DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FEDERAL INSURANCE COMPANY, HAROLD PEERENBOOM, and **WILLIAM MARVIN DOUBERLEY,**
Appellants,

v.

ISAAC ("IKE") PERLMUTTER and **LAURA PERLMUTTER,**
Appellees.

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

[October 7, 2026]

Consolidated appeals of nonfinal orders from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; G. Joseph Curley, Judge; L.T. Case No. 502013CA015257XXXXMB.

Joseph H. Lang, Jr., and Jeffrey A. Cohen of Carlton Fields, P.A., Tampa, and Kristen D. Perkins of Kennedys CMK LLP, Fort Lauderdale, for appellant Federal Insurance Company.

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

Travis J. Foels, Steven J. Rothman, and Danielle L. Jakeman of Jones Foster P.A., West Palm Beach, for appellant William Marvin Douberley.

Jesse Panuccio, David Costello, and Dante Ficarelli of Boies Schiller Flexner LLP, Fort Lauderdale, and Joshua E. Dubin of Joshua E. Dubin, P.A., Miami, for appellees.

ON REMAND FROM THE FLORIDA SUPREME COURT

CONNER, J.

In this consolidated appeal, Federal Insurance Company ("Federal"), Harold Peerenboom ("Peerenboom"), and William Douberley ("Douberley") (collectively, "the appellants") separately appeal trial court orders granting Isaac and Laura Perlmutter's ("the Perlmutters") motions to amend their counterclaims to seek punitive damages from the appellants.

We initially reversed the trial court's orders. *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023) ("*Perlmutter I*"). However, the Florida Supreme Court quashed *Perlmutter I* and remanded the case for our re-examination consistent with the Court's opinion. *Perlmutter v. Fed. Ins. Co.*, 434 So. 3d 681 (Fla. 2026) ("*Perlmutter II*").

Upon completing our re-examination, we affirm without discussion the trial court's order permitting amendment of the Perlmutters' counterclaims to assert punitive damages against Peerenboom. However, as explained below, we reverse the orders permitting amendment of counterclaims against Douberley and Federal.

In short, the Perlmutters' proposed second amended counterclaim ("proposed counterclaim") lacks sufficient allegations and evidentiary support of Douberley's intentional misconduct to support punitive damages. Regarding Federal, the "vicarious liability" theory fails because of our reversal as to Douberley, and independently because the proffered evidence was insufficient to show that a managing agent knew of and "condoned, ratified, or participated" in an employee's intentional misconduct, as required by the governing statute.

For our reconsideration, we have relied on the background facts and procedural history as discussed in *Perlmutter I*, 376 So. 3d at 28-30, and *Perlmutter II*, 434 So. 3d at 686-87.[1]

Standard of Review

Appellate courts review de novo an order granting leave to amend to assert punitive damages. *See Estancia US Ltd. P'ship v. Aji-Dawkins*, No. 6D2025-0673, 2026 WL 2363549, at *3 (Fla. 6th DCA Aug. 14, 2026) (decided after *Perlmutter II*); *Liston v. Salvi*, 436 So. 3d 499, 501 (Fla. 4th DCA 2026). In conducting de novo review, we evaluate the sufficiency of the claimant's proposed pleading and evidentiary proffer, just as the trial court must do. *McLane Foodservice Inc. v.*

[1] After remand, we ordered supplemental briefing on the Supreme Court's clarified standards for ruling on a motion to amend to assert punitive damages. In supplemental briefing, both sides have raised issues that were not raised in the initial briefing. We read the remand instructions as directing us to reexamine the trial court's decision using the Supreme Court's clarified guidance as to the arguments raised in the initial appeal. Accordingly, we decline to consider new arguments first raised in supplemental briefing. Additionally, the Perlmutters' supplemental briefing asserts facts about the trial court proceedings after the notice of appeal was filed in this case. We cannot consider facts occurring after the notice of appeal was filed. *See Lauderdale Marine Ctr., Ltd. v. MYD Marine Distribs, Inc.*, 31 So. 3d 256, 257 (Fla. 4th DCA 2010) ("This court may review only proceedings occurring prior to the date of appellant's notice of appeal.") (citing Fla. R. App. P. 9.110(h)).

