She acknowledged having access to this information for DTE customers. *Id.*

Marquess had a long history with DTE. He started at DTE in 2011 or 2012 (IB Appx. 482:18-19), first as a maintenance crewmember, then becoming a crew foreman, and eventually moving into management. (IB Appx. 482:21-25). In management, he was an account manager for at least two years (IB Appx. 485:5-7) and then was a branch manager for three years (IB Appx. 484:9-23), until shortly before he left DTE. His final position at DTE was "continuous improvement manager," which he held for a very brief time. (IB Appx. 483:1-3).

As branch manager, he worked out of DTE's location at Mount Dora and was part of the operations team. (IB Appx. 484:9-16,

530:1-6). He would receive a “lead,” or prospective customer, and then investigate the property and determine the necessary labor. (IB Appx. 530:20-532:5). He would provide that information to DTE’s estimating team, which would then provide to him specific pricing information. (IB Appx. 533:11-21). The estimating team would call him with questions regarding the specific needs of a particular project. (IB Appx. 530:20-532:5). In other words, Marquess was integral to determining staffing and pricing, critical items for a project. Rodgers and Stinson also worked closely at DTE on a similar basis: Stinson was involved in soliciting customers for construction contracts, and worked with Ms. Rodgers as part of the business development team at DTE. (IB Appx. 93:5-15, 94:11-22, 95:2-7).

2. Individual Appellants Execute Agreements in Favor of Appellees

Not surprisingly, considering their respective duties and responsibilities as outlined above, all three employees were central to Appellees’ business development. Given the importance of these employees, all were asked to execute, and did in fact execute, respective Non-Competition, Non-Solicitation, and Confidentiality Agreement. (IB Appx. 44-56).

The non-competition provisions for both Rodgers and Stinson are identical:

I agree that for a period of two (2) years after the termination, for any reason and however caused, of my employment with the Company, I will not, directly or indirectly, own, manage, control, or participate in the ownership, management or control of, or be employed or engaged by or otherwise affiliated or associated as a consultant, independent contractor or otherwise with any other corporation, partnership, limited liability company, proprietorship, firm, association, or other business entity, or otherwise engage in a business, which is engaged in any manner in, or otherwise competes with, the business of the Company in the landscaping and irrigation services industry within the state of Florida or within a 100-mile radius of the state of Florida.

(IB Appx. 44, 53).

The Marquess Agreement includes the following non-competition covenant:

I agree that for a period of two years after the termination of my employment with the Company, I will not, indirectly own, control, or participate in the ownership, or control of any other corporation, partnership, limited liability company, proprietorship, firm, association, or other business entity, or otherwise engage in a business, which is engaged in any manner in, or otherwise competes with, the business of the Company in the landscaping and irrigation services industry within the state of Florida.

(IB Appx. 52).

All three Agreements include the same provisions regarding both non-solicitation of customers and non-solicitation of employees.

As to the former, all Individual Appellants agreed as follows:

I agree that for a period of two (2) years after the termination of my employment with the Company, I will not divert or attempt to divert from the Company any business whatsoever, through any means whatsoever including, but not limited to, contacting, influencing or attempting to influence any of the customers, potential customers or clients with whom I have been dealing during my employment with the Company.

(IB Appx. 44, 48, 53).

As to non-solicitation of employees, all Individual Appellants agreed as follows:

I agree that during my employment with the Company and for a period of two (2) years thereafter, I will not, directly or indirectly, solicit or cause to be hired any employee, independent contractor or consultant of the company for the purpose of causing that employee, independent contractor or consultant to terminate his employment or contractual relationship with the Company.

(IB Appx. 45, 49, 54).

Bound by these promises, the three employees nevertheless were hired, one after another, by ULS, as described below.

3. ULS Hires Stinson and Directs Stinson to Solicit Rodgers

During the summer of 2021, ULS and Stinson engaged in numerous contacts regarding potential employment. ULS was aware of his Agreement with the Appellees (or at least a portion thereof) during this time and prior to being hired. (IB Appx. 135:8-138:4, 941-944). More specifically, Appellees proffered evidence that Bob Blandford, Chief Executive Officer of ULS at all relevant times, knew that Stinson had non-compete obligations. Blandford was included on an email transmitting at least a portion of the agreement. (IB Appx. 941-944).

In complete disregard of Stinson's Agreement with Appellees, and despite Mr. Blandford's personal knowledge of same, ULS elected to hire Stinson anyway. Stinson's first day with ULS was August 30, 2021, as client relations manager. (IB Appx. 81:4-7). As of September 2023—when Stinson was deposed—he worked for ULS as a business development manager. (IB Appx. 81:12-13). In each position, his responsibilities included qualifying prospective landscape maintenance customers, “running it through estimating”

(i.e. and “creating a proposal based off of their needs and solutions.” (IB Appx. 81:20-25). These duties and responsibilities are essentially identical to what he was doing at DTE. (IB Appx. 90:19-91:4).

Having successfully solicited and hired one DTE business development employee in the area in Stinson, ULS set its sights on others, including Jena Rodgers. At the time ULS was courting Rodgers, ULS set a meeting on November 12, 2021, at a Starbucks in Lake Mary, Florida. (IB Appx. 115:1-14). Stinson received a calendar notice listing him as a “required attendee,” and he in fact attended this meeting. (IB Appx. 115:6-11, 934-36). Also in attendance was ULS’s Director of Maintenance, Tom Enright, and its Chief Operating Officer, Ray Leach. (IB Appx. 115:15-116:15, 934-936). Stinson’s account is set forth as follows:

Q: How long did that meeting last?

