

**APPLICATION OF BARBARA LAGOA  
TO THE FLORIDA SUPREME COURT  
JUDICIAL NOMINATING COMMISSION**

## APPLICATION FOR NOMINATION TO THE SUPREME COURT

(Please attach additional pages as needed to respond fully to questions.)

**DATE:** October 5, 2018 Florida Bar No.: 966990

**GENERAL:** Social Security No.: §119.071(4)(d) F.S., §119.071(5)(a) F.S.

1. Name Barbara Lagoa E-mail: lagoab@flcourts.org

Date Admitted to Practice in Florida: November 9, 1992

Date Admitted to Practice in other States: N/A

2. State current employer and title, including professional position and any public or judicial office.

Chief Judge-Elect, Third District Court of Appeal

3. Business address: 2001 S.W. 117 Avenue

City Miami County Miami-Dade State FL ZIP 33175

Telephone (305) 229-3200 FAX (305) 229-3206

4. Residential address: §119.071(4)(d) F.S.

City §119.071(4)(d) F.S. County §119.071(4)(d) F.S. State §119.071(4)(d) F.S. ZIP §119.071(4)(d) F.S.

Since 2018 Telephone §119.071(4)(d) F.S.

5. Place of birth: Miami, Florida

Date of birth: November 2, 1967 Age: 50

6a. Length of residence in State of Florida: 50 years

6b. Are you a registered voter? ☒ Yes ☐ No

If so, in what county are you registered? Miami-Dade County

7. Marital status: Married

If married: Spouse's name §119.071(4)(d) F.S.

Date of marriage May 4, 1996

Spouse's occupation §119.071(4)(d) F.S.

If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

Not applicable

8. Children

*Name(s)*                      *Age(s)*                      *Occupation(s)*                      *Residential address(es)*

§ 119.071(4)(d) F.S.

9. Military Service (including Reserves)

*Service*                      *Branch*                      *Highest Rank*                      *Dates*

Not applicable

Rank at time of discharge \_\_\_\_\_ Type of discharge \_\_\_\_\_

Awards or citations \_\_\_\_\_

**HEALTH:**

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No

- 11a. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism?

Yes ☐      No ☒

If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.]

Please describe such treatment or diagnosis.

- 11b. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner?

- Experiencing periods of no sleep for 2 or 3 nights
- Experiencing periods of hyperactivity
- Spending money profusely with extremely poor judgment
- Suffered from extreme loss of appetite

- Issuing checks without sufficient funds
- Defaulting on a loan
- Experiencing frequent mood swings
- Uncontrollable tiredness
- Falling asleep without warning in the middle of an activity

Yes ☐ No ☒

If yes, please explain.

- 12a. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

Yes ☐ No ☒

- 12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental health impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes ☐ No ☐

Describe such problem and any treatment or program of monitoring or counseling.

13. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, give full details as to court, date and circumstances.

No

14. During the last ten years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

No

15. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

16. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No

17. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No

#### **EDUCATION:**

- 18a. Secondary schools, colleges and law schools attended.

<i>Schools</i>	<i>Class Standing</i>	<i>Dates of Attendance</i>	<i>Degree</i>
Columbia University School of Law	No class rankings	1989-1992	Juris Doctor
Florida International University	Honors	1985-1989	Bachelor of Arts in English
Monsignor Edward Pace High School	No class rankings	1981-1985	H.S. Diploma

- 18b. List and describe academic scholarships earned, honor societies or other awards.

1. Columbia University School of Law:

Associate Editor, Columbia Law Review

2. Florida International University:

Graduated with Honors  
Phi Kappa Phi Honor Society  
Dean's List  
National Dean's List

Student Honors Mentor Program  
Hispanic Leadership Opportunity Program (Ford Foundation)

**NON-LEGAL EMPLOYMENT:**

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

<i>Date</i>	<i>Position</i>	<i>Employer</i>	<i>Address</i>
Not applicable			

**PROFESSIONAL ADMISSIONS:**

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

<i>Court or Administrative Body</i>	<i>Date of Admission</i>
Florida Bar	November 9, 1992
U.S.District Court, Southern District of Florida	May 18, 1993
U.S. Court of Appeals, Eleventh Circuit	January 2, 1996

**LAW PRACTICE:** (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

<i>Position</i>	<i>Name of Firm</i>	<i>Address</i>	<i>Dates</i>
See Attachment A.			

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I served as an Assistant United States Attorney in the Southern District of Florida from 2003 until my appointment to the bench in 2006. Upon joining the U.S. Attorney's Office in 2003, I was assigned to the Civil Division, where my practice focused primarily on the defense of employment discrimination and federal tort claims brought against the United States and its agencies. In December 2003, I was transferred to the Criminal Division, where my practice focused exclusively on criminal trial and appellate work. Prior to joining the U.S. Attorney's Office, my practice generally consisted of complex commercial litigation. In private practice, my typical clients were insurance companies in coverage disputes, financial institutions, public and closely held corporations, partnerships, and individuals. While in private practice, I handled a variety of matters ranging from employment discrimination claims, construction litigation, contract disputes, business torts, franchise disputes, securities litigation, claims seeking injunctive relief, class actions, arbitrations, and shareholder derivative actions.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court		Area of Practice	
Federal Appellate	<u>25</u> %	Civil	<u>50</u> %
Federal Trial	<u>50</u> %	Criminal	<u>50</u> %
Federal Other	<u>      </u> %	Family	<u>      </u> %
State Appellate	<u>      </u> %	Probate	<u>      </u> %
State Trial	<u>25</u> %	Other	<u>      </u> %
State Administrative	<u>      </u> %		
State Other	<u>      </u> %		
	<u>      </u> %		
TOTAL	<u>100</u> %	TOTAL	<u>100</u> %

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury? 7 Non-jury?         
 Arbitration? 3 Administrative Bodies?       

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No

**(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)**

- 27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).
- 27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).
- 27c. During the last five years, how frequently have you appeared at administrative hearings?  
\_\_\_\_\_ average times per month
- 27d. During the last five years, how frequently have you appeared in Court?  
\_\_\_\_\_ average times per month
- 27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? \_\_\_\_\_%  
Defendants? \_\_\_\_\_%
28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.
30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.
31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

See Attachment B.

**PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:**

- 32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

Yes. I was appointed as a judge to the Third District Court of Appeal for a term commencing on July 17, 2006. I have been retained twice by the electorate (2008 and 2014). In October 2017, I was elected Chief-Judge Elect by my colleagues on the Third District Court of Appeal.

- 32b. List any prior quasi-judicial service:

<i>Dates</i>	<i>Name of Agency</i>	<i>Position Held</i>
N/A		

Types of issues heard:

- 32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

1. David Gersten, Gordon Rees Skully Mansukhani, Miami Tower, Suite 3900, 100 S.E. 2<sup>nd</sup> Street, Miami, FL 33131. Telephone: (305) 428-5300.

2. Gerald B. Cope, Akerman LLP, Three Brickell City Centre, Suite 1100, 99 S.E. 7<sup>th</sup> Street, Miami, FL 33131. Telephone: (305) 374-5600.

3. Kendall Coffey, Coffey Burlington, Penthouse One, 2601 South Bayshore Drive, Miami, FL 33133. Telephone: (305) 888-2900.

4. Lauri Waldman Ross, Ross & Girtan, Two Datan Center, Suite 1612, 9130 South Dadeland Boulevard, Miami, FL 33156. Telephone: (305) 670-8010.

5. Jeffrey S. Bass, Shubin & Bass, 3<sup>rd</sup> Floor, 46 S.W. 1<sup>st</sup> Street, Miami, FL 33130. Telephone: (305) 381-6060.

6. Maria E. Lauredo, Office of the Public Defender, 1320 N.W. 14<sup>th</sup> Street, Miami, FL 33125. Telephone: (305) 545-1960.

All of the attorneys listed above are appellate practitioners who have appeared before me on multiple occasions during my tenure on the Third District Court of Appeal. The first two are also former colleagues of mine from the Third District who are now in private practice.

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

See Attachment C.

(iii) List citations of any opinions which have been published.

See Attachment D.

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

See Attachment E.

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

No, not to my knowledge. However, I would not be made aware of any complaint unless the JQC found probable cause to investigate. Therefore, it is possible that complaints have been filed for which no probable cause to investigate was found.

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

No

- (vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

Not applicable

**BUSINESS INVOLVEMENT:**

- 33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Not applicable

- 33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

No

- 33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

No

**POSSIBLE BIAS OR PREJUDICE:**

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

There are no types of cases, group of entities, or extended relationships or associations that would limit the cases for which I could sit as a Supreme Court of Florida justice. Although I would recuse myself from a case where my husband's law firm was representing a litigant, that situation has occurred infrequently during my tenure on the Third District Court of Appeal.

**MISCELLANEOUS:**

- 35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  X  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

- 35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  X  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

- 35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?  
Yes \_\_\_\_\_ No   X   If "Yes" what charges? \_\_\_\_\_  
Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_
- 36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.  
No
- 36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?  
No
- 36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.  
No
- 37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?  
No
- 37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.  
No
38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.  
No
39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.  
No
40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).  
No
41. Are you currently the subject of an investigation which could result in civil, administrative

or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No

- 43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes ☒ No ☐ If no, please explain. \_\_\_\_\_

- 43b. Have you ever paid a tax penalty?

Yes ☐ No ☒ If yes, please explain what and why. \_\_\_\_\_

- 43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No

### **HONORS AND PUBLICATIONS:**

44. If you have published any books or articles, list them, giving citations and dates.

N/A

45. List any honors, prizes or awards you have received. Give dates.

1. Graduated with Honors, Florida International University, 1989.

2. Associate Editor, Columbia Law Review, 1991-1992.

3. Outstanding Women of Color, March 21, 2010. This award was presented to me by St. Thomas Law School's Justice Peggy A. Quince Chapter of the Black Law Students Association and St. Thomas Law School's Caribbean Law Students Association for my contributions as a sitting judge on the Third District Court of Appeal. The award was presented as part of the two Associations' Annual Spring Gala, "Celebrating Women of Color Within the South Florida Legal Community."

4. FIU Medallion of Honor - Outstanding Alumna, December 14, 2010. In conjunction with its graduation ceremonies, Florida International University presents its Medallion of Honor Award to outstanding alumni. Each recipient of the award is honored at one of the University's graduation ceremonies and gives the Commencement speech at the ceremony. On December 14, 2010, I received the Outstanding Alumna award and gave the Fall Commencement speech to the graduates of the College of Arts and Sciences. This award was particularly meaningful to me as I graduated with a degree from the School of Arts and Sciences, and many of my former professors were in attendance.

46. List and describe any speeches or lectures you have given.

1. Since my appointment to the Third District Court of Appeal, I have given numerous speeches to newly admitted members of The Florida Bar and their families as part of the swearing-in ceremony conducted by the Third District Court of Appeal.
2. As a member of the Florida Judicial Ethics Advisory Committee ("JEAC"), I have given numerous presentations and participated in question-and-answer sessions at Statewide Judicial Candidate Forums sponsored by the JEAC. As noted in response to Question 32d.(ii), the purpose of these forums is to educate judicial candidates (both judges and non-judges) regarding the application of the Code of Judicial Conduct to their campaigns and to provide those candidates with a real time question-and-answer session after the JEAC members' presentations.
3. On March 21, 2010, and in conjunction with my receipt of an award from the St. Thomas Law School's chapters of the Black Law Students Association and the Caribbean Law Students Association, I gave a speech about careers in the legal profession.
4. As noted in response to Question 45, on December 14, 2010, I gave the Fall Commencement speech to the graduating students of Florida International University's College of Arts and Sciences.
5. On February 17, 2011, I was a panelist at the National Association of Women Lawyers Mid-Year Meeting. The panel topic was "Leadership in the Courtroom and Beyond: A Judicial Roundtable." The panel moderator was Florida Supreme Court Justice Peggy A. Quince, and the other panelists were United States District Court Judge Cecilia Altonaga, United States Bankruptcy Court Judge Laurel Isicoff, and Florida Circuit Court Judges Ellen Leesfield and Jacqueline Scola.
6. On September 9, 2011, I administered the oath of office for the incoming officers and directors at the annual installation luncheon of the Broward County Women Lawyers' Association and gave the keynote address on work/life balance.
7. On October 20, 2015, I was a panelist on the Judicial Panel hosted by the H.T. Smith Chapter of the Black Law Students Association at Florida International University. The panel discussion related to the panelists' experiences on the bench and their careers prior to taking the bench.
8. On October 29, 2015, I was a panelist at the Dade County Bar Association Appellate Section's annual seminar. The panel conducted a mock oral argument using a case that was previously argued before the Fourth District Court of Appeal followed by a question-and-answer session.

