1

FEDERAL INSURANCE COMPANY, HAROLD PEERENBOOM, and WILLIAM MARVIN DOUBERLEY, Appellants,
v.
ISAAC "IKE" PERLMUTTER and LAURA PERLMUTTER, Appellees.

Nos. 4D2022-1558, 4D2022-1560, 4D2022-1562

Florida Court of Appeals, Fourth District

September 27, 2023

Not final until disposition of timely filed motion for rehearing.

Consolidated appeals of nonfinal orders from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Gerard Joseph Curley, Judge; L.T. Case No. 50-2013-CA-015257.

Kenneth R. Drake of Demahy Labrador Drake Cabeza, Coral Gables, for appellant Federal Insurance Company.

Jordan S. Cohen, Ethan A. Arthur and Victoria N. DeLeon of Wicker Smith O'Hara McCoy &Ford, P.A., Fort Lauderdale, for appellant Harold Peerenboom.

Daniel M. Bachi of Sellars, Marion &Bachi, P.A., West Palm Beach, for appellant William Marvin Douberley.

Roy Black and Jared M. Lopez of Black, Srebnick, Kornspan &Stumpf, P.A., Miami, and Elliot B. Kula and William D. Mueller of Kula &Associates, P.A., Miami, and Joshua E. Dubin of Joshua E. Dubin, P.A., Miami, for appellees.

CONNER, J.

In this consolidated appeal, Federal Insurance Company ("Federal"), Harold Peerenboom ("Peerenboom"), and William Douberley ("Douberley") (collectively, "the Appellants") separately appeal from trial court orders granting Isaac and Laura Perlmutter's ("the Perlmutters") motions to amend their counterclaims to seek punitive damages from the Appellants. We reverse because the record evidence was insufficient to permit claims for punitive damages. To explain our decision, we examine the substantive and procedural requirements for motions to amend seeking punitive damages. We also apply those requirements to our review of the trial court orders in this case.

2

Part 1: Background

The Perlmutters and Peerenboom lived in a residential community in which a dispute arose over retaining the community tennis instructor. The dispute resulted in the tennis instructor filing a defamation suit to which Peerenboom was eventually added as a defendant. Peerenboom notified his insurance carrier, Federal, about the tennis instructor's defamation suit. Federal designated Douberley's law firm as Federal's in-house counsel to defend Peerenboom in the tennis instructor's suit.

During the tennis instructor's suit, Peerenboom's family, friends, neighbors, and colleagues received a series of "hate mail" letters falsely accusing Peerenboom of child molestation and murder. Peerenboom suspected the Perlmutters were involved in the hate mail because, a year earlier, Isaac Perlmutter had circulated negative news articles about Peerenboom. Believing he was the victim of a crime, Peerenboom reported the hate mail to law enforcement and postal investigators, and hired private investigators to develop information about who had sent the hate mail.

As part of that investigation, Peerenboom and Douberley surreptitiously obtained the Perlmutters' DNA to compare against DNA obtained from the hate mail. Peerenboom then reported to the police and media that the DNA results had linked the Perlmutters to the hate mail campaign.

Peerenboom later filed a complaint against the Perlmutters raising various causes of action related to the sending of the hate mail.

Upon learning that Peerenboom had surreptitiously tested their DNA, the Perlmutters asserted a counterclaim against the Appellants. In their counterclaim, the Perlmutters alleged conversion and civil theft of their genetic information; abuse of process for issuing subpoenas upon them for improper purposes; defamation for false reports of their involvement in sending the letters; invasion of privacy for the surreptitious collection, testing, and reporting of their DNA; and civil conspiracy to defame them and falsely implicate them in criminal conduct.

The Perlmutters' intentional tort counts relied generally upon section 760.40, Florida Statutes (2013), which at the time[1] pertinently stated:

> (a) Except for purposes of criminal prosecution, except for purposes of determining paternity as provided in s. 409.256 or s. 742.12(1),
>
> 3
>
> and except for purposes of acquiring specimens as provided in s. 943.325, DNA analysis may be performed only with the informed consent of the person to be tested, and the results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested....
>
> (b) A person who violates paragraph (a) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§ 760.40(2), Fla. Stat. (2013).[2]

The Perlmutters later moved to amend their counterclaims to seek punitive damages from the Appellants. The Appellants responded in opposition. After a hearing on the Perlmutters' motions to amend, the trial court entered the separate orders, now on appeal, granting the motions to amend as to each of the Appellants.