A: About 45 minutes.

Q: Was there anybody else there other than the four of you?

A: No.

Q: And what was discussed?

A: Tom and Ray were discussing – **basically pitching ULS** from what I remember.

Q: Did you make any pitch for ULS to Ms. Rodgers?

A: No.

Q: Why were you at the meeting?

A: I was told to be at the meeting.

Q: Who told you to be at the meeting?

A: Tom Enright, my direct report.

Q: Did he tell you why he wanted you at the meeting?

A: No. I was just following orders.

(IB Appx. 117:4-20) (emphasis added). Stinson at first denied that he personally solicited Rodgers or considered his presence an endorsement of ULS (IB Appx. 118:2-21), but later changed his story. He admitted to meeting Rodgers one-on-one immediately after the ULS meeting, and also admitted that she asked him whether he enjoyed his new position at ULS, and he responded that it was “pretty good.” (IB Appx. 152:7-18). Once again, all of these actions were a clear breach of Stinson’s non-solicitation promises to the Appellees, conducted not only with the knowledge of ULS’s management team, but at their express direction.

4. ULS Hires Rodgers

ULS's solicitation of Rodgers—aided by Stinson's participation in the Starbucks meeting, as mandated by ULS's COO—bore fruit, as Rodgers joined ULS on February 14, 2022. (IB Appx. 254:14-16). Her initial position was regional manager, and as of the time of her deposition in September 2023 she had been promoted to Director of Sales and Business Development. (IB Appx. 221:1-4). Prior to her joining ULS, she had made ULS's COO Leach aware of her non-compete and non-solicit obligations. (IB Appx. 346:13-20). ULS hired her anyway.

5. ULS Hires Marquess

Ten days after Rodgers' arrival at ULS, several key figures in ULS management (COO Leach, CEO Blandford, and Tom Enright) interviewed Marquess for a position at ULS. (IB Appx. 516:3-5). ULS offered him a position within a day or two of that interview. (IB Appx. 516:6-10). Prior to Marquess' hire, ULS management was made aware of his non-compete and non-solicit promises to the Appellees (IB Appx. 558:24-559:7, 1009-1011), but again, ULS hired him anyway. (IB Appx. 520:14-21, 1001-1003). His initial position was business development manager with a base salary of \$95,000. (IB

Appx. 521:5-6). As of the date of his deposition in September 2023—after he had successfully abetted ULS in pirating DTE’s business with which he and/or Rodgers had prior contacts—he was promoted to business development manager for ULS’s landscape maintenance division. (IB Appx. 521:7-18). His annual salary more than doubled in just over a year, to \$200,000. (IB Appx. 521:4-6, 522:2-4).

6. ULS’s Scheme To Create a Business Development Department and Poach DTE Business

With all three former DTE business developers in the fold, ULS proceeded with its plan to poach DTE’s business. As an initial matter, ULS had to form a business development team. Prior to the arrival of Stinson, Rodgers, and Marquess, no such team existed; the idea was for these prior DTE employees to “build” the department for ULS. (IB Appx. 562:10-25). ULS formed such a business development team solely out of the Individual Appellees. In fact, for a significant period of time, the three employees were ULS’s entire business development team in the area. (IB Appx. 317:3-17, 562:19-25).

Marquess’ testimony on this point is absolutely essential to understanding ULS’s plan:

Q: One last question about this Exhibit 52, is it fair to say from Ms. Johnson's e-mail, and from your recollection of the interview, that you were presenting as a BD candidate for ULS?

A: Yes, I was. My goal was to be hired as a business development manager.

Q: Was there any discussion, in the formal interview with Mr. Enright, Mr. Leach and Mr. Blandford about ULS's desire to build a maintenance division?

A: Well, that was the purpose of building the BD team.

Q: And Ms. Rodgers yesterday testified similarly. And also testified that at or around the time that efforts were being made to secure The Country Club at Champions Gate business. That the business development team consisted of you, Ms. Rodgers and is [sic] Mr. Stinson; is that accurate?

A: That is accurate.

Q. Nobody else at ULS?

A. That I know, no.

(IB Appx. 562:10-563:2, 1009-1011).

Armed with its business development team of former DTE employees, ULS targeted at least three customers with which Marquess and/or Rodgers had prior contact while with DTE: this includes Harmony West Homeowners' Association and Community Development District (collectively "Harmony West") and Town of

Kindred Community Development District (“Town of Kindred”). Rodgers admitted that she prepared DTE’s proposals for both accounts while at DTE. (IB Appx. 200:2-18, 245:8-18, 246:21-247:6, 959-960). As discussed above, her role at DTE provided her access to pricing and staffing information for these customers (among others) and she was well aware of this critical data for both Harmony West and Town of Kindred. (IB Appx. 216:17-21). Despite her non-solicitation obligations—which were known to ULS of course—she was tasked with preparing the same proposals for contracts for Harmony West and Town of Kindred. For both customers, rather incredibly, Marquess and Rodgers were both involved in pre-bid meetings to assist in the preparation of these proposals, with full knowledge and participation of ULS management. (IB Appx. 608:13-17, 611:12-612:2, 1000). Marquess was included in this process precisely because of his intimate knowledge of and access to DTE’s pricing and staffing for both customers as part of DTE’s estimating team in his previous position. It is apparent from the evidence obtained to date that ULS used the experience and knowledge of both Marquess and Rodgers, secured in their previous positions at DTE, to tailor proposals to both Harmony West and Town of Kindred.

