No. 5D2024-1997
L.T. CASE NO. 2022-CA-1512

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

DOMINIQUE TUCKER,

Appellant,

v.
FLORIDA HOSPITAL OCALA, INC. d/b/a ADVENTHEALTH OCALA,

Appellee.

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes Pages

Other Authorities Pages

PRELIMINARY STATEMENT

This Initial Answer Brief refers to Plaintiff/Appellant collectively as "Appellant." Citations to Appellant's Appendix to Initial Brief are cited as "R. __." Citations to Appellee's Appendix to its Answer Brief are cited as "AB R. __."

I. SUMMARY OF ARGUMENT

This case is about an active shooter drill conducted in an educational, classroom setting to train licensed emergency department nurses on how to handle themselves and patients in an ever-more-likely eventuality of an active shooter and/or mass casualty event in the Appellee's emergency department. Appellant asks this Court to overturn the well-reasoned and record-supported decision of the lower court denying her Motion for Leave to Amend Complaint to Assert a Claim for Punitive Damages (the "Motion") for two independent reasons:[1] Appellant did not offer sufficient evidence

[1] The lower court also rejected the Motion for failing to demonstrate that the decision to use a live actor and props in the training did not rise to conduct that is punishable as reprehensible, gross, flagrant, reckless, and wanton, or of such a nature that it demonstrates a careless disregard for the life and safety of others. R. 002287. However, as Appellant recognizes on this appeal, because the claims alleged below are intentional torts, a claim for punitive damages must

that (1) any employee of Appellee engaged in intentional misconduct; or (2) that a managing agent of Appellee condoned or ratified the training.

The lower court properly found that the facts of this case did not provide a basis for a claim for punitive damages where there was no intentional misconduct or ratification of the training drill by Appellee's managing agents. This Court should affirm the trial court's decision.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Residency Program

The dispute arises out of a 10-person educational training drill in Florida Hospital Ocala, Inc. d/b/a AdventHealth Ocala's ("AdventHealth Ocala") Emergency Residency Program (the "Residency Program"). R. 000430, *see also* AB R. 44. The Program was new to AdventHealth Ocala; only one class had been completed previously. R. 000429. The paid program was 16 weeks and focused

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also meet an intentional misconduct standard—not gross negligence. *See Bistline v. Rogers*, 215 So. 3d 607, 610 (Fla. 4th DCA 2017) ("Because the claims at issue do not sound in negligence, the asserted basis for punitive damages under the statute was 'intentional misconduct.'").

on readying already-registered and licensed nurses to be a part of an emergency department staff. R. 001318.

Dr. Marie Hankinson and Beth Torrens-Nardine, nurses who are clinical educators at AdventHealth Ocala, designed the Residency Program to be an intensive and competitive educational program to prepare nurses for the rigors and dangers of working as emergency department nurses. R. 002073-2074. The students in the voluntary Residency Program, including the Appellant, were newly trained and licensed nurses, who would earn a special certification in emergency department operations, which would make them more valuable in the marketplace. R. 000029

Dr. Hankinson and Ms. Torrens-Nardine believed it was important to impress upon the residency students that hospitals are inherently dangerous workplaces. R. 001834. And while workplace violence against and involving health care professionals can happen everywhere, the hospital emergency department is among the most vulnerable settings, as it often serves the most marginalized groups of society under difficult circumstances. *Id.* *See also* R. 001895. Since the November 2021 training, there have been over a thousand mass shootings in the United States, R. 002051, fn. 5, and Appellee has

experienced several "Code Grey" (threatening incidents requiring security intervention) workplace violence incidents. R. 000066, 002051, fn. 8.

B. The Planning of the Training Drill

Before the November 2021 training drill that resulted in this and related litigation, one similar training had occurred. R. 002072. In September 2021, the first Residency Program cohort went through a similar simulated training but was given notice of the drill on the syllabus for that day. R. 000579, 000246. AB R. 45-46. Ms. Torrens-Nardine stated that those students did not take the training seriously, and she and her training colleague felt as though the nurses did not learn or gather much from it. R. 000168, 000486.