The first order, granting the punitive damages motion against Peerenboom and Douberley, described the Perlmutters' proffered evidence in detail. The trial court found the Perlmutters had made a reasonable evidentiary showing in support of the motion.

The second order, granting the punitive damages motion against Federal, likewise detailed the proffered evidence and found: (1) Douberley committed "intentional misconduct" as defined in section 768.72(2)(a), Florida Statutes (2013); (2) Douberley was Federal's employee; (3) Federal "actively and knowingly participated" in Douberley's intentional misconduct; and (4) Federal "knowingly condoned, ratified, or consented to" Douberley's intentional misconduct. The trial court again found the Perlmutters made a reasonable evidentiary showing in support of the motion. More specifically, the trial court permitted the Perlmutters to seek punitive damages from Federal based on sections 768.72(3)(a) and (b), Florida Statutes (2013).[3]

4

The Appellants separately gave notice of appeal. We have consolidated all three appeals for our review.

Part 2: Statute, Rule, and Caselaw Applicable to Pretrial Orders Ruling on Motions to Amend to Assert Punitive Damages

A. Section 768.72 and Florida Rule of Civil Procedure 1.190

Section 768.72, Florida Statutes (2013), and Florida Rule of Civil Procedure 1.190(a) and (f) control the Perlmutters' entitlement to punitive

damages and establish the basic substantive and procedural requirements for such an award. Both the statute and the rule require parties to initiate the process by moving to amend the complaint or counterclaim. § 768.72(1), Fla. Stat. (2013); Fla. R. Civ. P. 1.190(f). In other words, a complaint or counterclaim cannot plead entitlement to punitive damages without prior court approval.

The primary foundational requirement under both the statute and the rule 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. (2013); Fla. R. Civ. P. 1.190(f). Section 768.72 pertinently provides:

> (1) 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 her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.
>
> (2) *A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the*

> *defendant was personally guilty of intentional misconduct or gross negligence*. As used in this section, the term:
>
> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

§ 768.72(1)-(2), Fla. Stat. (2013) (emphasis added). Rule 1.190 similarly provides:

> (a) Amendments.... If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. ....
>
> (f) Claims for Punitive Damages. *A motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages*. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing.

Fla. R. Civ. P. 1.190(a), (f) (emphasis added).

We now discuss caselaw interpreting section 768.72's and rule 1.190's substantive and procedural requirements regarding punitive damages motions.

B. The Trial Court's Gatekeeping Function

In discussing the caselaw, we begin with the overarching concept of the trial court's gatekeeping function.

In *Globe Newspaper Co. v. King*, 658 So.2d 518 (Fla. 1995), our supreme court said:

> We read section 768.72 to create a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth

6

> discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages. ....
>
> *The plain meaning of section 768.72 now requires a plaintiff to provide the court with a reasonable evidentiary basis for punitive damages before the court may allow a claim for punitive damages to be included in a plaintiff's complaint*. To allow punitive damages claims to proceed as before [(reviewable after final judgment)] would render section 768.72 meaningless.

Id. at 519-20 (emphasis added).

Even before *Globe Newspaper*, the district courts clearly stated trial courts bore the responsibility to determine whether juries can consider punitive damages claims. *See, e.g.*, *Taylor v. Gunter Trucking Co., Inc.*, 520 So.2d 624 (Fla. 1st DCA 1988) (listing Florida Supreme Court cases supporting the trial court's entry of summary judgment in favor of defendants on a punitive damages claim, and noting the focus is on whether evidence shows that punitive damages could properly be awarded by a jury). The caselaw also explained:

> When claims for punitive damages are made, the respective provinces of the court and jury are well defined. The court is to decide at the close of evidence *whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff*.

Haynes v. Arman, 192 So.3d 546 (Fla. 5th DCA 2016) (emphasis added) (quoting *Wackenhut Corp. v. Canty*, 359 So.2d 430, 435-36 (Fla. 1978)). Thus, the early caselaw established a gatekeeping role for trial courts regarding entitlement to punitive damages.