47. Do you have a Martindale-Hubbell rating? Yes ☐ If so, what is it? \_\_\_ No ☒

#### **PROFESSIONAL AND OTHER ACTIVITIES:**

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

The Florida Bar, Member (1992-present).

Florida Judicial Ethics Advisory Committee. Member (August 2011-present), Vice-Chair (June 30, 2014-July 1, 2015), and Chair (July 1, 2015-June 30, 2016).

Florida Conference of District Court of Appeal Judges, Election Committee Chair (December 2009-present).

Florida District Court of Appeal Budget Commission, Member (2017-present).

The Federalist Society, Member.

Florida Supreme Court Committee on Standard Jury Instructions - Contract and Business Cases, Member (2013-2016).

Florida Bar Appellate Practice Section, Member.

American Bar Association, Planning Board, Litigation Committee, Young Lawyers Division (1999-2000).

- 48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

Federal Judicial Nominating Commission, Member (2001-2003).

United Way of Dade County, Member, Young Leaders Society (2000-2003).

YWCA of Greater Miami and Dade County, Inc., Board of Directors (1999-2001).

Film Society of Miami, Board of Directors (1997-2001). The Film Society was responsible for the Miami Film Festival, an annual film festival showcasing independent American and international films with a special focus on films from Spain and Central and South America, prior to Florida International University assuming responsibility for the Festival. The Festival is now run by Miami-Dade College.

Junior League of Miami, Member (1994-2004), Sustaining Member (2004).

Kristi House, Board of Directors (1996-1998). Kristi House is a private, non-profit organization involved in meeting the legal, medical, and emotional needs of child victims of sexual abuse.

Florida International University Alumni Association, Board of Directors (1996-1999).

- 48c. List your hobbies or other vocational interests.

Reading, hiking, and gardening. My family and I also enjoy movies and travel. I also enjoy cooking and crafting with my daughters.

- 48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

I am a former member of the Junior League of Miami, a charitable service organization that restricts its membership to women. I was an active member from 1994 to 2004 and became a sustaining member in June 2004.

48e. Describe any pro bono legal work you have done. Give dates.

As a sitting judge, I do not provide pro bono legal work. In 1999-2000, while in private practice, I provided pro bono legal work in the case of Elian Gonzalez. While in private practice, I also provided pro bono legal work to the Junior League of Miami.

**SUPPLEMENTAL INFORMATION:**

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

Yes, I have attended many continuing legal education programs in the past five years. Since my appointment in 2006 to the Third District Court of Appeal, I have attended most of the annual statewide District Court of Appeal judicial education conferences, which cover a broad range of substantive topics.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

In addition to the JEAC's Statewide Judicial Candidate Forums, I have taught at the following CLE/CJE programs:

1. "Preserving Error: The Tension Between Strategy and Appealability," (Panelist, 25<sup>th</sup> Annual Third District Court of Appeal Seminar and Reception, April 4, 2008).
2. "Dos & Don'ts of Merit Retention," (District Court of Appeal Appellate Conference, September 13, 2010).
3. "Tips for Effective Petitions and Briefs" and "Plenary Session: Questions and Answers," (Seminar on Practice before the Third District Court of Appeal, February 6, 2015).
4. "Developments in Florida Tort and Business Law," (Panel Moderator, February, 2015 Florida Chapters Conference, Federalist Society, February 28, 2015).

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

As a practicing attorney, I always sought to maintain a high level of excellence in both my written work and oral presentation, as well as a high level of professionalism in dealing with the court, opposing counsel, and my clients. I believe that these skills have enabled me to perform my judicial tasks with the utmost respect for litigants, lawyers and the public.

51. Explain the particular potential contribution you believe your selection would bring to this position.

See Attachment F.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

Third District Court of Appeal Judicial Nominating Commission, April 19, 2006.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

I am a native Floridian and a native of Miami-Dade County. I was raised in Hialeah by Cuban parents who instilled in me a profound appreciation of both the United States and Florida. This background formed my belief in the importance of public service and of giving back to this State that has provided so many opportunities for me and my family. Since I made the decision to leave private practice, I have used the skills I acquired as a lawyer to serve the public. My last twelve years as a member of the judiciary serving the communities of Miami-Dade and Monroe Counties have allowed me the opportunity to administer justice with integrity and the highest standards of professionalism.

**REFERENCES:**

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

1. The Honorable Alan Lawson, Justice, Florida Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1925. Telephone: (850) 921-1096.
2. The Honorable Ricky Polston, Justice, Florida Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1925. Telephone: (850) 488-2361.
3. The Honorable Stefanie W. Ray, Judge, First District Court of Appeal, 2000 Drayton Drive, Tallahassee, FL 32399-0950. Telephone: (850) 487-1000.
4. The Honorable Lori S. Rowe, Judge, First District Court of Appeal, 2000 Drayton Drive, Tallahassee, FL 32399-0950. Telephone: (850) 487-1000.
5. The Honorable Federico A. Moreno, United States District Court, Southern District of Florida, Wilkie D. Ferguson, Jr. United States Courthouse, Room 13-3, 400 North Miami Avenue, Miami, FL 33128. Telephone: (305) 523-5110.
6. Jason Gonzalez, Shutts & Bowen, LLP, Suite 804, 215 South Monroe Street, Tallahassee, FL 32301. Telephone: (850) 241-1720.
7. The Hon. Eliot Pedrosa, United States Alternate Executive Director, Inter-American Development Bank, 1300 New York Avenue, N.W., Washington, D.C. 20577. Telephone: (202) 765-8881 or (305) 804-4562.
8. Cesar L. Alvarez, Greenberg Traurig, LLP, Suite 4400, 333 S.E. 2<sup>nd</sup> Avenue, Miami, FL 33131. Telephone: (305) 579-0500/579-0668
9. Corali Lopez-Castro, Kozyak Tropin & Throckmorton, 9<sup>th</sup> Floor, 2525 Ponce de Leon Boulevard, Coral Gables, FL 33134. Telephone: (305) 372-1800.
10. Justin Sayfie, Ballard Partners, 14<sup>th</sup> Floor, 401 E. Las Olas Boulevard, Fort Lauderdale, FL 33301. Telephone: (954) 523-2427.

## CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 5<sup>th</sup> day of October, 2018.

Barbara Lagoa  
Printed Name

Barbara Lagoa  
Signature

*(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

## FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date 127,165.50

List Last 3 years	<u>154,140 (2015)</u>	154,140 (2016)	157,993.50 (2017)
-------------------	-----------------------	----------------	-------------------

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date 115,992.98

List Last 3 years	<u>144,855.80</u>	139,805.80	143,543.68
-------------------	-------------------	------------	------------

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current year to date      Not applicable

List Last 3 years

4. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current year to date      Not applicable

List Last 3 years

**FORM 6****FULL AND PUBLIC DISCLOSURE  
OF FINANCIAL INTERESTS****2017**Please print or type your name, mailing  
address, agency name, and position below:

FOR OFFICE USE ONLY:

LAST NAME — FIRST NAME — MIDDLE NAME:

Lagoa, Barbara

MAILING ADDRESS:

2001 SW 117 Avenue

CITY:

Miami

ZIP:

33175

COUNTY:

Miami-Dade

NAME OF AGENCY:

Third District Court of Appeal

NAME OF OFFICE OR POSITION HELD OR SOUGHT:

Judge

CHECK IF THIS IS A FILING BY A CANDIDATE ☐**PART A -- NET WORTH**Please enter the value of your net worth as of December 31, 2017 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]My net worth as of May 31, 20 18 was \$ 1,153,265.00.**PART B -- ASSETS****HOUSEHOLD GOODS AND PERSONAL EFFECTS:**

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds \$1,000. This category includes any of the following, if not held for investment purposes: jewelry, collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use, whether owned or leased.

The aggregate value of my household goods and personal effects (described above) is \$ 100,000.**ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:**

DESCRIPTION OF ASSET (specific description is required - see instructions p.4)

VALUE OF ASSET

House: <u>\$119.071(4)(d) F.S.</u>	\$ <u>2,800,000.00</u>
Bank Accounts (Citibank)	\$ <u>170,996.43</u>
401(K) (Federal Employment Retirement System)	\$ <u>80,396.72</u>

**PART C -- LIABILITIES****LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):**

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

Seaside National Bank, 201 South Orange Avenue, Orlando, FL 32801	\$ <u>1,894,089.00</u>
Honda Financial Services, P.O. Box 1027, Alpharetta, GA 30009-1027	\$ <u>4,041.72</u>

**JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:**

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

**PART D -- INCOME**

Identify each separate source and amount of income which exceeded \$1,000 during the year, including secondary sources of income. Or attach a complete copy of your 2017 federal income tax return, including all W2s, schedules, and attachments. Please redact any social security or account numbers before attaching your returns, as the law requires these documents be posted to the Commission's website.

- ☐ I elect to file a copy of my 2017 federal income tax return and all W2's, schedules, and attachments.  
 (If you check this box and attach a copy of your 2017 tax return, you need not complete the remainder of Part D.)

**PRIMARY SOURCES OF INCOME (See instructions on page 5):**

NAME OF SOURCE OF INCOME EXCEEDING \$1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
State of Florida	200 East Gaines Street, Tallahassee, FL	\$157,993.50

**SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person--see instructions on page 5]:**

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSINESS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE

**PART E -- INTERESTS IN SPECIFIED BUSINESSES [Instructions on page 6]**

	BUSINESS ENTITY # 1	BUSINESS ENTITY # 2	BUSINESS ENTITY # 3
NAME OF BUSINESS ENTITY			
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

**PART F - TRAINING**

For officers required to complete annual ethics training pursuant to section 112.3142, F.S.

- ☐ I CERTIFY THAT I HAVE COMPLETED THE REQUIRED TRAINING.

**OATH**

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

STATE OF FLORIDA  
COUNTY OF Miami-Dade

Sworn to (or affirmed) and subscribed before me this 25<sup>TH</sup> day of

June, 2018, by Barbara Lagoa

(Signature of Notary Public--State of Florida)

(Print, Type, or Stamp Commissioned Notary of No Commission # FF 906770

Personally Known X

Type of Identification Produced



**MICHELLE H. EDELSTEIN**  
Notary Public - State of Florida  
Commission # FF 906770  
My Comm. Expires Nov 29, 2019  
Bonded through National Notary Assn.

SIGNATURE OF REPORTING OFFICIAL OR CANDIDATE

If a certified public accountant licensed under Chapter 473, or attorney in good standing with the Florida Bar prepared this form for you, he or she must complete the following statement:

I, \_\_\_\_\_, prepared the CE Form 6 in accordance with Art. II, Sec. 8, Florida Constitution, Section 112.3144, Florida Statutes, and the instructions to the form. Upon my reasonable knowledge and belief, the disclosure herein is true and correct.

Signature

Date

**Preparation of this form by a CPA or attorney does not relieve the filer of the responsibility to sign the form under oath.**

**IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE** ☐

**Form 6A. Disclosure of Gifts, Expense Reimbursements or Payments, and Waivers of Fees and Charges**

All judicial officers must file with the Florida Commission on Ethics a list of all reportable gifts, reimbursements or direct payments of expenses, and waivers of fees or charges accepted during the preceding calendar year as provided in Canons 5D(5)(a) and 5D(5)(h), Canon 6A(3), and Canon 6B(2) of the Code of Judicial Conduct, by date received, description (including dates, location, and purpose of event or activity for which expenses, fees, or charges were reimbursed, paid, or waived), source's name, and amount for gifts only.