Dr. Hankinson and Ms. Torrens-Nardine discussed making the next training more realistic and, in their view, more valuable to the students. R. 000184, 000652. Dr. Hankinson and Ms. Torrens-Nardine did not plan to tell the students beforehand that the training was only a drill. R. 000172, 000579, 002201.

When asked what the goal was behind making the training seem more real, Dr. Hankinson and Ms. Torrens-Nardine unequivocally

pointed to their desire to train and impart valuable knowledge on the resident students:

> Q: So even if the reaction to the drill was not as you had planned or expected, do you take responsibility for what happened as a result of the drill?
>
> Ms. Clifton: Object to form.
>
> **A: Again, it was a classroom setting. I set forth an objective, and we wanted to make sure that the nurses were prepared, because, again, in today's society, everything that's going on – and 40 days – a couple days after the drill happened, there was a car with a woman in it that came charging into the ED, almost getting in, with a gun in her hand. So I wanted to make sure my nurses were prepared for anything. As an ER nurse, anything comes in through that door, you have to be prepared, and I was trying to prepare them for that. And that was my goal. And do I apologize? Yes. But that was not my intent to hurt or do anything of that matter. My goal was simply to teach them to make sure that they have everything the need to be a successful emergency room nurse.**

R. 000477-478.

> Q: Did you take into account how subjecting my clients to a drill like this active shooter training drill on November 30th could affect their mental health?
>
> **A: So when we were doing the planning, we looked at all those – those issues. Our – our main goal was to teach them a skill. We weren't trying to hurt them at all. We weren't trying to cause them any pain. We were trying to teach them a skill.**

R. 000146.

Q: What is the purpose of running an active shooter drill?

A: The purpose is to, again, give them the tools necessary to react, to know what -- the know-how to -- to handle that situation, if there is an active shooter, to be able to run if they could run, nowhere to run, not just run into a corner, nowhere to hide, hide in a good spot, so that the active shooter cannot find you, and fight, you know, if you -- if they come running into a room, and you're there, and the door's not locked, and you don't have something against the door, be able to fight with whatever you have, and to go through those motions, and to understand what to do.

R. 000561.

Q: So if the September nurse class got effective training on active shooter training drills without, you know, believing that they were in a real active shooter scenario, why did you feel like you had to do more for the next class?

Ms. Clifton: Object to form.

A: Just to make it more real and to help them understand that, you know, they need to run, hide, fight, and kind of get that point across in a controlled, safe environment. So we just wanted to make sure that they understood. The other class, again, understood, but did they really – would they really be able to react the same way in a – in a situation if it was real?

R. 000556.

Q: You don't want anyone to go through what you went through back at Johns Hopkins – correct?

A: Right . . . . That's correct. And that's why I thought – and I feel very strongly about making sure that people – my nurses – and I call them my nurses because they're like my babies, because they're new grad nurses, and I want them to go through and have the necessary tools so they can be successful. And it's not easy being an emergency room nurse because of the stuff that you see, the stuff that you deal with. So I wanted to make sure that they didn't feel what I felt, so they were prepared.

Q: But that's exactly what you did, isn't it? You put them through a scenario where they felt what you felt?

Ms. Clifton: Object to form.

A: Not intentionally, because I don't want anybody to feel what I felt.

Q: But by putting on this drill the way that it was put on, you made my clients, Lauren Palazini and Dominique Tucker . . . fear for their lives, didn't you?

Ms. Clifton: Object to form.

A: It was not my intent.

R. 000482-484.

Q: Why did you feel like you needed to apologize to the class?

Ms. Clifton: Object to form.