Rodgers' and Marquess' actions were in violation of the non-solicitation promises made to the Appellees. Put simply, ULS would not have secured the Harmony West or Town of Kindred business without Marquess' and Rodgers' efforts to include inside information as to how DTE serviced these customers. Most importantly, ULS's management (1) knew of Rodgers' and Marquess' non-solicitation obligations; (2) knew of their previous contact with these customers, and (3) directed them to assist in preparing the proposals anyway.

ULS's actions as to a third customer, Country Club at ChampionsGate (CCCG), illustrate ULS's plan even more starkly. As discussed above, at the time ULS solicited the CCCG business, ULS's entire business development team was Marquess, Rodgers, and Stinson. Marquess admittedly had substantial contact with CCCG while with DTE; it was one of the accounts he was responsible for while with DTE. (IB Appx. 541:10-543:2). As part of DTE's estimating team, he was involved in visiting the property, making determinations on pricing and staffing for that project, and overseeing the final proposal before it went to the customer. (IB Appx. 585:25-589:3).

Despite Marquess' intimate knowledge of DTE's servicing of the CCCG project, and despite ULS management's actual knowledge of the non-solicitation obligations of Marquess and the other former DTE employees, ULS management nevertheless chose to include Marquess in the solicitation process. (IB Appx. 577:18-579:5, 608:11-23, 999-1000). This included being provided copies of proposals and attending pre-bid conference calls. The purpose of this is obvious: ULS was relying on the intimate knowledge of DTE's servicing of the CCCG project—and Marquess' prior business relationship with CCCG and its property manager while at DTE, see IB Appx. 563:3-565:3, 972-998,, to gain an unfair advantage in securing the work.²

ULS's scheme is further evidenced by ULS's management's decision to attend the bid meeting without any of its business development team. (IB Appx. 348:4-349:2). This practice is unheard of in the business; the purpose of such obfuscation was not to "wall off" the ULS business development team (at the time consisting

² See IB Appx. 972. When the community association manager responsible for CCCG reached out to Marquess about ULS attempting to secure the CCCG contract, Marquess forwarded this to Rodgers and said "Can we please bid on this???"

entirely of DTE employees with non-solicit obligations) from the bid process; after all, Marquess and Rodgers had been heavily involved behind the scenes. Instead, the purpose of leaving the business development team at home was to hide the fact that ULS had, in effect, used DTE's employees who had been working the CCCG account for years in order to poach the work. In fact, after Marquess' deposition, Marquess and ULS supplemented their document production by including yet another email in which Marquess is offering his help on the CCCG project, advising ULS employee Austin Blandford "Hey let me know when you have time to jump on a call to look at the boundaries. I am very familiar with the property." (IB Appx. 1013-1014).

After ULS secured the business, Marquess was rewarded with a promotion and a raise of more than double his previous salary. (IB Appx. 521:19-522:4). Marquess further admitted that, after the work was secured, he reverted to have direct contact with CCCG, and that in his new role he visited the property at least monthly. (IB Appx. 571:10-13).

III. COURSE OF PROCEEDINGS

On April 1, 2022, Appellees filed their Complaint against ULS and the Individual Appellants. (IB Appx. 5-56). The Complaint includes claims for breach of contract (Counts One through Three, one directed to each Individual Defendant), tortious interference with contract (Count Four), tortious interference with business relations (Count Five), violation of the Florida Deceptive and Unfair Trade Practices Act (Count Six), conspiracy (Count Seven) unjust enrichment, (Count Eight), and preliminary and permanent injunctive relief (Count Nine). *Id.*

After taking extensive discovery and deposing each of the Individual Appellants, Appellees on February 22, 2024, filed a Motion for Leave to Amend their Complaint to add claims for punitive damages (the “Motion”). (IB Appx. 719-1014). The Motion was narrowly tailored to the facts here, directed solely against ULS and limited to the tortious interference causes of action (Counts Four and Five of the Complaint). The Motion came before the Trial Court for argument on April 24, 2024. (IB Appx. 1031-90). On June 5, 2024, the Trial Court entered the Order granting the Motion. (IB Appx. 1092-95). The Amended Complaint, which includes the prayers for

punitive damages, was deemed filed on that date, and the Appellants have filed Answers to same. On July 3, 2024, Appellants filed their Notice of Appeal of the Order. On August 20, 2024, Appellants served their Initial Brief.³ Meanwhile, during the pendency of this appeal, the case continues to progress at the Trial Court, with discovery ongoing and a trial date of February 3, 2025.

SUMMARY OF THE ARGUMENT

This Court must affirm the Trial Court’s Order. The Appellants strain to reframe this appeal as raising the same issues as a post-trial appeal of an award of punitive damages. Rather, the Order on appeal is only an Order granting leave to amend. The only question on appeal is whether the Appellees have provided a “reasonable basis for recovery” of punitive damages by a proffer of evidence in accordance with the requirements of Florida Statute § 768.72.