Wool, 400 So. 3d 757, 761 (Fla. 3d DCA 2024) (citations omitted). And, like the trial court, we view the evidentiary proffer in the light most favorable to the claimant but may not accept conclusory labels and characterizations as substitutes for competent substantial evidence. *Id.*

Foundational Statutes and Caselaw

Section 768.72, Florida Statutes (2013), the general statutory authority for the imposition of punitive damages, 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. . . .
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> (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:
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> (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.
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> (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.
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> (3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:
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> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

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

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

§ 768.72, Fla. Stat. (2013) (emphasis added). The underlined phrases form the bases for our reversal.

Perlmutter II recognized the well-settled principle that the statute "creates a substantive legal right not to be subjected 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." 434 So. 3d at 685 (citations omitted).

The Supreme Court's objective in *Perlmutter II* was to clarify the showing a movant must make to amend a pleading to seek punitive damages. *Id.* at 684. In doing so, *Perlmutter II* considered the interplay among subsections (1), (2), and (3) of section 768.72.[2] *Id.* at 688-90.

The Supreme Court identified four clarifications as to the movant's showing which are the most pertinent for our remand review.

First, in a proceeding under section 768.72(1), the trial court should consider only the evidence identified or proffered by the claimant, not any evidentiary counter-submission from the opponent. *Id.* at 688.

Second, the test for evidentiary sufficiency under section 768.72(1) is "whether a reasonable person could conclude, based on the claimant's evidence, that the defendant committed 'intentional misconduct' or 'gross negligence,' as defined in section 768.72(2)." *Id.*

Third (relevant to Federal), "[i]f the claimant seeks to plead punitive damages against an employer under a theory of vicarious liability, the evidentiary sufficiency test must also ask whether a reasonable person could conclude that the claimant's evidence satisfies the substantive legal criteria set out in section 768.72(3)." *Id.*

[2] Here, the interplay between subsections (1) and (2) applies to Douberley. The interplay between all three subsections applies to Federal.

Fourth, and particularly pertinent to this case, "'[b]ecause punitive damages never stand alone,' the trial court must 'review the request for punitive damages in the context of the underlying claims.'" *Id.* at 688 (alteration in original) (quoting *LoanFlight Lending, LLC v. Wood*, 388 So. 3d 1027, 1031 (Fla. 3d DCA 2024)); *see also Estancia*, 2026 WL 2363549, at *3 (applying *Perlmutter* II and *LoanFlight*).

In *Perlmutter II*, the Supreme Court clarified that "in reviewing the sufficiency of the evidence under section 768.72(1) at the pleading stage, the trial court should not apply the clear and convincing evidence standard of proof." *Perlmutter II*, 434 So. 3d at 688-89. The Supreme Court further explained that the trial court does not act as a factfinder at this stage and must not weigh the claimant's evidence. *Id.* at 689. Rather, the trial court must consider the record and proffered evidence in the light most favorable to the plaintiff. *Id.* (citation omitted). The Supreme Court emphasized that the allegations contained in the claimant's proposed amended complaint are not evidence. *Id.* Thus, the purpose of the proceeding under section 768.72(1) at the pleading stage "is to determine whether the claimant can show reasonable evidentiary support for those allegations." *Id.*

Consequently, we turn to the proposed counterclaim.

The Proposed Counterclaim

Perlmutter II did not specifically address the sufficiency of the proposed counterclaim but instead remanded the case for us to re-examine the proposed counterclaim under the clarified standards at the pleading stage. *Id.* at 691.

Section 768.72(1) states in part: "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." § 768.72(1), Fla. Stat. (2013). Pursuant to Florida Rule of Civil Procedure 1.190(a), "[i]f a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion."