A: Because I felt bad that it got to the point where someone felt the need to call 911, and that was not my

objective. You know, again, I care for them. I'm very passionate about teaching and I just felt like I failed.

R. 000606-000607.

Q: And does this document reference the live portion in regards to having the active shooter come into the scenario live?

A: So if you look at, let's see, this is the whole day. You can see where the Las Vegas shooting is discussed. We have the objectives here to reduce risk or harm to the patient, conduct assessments, appropriate for the care of the patient. That's our jumpstart triage, and you can go on. But those are the objectives.

R. 000272.

Dr. Hankinson further testified that: "our main goal was to teach them a skill. We weren't trying to hurt them at all. We weren't trying to cause them any pain. We were trying to teach them a skill." R. 002080.

There is no evidence in this record (nor could there be) that the training was intended by anyone to cause harm or with any knowledge that harm would result. To the contrary, the nurse trainers who planned the drill intended to help, not harm the trainees.

C. The Training Drill

Shortly before the training, Travis Gilman, a paramedic at AdventHealth Ocala, informed the security guard and other AdventHealth Ocala employees that the drill would be taking place. R. 000142, 002117. Before the drill took place, the students signed into their class, R. 000080, R. 000637, which was in the basement of the hospital, separate from any patients or other hospital staff, and in a controlled classroom setting. R. 000265. The top of the sign-in sheet for the November 30, 2021 training read "ED Day 4 MCI/Active shooter/Stop the bleed."[2] AB R. 44. Appellant signed the sign-in sheet. R. 000080, AB R. 44.

Following sign-in, the class began with a presentation on the 2017 Las Vegas shooting from a Federal Emergency Management Agency ("FEMA") employee. R. 002102, 001020. Throughout the hour and a half presentation, the nurses learned about the effects of such an event on the local hospitals and what a response to an MCI should look like. R. 002182, AB R. 10-16. When the presentation ended, Dr. Marie Hankinson shifted the class into the next lesson—the "tabletop

[2] MCI stands for mass casualty incident.

exercise." R. 000562-563. To do so, she set up a scenario for the class, reading from a National League of Nursing curriculum, detailing an active shooter at the local mall. R. 000644-645. AB R. 35-43. The tabletop exercise tried to prompt the trainees to think about what the local hospitals should do to prepare for a potential influx of patients, and what triage of so many trauma patients would look like. *Id.*, *see also* R. 000562, 000646.

Shortly after transitioning to the tabletop exercise and after reading "active shooter" literature to the trainees, paramedic Travis Gilman began the simulation part of the training and entered the classroom with a fake training weapon, painted orange, with no barrel or moving trigger. R. 002151-002152. The simulation lasted about five minutes, during which a call was placed to 911. R. 000203, R. 000207. The first 911 call was placed at 1:24:07 p.m., with a second call being placed at 1:24:23 p.m. AB R. 4-9. By 1:26:50 p.m., within three minutes of the first 911 call, a local law enforcement officer arrived at the facility. *Id.*

D. The Aftermath of the Training Drill

Following the approximately five-minute-long drill, a Marion County Sherriff's Office ("MSCO") officer arrived at the emergency

department. R. 001753-001756. Officer Robbins testified that after arriving, he was not aware of the purpose of the call, and only knew someone had dialed 911. R. 001753. He was quickly told that training was happening in the basement, and by the time he arrived in the basement, it was already over. R. 001754. Once he was told about the circumstances, he debriefed and de-escalated with the nurses and left. R. 001755. He quickly called off any other MSCO officers enroute, never wrote a report, did not feel like there was any criminal intent by anyone, and never drew his weapon. R. 001756.

Officer Robbins also understood the reasoning for the training being realistic, and testified that "the more realistic you can make your training, I think the student will learn from that a little bit more . . . . And certainly having a very realistic training is important in a controlled way." R. 1706.