Name: Barbara Lagoa Work Address: 2001 SW 117 Ave., Miami, FL 33175

Work Telephone: 305-229-3200 Judicial Office Held: Appellate Judge

1. Please identify all reportable gifts you received during the preceding calendar year, as required by Canons 5D(5)(a), 5D(5)(h), and 6B(2) of the Code of Judicial Conduct.

DATE	DESCRIPTION	SOURCE	AMOUNT
	NONE		NONE
	NONE		NONE
	NONE		NONE
	NONE		NONE

☐ Check here if continued on separate sheet

2. Please identify all reportable reimbursements or direct payments of expenses, and waivers of fees or charges you received during the preceding calendar year, as required by Canons 6A(3) and 6B(2) of the Code of Judicial Conduct.

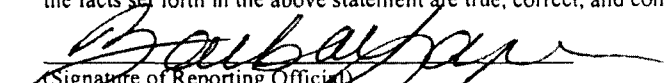
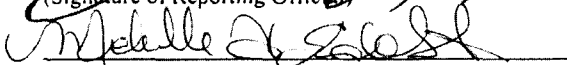
DATE	DESCRIPTION (Include dates, location, and purpose of event or activity for which expenses, fees, or charges were reimbursed, paid, or waived)	SOURCE
	NONE	NONE
	NONE	NONE
	NONE	NONE
	NONE	NONE

☐ Check here if continued on separate sheet

**OATH**

State of Florida  
County of Miami-Dade

I, Barbara Lagoa, the public official filing this disclosure statement, being first duly sworn, do depose on oath and say that the facts set forth in the above statement are true, correct, and complete to the best of my knowledge and belief.

  
(Signature of Reporting Official)  
  
(Signature of Officer Authorized to Administer Oaths)

My Commission expires  
Sworn to and subscribed before me this  
 **MICHELLE H. EDELSTEIN**  
Notary Public - State of Florida  
Commission # **EF 906770**  
My Comm. Expires **Nov 29, 2019**  
Bonded through National Notary Assn.

3/18 (As prescribed in Canon 6A)

20 18

## JUDICIAL QUALIFICATIONS COMMISSION FORM 6B

### REPORT OF BUSINESS INTERESTS

Pursuant to Canon 6C, of the Code of Judicial Conduct, all judicial officers are required to file this form with the Judicial Qualifications Commission on or before July 1 of each calendar year.

**Instructions:** List the names of any corporations or business entities, not otherwise identified on Form 6, in which you had a financial interest as of December 31 of the preceding year. If no business interests, or the interests are already identified on Form 6, then write "None," or "N/A." Attach additional pages as necessary.

Name of Judge: Barbara Lagoa Telephone: 305-229-3200 x3222

Address: 2001 SW 117 Avenue, Miami, FL 33175 Position: Appellate Judge

#### Name of Business Entity

#### Address of Business Entity

N/A

I certify that the foregoing list is complete, true, and correct.

  
JUDGE'S SIGNATURE

### OATH

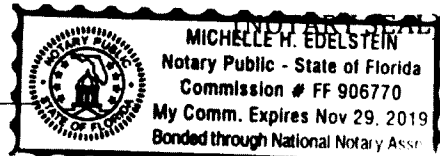
State of Florida, County of Miami-Dade.

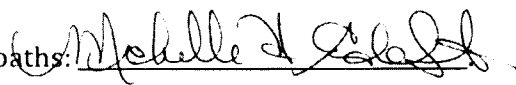
Sworn to (or affirmed) and subscribed before me, this 25<sup>th</sup> day of June, 2018.

by Barbara Lagoa (Name of Judge).

Personally Known X, or Produced Identification \_\_\_\_\_

Identification Produced: \_\_\_\_\_



Signature of Notary or official authorized to administer oaths: 

(THIS FORM IS FILED ONLY WITH THE JUDICIAL QUALIFICATIONS COMMISSION)

## JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: October 5, 2018

JNC Submitting To: Supreme Court

Name (please print): Barbara Lagoa

Current Occupation: Judge, Third District Court of Appeal

Telephone Number: (305) 608-4806 Attorney No.: 966990

Gender (check one): ☐ Male ☒ Female

Ethnic Origin (check one): ☐ White, non Hispanic  
☒ Hispanic  
☐ Black  
☐ American Indian/Alaskan Native  
☐ Asian/Pacific Islander

County of Residence: Miami-Dade

*FLORIDA DEPARTMENT OF LAW ENFORCEMENT*

DISCLOSURE PURSUANT TO THE  
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

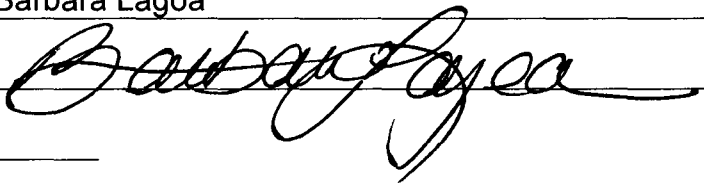
CONSUMER'S AUTHORIZATION FOR FDLE  
TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of  
Applicant:

Barbara Lagoa

Signature of Applicant:



Date: October 5, 2018

**ATTACHMENT A**  
**Response to Question 21**

## ATTACHMENT A

### Response to Question 21

**21. State the name, date and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as sole practitioner, law clerkships and other prior employment:**

<i>Position</i>	<i>Name of Firm</i>	<i>Address</i>	<i>Dates</i>
Assistant United States Attorney	U.S. Attorney's Office, Southern District of Florida	99 N.E. 4 <sup>th</sup> Street, Miami, Florida 33132	2003-2006
Associate	Greenberg Taurig, P.A.	1221 Brickell Avenue, Miami, Florida 33131	1998-2003
Associate	Cohen Berke Bernstein Brodie & Kondell, PA. (no longer in existence)	2601 South Bayshore Drive, Miami, Florida 33133	1994-1998
Associate	Schulte Blum Joblove & Haft, P.A. (no longer in existence)	200 South Biscayne Boulevard, Miami, Florida 33131	1993-1994
Associate	Morgan Lewis & Bockius	200 South Biscayne Boulevard, Miami, Florida 33131	1992-1993

**ATTACHMENT B**  
**Response to Question 31**

## ATTACHMENT B

### Response to Question 31

**31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.**

I was the sole author of the attached opinions, with proof-reading assistance from my law clerks. The opinions attached involve civil, criminal, and family law cases. I also authored the opinions listed on Attachment “D” in response to Question 32d.(iii), including those released as per curiam opinions.

The attached opinions are:

1. *Roth v. Cohen*, 941 So. 2d 496 (Fla. 3d DCA 2006).
2. *Valenzuela v. GlobeGround North America, LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009).
3. *J.A. v. State*, 247 So. 3d 710 (Fla. 3d DCA 2018).
4. *Solomon v. Solomon*, 43 Fla. L. Weekly D1398 (Fla. 3d DCA June 20, 2018). With respect to *Solomon*, I was the sole author of the special concurrence.

941 So.2d 496  
District Court of Appeal of Florida,  
Third District.

Peter ROTH and Marilyn Roth, Appellants,

v.

Alan COHEN, Appellee.

No. 3D06-116.

|

Nov. 8, 2006.

### Synopsis

**Background:** Interior designer brought action against homeowners for libel, defamation, slander, and tortious interference with relationship after homeowners sent letter to developer regarding designer's services. Homeowners filed answer and counterclaim, and third-party complaint naming designer's corporation as a third-party defendant, seeking damages for fraud, fraud in the inducement, unjust enrichment, conversion, civil theft, constructive fraud, breach of contract, and an equitable accounting. Designer and corporation filed motion to compel arbitration. The Circuit Court, Miami-Dade County, [Jon I. Gordon](#), J., granted the motion, and homeowners appealed.

**Holdings:** The District Court of Appeal, Third District, [Lagoa, J.](#), held that:

[1] designer could not prevail on argument that designer did not have the right to demand arbitration under the contract, as designer acted inconsistent with that argument by filing motion to compel arbitration;

[2] sufficient nexus existed between designer's claims and design contract such that claims were subject to contract's arbitration provision; and

[3] designer's act in commencing a lawsuit against homeowners constituted a waiver of designer's arbitration right.

Reversed and remanded.

### West Headnotes (9)

#### [1] Alternative Dispute Resolution

##### 🔑 Scope and Standards of Review

An order granting or denying a motion to compel arbitration is reviewed de novo.

[9 Cases that cite this headnote](#)

#### [2] Alternative Dispute Resolution

##### 🔑 Validity

#### Alternative Dispute Resolution

##### 🔑 Disputes and Matters Arbitrable Under Agreement

#### Alternative Dispute Resolution

##### 🔑 Waiver or Estoppel

When considering a motion to compel arbitration, three factors need to be considered: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived.

[4 Cases that cite this headnote](#)

#### [3] Alternative Dispute Resolution

##### 🔑 Disputes and Matters Arbitrable Under Agreement

Not every dispute that arises between contracting parties will be subject to arbitration, nor is the mere fact that a dispute would not have arisen but for the contract sufficient to compel arbitration of the dispute.

[2 Cases that cite this headnote](#)

#### [4] Alternative Dispute Resolution

##### 🔑 Presentation and Reservation of Grounds for Review

Interior designer failed to argue in trial court that, because design contract was between homeowner and design company, designer did not have a right to demand arbitration under the contract and therefore could not have waived any such right, and thus issue was

not preserved for review and appellate court would not consider that issue.

[2 Cases that cite this headnote](#)

## [5] Appeal and Error

### 🔑 Necessity of Presentation in General

For an issue to be preserved for appeal, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.

[4 Cases that cite this headnote](#)

## [6] Alternative Dispute Resolution

### 🔑 Scope and Standards of Review

Interior designer could not prevail on appeal on argument that, because design contract was between homeowner and design company, designer did not have the right to demand arbitration under the contract and therefore could not have waived any such right, as designer acted inconsistent with that argument by filing motion to compel arbitration of homeowners' counterclaims against him.

[1 Cases that cite this headnote](#)

## [7] Alternative Dispute Resolution

### 🔑 Disputes and Matters Arbitrable Under Agreement

Interior designer's defamation and tortious interference claims against homeowners, based on their complaints to developer about designer's failure to comply with terms of design contract, arose out of a construction of the design contract's terms and conditions, and thus sufficient nexus existed between designer's claims and the contract such that claims were subject to contract's arbitration provision.

[2 Cases that cite this headnote](#)

## [8] Alternative Dispute Resolution

### 🔑 Suing or Participating in Suit

Interior designer's act in commencing a lawsuit against homeowners was inconsistent with his contractual right to arbitration and thus constituted a waiver of that right.

[Cases that cite this headnote](#)

## [9] Alternative Dispute Resolution

### 🔑 Waiver or Estoppel

When considering whether a party has waived a right to arbitration, the essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.

[1 Cases that cite this headnote](#)

## Attorneys and Law Firms

\***498** Jorden Burt, and [Richard J. Ovelmen](#) and [Andres F. Chagui](#) and [Landon K. Clayman](#), Miami, for appellants.

[Lee Milich](#), Ft. Lauderdale, for appellee.

Before [RAMIREZ](#), [ROTHENBERG](#), and [LAGOA](#), JJ.

## Opinion

[LAGOA](#), J.

Appellants Peter and Marilyn Roth (hereinafter “the Roths”) appeal a non-final order compelling arbitration of their Counterclaim and Third Party Complaint. At issue on appeal is whether Appellee Alan Cohen (“Cohen”) waived his right to compel arbitration when he filed suit in circuit court. Because we find that, by filing his otherwise arbitrable defamation claims in circuit court, Cohen waived his right to compel arbitration, we reverse the trial court's order compelling arbitration of the Counterclaim.

## I. FACTUAL AND PROCEDURAL HISTORY

Cohen is the sole officer and director of Alan David, Inc. (“ADI”), an interior design company. In 2003, Cohen and ADI decorated a model home at Cloisters on the Bay (“Cloisters”), a luxury development in Miami, Florida.