Applying the plain language of section 768.72(1) and rule 1.190(a), we again adopt our statement in *Perlmutter I* that "[g]iven 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." 376 So. 3d at 32 (first quoting *Varnedore v. Copeland*, 210 So. 3d 741, 744 (Fla. 5th DCA 2017); and then citing *Henn v. Sandler*, 589 So. 2d 1334, 1335-36 (Fla. 4th DCA 1991)). We also reiterate *Perlmutter II*'s reminder that punitive damages "never stand alone," and "the trial court must 'review the request for punitive damages in the context of the underlying claims.'" 434 So. 3d at 688 (citation modified) (citations omitted).

Caselaw has further explained that in ruling on a motion to amend, the trial court "must first analyze whether the proposed amended complaint seeking punitive damages contains sufficient allegations to support such a claim." *Keen v. Jennings*, 327 So. 3d 435, 438 (Fla. 5th DCA 2021) (citing *Varnedore*, 210 So. 3d at 745). We also agree with the Fifth District's comments in *Varnedore* that:

> In order to perform its function as a gatekeeper, the trial court must understand the specific claim proposed by the plaintiff that may justify an award of punitive damages. "Litigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are." *Bank of Am. Nat'l Ass'n v. Asbury*, 165 So. 3d 808, 809 (Fla 2d DCA 2015). Thus, when entertaining a motion to amend in order to add a claim for punitive damages, the trial court must first consider whether the proposed amended complaint actually sets forth a claim that the defendants' conduct was [intentional misconduct], as defined by statute. Absent sufficient allegations, there would be neither a reason nor a framework for analyzing the proffered evidentiary basis for a punitive damages claim.

210 So. 3d at 745 (emphasis added).

Importantly, "[i]f the evidentiary showing does not match the amended complaint's allegations, the trial court should not permit the punitive damages claim." *Perlmutter I*, 376 So. 3d at 32 (citing *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); and *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))).

Intentional Misconduct Alleged

The Perlmutters' proposed counterclaim asserts intentional misconduct, rather than gross negligence, as grounds for punitive damages. The Perlmutters' motion to amend the counterclaim uses the phrase "gross negligence" four times but only to point out that section 768.72(2) allows punitive damages for intentional misconduct and gross negligence as defined within the statute. The motion does not assert a theory of gross negligence as grounds for punitive damages and, in the evidentiary proffer attached to that motion, the phrase "gross negligence" appears once—in an attachment containing a copy of section 768.72.

Because the proposed counterclaim's allegations control the first component of our analysis, we reject the Perlmutters' arguments on appeal that we should affirm the orders allowing the punitive damages amendment against Douberley and Federal based on a gross negligence showing.

Thus, our re-examination considers whether the trial court properly allowed amendment of the counterclaim to assert punitive damages based on intentional misconduct. In *Perlmutter I*, we described the caselaw characterizations of intentional misconduct as follows:

> As the Supreme Court in *Cooper Industries [v. Leatherman Tool Group, Inc.]* observed, "[I]n deciding whether [the punitive damages] line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability." 532 U.S. [424,] 435, 121 S. Ct. 1678 [(2001)] (emphasis added).
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> "[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!**'" [*Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v.*] *Oriolo*, 357 So. 3d [703,] 706 [(Fla. 4th DCA 2023)]; *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*, 126 Fla. 308, 171 So. 214 (1936))).

376 So. 3d at 36 (Emphasis added).

Because section 768.72(2)(a) defines "intentional misconduct" to mean 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," we reaffirm our statement in *Perlmutter I* that intentional misconduct justifying punitive damages requires "specific intent, not general

intent, to knowingly engage in wrongful conduct." 376 So. 3d at 35 (emphasis in original).

The Perlmutters' proposed counterclaim repeats and succinctly states the overarching theme for punitive damages in two paragraphs:

> 39. Peerenboom thus enlisted Chubb[3] (including its employee Douberley) . . . to form a conspiracy to collect, test, and disclose the Perlmutters' genetic information without the Perlmutters' knowledge or consent, and manipulate the results of such genetic testing to falsely implicate the Perlmutters in allegedly illegal activity (the "DNA theft scheme"), for purposes of intimidation and retaliation.
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> . . .
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> 162. As part of the wrongful acts described above, each of the Conspirators[4] and other, unnamed co-conspirators, knowingly, falsely, and intentionally agreed to participate in an overarching conspiracy to harm the Perlmutters, and each carried out one or more overt acts, as described herein.