E. Procedural History

The training resulted in several lawsuits bringing claims for intentional infliction of emotional distress ("IIED"), assault, and false

imprisonment.[3] On March 6, 2024, Appellant filed her Motion. R. 000004. Appellee first responded in opposition on April 9, 2024. R. 002049. A hearing was held. The Court heard the Motion on June 11, 2024, and the lower court entered its order denying the Motion on September 9, 2024, determining there was not enough evidence to support a finding of intentional misconduct or gross negligence, and that no high-level agent of Appellee approved of or ratified the drill, as required by Florida law for the imposition of punitive damages. R. 002287. Appellant timely filed this appeal.

III. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision about whether a party should be allowed to plead punitive damages. *Orlando Health, Inc. v. Mohan*, 5D2023-1596 (Fla. 5th DCA Jun. 18, 2024) (citing *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1009 (Fla. 1st DCA 2009)). "In evaluating the sufficiency of the evidence proffered in support of a punitive damages claim, the evidence is viewed in a light favorable to

[3] *Palazini v. Florida Hospital Ocala, Inc. d/b/a AdventHealth* Ocala, Fifth District Court of Appeals, Case No. 5D2024-1998 and *Baker, et al. v. Florida Hospital Ocala, Inc. d/b/a AdventHealth Ocala,* Fifth District Court of Appeals, Case No. 5D2024-2016.

the moving party." *Id*. Here, the trial court properly dismissed Appellant's Motion, and the decision should be affirmed.

IV. ARGUMENT

A. Punitive Damages Standard

"A plaintiff's ability to assert a claim for punitive damages is substantively governed by section 768.72, Florida Statutes." *Crump v. Am. Multi-Cinema, Inc.*, 383 So. 3d 880, 885 (Fla. 5th DCA 2024). "[N]o 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." § 768.72(1), Fla. Stat. (2017) (emphasis added). This statute creates for a defendant "a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages." *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995); *see also Hosp. Specialists, P.A. v. Deen*, 373 So. 3d 1283, 1287 (Fla. 5th DCA 2023) (citing *Globe Newspaper*, 658 So. 2d at 519).

A party wishing to pursue punitive damages must first move to seek leave of court to file an amended complaint and then make "a

reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." *Mohan*, 5D2023-1596 (citing § 768.72(1), Fla. Stat; Fla. R. Civ. P. 1.190(f). In deciding whether to permit a claim for punitive damages, the trial court acts as "a 'gatekeeper' to assess whether the claimant has shown a reasonable evidentiary basis for the recovery of punitive damages." *Hosp. Specialists*, 373 So. 3d at 1287 (quoting *Varnedore v. Copeland*, 210 So. 3d 741, 745 (Fla. 5th DCA 2017)). The trial court's gatekeeping function "similarly tasks the trial court with preventing a party from being subjected to a punitive damages claim when no reasonable [evidentiary] basis for these damages has been shown." *Hosp. Specialists*, 373 So. 3d at 1288.

"By the plain language of section 768.72, punitive damages are permissible 'only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.'" *Crump*, 383 So. 3d 885 (citing § 768.72(2), Fla. Stat.). Further, in Florida, a corporation or employer may become liable for punitive damages for the conduct of an employee or agent "only if" the employee's conduct is intentional misconduct or gross negligence as defined by the statute and the

employer "actively and knowingly participated in such conduct[,] . . . knowingly condoned, ratified, or consented to such conduct[,] or . . . engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by" a plaintiff. *See* § 768.72(3), Fla. Stat.; *see also Wells Fargo Bank, N.A. v. Elec. Funds Transfer Corp.*, 326 So. 3d 753, 757 (Fla. 5th DCA 2021) (citing *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159 (Fla. 1995)).