Post-*Globe Newspaper*, this Court and others specifically acknowledged the trial court's "gatekeeping" function. In *Bistline v. Rogers*, 215 So.3d 607 (Fla. 4th DCA 2017), we recognized *Globe Newspaper's* clear statement that section 768.72 created "a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a *reasonable evidentiary basis* for recovery of punitive damages." *Id.* at 610 (emphasis added). We specifically opined the statute meant the trial courts have a "gatekeeping" role to preclude a punitive damages claim where no reasonable evidentiary basis for recovery exists. *Id.* at 611. Other district courts have similarly identified a trial court's gatekeeping function in allowing punitive damages claims. *See Varnedore*, 210 So.3d at 745 ("In order to perform its function as a gatekeeper, the trial court must understand the

7

specific claim proposed by the plaintiff that may justify an award of punitive damages."); *Watt v. Lo*, 302 So.3d 1021, 1025 (Fla. 1st DCA 2020) (acknowledging the trial court understood its

gatekeeping function, and, in ruling on the plaintiff's motion to amend, made the determination required by the statute, the rule, and *Globe Newspaper*).[4]

We now turn to some additional legal principles regarding the trial court's responsibilities in ruling on a motion to amend.

C. The Pleading and the Evidentiary Showing Must Match.

"Given the nature of the applicable statute and rule, the court must consider both *the pleading component* and *the evidentiary component* of each motion to amend to assert punitive damage claims." *Varnedore*, 210 So.3d at 744 (emphasis added) (citing *Henn v. Sandler*, 589 So.2d 1334, 1335-36 (Fla. 4th DCA 1991)), *adhered to on reh'g en banc* (Nov. 20, 1991). Thus, once the trial court determines the proposed amended complaint states sufficient allegations to plead a proper punitive damages claim, the trial court must next determine whether the movant has established a reasonable factual basis for its punitive damages claim consistent with the allegations in the amended complaint. *Id.* at 746. If the evidentiary showing does not match the amended complaint's allegations, the trial court should not permit the punitive damages claim. *See Desanto v. Grahn*, 362 So.3d 247, 248-50 (Fla. 4th DCA 2023) (reversing order granting leave to amend because the allegations of the motion to amend did not match any record evidence); *HRB Tax Grp., Inc. v. Fla. Investigation Bureau, Inc.*, 360 So.3d 1159 (Fla. 4th DCA 2023) (reversing order permitting amendment because the trial court improperly considered allegations and evidence not relevant to the claim for which punitive damages were sought).

D. Showing of Reasonable Evidentiary Basis by the Movant

In support of a punitive damages motion, the movant's pretrial evidentiary showing (sworn statements and authenticated records) must "provide the court with a reasonable evidentiary basis for punitive damages." *Globe Newspaper*, 658 So.2d at 520.[5] Thus, "a reasonable basis" for punitive damages means the

8

plaintiff will be able to produce competent, substantial evidence at trial upon which "a rational trier of fact could find" that the defendant specifically intended to engage in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment.

The determination of the pretrial evidentiary showing's sufficiency is to be made without weighing evidence or witness credibility and must consider all reasonable inferences from the evidence.[6] *See Werner Enters., Inc. v. Mendez*, 362 So.3d 278, 282 (Fla. 5th DCA 2023) (noting that, in ruling on a motion to amend, "the [trial] court asks whether a reasonable jury could infer from the proffer that the defendant's conduct satisfies the statutory criteria for punitive damages" (citation omitted)); *Varnedore*, 210 So.3d at 747 (noting movant's counsel is free to argue inferences that may be drawn from the timely filed evidence and proffers).

E. Evidentiary Showing by Both Sides

We agree with the Third District and hold that to fulfill its gatekeeping function and assure the opposing party's substantive legal right not to be subject to a punitive damages claim until a pretrial reasonable evidentiary basis for recovery is shown, the trial court must consider the evidentiary showing *by both sides* at the hearing on the motion to amend (assuming the defendant files an evidentiary showing opposing the motion).[7] *See Manheimer v. Fla. Power &Light Co.*, 48 Fla.L.Weekly D1495, at *3 (Fla. 3d DCA Aug. 2, 2023).

9

Like the evidentiary showing by the movant, the opposing party's evidentiary showing is to be considered without weighing the evidence and witness credibility.

F. Clear and Convincing Evidence Standard

Ultimately, the trial court should keep in mind the definition of clear and convincing evidence which must be met at trial to allow the claim to be considered by the jury.