(Emphasis added).

As stated, we affirm without comment the trial court's ruling as to Peerenboom. Thus, we turn our analysis to Douberley and Federal and address the pleading and evidentiary proffer as to them.

Douberley

Pleading Component—Douberley

The proposed counterclaim asserts punitive damages claims against Douberley for Count I (Conversion), Count II (Abuse of Process), and Count VII (Civil Conspiracy).

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[3] Chubb Insurance Company of Canada is a separate corporate division of Federal. Federal was not initially a party to the suit below. Chubb handled the insurance claim against Peerenboom as an adjuster in the Kay-Dee litigation. Douberley, an employee of Federal, handled the legal defense in the same suit. Tracy Murphy, the Chubb claims adjuster handling the insurance claim against Peerenboom, is not mentioned in the proposed counterclaim.

[4] The amended counterclaim repeatedly refers to "the Conspirators," who were specifically identified in the counterclaim as Peerenboom, Douberley, Federal, and Speckin Forensics.

The Perlmutters' overarching theme for punitive damages alleges a conspiracy by Peerenboom, Douberley, Federal, and Speckin Forensics to surreptitiously collect, test, and manipulate DNA test results to intentionally and falsely implicate the Perlmutters in illegal hate mail activity (the "DNA theft scheme"), for purposes of intimidation, retaliation, and hurting Isaac Perlmutter's financial connections with Disney.

The principal problem with the proposed counterclaim is its reliance on the repeated use of "Conspirators" to refer collectively to all the counterclaim defendants, lumping them together and failing to differentiate which defendants engaged in the alleged wrongful conduct.[5] More specifically, the proposed counterclaim fails to allege with sufficient specificity which acts Douberley committed individually or in concert with another counterclaim defendant that constituted intentional misconduct with the specific intent to harm either of the Perlmutters. Additionally, the proposed counterclaim does not clearly allege that Douberley intended to fabricate false evidence to defame the Perlmutters or to harm Isaac Perlmutter's business relationship with Disney. Finally, the proposed counterclaim does not contain any allegations that Douberley acted for personal profit or with malicious motive.

Stated another way, the proposed counterclaim fails to allege intentional misconduct that 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!'" or that demonstrates "malicious motive, or wrongful intention." *Perlmutter I*, 376 So. 3d at 36 (alterations in original) (citations omitted).

For these reasons, we conclude the proposed counterclaim fails to support punitive damages against Douberley. Thus, the trial court erred in granting the motion to amend as to Douberley. *See Keen*, 327 So. 3d at 438-39 (trial court "must first analyze whether the proposed amended complaint seeking punitive damages contains sufficient allegations to support such a claim." (citing *Varnedore*, 210 So. 3d at 745)).

Even so, we analyze the evidentiary proffer component as an alternative basis for reversing as to Douberley. *See Varnedore*, 210 So. 3d at 745 ("Absent sufficient allegations, there would be neither a reason nor a framework for analyzing the proffered evidentiary basis for a punitive damages claim.").

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[5] For example, multiple paragraphs of the proposed counterclaim allege acts by "Peerenboom and his agents," making it unclear whether the other counterclaim defendants ("the Conspirators") were involved, or other people and entities Peerenboom hired to investigate the hate mail against him but not identified in the counterclaim as "the Conspirators."

Evidentiary Proffer Component—Douberley

Douberley correctly argues that if the evidentiary proffer does not support punitive damages liability under either the conversion or abuse of process counts against him, the evidentiary proffer also fails for the civil conspiracy count against him. *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016) ("[A] demand for punitive damages [for conspiracy] is 'not a separate and distinct cause of action; rather it is auxiliary to, and dependent upon, the existence of an underlying claim.'" (quoting *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 456 (Fla. 3d DCA 2003), *quashed in part by*, 945 So. 2d 1246, 1254 (Fla. 2016))).