B. Here, No Managing Agent Condoned, Ratified, or Approved of the Drill

The lower court properly denied Appellant's Motion because Appellant did not offer enough evidence, as required by Florida law, that a managing agent of Appellee condoned, ratified, or approved of the drill. Specifically, Florida law requires showing culpable conduct at two levels—first, at the employee level through evidence that the employee "was personally guilty of intentional misconduct;"[4] and second, at the corporate level, through the "willful and malicious actions of managing agents of the corporation." *See* § 768.72(3), Fla. Stat.; *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159 (Fla.

[4] Discussed in more detail *infra*.

1995) (emphasis added); *see also FPL v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019).

To show "willful and malicious actions of managing agents of the corporation," Appellant must prove one of these three types of acts under section 768.72(3):

> (a) Appellee actively and knowingly participated in its employee's wrongful conduct;
>
> (b) The officers, directors, or managers of Appellee knowingly condoned, ratified, or consented to its employee's wrongful 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.[5]

Fla. Stat. § 768.72(3).

Appellant moved forward under subsection (b), relying on the actions of Ms. Torrens-Nardine and Dr. Hankinson—two nurses who are clinical educators. Such educators, however, are not managing agents under Florida law. A managing agent is "more than just a

[5] Because Appellant "seeks to recover punitive damages for intentional torts, [she] must show intentional misconduct; gross negligence would not suffice." *CCP Harbour Island, LLC v. Manor at Harbour Island, LLC*, 2023 WL 6612753, at *7 (Fla. 2d DCA 2023) (citing *Bistline*, 215 So. 3d at 610 ("Because the claims at issue do not sound in negligence, the asserted basis for punitive damages under the statute was 'intentional misconduct.'").

manager or midlevel employee." *Dominguez*, 295 So. 2d at 1205. Rather, "a managing agent is an individual like a president [or] primary owner who holds a position with the corporation which might result in his acts being deemed the acts of the corporation." *Id.* (internal quotation marks omitted) (quoting *Taylor v. Gunter Trucking Co.*, 520 So. 2d 624, 625 (Fla. 1st DCA 1988)).

Mere job titles are "insufficient to transform low-level and mid-level supervisors into managing agents of a company." *Napleton's N. Palm Auto Park, Inc. v. Agosto*, 364 So. 3d 1103, 1107 (Fla. 4th DCA 2023) (internal quotations omitted) (citing *Halum v. ZF Passive Safety Sys. US, Inc.*, 360 So. 3d 391 (Fla. 4th DCA 2023). Florida courts have consistently required employees to have a significant degree of company-wide responsibility to be considered a managing agent. The policy behind such holdings is clear—allowing a claim for punitive damages under any other circumstances would compromise the very purpose of corporate punitive damages liability.

For example, in *P.V. Const. Corp. v. Atlas Pools of the Palm Beaches, Inc.*, 510 So. 2d 318 (Fla. 4th DCA 1987), the court found that the president and chief operating officer of the company was considered a managing agent. Comparatively, in *Pier 66 Co. v. Poulos*,

542 So. 2d 377 (Fla. 4th DCA 1989), the court found that the actions of a sales director, personnel director, president of the hotel, and a staff attorney of the corporation that owned the hotel were not subject to punitive damages because, as a matter of law, none of the employees—including the hotel president—were considered managing agents of the hotel.

Also, in *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994), the court found that even a bank vice president did not qualify as a managing agent because he was not a primary owner of the bank or a member of the Board of Directors. In *Napleton's North Palm Auto Park, Inc.*, 364 So. 3d 1107 (Fla. 4th DCA 2023), the court reversed an award of punitive damages where there was no evidence that the dealership's platform manager was a "managing agent" of the corporation. The court found that although the platform manager oversaw "three or four different vehicle stores in the Palm Beach area," and had "decision-making authority over the stores" he supervised, he was not a managing agent to determine punitive damages because there was "no evidence presented that the platform managers ever participated in the formation of company policy." *Id.* (internal quotation marks omitted).