After purchasing a residence at the Cloisters, Peter Roth received a recommendation from the Cloisters that he use Cohen's and ADI's services. Peter Roth and ADI subsequently entered into an interior design services agreement. The signatories to that contract were Peter Roth and Cohen.<sup>2</sup>

The design contract provides that Roth would purchase items through or from the designer at cost. The contract also contains an arbitration clause that states, in relevant part: "Any controversy or claim *arising out of or relating to this Agreement or the breach thereof* shall be settled by arbitration in Broward County ...." (emphasis added).

According to the Roths, Cohen and ADI breached the contract by charging and collecting more than cost for design items and by inappropriately charging sham Florida sales taxes. The Roths met with Leonard Albanese ("Albanese"), the Cloisters' developer, in November of 2004 to discuss Cohen and ADI's breach and Albanese's continued recommendation of Cohen and ADI to Cloisters' residents. On February 1, 2005, the Roths sent a letter to Albanese questioning why he continued to \*499 refer Cohen's services to Cloisters' residents, and enclosing invoices which the Roths claimed showed the improper cost overcharges and sham sales taxes.

On June 23, 2005, Cohen filed suit in circuit court against the Roths asserting claims for libel, defamation, slander, and tortious interference with his relationship with Albanese<sup>3</sup> and the Cloisters. In his Complaint, Cohen alleged that he is the president of ADI and was employed by Peter Roth to provide interior design services to Roth's residence at the Cloisters.

The Roths filed their Answer and Affirmative Defenses, as well as a Counterclaim and Third Party Complaint (naming ADI as a third party defendant) seeking joint and several damages from Cohen and ADI for fraud, fraud in the inducement, unjust enrichment, conversion, civil theft, constructive fraud, breach of contract, and an equitable accounting. In all but the constructive fraud and equitable accounting counts, the Roths allege that Cohen is the alter ego of ADI.

On October 10, 2005, Cohen and ADI filed a Motion to Stay Proceedings and Compel Arbitration of the Counterclaim and the Third Party Complaint. At the hearing before the trial court, the parties' arguments

centered on the issue of whether there was a nexus between Cohen's claims and the design agreement and whether Cohen waived his right to arbitrate. The trial court granted the motion, and ordered arbitration of both the Counterclaim against Cohen and the Third Party Complaint against ADI.

## II. STANDARD OF REVIEW AND FACTORS TO BE CONSIDERED IN GRANTING MOTION TO COMPEL ARBITRATION

[1] [2] We review an order granting or denying a motion to compel arbitration *de novo*. *Vacation Beach, Inc. v. Charles Boyd Construction, Inc.*, 906 So.2d 374, 376 (Fla. 5th DCA 2005); *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259 (Fla. 2d DCA 2004). When considering a motion to compel arbitration, three factors need to be considered: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived. See *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla.1999).

[3] In *Seifert*, the Florida Supreme Court stated that "even in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause." *Id.* at 638. Thus, not every dispute that arises between contracting parties will be subject to arbitration, nor is the mere fact that a dispute would not have arisen but for the contract sufficient to compel arbitration of the dispute. *Id.* In establishing this standard, the Florida Supreme Court relied upon cases holding that for a tort claim to be considered "arising out of or relating to" a contract, "it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." *Id.*

## III. ARGUMENTS ON APPEAL

[4] [5] On appeal, the Roths argue that the trial court erred in compelling arbitration of their Counterclaim because the arbitration clause contained in the design contract applied to Cohen's defamation claims and, therefore, Cohen waived his right to compel arbitration when he filed \*500 suit in circuit court. In response to the Roths' arguments, Cohen advances two arguments on appeal. First, he argues that, because the design contract is between ADI and Peter Roth, he did not have the right

to demand arbitration under the contract in the first place and, therefore, could not have waived any such right. Cohen, however, failed to preserve this issue for appellate review. “For an issue to be preserved for appeal, ... it ‘must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.’ ” *Archer v. State*, 613 So.2d 446, 448 (Fla.1993); *Vacation Beach, Inc. v. Charles Boyd Const., Inc.*, 906 So.2d 374 (Fla. 5th DCA 2005); *Parlier v. Eagle-Picher Indus., Inc.*, 622 So.2d 479 (Fla. 5th DCA 1993). Because Cohen did not raise this argument before the trial court, the issue was not preserved and is, therefore, not properly before this Court.

[6] Even if Cohen had preserved this issue, however, it would not avoid reversal, as Cohen proceeded before the trial court in a manner inconsistent with this argument. By moving to compel arbitration of the Counterclaim against him, Cohen affirmatively took advantage of the very arbitration clause he now claims he did not have a right to demand. Following Cohen's argument, his motion to compel arbitration of the Counterclaim would have been without factual or legal basis.

[7] Cohen also argues that the arbitration clause does not apply to the defamation claims he filed before the circuit court because, following *Seifert*, an insufficient nexus exists between his claims and the arbitration clause. We disagree.

In support of his position, Cohen relies on *King Motor Co. v. Jones*, 901 So.2d 1017 (Fla. 4th DCA 2005). In *King*, the plaintiff purchased a car pursuant to a purchase and sales contract containing a broad arbitration clause. After learning that the financial information she provided to the dealer had been stolen and that she had become a victim of identity theft, the plaintiff sued the dealer under a variety of tort and statutory theories. The trial court denied the dealer's motion to compel arbitration and the Fourth District affirmed. Relying on *Seifert*, the Fourth District reasoned that the tort claims were based on the dealer's alleged breach of duty to keep customer's confidential and financial information safe—duties owed generally to the public—and did not implicate the contractual duties created or governed by the parties' purchase and sales contract. Moreover, none of the allegations in the complaint required reference to, or construction of, any portion of the parties' contract. *King*, 901 So.2d at 1020.

In contrast, in the present case, there is a sufficient nexus between Cohen's claims and the design contract such that the arbitration clause applies to this action. Cohen's claims all relate to allegedly false verbal and written statements made by the Roths regarding Cohen's failure to comply with the terms of the design contract. As such, and unlike *King*, the dispute in this case arises out of a construction of the design contract's terms and conditions, and necessarily requires reference to those provisions of the contract. Because Cohen's claims are based upon statements regarding the alleged breach of rights and obligations that exist under the design contract, they have a sufficient nexus to that contract as to fall within the arbitration clause. Cf. *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency*, 664 So.2d 1107, 1109 (Fla. 3d DCA 1995)(where contract between the parties provided for arbitration of “any controversy or claim arising out of or relating to this Agreement,” claims for defamation, fraud, and \*501 business interference clearly had their origin or genesis in the contract and arbitration clause applied). See also *Popper v. Monroe*, 673 F.Supp. 1228 (S.D.N.Y.1987)(where allegedly defamatory statements directly related to the interpretation of contract terms, dispute subject to arbitration pursuant to contract). Accordingly, we hold that the trial court erred when it found that Cohen's claims against the Roths were not subject to the design contract's arbitration clause.

[8] [9] Turning to whether Cohen waived his right to arbitrate, in *Raymond James Financial Services Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla.2005), the Florida Supreme Court noted that “[t]he right to arbitration, like any contract right, can be waived .... [therefore] an arbitration right must be safeguarded by a party who seeks to rely upon that right, and the party must not act inconsistently with the right.” “[T]he essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.” *Id.*

In this case, Cohen commenced a lawsuit against the Roths in circuit court and propounded discovery requests. This active participation in a lawsuit is inconsistent with a party's contractual right to arbitration and constitutes a waiver of that right. See *Fine Decorators, Inc. v. Argent Global (Bermuda) Ltd.*, 919 So.2d 604, 606 (Fla. 3d DCA 2006); *Hill v. Bluntzer*, 701 So.2d 901, 902 (Fla. 3d DCA 1997); *Lapidus v. Arlen Beach Condominium Assn., Inc.*,

[394 So.2d 1102, 1103 \(Fla. 3d DCA 1981\)](#). Because we find that the arbitration clause applied to Cohen's defamation claims and that Cohen waived his right to arbitrate by filing suit in circuit court, the trial court's order compelling arbitration of the Counterclaim is reversed.

Reversed and remanded for further proceedings consistent herewith.

#### All Citations

941 So.2d 496, 31 Fla. L. Weekly D2797

#### Footnotes

- 1 Although the order on appeal compelled arbitration of both the Counterclaim against Cohen and the Third Party Complaint against ADI, appellants' arguments on appeal were limited solely to the Counterclaim against Cohen. As no argument was presented to this Court regarding the Third Party Complaint, we do not address it here. See [Ramos v. Philip Morris Companies Inc.](#), 743 So.2d 24, 29 (Fla. 3d DCA 1999); [Polyglycoat Corp. v. Hirsch Distributors Inc.](#), 442 So.2d 958, 960 (Fla. 4th DCA 1984).
- 2 Peter and Marilyn Roth were not married at the time the contract was signed, and Marilyn Roth is not a party to the contract.
- 3 The Roths' letter to Albanese is attached to the Complaint.

18 So.3d 17  
District Court of Appeal of Florida,  
Third District.

Gelsa A. VALENZUELA, Appellant,

v.

GLOBEGROUND NORTH  
AMERICA, LLC, Appellee.

No. 3D07-1742.

|

Aug. 19, 2009.

### Synopsis

**Background:** Female employee of aircraft refueling company who was terminated during her probationary period for an inability to refuel certain aircraft and for failing to possess required commercial driver's license brought gender discrimination action against company. The Circuit Court, Miami-Dade County, [Mindy S. Glazer](#), J., awarded summary judgment to company. Employee appealed.

**Holdings:** The District Court of Appeal, [Lagoa](#), J., held that:

[1] employee failed to establish that male employees who she alleged received more favorable treatment were similarly situated to her;

[2] company proffered a legitimate, non-discriminatory reason for the termination;

[3] employee's conclusory allegations were insufficient to create a triable issue as to whether company's proffered explanation was a pretext for gender discrimination; and

[4] affidavit of a trainer who gave employee satisfactory evaluations was insufficient to create a triable issue as to whether the explanation was a pretext.

Affirmed.

West Headnotes (21)

### [1] Civil Rights

 [Employment practices](#)

An employee may prove that the employer engaged in gender discrimination by direct, circumstantial, or statistical evidence. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[2 Cases that cite this headnote](#)

### [2] Civil Rights

 [Employment practices](#)

A plaintiff alleging employment discrimination must first establish, by a preponderance of the evidence, a prima facie case of discrimination; if successful, this raises a presumption of discrimination against the defendant. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[2 Cases that cite this headnote](#)

### [3] Civil Rights

 [Employment practices](#)

If a prima facie showing of employment discrimination is made by the employee, the burden of proof then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action; if the employer meets its burden, the presumption of discrimination disappears and the employee must prove that the employer's legitimate reasons for dismissal were a pretext for discrimination. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[4 Cases that cite this headnote](#)

### [4] Civil Rights

 [Employment practices](#)

The ultimate burden of proving employment discrimination rests at all times with the plaintiff. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

### [5] Civil Rights

🔑 **Disparate treatment**

Female employee of aircraft refueling company who was terminated during her probationary period for an inability to refuel certain aircraft and for failing to possess required commercial driver's license failed to establish that male employees who she alleged received more favorable treatment were similarly situated to her, as necessary to establish prima facie case of gender discrimination; all but one of the male employees had a different class of commercial license and needed only to update it, and there was no evidence that other male employee had lied on his application, had failed to make effort to obtain license during his probationary period, or had problems fueling aircraft. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

**[6] Civil Rights**

🔑 **Disparate treatment**

In order to establish a prima facie case of disparate treatment based on gender discrimination, a plaintiff must prove that: (1) the employee is a member of a protected class; (2) the employee was qualified for her position; (3) the employee suffered an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[5 Cases that cite this headnote](#)

**[7] Civil Rights**

🔑 **Disparate treatment**

In determining whether employees are similarly situated for purposes of establishing a prima facie case of discrimination, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[1 Cases that cite this headnote](#)