Conversion

On the conversion count, Douberley focuses on the physical aspects of Laura Perlmutter's DNA sample to argue that one cannot be guilty of conversion if the property (DNA sample) was not directly taken from Laura's body and instead was collected from a bottle. However, Douberley does not effectively address the Perlmutters' contention that Douberley assisted in converting (stealing) information to which Laura Perlmutter had privacy and property rights.

Nonetheless, we agree with Douberley that the evidentiary proffer did not show he had "actual knowledge" that he was violating section 760.40, Florida Statutes (2013), or DNA information rights. Again, the "actual knowledge" requirement means that specific intent is required rather than general intent. Stated another way, "should have known" does not qualify in the context of intentional misconduct under section 768.72(2)(a). *See Selz v. McKagen*, 386 So. 3d 933, 937 (Fla. 4th DCA 2024) ("Punitive damages liability based on a 'should have known' standard does not meet the specific intent requirement for intentional misconduct as defined in section 768.72(2).").

We also find merit in Douberley's argument that "[t]his is the first case known to the litigants -- or cited to the trial court in over 9 years of litigation -- that has permitted a party to seek monetary damages for the alleged conversion of contact DNA taken from abandoned objects touched by claimants." If an evidentiary proffer does not show that the defendant intentionally violated a law which he knew about, the defendant's actions cannot qualify as intentional misconduct deserving punishment, i.e., outrageous, malicious, or fraudulent conduct.

Thus, we agree with Douberley that the Perlmutters' evidentiary proffer on their conversion (theft) count was insufficient to support punitive damages against him.

Abuse of Process

We also agree with several arguments which Douberley has raised regarding the abuse of process count. "Where the process was used to accomplish the result for which it was intended, '*regardless of an incidental or concurrent motive of spite or ulterior purpose*,' there is no abuse of process." *S&I Invest. v. Payless Flea Mkt., Inc.*, 36 So. 3d 909, 917 (Fla. 4th DCA 2010) (quoting *Scozari v. Barone*, 546 So. 2d 750, 751 (Fla. 3d DCA 1989)) (emphasis in original). The fact that collecting DNA may have been an "incidental or concurrent motive" or "ulterior purpose" for taking the Perlmutters' depositions does not change the fact that the process was properly used for the intended purpose for which it was created—to subpoena witnesses to offer relevant testimony. *Id.*

The Perlmutters' evidentiary proffers failed to show Douberley lacked a valid reason to depose them in the Kay-Dee litigation. Their depositions yielded information useful to Peerenboom's defense. Thus, the Perlmutters' conclusory claim that Douberley lacked a legitimate basis to subpoena them for a deposition in that case is unsupported. *See McLane Foodservice Inc.*, 400 So. 3d at 761 (recognizing conclusory labels and characterizations are not substitutes for competent evidentiary support).

We also agree with Douberley that "[i]t is also inconceivable that taking depositions authorized by a court order could be considered punitive conduct." Thus, we agree with Douberley that the Perlmutters' abuse of process count was insufficient to support punitive damages against him.

Conspiracy

Because the evidentiary proffer does not support punitive damages against Douberley under the conversion and abuse of process counts (Counts I and II), the evidentiary proffer for punitive damages under the conspiracy count (Count VII) also fails. *Soffer*, 187 So. 3d at 1221.

Conclusion as to Douberley

Having concluded the amended pleading and evidentiary proffer are insufficient to support punitive damages against Douberley, we reverse the order allowing the counterclaim to be amended to assert punitive damages against him.

Federal

Pleading Component—Federal

We begin with our conclusion that Federal waived any challenge to pleading deficiencies in the Perlmutters' proposed counterclaim. Federal's answer brief's summary of argument states that the Perlmutters were required to "first allege and proffer sufficient evidence" to be entitled to punitive damages. However, nowhere in that brief does Federal make any argument, beyond conclusory statements, that the amended counterclaim insufficiently pled grounds for punitive damages.[6] Thus, Federal waived any challenge to the pleading component for punitive damages. *See Desilvio v. Desilvio*, 433 So. 3d 847, 847 (Fla. 4th DCA 2026) ("Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived." (quoting *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010))).