As an initial matter, the Trial Court applied the correct legal standard in determining whether there was a “reasonable basis for

³The Initial Brief was originally due on August 19, 2024, but due to e-filing outages that day, Appellants filed and served their Initial Brief the following day, August 20, 2024. Pursuant to Fla. R. App. P. 9.210(g), Appellees file this Answer Brief within thirty (30) days of the date Appellants actually served their Initial Brief.

recovery.” The Trial Court reviewed Appellees’ proffer of evidence in a light most favorable to Appellees. It also reviewed any evidence submitted by ULS.

Having applied the correct legal standard, the Trial Court correctly determined that the proffer provided a “reasonable basis for recovery” under the statute. The actions of ULS and its officers as presented in the proffer—and again, reviewing the evidence in a light most favorable to Appellees—demonstrates reprehensible conduct which would form a basis for recovery of punitive damages. In fact, Appellees have satisfied this modest standard easily, under both subsection (3)(a) and (3)(b) of Section 768.72. In accordance with Section 3(a), Appellees have made a proffer demonstrating a reasonable basis for recovery based on the “active and knowing participation” of ULS in the scheme to poach DTE’s employees, form its own business development team, and pursue DTE customers with whom DTE had a prior relationship through the Individual Appellants.

Appellees have also made an appropriate showing under subsection (3)(b), which allows for punitive damages if ULS’s officers, directors, or managers “knowingly condoned, ratified, or consented

to such conduct.” §768.72(3)(b), Fla. Stat. have made or the foregoing reasons, this Court should affirm the Trial Court’s Order Granting Appellees’ Motion for Leave to Amend, and grant Appellees any further relief the Court deems just and proper.

Finally, Appellants’ argument that any interference was “justified” (i.e., that the competition privilege should apply) must be rejected. At this stage, the only issue is whether there is a sufficient proffer that would provide a “reasonable basis for recovery” of punitive damages. Appellants’ position is that if there may be a factual defense available, that such defense would negate a claimant’s right to plead punitive damages if Section 768.72 were otherwise satisfied. That is not the law, and Appellants’ position would require claimants to prove their case at the pleading stage. This argument has no merit and the Trial Court should be affirmed.

STANDARD OF REVIEW

The standard of review on appeal of an order granting a motion for leave to amend to add a claim for punitive damages is *de novo*. *Werner Enters. v. Mendez*, 362 So. 3d 278 (Fla. 5th DCA 2023) (reversing denial of motion for leave to amend). This Court must determine whether the Appellees made a “reasonable showing” of

having a “reasonable basis” for the recovery of punitive damages. §768.72(1), Fla. Stat. This determination is “similar to the standard that is applied to determine whether a complaint states a cause of action.” *Mendez*, 362 So. 3d at 281-82 (citing *Estate of Despain v. Avante Grp., Inc.*, 900 So. 2d 637, 644 (Fla. 5th DCA 2005)). The Trial Court, and this Court on *de novo* review, must view the proffer of evidence in a light most favorable to the Plaintiffs (i.e., the Appellees here). *Mendez*, 362 So. 3d at 282 (citing *Estate of Despain*, 900 So. 2d at 644).

ARGUMENT

I. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARDS IN GRANTING THE MOTION

The Appellants first argue that the Trial Court applied the wrong legal standards in granting the Motion. This argument must fail for the reasons set forth below.

A. The Trial Court Applied the Correct Standard of Review in Granting the Motion

Appellants’ Initial Brief contends that the Trial Court “erroneously applied a pleading-standard analysis” in granting the Motion. This is incorrect. In so arguing, Appellants in essence ask this Court to disregard its own ruling in *Estate of Despain, supra*.

Appellants also suggest some sort of conflict between this Court's case law regarding the standard of review of orders granting leave to amend to add punitive damages, and the Florida Supreme Court's jurisprudence regarding same. Put simply, there is no conflict, and the Trial Court correctly applied the law.

Estate of Despain involved a post-verdict appeal to this Court by the plaintiff of the trial court's denial of the plaintiff's motion for leave to amend pursuant to Section 786.72, Florida Statutes. Unlike here, there was no evidence of direct actions by the managing agent or principal owner of the corporate defendant. However, this Court conducted a detailed analysis of whether the corporate employer there could be vicariously liable for punitive damages for the acts of its employees. This Court noted, correctly, that Section 768.72 requires that the claimant provide a reasonable basis for recovery of such damages. *Estate of Despain*, 900 So. 2d at 641-642. With the "reasonable basis" requirement as the foundation, this Court then embarked on a discussion of the appropriate standard of review for determining whether such "reasonable basis" has been shown. The Court concluded that "the finding of a reasonable basis under the statute requires a legal determination by the trial court that the

requirements of section 768.72(1) have been met.” *Id.* at 644 (*citing Henn v. Sandler*, 589 So. 2d 1334 (Fla. 4th DCA 1991)).

Thus, this Court in *Estate of Despain* concluded that the appellate standard of review of *de novo*. But how should that *de novo* review be conducted? This Court answered that question directly:

We are of the view that the standard that applies to determine whether a reasonable basis has been shown to plead a claim for punitive damages should be similar to the standard that is applied to determine whether a complaint states a cause of action . . . Within the framework of this standard, we will view the record evidence and the proffer in the light most favorable to Despain [the Plaintiff/Appellant] and accept it as true.