We previously defined "clear and convincing evidence" as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983). Notably, our supreme court has cited and used *Slomowitz's* definition. *See Inquiry Concerning Davey*, 645 So.2d 398, 404-05 (Fla. 1994). Although the clear and convincing evidence standard can be met when evidence is inconsistent or conflicting, the standard cannot be met when the evidence is ambiguous. *See In re Guardianship of Browning*, 543 So.2d 258, 273 (Fla. 2d DCA 1989) ("It is possible for the evidence . . . to be clear and convincing, even though some evidence may be inconsistent. Likewise, it is possible for the evidence to be uncontroverted, and yet not be clear and convincing."); *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So.2d 986, 988 (Fla. 1st DCA 1991) (recognizing that conflicting evidence can meet the standard, but ambiguous evidence cannot); *Brewer v. Fla. Dep't of Health, Bd. of Nursing*, 268 So.3d 871, 873 (Fla. 1st DCA 2019) ("The clear and convincing evidence standard precludes ambiguous evidence." (citing *Westinghouse Elec.*, 590 So.2d at 988)).

10

Part 3: Application of the Substantive and Procedural Requirements to the Instant Case

Having reviewed the above substantive and procedural requirements, we now apply those requirements to this case's facts and the orders granting the Perlmutters' motions to amend seeking punitive damages from the Appellants.

Because the trial court properly did not consider live witness testimony in ruling on the motion, our review is de novo. *See Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So.3d 703, 705 (Fla. 4th DCA 2023) (reviewing "de novo the trial court's purely legal ruling that plaintiff made a 'reasonable showing' under section 768.72 to recover punitive damages" (citing *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005))).

A. Peerenboom's and Douberley's Arguments[8]

The Perlmutters' amended counterclaim asserts punitive damages liability based on intentional misconduct. Under sections 768.72(1) and (2), a punitive damages claim for intentional misconduct requires a *pleading and evidentiary showing* demonstrating "the defendant had *actual knowledge of the wrongfulness of the conduct* and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." § 768.72(1), (2), Fla. Stat. (2013) (emphasis added). In other words, section 768.72(2) requires an evidentiary showing of *specific intent*, not general intent, to knowingly engage in wrongful conduct.

Peerenboom argues the trial court erred in granting the Perlmutters' motion to amend because the trial court failed to use the proposed amended counterclaim as the framework for analysis. Peerenboom points out that "th[e] vital gatekeeping function requires trial courts to consider the movant's proposed amended

pleading, and determine whether it has alleged a basis for punitive damages." Additionally, he argues the trial court failed to hold the Perlmutters to their pleadings and permitted a punitive damages amendment based on unpled conduct. Peerenboom and Douberley argue the Perlmutters' proffers do not demonstrate intentional misconduct "[rising] to a level of culpability sufficient to support punishment" or "equivalent to that required for criminal manslaughter in order to plead punitive damages."

The Perlmutters' evidentiary proffers are ambiguous in terms of establishing specific intent by Peerenboom and Douberley to knowingly engage in wrongful conduct, and do not demonstrate intentional misconduct "[rising] to a level of

11

culpability sufficient to support punishment" or "equivalent to that required for criminal manslaughter in order to plead punitive damages."

Because of the ambiguity of the evidence as to specific intent to intentionally engage in wrongdoing, we agree with Peerenboom and Douberley that the Perlmutters' evidentiary showing was insufficient. However, even conceding that the Perlmutters' proffer demonstrated evidence that could lead a jury to conclude that Peerenboom and Douberley specifically intended to engage in acts constituting misdemeanors by testing DNA and disclosing the results, we conclude there was no proffered evidentiary showing that Peerenboom and Douberley were trying to develop DNA information about either of the Perlmutters to invade their privacy *beyond trying to investigate the hate mail campaign*. Thus, again, we conclude the evidentiary showing was insufficient.

As the United States Supreme Court, the Florida Supreme Court, and this Court have said, "[punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish *reprehensible conduct* and to deter its future occurrence." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (emphasis added) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1262 (Fla. 2006) (describing punitive damages as "'private fines' intended to punish the defendant and to deter future wrongdoing"); *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So.3d 68, 76 (Fla. 4th DCA 2010) (observing that historically punitive damages were "justified as punishment for extraordinary wrongdoing"). As the Supreme Court in *Cooper Industries* observed, "[I]n deciding whether [the due process] line has been crossed, we have focused on the same general criteria: *the degree of the defendant's reprehensibility or culpability*." 532 U.S. at 435 (emphasis added).