Evidentiary Proffer Component—Federal

Given the Perlmutters' acknowledgments in their answer briefs that they assert vicarious, rather than direct, liability against Federal, we review the claim accordingly.[7] Section 768.72(3) governs an employer's vicarious liability for punitive damages caused by an employee's wrongful conduct.[8]

The primary disagreement on appeal between Federal and the Perlmutters is whether an employer's vicarious liability under section 768.72(3) for an employee's intentional misconduct, as defined by section 768.72(2)(a), requires

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[6] Again, we will not consider arguments raised in supplemental briefing that were not made in the initial briefing.

[7] The Perlmutters' initial answer brief unequivocally states: "In this case, the Perlmutters seek damages against Federal based on vicarious liability under section 768.72." They further state: "Which is to say, under a vicarious theory of liability, Federal is liable for the actions of its employees (Douberley, Murphy) if any of the three conditions in section 768.72(3) are met." Thereafter, Federal states: "The point is that under a vicarious theory of liability, Federal is liable for the actions of its employees—Douberley and Murphy—if it was made aware of the misconduct and did nothing to prevent or subsequently remedy the misconduct. That is what happened here."

Likewise, the Perlmutters' supplemental answer brief states: "Because Douberley's conduct meets section 768.72(2), his employer—Federal—is liable for punitive damages if a Federal 'manager[]' 'knowingly condoned, ratified, or consented to [Douberley's] conduct.'"

[8] The Perlmutters' supplemental briefing appears to seek affirmance of Federal's vicarious liability under section 768.72(3) based on gross negligence. Having determined the proposed counterclaim asserts an overall theory of intentional misconduct, rather than gross negligence, we decline to consider new arguments first raised in supplemental briefing.

a "managing agent" to know of the employee's misconduct and knowingly participate in, condone, ratify, or consent to that misconduct.

Caselaw defines a "managing agent" as "more than just a manager or a mid-level employee," such as a job foreman, bank vice president, or hotel manager. *Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019) (citations omitted). Rather, a managing agent would be someone like a corporate president or primary corporate owner, who holds a "position with the corporation which might result in his acts being deemed the acts of the corporation." *Id.* (citation omitted).

Federal argues that by enacting the definition of "intentional misconduct" in section 768.72(2)(a) in 1999, the legislature rejected the previous common law standard for imposing employer vicarious liability for punitive damages and imposed a heightened standard. Although section 768.72(3) does not use the term "managing agent," Federal argues that the post-1999 caselaw interpreting section 768.72(3) has clearly held that the employer's vicarious liability is based on wrongful conduct as demonstrated by one or more "managing agents."

The Perlmutters respond that "[t]he plain language of section 768.72(3) codifies Florida's longstanding rule that corporate vicarious liability does not include a 'requirement that the independent negligent conduct by the corporation be attributed to a managing agent.'" The Perlmutters cite several cases in support of their argument. However, we conclude the cases do not support their argument.

We agree with Federal's arguments and cited caselaw that the concept of "managing agent" applies to all three subsections of section 768.72(3). *See Napleton's N. Palm Auto Park, Inc. v. Agosto*, 364 So. 3d 1103, 1106-07 (Fla. 4th DCA 2023) (holding that a platform manager, service manager, and assistant service manager were not managing agents because a corporation cannot act on its own and a plaintiff must identify a managing agent with "**ultimate decision-making authority for the company**" (citation omitted)); *HCA Health Servs. of Fla., Inc. v. Byers-McPheeters*, 201 So. 3d 669, 670 (Fla. 4th DCA 2016) (holding "[u]nder section 768.72(3), the legislature established a heightened standard for imposing punitive damages on an employer rather than adopting the common law rules of agency and vicarious liability" (citation omitted)); *Tallahassee Mem'l Healthcare, Inc. v. Dukes*, 272 So. 3d 824, 826 (Fla. 1st DCA 2019) (quashing an order permitting amendment under subsection (3)(b) and explaining: "[w]hat is missing from Ms. Dukes's motion and proffer, however, is an allegation or evidence that corporate management knowingly condoned, ratified or consented to the alleged misconduct"); *Fetlar, LLC v. Suarez*, 230 So. 3d 97, 100 (Fla. 3d DCA 2017) (no liability under any subsection of 768.72(3) because individual construction managers, superintendents, construction workers were not officers or managing members of the limited liability companies); *Coronado Condo. Ass'n*