**[8] Civil Rights**

🔑 **Disparate treatment**

To establish a prima facie case of employment discrimination, the employee must show that she and the employees outside her protected class are similarly situated in all relevant respects. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[6 Cases that cite this headnote](#)

**[9] Civil Rights**

🔑 **Disparate treatment**

In determining whether employees are similarly situated for purposes of establishing a prima facie case of discrimination, the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

**[10] Civil Rights**

🔑 **Disparate treatment**

Similarly situated employees, for purposes of establishing a prima facie case of employment discrimination, must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[1 Cases that cite this headnote](#)

**[11] Civil Rights**

🔑 **Disparate treatment**

If a plaintiff alleging employment discrimination fails to present sufficient evidence that a non-protected, similarly situated employee was treated more favorably by the employer, the defendant is entitled to

summary judgment. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[2 Cases that cite this headnote](#)

## [12] Civil Rights

🔑 Particular cases

### Civil Rights

🔑 Employment practices

Aircraft refueling company that terminated female employee during her probationary period proffered a legitimate, non-discriminatory reason for the termination, and thus any presumption of discrimination arising out of employee's attempt to establish a prima facie case disappeared; company stated that employee was terminated for failure to complete the probationary period, and attributed its decision to employee's inability to refuel certain kinds of aircraft, and her failure to comply with the licensing requirements to operate the fueling equipment. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

## [13] Civil Rights

🔑 Employment practices

An employer's intermediate burden to produce a legitimate, non-discriminatory reason for an adverse employment action, in order to rebut a presumption of discrimination arising from the employee's establishment of a prima facie case of discrimination, is exceedingly light; indeed, it is a burden of production, not persuasion. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[2 Cases that cite this headnote](#)

## [14] Civil Rights

🔑 Employment practices

In order to rebut the presumption of employment discrimination arising from the plaintiff's establishment of a prima facie case, the defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by

the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

## [15] Civil Rights

🔑 Motive or intent;pretext

Pretext of an employer's proffered non-discriminatory reason for terminating an employee is established either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence; where an employer offers multiple reasons for the termination, a plaintiff must produce sufficient evidence for a reasonable fact finder to conclude that each reason is pretextual. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[1 Cases that cite this headnote](#)

## [16] Judgment

🔑 Labor and employment

Because the plaintiff bears the burden of establishing that an employer's proffered non-discriminatory reason for an adverse employment action is pretext for discrimination, she must present significantly probative evidence on the issue to avoid summary judgment. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[3 Cases that cite this headnote](#)

## [17] Civil Rights

🔑 Motive or intent;pretext

To show that an employer's proffered non-discriminatory reasons for an adverse employment action were pretextual, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find

them unworthy of credence. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[1 Cases that cite this headnote](#)

**[18] Judgment**

 [Matters of fact or conclusions](#)

Female employee's conclusory allegations that similarly situated male employees were given preferential treatment with respect to obtaining a required commercial driver's license were insufficient to create a genuine issue of material fact as to whether aircraft refueling company's proffered explanation that it terminated employee, in part, due to her failure to obtain the license was a pretext for gender discrimination, so as to preclude summary judgment in employee's gender discrimination action; employee testified that she was informed of her need for the license when she was hired, making employer's stated reason believable. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

**[19] Judgment**

 [Labor and employment](#)

Affidavit of a trainer who gave female employee of aircraft refueling company satisfactory evaluations was insufficient to create a genuine issue of material fact as to whether company's proffered explanation that it terminated employee, in part, due to her inability to fuel certain kinds of aircraft was a pretext for gender discrimination, so as to preclude summary judgment in employee's gender discrimination action; employee did not dispute the testimony of another trainer that he gave her unsatisfactory job performance evaluations. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

**[20] Civil Rights**

 [Motive or intent;pretext](#)

[Civil Rights](#)

 [Employment practices](#)

A plaintiff's claim that an employer's proffered non-discriminatory reasons for an adverse employment action are a pretext for discrimination will fail where she merely questions the wisdom of the employer's reasons, at least where the reason is one that might motivate a reasonable employer; the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[1 Cases that cite this headnote](#)

**[21] Judgment**

 [Labor and employment](#)

Where employer produces evidence showing poor performance, employee's assertions of her own good performance are insufficient to defeat summary judgment as to whether employer's proffered performance-based reasons for adverse employment action are pretext for discrimination, in absence of other evidence. [West's F.S.A. § 760.10\(1\)\(a\)](#).

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*20** [Peter Marcellus Capua](#) and [Jorge A. Calil](#), for appellant.

[Wilson, Elser, Moskowitz, Edelman & Dicker](#) and [Ricardo J. Cata](#) and [Brian M. McKell](#) and [Ronnie Guillen](#), Miami, for appellee.

Before [COPE](#), [SHEPHERD](#), and [LAGOA](#), JJ.

**Opinion**

[LAGOA](#), J.

Gelsa A. Valenzuela appeals the entry of final summary judgment in favor of GlobeGround North America, LLC ("GlobeGround"). Because we conclude that Valenzuela failed to establish a prima facie case of gender discrimination and further failed to present evidence that

GlobeGround's legitimate, non-discriminatory reasons for terminating her employment were pretextual, we affirm the entry of summary judgment in favor of GlobeGround.

### I. FACTUAL AND PROCEDURAL BACKGROUND

GlobeGround, a provider of aircraft refueling services at Miami International Airport, hired Valenzuela as a commercial aircraft fueler on September 8, 2004. Valenzuela's job as a fueler involved the fueling of aircraft, and the operation of aircraft refueling equipment such as tanker trucks and hydrant cars. Federal, State and local licensing requirements mandate that employees operating aircraft fueling equipment at an airport possess a commercial driver's license ("CDL"). Valenzuela did not possess the required CDL. On her employment application, however, Valenzuela lied and stated that she held one.

Valenzuela's employment was subject to a Collective Bargaining Agreement ("CBA") between GlobeGround and the Transport Workers Union of America, Local 500, AFL-CIO. Article VIII, section 6 of the CBA provides that a new employee is on probation during the first 120 days of employment, during which time the employee may be terminated for any reason. Termination within the probationary period is not subject to the grievance or arbitration provisions contained in the CBA. It is undisputed that Valenzuela was terminated within her probationary period.

Valenzuela testified that in her introductory training class she was informed that a CDL was required in order to work as a fueler. On December 18, 2004, GlobeGround advised Valenzuela that she needed \*21 to obtain a CDL permit by the close of business on Monday, December 20, 2004, or risk termination. Valenzuela went to the license office, but was unable to get an appointment until December 22, 2004. It is undisputed that at no time prior to this date did Valenzuela attempt to obtain a CDL permit during her probationary period. On December 21, 2004, GlobeGround terminated Valenzuela for failure to complete the probationary period. GlobeGround based its decision on the following: (1) Valenzuela's inability to fuel the Boeing 737 and MD-80 series aircraft; and (2) Valenzuela's failure to obtain the required CDL.

Valenzuela filed a Charge of Discrimination with the United States Equal Employment Opportunity

Commission ("EEOC"). The EEOC found no probable cause, and dismissed the charges.

Following the EEOC's dismissal, Valenzuela filed a lawsuit against GlobeGround pursuant to the Florida Civil Rights Act of 1992, alleging that GlobeGround engaged in unlawful gender discrimination when it dismissed her for failure to comply with GlobeGround's requirement that she obtain a CDL. At the conclusion of discovery, GlobeGround moved for final summary judgment, arguing that Valenzuela failed to establish a prima facie case of gender discrimination and that Valenzuela failed to show that GlobeGround's legitimate, non-discriminatory reasons for terminating her employment were pretextual. The trial court granted final summary judgment in favor of GlobeGround and this appeal followed.

### II. STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *Haddad v. Hester*, 964 So.2d 707 (Fla. 3d DCA 2007), review denied, 980 So.2d 489 (Fla.2008). We review the summary judgment under a de novo standard of review. *Bryan v. Dethlefs*, 959 So.2d 314 (Fla. 3d DCA 2007); *Am. Eng'g & Dev. Corp. v. Sanchez*, 932 So.2d 1241, 1243 (Fla. 3d DCA 2006).

### III. ANALYSIS

The Florida Civil Rights Act of 1992 ("FCRA") protects employees from gender discrimination in the workplace. See §§ 760.01-.11, Fla. Stat. (2005). It provides, in pertinent part: "It is an unlawful employment practice for an employer: To discharge ... or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." § 760.10(1)(a), Fla. Stat. (2005).

[1] Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, we look to federal case law. See *Russell v. KSL Hotel Corp.*, 887 So.2d 372, 377 (Fla. 3d DCA 2004); *Green v. Burger King Corp.*, 728 So.2d 369, 370-71 (Fla. 3d DCA 1999); *Fla. Dep't of Cmty. Affairs v. Bryant*, 586 So.2d 1205, 1209 (Fla. 1st DCA 1991); see also *Maniccia v. Brown*, 171 F.3d 1364, 1368 n. 2 (11th Cir.1999); *Harper v. Blockbuster Enter. Corp.*, 139 F.3d 1385, 1387 (11th Cir.1998). It is well-settled law that Florida courts follow

the three-part framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny, for establishing, \*22 by circumstantial evidence, a discrimination claim based on disparate treatment in the workplace.<sup>2</sup> See *City of Hollywood v. Hogan*, 986 So.2d 634, 641-42 (Fla. 4th DCA 2008) (age discrimination); *Dep't of Children & Family Servs. v. Garcia*, 911 So.2d 171 (Fla. 3d DCA 2005) (gender discrimination); *Scholz v. RDV Sports, Inc.*, 710 So.2d 618, 624 (Fla. 5th DCA 1998) (racial discrimination).

[2] Under the *McDonnell Douglas* framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination. If successful, this raises a presumption of discrimination against the defendant. See *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997) (“Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination.”).

[3] [4] If a prima facie showing is made, the burden of proof then shifts to the employer to offer a “legitimate, non-discriminatory reason” for the adverse employment action. If the employer meets its burden, the presumption of discrimination disappears and the employee must prove that the employer's legitimate reasons for dismissal were a pretext for discrimination. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1081 (11th Cir.2005). The ultimate burden of proving discrimination rests at all times with the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

[5] [6] On appeal, Valenzuela contends that she demonstrated a prima facie case of gender discrimination. GlobeGround, however, argues that Valenzuela failed to meet her burden. We agree. In order to establish a prima facie case of disparate treatment based on gender discrimination, a plaintiff must prove that: (1) the employee is a member of a protected class; (2) the employee was qualified for her position; (3) the employee suffered an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably. See *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Rice-Lamar v. City of*

*Ft. Lauderdale*, 232 F.3d 836, 842-43 (11th Cir.2000); *Maniccia*, 171 F.3d at 1368. It is undisputed that Valenzuela is a member of a protected class, and that she suffered an adverse employment action. We find, however, that she has not satisfied the fourth element—the “similarly situated” element—necessary to establish a prima facie case of gender discrimination.<sup>3</sup>

[7] [8] [9] “In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees \*23 are involved in or accused of the same or similar conduct and are disciplined in different ways.” *Holifield*, 115 F.3d at 1562 (quoting *Maniccia*, 171 F.3d at 1368). The employee must show that she and the employees outside her protected class are similarly situated “in all relevant respects.” *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir.2003) (quoting *Holifield*, 115 F.3d at 1562). Thus, “the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.” *Maniccia*, 171 F.3d at 1368.

[10] [11] Similarly situated employees “must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it.” *Gaston v. Home Depot USA, Inc.*, 129 F.Supp.2d 1355, 1368 (S.D.Fla.2001) (quoting *Mazzella v. RCA Global Commc'ns, Inc.*, 642 F.Supp. 1531, 1547 (S.D.N.Y.1986)), *affirmed*, 265 F.3d 1066 (11th Cir.2001) (table). If a plaintiff fails to present sufficient evidence that a non-protected, similarly situated employee was treated more favorably by the employer, the defendant is entitled to summary judgment. *Holifield*, 115 F.3d at 1562.