Estate of Despain, 900 So. 2d at 644. This standard has been reaffirmed in numerous cases before this Court and other appellate courts across the State. *See, e.g., John Knox Vill. Of Cent. Florida, Inc. v. Est. of Lawrence*, 379 So. 3d 1205, 1209 n. 1 (Fla. 5th DCA 2024); *Fed Ins. Co. v. Perlmutter*, 376 So. 3d 24, 40-41 (Fla. 4th DCA 2023); *Cook v. Florida Peninsula Ins. Co.,* 371 So. 3d 958 (Fla. 5th DCA 2023); *Mendez, supra*, 362 So. 2d at 278; *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So. 3d 1006, 1008-09 (Fla. 1st DCA 2009).

In their Initial Brief, however, Appellants try to argue that, merely because the Trial Court's Order cites *Estate of Despain's* standard of review, or otherwise makes references to the "pleading stage," that somehow the Trial Court's analysis runs afoul of Supreme Court case law, including *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995). *Globe Newspaper* stands for the rather uncontroversial proposition that a trial court must determine whether there is a reasonable basis for recovery of punitive damages based on the claimant's proffer, a requirement taken directly from the plain language of section 768.72. This requirement, as noted above, actually undergirds the analytical framework of *Estate of Despain* and subsequent cases. A "reasonable basis" must be shown, but in determining **whether** such basis was shown, a trial court should approach the proffer as it would a motion to dismiss, with all inferences favorable to the plaintiff.

Setting all of that aside, Appellants' argument disregards other language in the Order which demonstrates that the Trial Court did in fact apply the correct legal standard. For instance, paragraph 1 of the Order defines the term "proffer" as an offer of evidence. (IB Appx. 1092). In paragraph 5, the Order correctly notes that section 768.72

requires a “reasonable basis” for pleading punitive damages. (IB Appx. 1093). In Paragraph 6 of the Order, the Trial Court holds that the Appellees have “demonstrated a reasonable basis” and goes on to analyze the proffer of evidence in some detail. *Id.* In paragraph 7, the Trial Court states that “the proffer does suggest intentionality and indifference toward the contractual rights of Plaintiff.” *Id.* The Order is not merely accepting the allegations of the pleading, but rather analyzing the proffer in a manner consistent with the standard set forth in *Estate of Despain*. The Trial Court applied the correct legal standard in reviewing the Motion.

Finally, even if the Trial Court employed the incorrect legal standard in granting the Motion, the Trial Court was still correct in doing so, as explained below in detail. Therefore, this Court, in conducting its *de novo* review, may affirm the Order under the “tipsy coachman” doctrine. *S & M Transp., Inc. v. Northland Ins. Co.*, 208 So. 3d 230, 233 (Fla. 5th DCA 2016) (cits. omitted) (“the tipsy coachman doctrine allows an appellate court to affirm a trial court that ‘reaches the right result, but for the wrong reasons’ so long as ‘there is any basis which would support the judgment in the record’”).

B. The Trial Court Did Not Ignore Appellants' Evidence, and Correctly Held That Any Responsive Evidence Did Not By Itself Render the Proffer Insufficient

Appellants next argue that the Trial Court's Order must be reversed because the Trial Court ignored "countervailing evidence" submitted by the Appellants in advance of the hearing on the Motion. This argument is without merit for several reasons.

First, and most importantly, the Trial Court did not ignore Appellants' evidence. Paragraph 8 of the Order demonstrates that the Trial Court did in fact consider the alleged "countervailing evidence" and concluded that it "might later prove to be a compelling defense" but that the evidence is "premature at this proffer/pleading stage." (IB Appx. 1093).

The word "proffer" is of paramount importance. Appellants contend, in essence, that the Trial Court's refusal to **accept** the countervailing evidence at face value such that it negates the proffer, is in and of itself proof that the Order had the same defect as addressed in the previous section of this Brief, i.e., that the Trial Court merely accepted the **allegations** of the Appellees as true. This is not what the Trial Court did. Instead, the Trial Court acknowledged that the Appellants had submitted "countervailing

evidence” but went on to hold, as is appropriate under the case law and Section 768.72, that the Appellees’ proffer was sufficient to form a reasonable basis for leave to amend. (IB Appx. 1094). Put simply, the Trial Court did not ignore the “countervailing evidence,”⁴ but deemed it insufficient to deny the Motion in light of the proffer.

On this point, Appellants fail to cite a single case binding upon this Court which would require the Trial Court to deny a motion for leave to amend merely because the responding party presented evidence contradicting the evidentiary proffer. Appellants cite to *Perlmutter, supra*, 376 So. 3d at 33, and *Manheimer v. Florida Power & Light Co.*, 2023 Fla. App. LEXIS 5449 (Fla. 3d DCA Aug. 2, 2023).