v. La Corte, 103 So. 3d 239, 241 (Fla. 3d DCA 2012) (no employer vicarious liability under section 768.72(3) because the property manager was "not a controlling officer, director, or 'manager' of the Association as a corporate entity" and the alleged actions of the contractor's employees "do not involve active, knowing participation by, or the consent or gross negligence of, the Association as an entity" (footnote omitted)).

Having determined the role of managing agents for asserting an employer's vicarious liability for punitive damages, we turn to the Perlmutters' motion to amend to seek punitive damages against Federal.

Because the Perlmutters concede they seek to vicariously impose punitive damages against Federal based on Douberley's and Tracy Murphy's misconduct, our reversal of the order allowing the proposed counterclaim to assert punitive damages against Douberley also negates any claim against Federal based on Douberley's alleged misconduct. *Soffer*, 187 So. 3d at 1221. Additionally, we determine that the Perlmutter's proffer does not provide evidence that either Douberley or Murphy were managing agents of either Federal or Chubb, a threshold requirement for imposing vicarious punitive damages liability against Federal, as stated above.

We also agree with Federal that the Perlmutters' evidentiary proffer used highly selective and parsed snippets from record documents to support their contention that Federal was part of the conspiracy ("the DNA scheme") to use false DNA evidence to accuse the Perlmutters of being involved in criminal activity relating to the hate mail against Peerenboom. More importantly, those snippets do not support that contention.

Additionally, the Perlmutters' evidentiary proffer, like their amended counterclaim, repeatedly lumps the actions of Peerenboom as proof of Douberley's, Murphy's, and Federal's misconduct. Because punitive damages for intentional misconduct require specific intent and actual knowledge of the wrongfulness of the conduct, one defendant's intentional misconduct cannot establish another's direct liability for punitive damages to another defendant. *Perlmutter I*, 376 So. 3d at 35.

Likewise, in the context of section 768.72(3), vicarious liability for an employee's intentional misconduct cannot be imposed on the employer absent proof that the requirements of at least one of the subsections of section 768.72(3) have been met. *See* § 768.72(3)(a)-(c), Fla. Stat. (2013). The Perlmutters' arguments lumping proof of acts of intentional misconduct by Peerenboom as proof of acts of intentional misconduct by either Douberley or Murphy to meet the requirements of section 768.72(3) have no merit. Moreover, Federal's vicarious liability under section 768.72(3) also requires more than showing intentional misconduct by either Douberley or Murphy.

Thus, we conclude the Perlmutters' evidentiary proffer fails to support punitive damages against Federal.

Conclusion As to Federal

Having concluded the evidentiary proffer is insufficient to support punitive damages against Federal, we reverse the order allowing the counterclaim to be amended to assert punitive damages against Federal.

Additional Ground for Reversal—Douberley and Federal

The Perlmutters' proposed counterclaim alleges that Douberley and Federal carried out a "DNA theft scheme" to intimidate and retaliate against the Perlmutters and to harm Isaac Perlmutter's Disney ties. However, the Perlmutters' evidentiary proffer did not show that Douberley or Federal actually intended to improperly harm the Perlmutters, as opposed to pursuing them for alleged defamation of Peerenboom (and possible postal-law violations). For that additional reason, we conclude that the evidentiary proffer failed to establish "outrageous" intentional misconduct sufficient to support punitive damages against Douberley and Federal. *Perlmutter I*, 376 So. 3d at 36; *Oriolo*, 357 So. 3d at 706.

Conclusion

Having re-examined the trial court orders granting the Perlmutters' motions to amend their counterclaims to assert punitive damages against all three appellants, we affirm the trial court as to Peerenboom without discussion but reverse the orders as to Douberley and Federal for the reasons discussed above.

Affirmed in part, reversed in part, and remanded.

LEVINE and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely-filed motion for rehearing.