The same is true here—the clinical educators who planned the drill had the authority and autonomy to create curriculum of the Nurse Residency Program as they saw fit, but there is no evidence in the record or offered that they took part in corporate-level decision-making. It therefore cannot be said that the nurses involved in planning the drill were enough managing agents to bind Appellee.

In addition to Appellant's failure to offer any evidence to show Dr. Hankinson or Ms. Torrens-Nardine were managing agents of Appellee, they similarly did not offer evidence that any of Appellee's higher-up employees condoned and approved of the drill. Instead, to support her Motion and this appeal, Appellant continues to point to deposition testimony in which Appellee's employees were asked hypothetical and rhetorical questions in a confrontational setting about whether they supported their colleagues and their intentions in training emergency nurses for potential emergencies in the future. But this testimony cannot support a punitive damages claim against Appellee. Instead, the court must look to what steps Appellee actually took once it knew about the drill.

Generally, "before one may infer that a principal ratified an unauthorized act of his agent, the evidence must demonstrate that

the principal was fully informed—beyond having simple constructive knowledge—and that he approved of the act." *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24, 37 (Fla. 4th DCA 2023) (citing *Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 707 (Fla. 4th DCA 2023). Without this knowledge, there can be no punitive damage claim. *See, e.g., Dominguez*, 295 So. 3d at 1206-07 (reversing award of punitive damages when a managing agent of electrical utility was not directly involved with electrocution of the plaintiff's child, did not know the details of child's death until years after the fact, and seemed unaware of specific company safety standards at issue).

Here, once Kim Loucks, the Director of the Emergency Department and senior to the two nurse educators, was told about what happened at the training and the effect it had on the student nurses, an action plan was put into practice to ensure this training would not occur again. AB R. 12-16. Specifically, the "Active Shooter Drill—After Action Plan" detailed the problems with the training, including team distress, and put a plan into practice for all future similar trainings to include pre-briefings to ensure the participants were "made aware, that during the class day, there will be an active

shooter drill and that they will be expected to participate in the drill." *Id.* 12. And Appellant offered no evidence—nor could she—that any training similar to the one in this appeal has ever happened again. Rather, Appellee, once fully informed of the post-training distress, put a plan into practice to ensure proper protocols would be followed. The record evidence shows Appellee—at a corporate level—did not condone, ratify, or approve of the drill.[6] For this reason alone, the lower court's order should be affirmed.

C. Appellant Failed to Demonstrate Intentional Misconduct

In addition to her failure to show a managing agent condoned, ratified, or approved of the drill, Appellant did not show the clinical educators' intentional misconduct that planned and took part in the drill. Instead, Appellant seemed to focus on whether a reasonable jury could find she has satisfied the prima facie elements of her

[6] Indeed, Appellee affirmatively included in this record, for the benefit of the trial court, a detailed affidavit from Erika Skula, the President and CEO of AHS Ocala, explaining the corporate structure and decision-making authority of AHS Ocala. *See* R. 002147. The two nurse educators fell way below any key management responsibility or authority that could possibly justify punitive damages within the meaning of Florida law.

claims, which is not enough to meet the extremely high evidentiary burden required to sustain a claim for punitive damages.[7]

Florida courts have clarified that record evidence "may support an intentional tort, but not necessarily an award of punitive damages." *Air Ambulance Pros., Inc. v. Thin Air*, 809 So. 2d 28, 30 (Fla. 4th DCA 2002). Evidence "in support of the commission of an intentional tort alone is not sufficient to establish a reasonable basis for a claim of punitive damages." *CCP Harbour Island, LLC v. Manor at Harbour Island, LLC*, 373 So. 3d 18, 29 (Fla. 2d 2023) (citing *Bistline*, 215 So. 3d at 611).

Also, Appellant's reliance on cases suggesting that evidence sufficient to meet the prima facie elements of her claims will satisfy the evidentiary burden to make claim for punitive damages is misguided.[8] Specifically, *Scheuer v. Wille*, 385 So. 2d 1076, 1077 (Fla.