⁴The Initial Brief engages in some sleight of hand in this section, see Initial Brief of Appellants at 26-28, by not actually addressing what the “countervailing evidence” is, or why such evidence would require reversal of the Trial Court. In fact the “evidence,” such as it is, has nothing to do with the actual bad acts of ULS, but rather presents (disputed) evidence that the Appellees might not be able to recover money damages for one or more of the customers which ULS stole. In other words, ULS is relying upon damages evidence. However, punitive damages may be recoverable in a case of an intentional interference with business relationships, even if the plaintiff is unable to prove compensatory or actual damages. *Platte v. Whitney Realty Co., Inc.*, 538 So. 2d 1358, 1360 (Fla. 1st DCA 1989). ULS in its Initial Brief fails to cite any case law for the contrary proposition, that the presentation of disputed damages evidence requires a reversal of a trial court’s order granting a motion for leave to amend to add a claim for punitive damages.

In those cases, the Fourth and Third Districts, respectively, held that a trial court must consider the evidentiary showings of all parties, but neither case stands for the very broad proposition that Appellants propose here; namely, that any countervailing evidence negates the proffer. The Order makes clear that the Trial Court did in fact consider all such evidence, and determined that Appellees' proffer was sufficient.⁵

II. CONSTRUING THE PROFFER MOST FAVORABLY TO THE APPELLEES, THE TRIAL COURT CORRECTLY FOUND THAT THE PROFFER PROVIDED A REASONABLE BASIS TO CLAIM PUNITIVE DAMAGES UNDER COUNTS FOUR AND FIVE OF THE AMENDED COMPLAINT

There is ample evidence in Appellee's proffer to support a claim for punitive damages, and the Trial Court correctly granted the Motion. Appellants seek to reverse the Order on two grounds. First, they contend that there is no evidence of "egregious or reprehensible conduct" to support the claim. That argument must be rejected outright. Second, Appellants make the peculiar and baseless argument that the existence of a possible affirmative defense to the

⁵ Even if the Trial Court failed to consider the Appellants' evidence—which is not the case—this Court under the "tipsy coachman" doctrine, *supra*, can and should determine in the course of its *de novo* review that the Order should be affirmed in any event.

underlying tortious interference claim—in this case based ostensibly on the competition privilege—should somehow negate what would otherwise be a sufficient proffer at the pleading stage. That argument, too, must fail.

A. The Proffer Clearly Presents a Reasonable Basis for Recovery of Punitive Damages Based on ULS’s Intentional Misconduct

Florida law allows a plaintiff to amend the complaint to state a claim for punitive damages upon a mere proffer of evidence which would legally support an award of punitive damages. Section 768.72(1), Florida Statutes, provides, in pertinent part, as follows:

In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

§768.72(1), Fla. Stat. In other words, the movant must provide a “reasonable basis for recovery” of punitive damages. Fla. Stat. §768.72(1). As noted in the Standard of Review section, *supra*, the determination of a “reasonable basis” is a question of law that this Court must review *de novo*. *Estate of Despain*, 900 So. 2d. at 644. To

ascertain whether a “reasonable basis” exists, the court is not called upon to weigh testimony and evidence. *Id.* at 645; *John Knox Vill.*, 379 So. 3d at 1209; *see also Dolphin Cove Ass’n v. Square D. Co.*, 616 So.2d 553 (Fla. 2d DCA 1993) (“Prejudging the evidence is not a proper vehicle for the court's denial of the motion to amend.”). Thus, the Court should only consider whether the proffered evidence, if the fact finder believed that evidence, could legally support an award of punitive damages. *See Estate of Despain*, 900 So. 2d at 642-644 (stating that a “proffer” is merely an offer of evidence and that the punitive damages statute does not contemplate an adjudication of the veracity of such evidence).

The statute does not require that the Trial Court, or this Court, examine the record as closely as it would for a summary judgment issue. Instead, a court should review a motion in a manner akin to addressing a motion to dismiss for failure to state a cause of action, or a motion to strike, in a light most favorable to the Plaintiff. *See Porter v. Ogden, Newell & Welch*, 241 F.3d 1334, 1340-41 (11th Cir. 2001); *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005); *State of Wis. Inv. Bd. v. Plantation Square Ass’n*, 761 F. Supp. 1569, 1580 (S.D. Fla. 1991).

With respect to a corporate defendant such as ULS, punitive damages may be imposed only if the conduct of the employee or agent meets the criteria of Section 768.72, subsection (2) (i.e., intentional misconduct or gross negligence), and either (a) the corporation “actively and knowingly participated in such conduct;” (b) the “officers, directors, or managers” of the company “knowingly condoned, ratified, or consented to such conduct,” or (c) the company engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant. Fla. Stat. § 768.72(3). Proof of malice is not essential. *See Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664, 667-68 (Fla. 3d DCA 2003). While proof of motive for the contumacious conduct is likewise not required, a desire to protect or enhance one’s financial interests may support punitive damages. *See Holmes*, 891 So. 2d at 1191-92 (Fla. 4th DCA 2005).

Under that standard, the Trial Court correctly granted the Motion because the Appellees’ proffer demonstrates a “reasonable basis” for recovery of punitive damages against ULS. More specifically, Appellees made a proffer which provides a reasonable basis for the award of punitive damages against ULS as to

subsections (3)(a) and (3)(b) above. There is ample evidence of ULS's intentional misconduct which falls under both subsections.