Valenzuela identifies several individuals she believes were afforded more favorable treatment. In particular, Valenzuela points to Javier Vargas, and to twenty-five other male employees who Valenzuela contends were employed for more than three months without a CDL with proper endorsements.

With regard to Javier Vargas, GlobeGround hired both Vargas and Valenzuela as fuelers at the same time.

Neither employee had a CDL, and both received notice that the license was required. Although Vargas received a different form of notice and additional time (fifteen days) to comply, no record basis exists to support Valenzuela's assertion that the circumstances of Vargas's license status conduct was comparable to her situation in all relevant respects. Indeed, Valenzuela did not show that Vargas lied on his application or that he had failed to make any progress in an effort to obtain the license permit during the probationary period. In addition, there is no record evidence showing that Vargas received evaluations indicating that he had a problem fueling the aircraft—the other reason GlobeGround gave for terminating Valenzuela. Finally, the record shows that Vargas resigned his position before the end of the probationary period as well as before the end of the fifteen-day period given by GlobeGround.<sup>4</sup> As stated in *Maniccia*, 171 F.3d at 1368, the comparator's misconduct must “be nearly identical.” Because Valenzuela cannot establish that Vargas was involved in or accused of the same or nearly identical conduct, Valenzuela has failed to demonstrate that Vargas was similarly situated for purposes of establishing a prima facie case. *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir.1997); *Garcia*, 911 So.2d at 174, 174 n. 6.

With respect to the additional twenty-five male employees Valenzuela claims as valid comparators, the record fails to establish that they were similarly situated and engaged in comparable conduct. Unlike Valenzuela, the record evidence shows that these alleged comparators held at \*24 least a CDL “B” license, and only needed to update their existing license to the “A” classification or obtain the required endorsements to a CDL “A” license. Thus, while some of these employees did not hold the “A” classification, they had been licensed to drive commercial vehicles. Valenzuela, however, did not hold *any* CDL, and further misrepresented on her application that she actually possessed a CDL, when she did not. Significantly, Valenzuela proffered no evidence that GlobeGround failed to terminate any male fueler that, like Valenzuela, possessed no CDL of any type. Moreover, Valenzuela presented no evidence that any male fuelers who failed their probationary period were not terminated.<sup>5</sup> Lastly, Valenzuela offered no evidence establishing whether these twenty-five male employees had any reported problems with fueling aircraft. Accordingly, Valenzuela failed to meet her burden that these alleged comparators

were similarly situated and had engaged in comparable conduct.

[12] [13] [14] However, assuming *arguendo*, that Valenzuela had established a prima facie case of gender discrimination, we conclude that GlobeGround proffered a legitimate, non-discriminatory reason for terminating Valenzuela's employment. “This intermediate burden” to produce a legitimate, non-discriminatory reason “is exceedingly light.” *Holifield*, 115 F.3d at 1564. Indeed, it is a burden of production, not persuasion. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1331 (11th Cir.1998). “[T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.” *St. Mary's Honor Ctr.*, 509 U.S. at 507, 113 S.Ct. 2742 (quoting *Burdine*, 450 U.S. at 255, and n. 8, 101 S.Ct. 1089).

GlobeGround's written notice of termination to Valenzuela stated that her employment was “terminated for failure to complete the probationary period, pursuant to Section 6 [of Article VIII] of [the] Collective Bargaining Agreement.”<sup>6</sup> In support of its employment decision, GlobeGround advanced two specific reasons for the termination: (1) Valenzuela was unable to “hook up” the Boeing 737 and the MD-80 series aircraft for fueling; and (2) Valenzuela failed to comply with the licensing requirements to operate the aircraft fueling equipment. These are legitimate, non-discriminatory reasons to terminate an employee. Indeed, the failure to complete the probationary period is a facially legitimate, non-discriminatory reason for termination. See *Bicknell v. City of St. Petersburg*, No. 8:03-CV-1045-T-27, 2006 WL 560167, at \*11 (M.D.Fla. Mar. 7, 2006) (failure to complete the probationary period is a facially legitimate, non-discriminatory reason for termination); *Winegard v. W.S. Badcock Corp.*, No. 8:06-cv-1594T17TGW, 2008 WL 1848787, at \*7 (M.D.Fla. Apr. 23, 2008) (“A company is not required by law to retain sub-par employees who under-perform their duties....”). Accordingly, we conclude that GlobeGround has met its burden of showing a legitimate business reason for Valenzuela's termination.

\*25 [15] Because GlobeGround offered a legitimate, non-discriminatory reason for terminating Valenzuela, the presumption of discrimination disappears and, in order to proceed with a claim, Valenzuela must show “by a

preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Reeves*, 530 U.S. at 143, 120 S.Ct. 2097 (quoting *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089). In other words, the employee at this stage must show that a genuine issue of material fact exists as to whether the reason advanced by the employer is pretextual. Pretext is established “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. Where an employer offers multiple reasons for the termination, a plaintiff must produce sufficient evidence for a reasonable fact finder to conclude that each reason is pretextual. *Chapman v. AI Transp.*, 229 F.3d 1012, 1037 (11th Cir.2000) (en banc).

[16] [17] We find that Valenzuela has failed to raise a genuine issue of material fact as to each of the legitimate reasons proffered by GlobeGround for her termination. “Because the plaintiff bears the burden of establishing pretext [for discrimination], [s]he must present ‘significantly probative’ evidence on the issue to avoid summary judgment.” *Young v. Gen. Foods Corp.*, 840 F.2d 825, 829 (11th Cir.1988) (alteration not in original). Indeed, “[t]o show that the employer’s reasons were pretextual, the plaintiff must demonstrate ‘such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.’ ” *Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir.2004) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir.1997)).

[18] Valenzuela attempts to show that GlobeGround’s reasons for terminating her were pretextual by presenting evidence of similarly situated male employees, who suffered less adverse employment consequences as a result of sufficiently comparable conduct. While Valenzuela does not dispute that she did not have a CDL or that she failed to obtain a CDL permit, she argues that “many, many other, similarly situated” male employees were given preferential treatment in obtaining the proper CDL within a reasonable time. Such conclusory general assertions, however, do not create factual issues necessary to avoid summary judgment. See *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir.1996) (In order

to avoid summary judgment, “ ‘[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered ... extensive evidence of legitimate, non-discriminatory reasons for its actions.’ ” (quoting *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir.1996))). Moreover, Valenzuela testified that when she was hired, the safety and training manager told her that she needed a CDL in order to work as a fueler. Therefore, Valenzuela was aware from the beginning of her employment that this license was required for permanent employment, and as such, Valenzuela cannot show that GlobeGround’s reason for the discharge is not worthy of belief.

[19] [20] [21] Additionally, as to her problems fueling 737s and MD-80s, Valenzuela does not dispute the fueler-trainer’s testimony concerning his evaluations of her unsatisfactory job performance. Instead, Valenzuela submits the affidavit of another trainer who gave her satisfactory evaluations. \*26 Valenzuela further argues that there were other fuelers who were her height or shorter and who also needed a readily available taller ladder to fuel the planes. This argument, however, does not carry Valenzuela’s burden of proof because it ignores the record testimony explaining that Valenzuela’s problems with fueling involved her lack of strength, power or force necessary to connect the fuel hose coupling to the airplane, rather than the mere use of a taller ladder. Furthermore, the fact that a fueler-trainer testified that she had a problem fueling the 737s, but did not testify that she “absolutely could not, under any circumstances, fuel the 737,” does not prove pretext. “A plaintiff’s pretext claim will fail where [she] merely questions the wisdom of the employer’s reasons, at least where the reason is one that might motivate a reasonable employer.” *Combs*, 106 F.3d at 1543. See also *Cooper*, 390 F.3d at 730; *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir.1991). “The inquiry into pretext centers upon the employer’s beliefs, and not the employee’s own perceptions of his performance.” *Holifield*, 115 F.3d at 1565. Where the employer produces evidence showing poor performance, “an employee’s assertions of [her] own good performance are insufficient to defeat summary judgment, in the absence of other evidence.” *Id.*

Finally, Valenzuela’s attempt to use allegedly similarly situated male employees to show pretext fails as these are the same comparators who were not sufficiently

similar to demonstrate a prima facie case.<sup>7</sup> In listing the relevant respects in which the male employees are similarly situated, Valenzuela did not present evidence that the employees had the same job performance problems, and that they did not hold a CDL or had lied on their applications. Therefore, these comparators do not create a basis for a finding that the proffered reasons advanced by GlobeGround for terminating Valenzuela are merely a pretext for gender discrimination.

Accordingly, for the foregoing reasons, we affirm the trial court's order granting final summary judgment as to GlobeGround.

Affirmed.

#### All Citations

18 So.3d 17, 34 Fla. L. Weekly D1680

#### Footnotes

- 1 See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).
- 2 An employee may prove that the employer engaged in gender discrimination by direct, circumstantial, or statistical evidence. See *Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. 1478; *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1258 (11th Cir.2001); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir.1998); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990). On appeal, Valenzuela does not argue that either direct or statistical evidence supports her discrimination claim.
- 3 We do not address the "qualification" prong, as we conclude that Valenzuela cannot meet the similarly situated element needed to prove her prima facie case of gender discrimination.
- 4 In addition to Vargas, the record shows that two other male fuelers who began their employment at the same time as Valenzuela also resigned before obtaining a CDL.
- 5 Indeed, Valenzuela can offer no such evidence because the record evidence establishes the opposite. Two other male fuelers who began their employment with GlobeGround at the same time as Valenzuela were terminated for failure to complete the probationary period. Specifically, one fueler failed to obtain an airport identification, and the other failed to attend training.
- 6 Section 6 provides, in pertinent part, that "[a]n employee on probation may be discharged for any reason...."
- 7 We note, of course, that Valenzuela may use evidence that similarly situated male employees were treated more favorably to establish both a prima facie case and to establish pretext. See *Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 561 (7th Cir.1998) ("Whether couched in terms of establishing a prima facie case or in terms of demonstrating pretext, the inquiry remains the same: The plaintiff[ ] ... ha[s] the burden of showing that similarly-situated [male] employees-that is, [male] employees who had been the subject of comparable complaints ...-were treated more favorably than the plaintiff[ ]."); see also *Reeves*, 530 U.S. at 143, 120 S.Ct. 2097 (evidence presented in prima facie case may be used to show pretext); *Hicks*, 509 U.S. at 506-08, 113 S.Ct. 2742 (same); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir.2001) (considering treatment of similarly situated employees in pretext part of case). In this case, however, the evidence is insufficient to establish either.

247 So.3d 710

District Court of Appeal of Florida, Third District.

J.A., a juvenile, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D16–2381

|

Opinion filed May 30, 2018

**Synopsis**

**Background:** Juvenile was charged with first-degree misdemeanor criminal mischief. The Circuit Court, Miami Dade County, [Orlando A. Prescott](#), J., entered an order withholding adjudication of delinquency, entered an order of restitution for \$272.72, and placed juvenile on probation. Juvenile appealed.

**Holdings:** The District Court of Appeal, [Lagoa](#), J., held that:

[1] sufficient evidence proved the value of damage done to truck's windshield when juvenile and another juvenile threw rocks at truck, and

[2] truck owner's testimony that he paid \$272.72 to repair the damage was not inadmissible hearsay.

Affirmed.

West Headnotes (4)

**[1] Automobiles**

🔑 **Malicious mischief**

**Infants**

🔑 **Particular Offenses, Violations, or Defenses**

Sufficient evidence proved the value of damage to truck, as required to support trial court's order withholding an adjudication of delinquency as to juvenile charged with first-degree misdemeanor criminal mischief and determining restitution to be \$272.72, where

truck owner's testimony was that the cost to repair truck's windshield, which was damaged when juvenile and another juvenile threw rocks at the truck, was \$272.72. [Fla. Stat. Ann. § 806.13\(1\)\(b\)\(2\)](#).