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[7] This standard is not only wrong, as discussed in more detail *infra*, it is also waived because Appellant did not present this argument in her initial Motion. *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

[8] Appellant relies on *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989) for the proposition that a "finding of liability [for assault and battery]

4th DCA 1980), which has not been relied on by any Florida court since 1993, was decided before Florida codified its punitive damage standard in 1986. It therefore holds little, if any, persuasive value to this Court. *See McGuire, Woods, Battle & Boothe, L.L.P. v. Hollfelder*, 771 So. 2d 585, 586 (Fla. 1st DCA 2000) ("Decisions in other contexts do not support respondent's contention that punitive damages are awardable in all civil actions after enactment of sections 768.72 and .73.").

Further, the *Scheuer* court dealt with a type of case more commonly justifying claims for punitive damages under Florida law—those involving physical or real harm, rather than the alleged emotional harm from which the Appellant claims to suffer. And neither the *Donigan* nor the *Bridges* cases cited by Appellant dealt with an analysis of whether the plaintiffs satisfied their burden of pleading a claim for punitive damages. Instead, in *Donigan v. Nevins*,

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alone will support an award of punitive damages 'even in the absence of financial loss for which compensatory damages would be appropriate." I.B. at pg. 31. However, the *Ault* case dealt very narrowly with the issue of whether compensatory damages award must underlie a punitive damages award in a case in which the jury has made express findings against a defendant, and did not go into an extensive punitive damages or intent analysis. *Ault*, 538 So. 2d at 454.

785 So. 2d 573, 574 (Fla. 4th DCA 2001), the court was considering an appeal from an order granting summary judgment on a claim for IIED. In *Cape Publications, Inc. v. Bridges*, 387 So. 2d 436, 438 (Fla. 5th DCA 1980), the court was considering a discovery dispute regarding an order compelling a production of documents. Neither case therefore stand for the bold proposition Appellant advances that a claim for punitive damages can be satisfied by merely alleging prima facie elements of a claim for IIED or assault.

Instead, to show intentional misconduct sufficient for punitive damages, Appellant must make "a reasonable showing" that there is "a reasonable basis" for the finder of fact to believe that Appellee 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." *Id.* (citing § 768.72(1)–(2)(a)). The evidence of intentional misconduct necessary to justify a claim for punitive damages must show the "specific intent, not general intent, to knowingly engage in wrongful conduct." *Fed. Ins. Co. v. Perlmutter*, 4D2022-1558, 2023 WL 8609988, at *7 (Fla. 4th DCA Dec. 13, 2023).

Under Florida law, "[i]ntent in the law of torts means that the actor acts *for the purpose* of causing an invasion of another's interest or *knows* that such an invasion is resulting, or is substantially certain to result, from his conduct. *It is not enough that the act itself is intentionally done*." *Deane v. Johnston*, 104 So. 2d 3, 8 (Fla. 1958) (emphasis added). Indeed, the "word 'intent' is used throughout the Restatement of Torts, 2nd, to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Forehand v. Sch. Bd. of Gulf Cnty.*, 600 So. 2d 1187, 1193 (Fla. 1st DCA 1992) (citing Black's Law Dictionary 727 (5th Ed. 1979)).

Here, no such showing was made, and the record evidence shows: the nurses who planned the drill did not intend to cause harm to the Appellant; they believed they were helping the students, and they took what they considered enough precautions to ensure the safety of the Appellant and other students; and the drill tried to educate and train the nurses to be ready to work in a dangerous environment like the emergency department. Dr. Hankinson and Ms. Torrens-Nardine also testified that the drill was planned in an educational setting, designed for safety and demonstrative purposes.

There is no evidence in the record that the educators responsible for the training plan believed that their conduct was wrong or that there was a high probability of injury.