Punitive damages may be recoverable on claims for tortious interference with business or contractual relationships. See *Ferguson Transp., Inc. v. North American Van Lines*, 687 So. 2d 821 (Fla. 1996); *Platte v. Whitney Realty Co., Inc.*, 538 So. 2d 1358 (Fla. 1st DCA 1989); *Wyndham Vacation Ownership, Inc. v. Square One Dev. Grp., Inc.*, Case No. 6:20-cv-643-RBD-EJK, 2022 U.S. Dist. LEXIS 93569 (M.D. Fla. Feb. 2, 2022) (granting motion for leave to amend to add a prayer for punitive damages for tortious interference claims). In *Ferguson*, the Supreme Court first observed that a mere breach of contract does not support an award of punitive damages, but then held “[w]here the acts constituting a breach of contract amount to a cause of action in tort there may be a recovery of exemplary damages upon proper allegations and proof. In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse, or gross negligence which amounts to an independent tort.” *Ferguson*, 687 So. 2d at 822-23 (quoting *Griffith v. Shamrock Village, Inc.*, 94 So. 2d 854 (Fla. 1957)). Further, the *Platte* Court held that a cause of action for intentional

interference with a business relationship may support a claim for punitive damages even if the Plaintiff is unable to prove compensatory or actual damages. *Platte*, 538 So. 2d at 1360 (citing *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989)).⁶

Under the above standard, Appellees' proffer easily supported the Trial Court's Order granting the Motion. The proffer demonstrates that, with full knowledge of and participation by ULS officers, ULS embarked on a scheme to hire away several DTE employees, start its own business development department using such employees, and pursuing DTE customers. The acts supporting a claim for punitive damages may be summarized, in chronological order, as follows:

- ULS hired Stinson despite ULS's CEO, Bob Blandford, having actual knowledge of Stinson's non-competition and non-solicitation Agreement with Appellees;

⁶Appellants' reliance on *James Crystal Licenses, LLC v. Infinity Radio, Inc.*, 43 So. 3d 68 (Fla. 4th DCA 2010) for the proposition that there must be proof of physical harm is misplaced. The above-referenced cases (*Ferguson*, *Platte*, *Wyndham Vacation*, et al.) involve business torts with no physical harm. *James Crystal Licenses* was a post-trial appeal of an award of punitive damages, analyzed under a higher burden of proof. That case dealt with a bare violation of a non-compete agreement, with no evidence of stolen customers.

- ULS’s COO, Ray Leach, personally solicited Jena Rodgers, to come work for ULS, despite Rodgers having disclosed to ULS her a non-competition and non-solicitation Agreement with Appellees;
- ULS COO Leach **required** that Stinson attend the solicitation meeting with Rodgers, despite ULS’s knowledge (and Leach’s personal knowledge) of Stinson’s non-solicitation obligations;
- ULS hired Marquess despite knowledge his Agreement with Appellees;
- ULS implemented a new “business development” team consisting entirely of the three Individual Appellants, all of whom were business developers poached from DTE;
- ULS decided, with full knowledge of its officers, including CEO Blandford and COO Leach, to pursue DTE customers with whom Marquess and Rodgers worked at DTE, including, but not limited to, CCCG, Harmony West, and Town of Kindred; and
- Further, and most importantly, ULS CEO Blandford elected to rely on Marquess and/or Rodgers in preparing

proposals to these customers. At all times relevant, Blandford knew of the prior relationships between Marquess/Rodgers and these customers; this is evidenced, in part, by Blandford's decision to keep Marquess and Rodgers from attending the "pitch" meeting with CCCG, in an obvious ruse to make it appear there was no effort made by either employee to divert the CCCG business to ULS. The evidence in the proffer (including Marquess' plea to Rodgers to "please bid" on the CCCG work) reveal this ruse for what it is.

In sum, ULS intentionally chose to interfere with three employment contracts, and at least three DTE relationships, in order to open its own business development department—staffed entirely by these ex-DTE employees—and wrongfully divert DTE's business to ULS. All of this was done with full knowledge and active participation of ULS officers. The proffer fully supports leave to amend, as these actions satisfy Florida Statutes §768.72(2) and both subsection (a) and (b) or Florida Statutes § 768.72(3).

Appellants seek reversal based on Fourth District case law which hold that, to merit punitive damages, conduct in an intentional

interference case must be “egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment.” *See, e.g., Bistline v. Rogers*, 215 So. 3d 607, 609 (Fla. 4th DCA 2017); *Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc.*, 987 So. 2d 706, 708 (Fla. 4th DCA 2008). There is no Fifth District case adopting this standard, or otherwise analyzing the Fourth District holdings in the context of tortious interference cases. Those cases therefore are not binding precedent on this Court. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992) (holding that as between District Courts of Appeal, a sister district’s opinion is “merely persuasive”). Appellees respectfully submit that the requirements in *Bistline* and *Imperial Majesty* are inconsistent with and abrogate the rights of plaintiffs to pursue such punitive damages under the standards set forth in the Florida Statutes.