[Cases that cite this headnote](#)

**[2] Malicious Mischief**

🔑 **Nature and elements of offenses**

Absent proof of the amount of damage, an act of criminal mischief, as defined by the criminal mischief statute, is a misdemeanor of the second degree. [Fla. Stat. Ann. § 806.13\(1\)\(b\)](#).

[Cases that cite this headnote](#)

**[3] Sentencing and Punishment**

🔑 **Degree of proof**

For an order of restitution, evidence demonstrating the amount of loss must be established through more than mere speculation; it must be based on competent evidence.

[Cases that cite this headnote](#)

**[4] Infants**

🔑 **Confessions, Admissions, and Statements**

Truck owner's testimony in proceeding in which a juvenile was charged with first-degree misdemeanor criminal mischief that he paid \$272.72 to repair the damage to truck's windshield when juvenile and another juvenile threw rocks at the truck involved an act in which owner was a participant rather than an out-of-court statement and, thus, was not inadmissible hearsay.

[Cases that cite this headnote](#)

**\*711** An Appeal from the Circuit Court for Miami Dade County, [Orlando A. Prescott](#), Judge. Lower Tribunal No. 16 1797

## Attorneys and Law Firms

Carlos J. Martinez, Public Defender, and Jonathan Greenberg, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Kayla H. McNab, Assistant Attorney General, for appellee.

Before LAGOA, EMAS, and LUCK, JJ.

## Opinion

LAGOA, J.

J.A., a juvenile, appeals his withhold of adjudication of delinquency. J.A. argues that the State failed to prove the value of the truck's damaged windshield, and therefore, this Court should reduce the finding of delinquency under Count 2 of the petition from first-degree criminal mischief to second-degree criminal mischief. We find J.A.'s arguments without merit and affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 5th, 2016, Edy Iglesias ("Iglesias") was driving home in a truck owned by his employer when J.A. and another juvenile threw rocks at the truck, which damaged the truck's windshield in two places. The following day, Iglesias called a company to repair the truck's windshield.

The State charged J.A. with two counts: throwing a deadly missile (Count 1) and first-degree misdemeanor criminal mischief (Count 2). At trial, Iglesias testified that a company he contacted repaired the windshield and that he paid the total cost of repair of \$272.72, which included the cost of the windshield and labor expended. Defense counsel objected to Iglesias's testimony as "hearsay and inferential hearsay."

After the State rested, defense counsel moved for a judgment of dismissal and argued that the State failed to prove the fair market value of the windshield and its repair. The trial court denied the motion for judgment of dismissal and found that the State proved damages and the value of the damaged property. The trial court entered an order withholding adjudication of delinquency as well as an order of restitution for \$272.72, and placed J.A. on probation. This timely appeal followed.

## II. ANALYSIS

[1] [2] [3] On appeal, J.A. argues that the State did not present sufficient evidence to prove the value of the damage to the property. We disagree. In a criminal mischief case, the amount of damage is an essential element of the crime of felony criminal mischief and the crime of first-degree misdemeanor criminal mischief. \*712 See Marrero v. State, 71 So.3d 881, 887 (Fla. 2011); B.J.M. v. State, 185 So.3d 692, 693 (Fla. 5th DCA 2016). For first-degree misdemeanor criminal mischief, the State must prove that the defendant's criminal mischief resulted in damage to property greater than \$200 but less than \$1000. See § 806.13(1)(b)2., Fla. Stat. (2016). "Absent proof of the amount of damage, an act of criminal mischief, as defined by the criminal mischief statute, is a *misdemeanor* of the second degree." Marrero, 71 So.3d at 887 (emphasis in original). Additionally, for an order of restitution, evidence demonstrating the amount of loss "must be established through more than mere speculation; it must be based on competent evidence." Glaubius v. State, 688 So.2d 913, 916 (Fla. 1997).

At trial, the State presented Iglesias's own testimony regarding the amount he paid for the repair. The State did not introduce Iglesias's actual repair bill showing the cost of replacing the windshield, any estimates that Iglesias may have received for the repair, or any other documentary evidence (e.g., a cancelled check or a credit card bill) establishing the cost of the repair.

[4] In a similar case, C.H. v. State, 199 So.3d 447 (Fla. 3d DCA 2016), this Court found that the victim's testimony that he paid \$500 as his insurance deductible to repair his car sufficiently established that amount of damage and therefore supported an adjudication for first-degree misdemeanor criminal mischief. Id. at 448.<sup>2</sup> As in C.H., the owner's testimony here was not inadmissible hearsay as it did not involve an out-of-court statement, but rather an act in which the owner was a participant. See also L.D.G. v. State, 960 So.2d 767, 767 68 (Fla. 4th DCA 2007) (finding that the victim's testimony that she paid \$1250 consisting of her \$500 deductible and insurer's payment of \$750 to repair car door was not inadmissible hearsay and was sufficient to establish damage in excess of \$1000 for purposes of felony criminal mischief).<sup>3</sup> Based on our prior conclusion in C.H. and our sister court's conclusion in L.D.G., we find that the State presented

competent, substantial evidence of the actual cost of repair to the damaged windshield.

J.A. argues, however, that the State was also required to prove the fair market value of the truck, the windshield, and the repair. J.A. bases his argument on [R.C.R. v. State](#), 916 So.2d 49 (Fla. 4th DCA 2005). In [R.C.R.](#), the record established that the victim had purchased a vehicle for \$500 as “junked,” without an engine or wheels, placed on blocks, and with the idea of restoring the vehicle. The evidence in [R.C.R.](#) also established that the vehicle's prior owner had not expected to get anything for the truck. At trial, the victim “estimated, without supporting documentation, that repairs [as a result of the criminal mischief] were close to \$2,700.00 ....” [Id.](#) at 49. Relying on case law relating to the crime of theft, the court in [R.C.R.](#) concluded that the State had to prove damages by the value of what was lost; thus, where the cost of repair exceeded the value of the vehicle, the value of the vehicle (in that case, \$500) would set the damages for purposes of determining whether the crime qualified as felony, first-degree \*713 misdemeanor, or second-degree misdemeanor criminal mischief. [Id.](#)

We find [R.C.R.](#) inapplicable for a number of reasons. First, while it is true that the definition of “value” in Florida's theft statutes includes the concept of market value, the Florida Supreme Court in [Marrero](#), 71 So.3d at 887 890, disapproved of importing the definition of “value” from Florida's theft statute into the criminal mischief statute. Indeed, the harm resulting from a theft (i.e., dispossession) is different in kind from the

harm resulting from criminal mischief (i.e., damage or defacement).

Second, the Fourth District Court of Appeal subsequently refused to apply its own holding in [R.C.R.](#) in the broad manner urged on us by J.A. In [L.D.G. v. State](#), 960 So.2d 767 (Fla. 4th DCA 2007), the owner of a vehicle testified regarding the actual cost to repair the car door damaged by the juvenile repeatedly kicking and beating the door of the vehicle. [Id.](#) at 767. The Fourth District rejected the juvenile's argument that the owner's testimony was insufficient under [R.C.R.](#) Instead, the Fourth District concluded that its “decision in [R.C.R.](#) stands for the proposition that repair costs cannot be used to establish the amount of the damage element in a charge of criminal mischief to the extent that the repair costs exceed the fair market value of the damaged property.” [Id.](#) at 768. Contrasting the junked car on blocks in [R.C.R.](#) with the vehicle used by the victim as her personal van in [L.D.G.](#), the Fourth District found [R.C.R.](#) to be “simply inapposite to this case.” [Id.](#) For the same reason, even if [R.C.R.](#)'s use of fair market value had continuing validity after [Marrero](#), we find it inapplicable to the facts before us here.<sup>4</sup>

Accordingly, for the reasons discussed, we affirm the trial court's order withholding adjudication of guilt.

Affirmed.

#### All Citations

247 So.3d 710, 43 Fla. L. Weekly D1210

#### Footnotes

- 1 J.A. does not appeal the trial court's finding regarding Count 1 of the petition. Accordingly, the trial court's order finding J.A. delinquent on Count 1 of the petition is affirmed.
- 2 This Court concluded in [C.H.](#) that the \$1000 threshold for felony criminal mischief had not been met because the State did not introduce any evidence regarding amounts paid in addition to the victim's deductible.
- 3 Because the State proved the amount of damage based on what was actually paid, and not based on estimates to repair, we find the conclusions of [B.J.M.](#) and [B.L.N. v. State](#), 722 So.2d 860 (Fla. 1st DCA 1998), inapplicable.
- 4 We note that if [R.C.R.](#) retains vitality post-[Marrero](#), the argument that the cost of repair cannot be the proper measure of damage when it exceeds the fair market value of the damaged property would appear to be a defense to be asserted once the State has established a prima facie case of criminal mischief.

2018 WL 3040327

District Court of Appeal of Florida, Third District.

David SOLOMON, Appellant,

v.

Sofia Vasquez SOLOMON, Appellee.

No. 3D17-1553

|

Opinion filed June 20, 2018.

**Synopsis**

**Background:** Wife filed a petition for dissolution of marriage, and obtained a temporary injunction for protection against domestic violence. Husband counter-petitioned for dissolution of marriage. The Circuit Court, Miami-Dade County, Valerie Manno Schurr, J., entered a judgment that provided husband supervised timesharing. Husband appealed.

**[Holding:]** The District Court of Appeal, [Lagoa, J.](#), held that trial court failed to set specific benchmarks or identify for the husband the steps necessary to terminate the supervised timesharing.

Affirmed in part, reversed in part, and remanded.

[Lagoa, J.](#), filed a specially concurring opinion.

West Headnotes (4)

**[1] Child Custody****Decision and findings by court**

The failure to set forth any specific requirements or standards for the alleviation of timesharing restrictions when making a child custody determination is error; this applies to both the prevention of timesharing altogether and to restrictions.

[Cases that cite this headnote](#)

**[2] Child Custody****Determination and disposition of cause**

Where a final judgment fails to set forth what steps a parent must take in order to establish unsupervised timesharing, the final judgment must be reversed and remanded for the trial court to identify such steps.

[Cases that cite this headnote](#)

**[3] Child Custody****Judgment**

Although a trial court is not required to set forth every minute detail of the steps to reestablish unsupervised timesharing in a final judgment, the requirement is for the parent to walk out of the courtroom knowing that if they satisfactorily accomplishes relatively specific tasks, they will be able to reestablish unsupervised timesharing.

[Cases that cite this headnote](#)

**[4] Child Custody****Reports and recommendations****Child Custody****Judgment**

Trial court failed to set specific benchmarks in final dissolution judgment or identify for the husband the steps necessary to terminate the supervised timesharing when it adopted the reports of a court appointed examiner of parties and children and the guardian ad litem, where each report stated that the supervised nature of the timesharing should not be permanent but neither identified steps necessary for the father to terminate supervised timesharing.

[Cases that cite this headnote](#)

An Appeal from the Circuit Court for Miami Dade County, Valerie Manno Schurr, Judge. Lower Tribunal No. 16 1705

## Attorneys and Law Firms

Nancy A. Hass, P.A., and [Nancy A. Hass](#) (Fort Lauderdale), for appellant.

Cynthia J. Dienstag, P.A., and [Cynthia J. Dienstag](#), for appellee.

Before [ROTHENBERG](#), C.J., and [LAGOA](#) and [LOGUE](#), JJ.

## Opinion

[LAGOA](#), J.

\*1 David Solomon (the “husband”) appeals from a Final Judgment of Dissolution of Marriage with Dependent or Minor Children (the “Final Judgment”), and he raises several arguments on appeal, only one of which warrants discussion. Because the Final Judgment does not set forth specific steps that the husband must take in order to obtain unsupervised time sharing with his children, we reverse and remand to the trial court for the limited purpose of setting forth such steps, and otherwise affirm.

### I. FACTUAL AND PROCEDURAL HISTORY

The husband and Sofia Vasquez (the “wife”) were married on July 12, 2001. The husband and wife have two minor children from the marriage. The wife filed a petition for dissolution of marriage on January 25, 2016. With the filing of the petition for dissolution, the wife also obtained a temporary injunction for protection against domestic violence, which prevented the husband from having contact with the wife and the children. The husband filed a counter-petition for dissolution of marriage.