Finally, Appellant incorrectly asserts that "the subjective response of the person who is the target of the actor's conduct does not control the question of whether [intentional infliction of emotional distress] occurred" in support of her argument that Dr. Hankinson and Ms. Torrens-Nardine knew they would cause harm. I.B. at pg. 40. (citing *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1213 (Fla. 5th DCA 1995). While it may not have been necessary for the trial court to determine that Dr. Hankinson and Ms. Torrens-Nardine knew the Appellant was uniquely susceptible to harm coming from the drill, Florida law is clear that the intent behind the act leading to the punitive damages claim must be specific intent to cause harm.

D. *McLean* Case Not Instructive to This Court

Appellant's argument that the trial court's decision contradicts *McLean v. Pine Eagle Sch. Dist., No. 61*, 194 F. Supp. 3d 1102 (D. Or. 2016) and should be overturned is unavailing. First, the District Court of Oregon case holds little if any persuasive value to Florida

state courts. *See Adams v. Auchter Co.*, 339 So. 2d 623, 625 (Fla. 1976) ("While the decision of the District Court may be in accord with the view of other states which have considered the issue now before this Court, decisions of other jurisdictions are not binding on the courts of this state."). Additionally, although the *McLean* case was decided in 2016, and was at Appellant's disposal during the pendency of this litigation, Appellant did not argue or even identify this case in her initial Motion,[9] which should result in a waiver of the argument. Assuming, however, that the *McLean* case holds any value in this appeal, the case is still distinguishable from this case.

First, the training happened on an "in-service workday" during which the teachers had no warning of the possibility of an active shooter training. *McLean*, 194 F. Supp. 3d at 1102. Here, Appellant was learning about mass casualty incident responses, the Las Vegas mass shooting, and signed the sign-in sheet which indicated the purpose of the class that day — "MCI/active shooter/stop the bleed." The drill in *McLean* also involved the masked men pointing start pistols—which were loaded with .22 caliber blanks—at the plaintiff

[9] Instead, Appellant first addressed this 2016 case in a Motion for Reconsideration of the trial court's Order denying Appellants' Motion.

and pulling the trigger, causing a loud noise, as well as the use of firecrackers to startle the teachers. *Id.* at 1109. Here, the training prop could not be, and was not, fired, nor could it or did it make any noise.

Further, the *McLean* court did not engage in any punitive damages analysis similar to that required by Florida law to allow the plaintiff to seek punitive damages. Unlike Florida's extensive punitive damages standard, the entire Oregon statute on punitive damages: "Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." Or. Rev. Stat. Ann. § 31.730. Oregon's case law on punitive damages therefore cannot be "instructive" to this Court. The trial court's decision should be affirmed.

E. <u>Punitive Damages is Not Necessary for Deterrence</u>

Finally, there is no evidence that punitive damages is necessary in this case to deter Appellee from similar trainings happening in the future. Indeed, there is no evidence in this record (nor could there be)

that a training similar to the one here has happened again since November 30, 2021, and the after-action plan implemented just over a week after the training demonstrates a clear protocol to ensure issues with the training will not be repeated. AB R. 12. Specifically, the "Active Shooter Drill—After Action Plan" requires that the nurse residents, emergency department staff, and hospital personnel be "prebriefed and made aware, that during the class day, there will be an active shooter drill," and details plans to include local authorities in the training. *Id.* Accordingly, Appellant failed to demonstrate that punitive damages are justified or necessary here.

V. CONCLUSION

This Court should affirm the lower court's decision that Appellant did not offer evidence sufficient to justify a claim for punitive damages against a corporation under Florida law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 26, 2024, a true and correct copy of the foregoing was filed via the Florida e-Portal filing system which will send an electronic notification to Patrick M. Hale, Esq. service@patrickhalelaw.com and Rose Kasweck

rose@halelaw.com of Hale Law, 2803 Fruitville Road, Suite 240, Sarasota, FL 34237.

/s/ Mayanne Downs
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