However, even if “truly culpable behavior” is required, the Trial Court correctly granted the Motion. There is ample evidence of such behavior on the part of ULS in several respects. First, the officers of ULS demonstrated a complete disregard for valid employment contracts between Appellees and their employees. Second, by “hiding” Marquess and Rodgers away from the actual pitch meeting

with CCCG, ULS was intending to deceive others—including DTE—who might otherwise have been made aware of the employees' involvement in procuring the business. Third, ULS's officers strong-armed Stinson into further violations of his Agreement with the Appellees by mandating his attendance at an employment interview with Rodgers. Fourth, the assault on DTE's and SSS's contractual and business relationships was targeted. ULS was not looking to hire just any employee, but rather ULS chose to pursue only client-facing employees, with knowledge of DTE's customers' wants and needs in the same geographic area, and who could quickly create a business development department at ULS which did not previously exist. Between Rodgers, Stinson, and Marquess, the three of them could provide to ULS a complete puzzle, from A to Z, of how the Appellees prepared, priced, staffed, and sold proposals to prospective customers in the area.

As a final point, Appellants' Initial Brief appears to argue that the Trial Court disregarded the Fourth District precedent. To the contrary, the Order cites *Imperial Majesty*, IB Appx. 1093, and there is nothing on the face of the Order indicating that the Trial Court has rejected the applicability of any of the cases cited by Appellants. Also,

the question of whether ULS's actions constituted "truly culpable behavior," and the impact *Imperial Majesty* case, were both discussed at some length before the Trial Court at the hearing on the Motion, as was what constitutes "improper means" for the purposes of the potential application of the competition privilege. (IB Appx. 1046-65). This Court, reviewing the matter *de novo*, is under no obligation to follow the Fourth District cases but, as noted above, even if this Court were to adopt the "truly culpable behavior" standard from *Bistline* and *Imperial Majesty* there is still a trove of evidence in Appellees' proffer to support the grant of the Motion, and the Order should therefore be affirmed.

B. Appellants' Argument That Any Interference Was "Justified" Must Be Rejected

Appellants' final argument is that there is record evidence that ULS's interference was "justified" and as a result the Appellees should not be allowed to plead a claim for punitive damages under Section 768.72. This argument is as strange as it appears, and must be rejected out of hand. Appellants appear to argue that mere evidence of a defense negates a claimant's proffer in support of leave to plead a claim for punitive damages. Such an argument turns the

entire litigation process on its head, allowing potential defenses to prevent mere pleading. The argument also highlights the fallacy running through the entire Initial Brief, which is that Appellants are conflating the burden of proof at the pleading stage with the burden of proof at trial.

Appellees are aware of no case law—and indeed, Appellants cite to none—holding that evidence supporting an affirmative defense to a claim for punitive damages negates a claimant’s statutory right to plead the claim after a sufficient proffer. The Appellants seek to add to Section 768.72 a requirement that the proffer anticipate and pierce affirmative defenses that may be available to a defendant. This is not required by the statute. In fact, Section 768.72 does not even require that a claimant’s proffer include evidence of every element of a particular cause of action. Appellees need only make a “reasonable showing” by proffer of evidence which would provide a “reasonable basis for recovery” of punitive damages. § 768.72(1), Fla. Stat. For the reasons discussed in Section III.A., *supra*, Appellees have clearly made such a showing.

Even if this Court were to entertain the substance of Appellants’ argument, it must be rejected. Appellants’ position appears to be

that because ULS and DTE are competitors, the interference was justified and privileged unless ULS used “improper means.” There is no opinion of this Court discussing “improper means” in the context of the competition privilege as a defense to a tortious interference claim. Other Florida appellate courts have held that “improper means” can include, among other things, “conspiratorial conduct, illegal conduct, and threats of illegal conduct.” *Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. 2d DCA 1995).

The proffer includes ample evidence of “improper means” under that definition. At the very least, construing the proffer in a light most favorable to the Appellees, there is sufficient evidence to allow the claim for punitive damages to be pled even if proof of “improper means” were required by Section 768.72. There is conspiratorial conduct, namely, the ULS officers and Stinson conspiring to breach his non-solicitation and conspiring to hire Rodgers as part of ULS’s plan to create a business development team from DTE’s employees. Once all three employees were in the fold at ULS, there was further conspiratorial conduct among all the Appellants to use the individuals’ knowledge of DTE’s marketing, sales, and performance processes to target DTE’s customers. This conduct is best evidenced

by the decision of ULS to conceal Rodgers' and Marquess' involvement in these proposals.⁷

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court's Order Granting Appellees' Motion for Leave to Amend, and grant Appellees any further relief the Court deems just and proper.

This 19th day of September, 2024.

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⁷ Such actions can be the "improper means" to pierce any competition privilege which might otherwise be available to ULS. In this regard, it is noteworthy that when the Initial Brief argues that "the mere act of intentionally inducing a contractual breach does not meet the high bar for punitive damages because there is no evidence that ULS utilized "improper means,"

CERTIFICATE OF COMPLIANCE

1. This Brief of Appellees complies with the word count limit requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B), excluding the exempted portions of the Brief.

2. This Brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.045(b), as it has been prepared in a proportionally spaced typeface using Microsoft Word in Bookman Old Style 14-point font.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished via the Florida Courts' E-Filing System this 19th day of September, 2024 to: Cameron G. Kynes, Esq., Jason R. Bowyer, Esq. and Kathleen D. Dackiewicz, Esq., McGuireWoods LLP at ckynes@mcguirewoods.com; jbowyer@mcguirewoods.com; kdackiewicz@mcguirewoods.com; clambert@mcguirewoods.com; flservice@mcguirewoods.com; lgray@mcguirewoods.com and CNi@mcguirewoods.com (counsel for Appellants).

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