"[L]ong-established precedent dictates that actions which deserve punitive sanctions involve outrageous conduct, malicious motive, or wrongful intention." *William Dorsky Assocs., Inc. v. Highlands Cnty. Title &Guar. Land Co.*, 528 So.2d 411, 412 (Fla. 2d DCA 1988). "[P]unitive damages are reserved for truly 'culpable conduct,'" where the conduct is "so outrageous in character, and so extreme in degree . . . [that] the facts [of the case] to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Oriolo*, 357 So.3d at 706; *see also W.R. Grace &Co.- Conn v. Waters*, 638 So.2d 502, 503 (Fla. 1994) ("Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others."); *Lee Cnty. Bank v. Winson*, 444 So.2d 459, 463 (Fla. 2d DCA 1983) ("Punitive damages may be properly awarded only where a tort involves malice, moral turpitude, or wanton and outrageous disregard of a plaintiff's rights." (citing *Winn &Lovett Grocery Co. v. Archer*, 171 So. 214 (Fla. 1936))).

12

We conclude, as a matter of law based on the facts of this case, that Peerenboom's conduct in testing and reporting DNA results, under the circumstances of the hate mail campaign leading to a law enforcement investigation, did not meet the threshold of reprehensible or outrageous conduct. Thus, the Perlmutters' counterclaims could not be amended to assert punitive damages against Peerenboom or Douberley.

We additionally agree with Peerenboom's and Douberley's arguments that because the individual claims against them fail, the conspiracy claims against them also fail. *See Palm Beach Cnty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So.3d 1090, 1096 (Fla. 4th DCA 2009) ("Since the counts regarding the goals of the conspiracy-defamation and tortious interference-fail, so too the conspiracy count must fail.").

Finally, we conclude the evidentiary proffer was insufficient to show Peerenboom intentionally and wrongfully disseminated DNA test results linking Laura Perlmutter to the hate mail while ignoring that the DNA sample was possibly compromised or that Peerenboom's disgruntled prior employee could have been the author of the hate mail. We again conclude the evidentiary showing presented *ambiguous* evidence in that regard.

For the above reasons, we reverse the trial court's order granting the Perlmutters' motion to amend to seek punitive damages against Peerenboom and Douberley. Our decision should not be construed to preclude an award of *compensatory damages*, by a preponderance of the evidence burden of proof, for any intentional tort which the jury determines Peerenboom or Douberley may have committed. *See Bistline*, 215 So.3d at 610 (recognizing that record evidence may support an intentional tort, but not necessarily a punitive damages award).

B. Federal's Arguments

Regarding the liability of an employer or corporation for punitive damages imposed for the conduct of an employee or agent, section 768.72, Florida Statutes, provides:

> In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:
>
> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
>
> 13
>
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or
>
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.
>
> § 768.72(3), Fla. Stat. (2013).

"In order to impose direct liability for punitive damages on a corporation, there must be a showing of willful and malicious action on the part of a managing agent of the corporation." *Partington v. Metallic Eng'g Co., Inc.*, 792 So.2d 498, 501 (Fla. 4th DCA 2001) (citing *Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158 (Fla. 1995)). "[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.'" *Dominguez*, 295 So.3d at 1205 (citation omitted). In other words, a managing agent is more than a mid-level employee with some, but limited, managerial authority; instead,

a managing member makes policy decisions for the corporation. *See id.* at 1206 (holding defendant corporation's regional supervisor, who had "significant managerial power" over regional program but did not make policy decisions, was not managing agent for purpose of establishing direct corporate liability for punitive damages).

As a preliminary matter, because we conclude a punitive damages claim against Douberley was improper, we also conclude the trial court erred in allowing the counterclaims to be amended to seek punitive damages against Federal under section 768.72(3)(b). As we said in *Oriolo*, "[g]enerally, 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." 357 So.3d at 707 (internal quotation marks and alterations omitted). The evidentiary proffer did not unambiguously show that a Federal principal was fully informed of (beyond simple constructive knowledge) and approved Douberley's acts.

Additionally, we agree with Federal's argument that the Perlmutters did not allege or proffer an evidentiary showing demonstrating that Douberley, or Federal's claims manager to whom Douberley reported, held a position as a corporate policymaker which might result in conduct deemed to be Federal's acts, or that Federal "actively and knowingly participated" in Douberley's intentional misconduct to merit punitive damages under section 768.72(3)(a).

For the above reasons, we also reverse the trial court's order granting the Perlmutters' motion to amend to seek punitive damages against Federal.

14

Part 4: Conclusion

Having determined the trial court improperly granted the Perlmutters' motions to amend their counterclaims to seek punitive damages against the Appellants due to an insufficient evidentiary showing of a reasonable basis to award punitive damages, we reverse and remand for the trial court to vacate the nonfinal orders granting amendment.

Reversed and remanded with instructions.

KLINGENSMITH, C.J, and LEVINE, J, concur

Notes:

[1] In 2021, section 760.40 was amended and subsection (2)(b), the misdemeanor provision quoted below, was removed. Simultaneously, the legislature created section 817.5655, Florida Statutes (2021), to criminalize DNA testing and reporting results without the donor's consent, with limited exceptions.

[2] Notably, as the trial court correctly ruled, the Perlmutters could not sue directly for violation of section 760.40, as the statute did not provide for a private cause of action. We also note the statute in effect at the time did not provide for punitive damages.

[3] The trial court's orders permitting amendment for punitive damages claims made detailed written findings and explanations for its rulings. We agree with the Fifth District that "the trial court, serving as a gatekeeper, is required to make an affirmative finding that [movant] has made a 'reasonable showing by evidence,' which would provide a 'reasonable evidentiary basis for recovering such damages'" if the motion to amend is granted. *Varnedore v. Copeland*, 210 So.3d 741, 747-48 (Fla. 5th DCA 2017) (citations omitted); *see also Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, Inc.*, 174 So.3d 1122, 1122 (Fla. 4th DCA 2015) (reversing amendment to plead punitive damages where neither the trial court's verbal comments nor written order indicated whether it found the plaintiff demonstrated a reasonable basis for seeking punitive damages). While not mandatory under Florida Rule of Civil Procedure 1.190, we encourage trial courts to

identify on the record (preferably in writing) the evidence presented by the movant that satisfied the evidentiary showing, or the evidence presented by the opposing party that defeated the movant's entitlement. Without an affirmative finding and identification of evidence supporting the ruling, appellate courts will be significantly hampered in their review of whether the trial court properly performed its gatekeeping function.

[4] Although not explicitly argued below or on appeal, but more fully discussed below, we also note that, in addition to the requirements imposed by section 768.72 and rule 1.190(a) and (f), the gatekeeping function requires the trial court to deny a motion to amend if the opposing party's conduct is not alleged or shown by a proper *pretrial* evidentiary showing to be sufficiently reprehensible and outrageous to merit punitive damages.

[5] We agree with the Fifth District that "the term 'proffer' for purposes of rule 1.190(f) refers only to timely filed documents and excludes oral representations of additional evidence made during the hearing." *Varnedore*, 210 So.3d at 747. Additionally, "the trial court cannot properly consider plaintiff's counsel's oral or other proffers of evidence which are first presented during the hearing." *Id.; see also WG Evergreen Woods SH, LLC v. Fares*, 207 So.3d 993, 996 (Fla. 5th DCA 2016) (noting the similarity between rules 1.190(f) and 1.510(c)).

[6] In *Bistline*, we said that "an evaluation of the evidentiary showing required by section 768.72 does not contemplate the trial court simply accepting the allegations in a complaint or motion to amend as true." 215 So.3d at 610. Our point in *Bistline* was that the trial court's gatekeeping function requires more than simply assuming all of the movant's allegations in the amended complaint are true-the standard when ruling on a motion to dismiss for failure to state a cause of action. Instead, we opined the trial court must evaluate the evidentiary showing by the movant. *Id.* We note again that the trial court's pretrial gatekeeping function involves more than whether the statutory criteria of section 768.72 are met; the trial court must also evaluate *as a matter of law* whether the opposing party's conduct meets the threshold of being sufficiently reprehensible or outrageous to warrant punitive damages.

[7] Although not an issue in the instant appeals, we have previously determined section 768.72 only authorizes a proffer and does not require a full evidentiary hearing with witness testimony. *Strasser v. Yalamanchi*, 677 So.2d 22, 23 (Fla. 4th DCA 1996). In addition to not being required, we also agree with the Fifth District that an evidentiary hearing with live witness testimony is not permitted. *See Est. of Despain v. Avante Grp., Inc.,* 900 So.2d 637, 642 (Fla. 5th DCA 2005) ("[A]n evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages." (Emphasis added)).

[8] Both Peerenboom and Douberley raise additional arguments besides the ones which we discuss above, but we do not address those arguments.