On April 19, 2016, the trial court entered an agreed order appointing Jerome H. Poliacoff, Ph.D. (“Poliacoff”), to examine the parties and the children and make recommendations pursuant to [section 61.13, Florida Statutes \(2016\)](#). Poliacoff rendered his report on July 11, 2016 (the “Poliacoff Report”). Poliacoff recommended supervised visitation between the husband and the children, which “should begin with a goal of ending in a short time frame.” Under a section entitled “Review and Revision,” Poliacoff recommended that the plan be reviewed every three months by a guardian ad litem with the stated goal of increasing access time for the husband with the children.

The husband states that on July 13, 2016, the parties agreed to extend the temporary injunction for a year and to amend the temporary injunction to provide that the husband have supervised time-sharing with the children in accordance with the Poliacoff Report. On August 15, 2016, the trial court entered an agreed order appointing Terilee Wunderman, Ph. D., as guardian ad litem for the children.

The matter proceeded to trial on April 20, 2017. On May 3, 2017, the trial court entered a Final Judgment, and attached to the Final Judgment were the Poliacoff Report and a Guardian ad Litem Status Report Update dated April 13, 2017 (the “Guardian's Status Report”). The Guardian's Status Report recommended that the husband continue with his individual therapy and that “[u]nsupervised visits between [the husband and the children] should be considered as the next step in this family's healing process.”

Paragraph “5.C.” of the Final Judgment, entitled “Parenting Plan,” provides in relevant part:

The Court adopts the Evaluation of Jerome H. Poliacoff, PhD, attached as Exhibit B, and the Guardian Ad Litem Status Report Update dated April 13, 2017, attached as Exhibit C, as the Parenting Plan to be followed by the parties at this time. The Father's supervised time sharing shall continue .... Terrilee Wunderman shall continue her role as Guardian Ad Litem for the two minor children pursuant to previous court order. Individual therapy for the Husband shall continue .... The Wife and the children shall participate in family therapy on an as needed basis.

\*2 On May 18, 2017, the husband filed a Motion for Rehearing and/or Reconsideration. On June 9, 2017, the trial court denied the Motion for Rehearing and/or Reconsideration. This appeal followed.

### II. ANALYSIS

[1] [2] “The failure to ‘set forth any specific requirements or standards’ for the alleviation of timesharing restrictions is error. This applies to both the prevention of timesharing altogether and to restrictions.” [Witt Bahls v. Bahls](#), 193 So.3d 35, 38 (Fla. 4th DCA 2016) (citation omitted) (quoting [Ross v. Botha](#), 867 So.2d 567, 571 (Fla. 4th DCA 2004) ). Where a final judgment fails to set forth what steps a parent must take in order to establish unsupervised timesharing, the final judgment must be reversed and remanded for the trial court to identify such steps. [Tzynder v. Edelsburg](#), 184 So.3d 583, 583 (Fla. 3d DCA 2016) (reversing and remanding for the trial court to identify the necessary steps for the parent to reestablish unsupervised timesharing with child where the final judgment restricted timesharing to supervised contact one time per week); see also [Curiale v. Curiale](#), 220 So.3d 554, 555 (Fla. 2d DCA 2017); [Perez v. Fay](#), 160 So.3d 459, 466 (Fla. 2d DCA 2015) (finding that “the amended supplemental final judgment is legally deficient on its face because it does not set forth what steps the Mother must take to regain primary residential custody and/or meaningful unsupervised time-sharing with her daughter”). But see [Dukes v. Griffin](#), 230 So.3d 155, 157 (Fla. 1st DCA 2017) (stating that vesting trial courts with authority to enumerate steps to re-modify timesharing schedules and alleviate timesharing restrictions “appears contrary to § 61.13(3), Florida Statutes, which sets forth its own specific requirements for modifying parenting plans, including time-sharing schedules” and certifying conflict with [Perez](#), 160 So.3d 459, and [Witt Bahls](#), 193 So.3d 35, and other cases addressing the issue).

[3] [4] Here, the trial court adopted the Poliacoff Report and the Guardian's Status Report as the parenting plan in the Final Judgment. The Poliacoff Report recommended that the supervised visitation between the husband and his children “begin with a goal of ending in a short time frame” and that the plan be reviewed every three months by a guardian ad litem with the stated goal of increasing access time for the husband with the children. The Guardian's Status Report, issued one month before the final judgment, recommended that “[u]nsupervised visits between [the husband and the children] should be considered as the next step in this family's healing process.” Each report, therefore, stated that the supervised nature of the timesharing should not be permanent, but neither identified the steps necessary for the father to terminate supervised timesharing. In adopting the reports as the parenting plan, the trial

court therefore failed to set forth specific benchmarks or identify for the husband the steps necessary to terminate the supervised timesharing. Although a trial court is not required to set forth “every minute detail of the steps to reestablish unsupervised timesharing[,] ... [t]he requirement is for the [husband] to walk out of the courtroom knowing that if [he] satisfactorily accomplishes relatively specific tasks, [he] will be able to reestablish unsupervised timesharing.” [Witt Bahls](#), 193 So.3d at 39 (citation omitted).

\*3 We therefore reverse the Final Judgment to the extent it fails to provide the husband with the specific steps he must undertake in order to obtain unsupervised timesharing with his children. On remand, the trial court is instructed to amend the Final Judgment to identify such steps. See [Tzynder](#), 184 So.3d at 583. The Final Judgment is otherwise affirmed.

Affirmed in part, reversed in part, and remanded.

ROTHENBERG, C.J., and LOGUE, J., concur.

LAGOA, J., specially concurring,

I write separately to address [section 61.13\(3\), Florida Statutes \(2018\)](#). Our precedent in [Tzynder v. Edelsburg](#), 184 So.3d 583 (Fla. 3d DCA 2016), as well as opinions from other district courts, [Witt Bahls v. Bahls](#), 193 So.3d 35 (Fla. 4th DCA 2016), and [Perez v. Fay](#), 160 So.3d 459 (Fla. 2d DCA 2015), require the trial court to set forth in its final judgment or order the specific steps necessary to reestablish unsupervised timesharing, and the trial court's failure to include such steps render the judgment or order legally deficient. Because we are bound by our prior precedent, I join the majority's opinion.

\*4 These cases, however, appear to establish a judicially created requirement not supported by the statutory language of [section 61.13\(3\)](#). “ ‘[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.’ ” [Atwater v. Kortum](#), 95 So.3d 85, 90 (Fla. 2012) (quoting [Holly v. Auld](#), 450 So.2d 217, 219 (Fla. 1984) ); see also [DMB Inv. Tr. v. Islamorada, Village of Islands](#), 225 So.3d 312, 317 (Fla. 3d DCA 2017) (“ ‘The Legislature must be understood to mean what it has plainly expressed and

this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.’ ” (quoting [Forsythe v. Longboat Key Beach Erosion Control Dist.](#), 604 So.2d 452, 454 (Fla. 1992) ). “Florida courts are ‘without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.’ ” [Brown v. City of Vero Beach](#), 64 So.3d 172, 174 (Fla. 4th DCA 2011) (emphasis omitted) (quoting [Holly](#), 450 So.2d at 219).

The language of [section 61.13\(3\)](#) is clear and unambiguous, and sets forth specific requirements for modifying parenting plans including time-sharing

schedules. While it is certainly understandable that a parent would want to know the specific steps necessary to restore time-sharing with his or her child, “it is not the prerogative of the courts to rewrite a statute,” [Westphal v. City of St. Petersburg](#), 194 So.3d 311, 321 (Fla. 2016), and [section 61.13\(3\)](#) does not mandate the inclusion of such steps in a trial court’s judgment or order. Because [section 61.13\(3\)](#) contains no language mandating that a trial court set forth the specific steps a parent must take in order to reestablish time-sharing with a child, I therefore agree with the reasoning set forth in our sister court’s decision in [Dukes v. Griffin](#), 230 So.3d 155 (Fla. 1st DCA 2017), and would certify conflict.

#### All Citations

--- So.3d ----, 2018 WL 3040327, 43 Fla. L. Weekly D1398

#### Footnotes

i [Section 61.13\(3\)](#) states, in relevant part:

(3) For purposes of establishing or modifying parental responsibility and creating, developing, approving, or *modifying a parenting plan, including a time-sharing schedule*, which governs each parent’s relationship with his or her minor child and the relationship between each parent with regard to his or her minor child, the best interest of the child shall be the primary consideration. A determination of parental responsibility, a parenting plan, or a time-sharing schedule *may not be modified* without a showing of a substantial, material, and unanticipated change in circumstances and a determination that the *modification* is in the best interests of the child. Determination of the best interests of the child shall be made by evaluating all of the factors affecting the welfare and interests of the particular minor child and the circumstances of that family, including, but not limited to:

- (a) The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required.
- (b) The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.
- (c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child’s friends, teachers, medical care providers, daily activities, and favorite things.
- (k) The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.

(l) The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.

(m) Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought. If the court accepts evidence of prior or pending actions regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect, the court must specifically acknowledge in writing that such evidence was considered when evaluating the best interests of the child.

(n) Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect.

(o) The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation, including the extent to which parenting responsibilities were undertaken by third parties.

(p) The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities.

(q) The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.

(r) The capacity and disposition of each parent to protect the child from the ongoing litigation as demonstrated by not discussing the litigation with the child, not sharing documents or electronic media related to the litigation with the child, and refraining from disparaging comments about the other parent to the child.

(s) The developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs.

(t) Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.

§ 61.13(3), Fla. Stat. (2018) (emphasis added).

**ATTACHMENT C**  
**Response to Question 32d.(ii)**

## ATTACHMENT C

### Response to Question 32d.(ii)

**32d.(ii). Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.**

As a judge on the Third District Court of Appeal, I have handled 11,350 cases as of October 2, 2018. Approximately 52 percent of these dispositions involved criminal plenary and post-conviction appeals, and the remaining 48 percent involved civil appeals. The civil matters on appeal vary widely and include: (1) appeals from the civil, family, probate, delinquency, dependency, and appellate divisions of the circuit courts of Miami-Dade and Monroe Counties; (2) appeals from administrative agency decisions; (3) petitions for writs of certiorari, prohibition, mandamus, and habeas corpus; (4) motions to dismiss and motions for rehearing en banc; and (5) emergency motions for review and to stay. The Third District Court of Appeal decides cases either by way of an opinion—an elaborated opinion or an unelaborated opinion known as a per curiam affirmance—or by way of a Clerk's order. The decisions listed in Attachment "D" in response to Question 32d.(iii) reflect my work that resulted in published elaborated opinions. As reflected in the total number of cases handled since I joined the Third District, however, a judge's workload on the court also involves matters that require judicial review but do not require an elaborated opinion, such as a per curiam affirmance or a Clerk's order disposing of a petition or motion.

In addition to my work as a judge on the Third District Court of Appeal, I have served as a member of the Supreme Court of Florida's Judicial Ethics Advisory Committee ("JEAC") since August 2011. From July 1, 2014, through June 30, 2015, I served as the Vice-Chair, and from July 1, 2015, through June 30, 2016, I served as the Committee Chair of the JEAC. The JEAC is charged by the Supreme Court of Florida with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge. The JEAC also renders advisory opinions to judicial candidates regarding the application of the Code of Judicial Conduct to their campaign activities. In addition to rendering written advisory opinions that afford guidance to judges and judicial candidates throughout the State, the JEAC also conducts Statewide Judicial

Candidate Forums. These Forums are held in various judicial circuits throughout the State during judicial election season, and they provide a forum to educate judicial candidates (both judges and non-judges) about the application of the Code of Judicial Conduct to their campaigns and offer candidates a real time question-and-answer session after the JEAC members' presentations. As Chair, I was responsible for ensuring the success of the statewide forums for the 156 candidates seeking a judicial seat, with the assistance of members from the General Counsel's Office of the Office of the State Court Administrator. I also serve on the JEAC's Election Subcommittee. This subcommittee strives to provide immediate verbal and/or written responses to campaign questions from inquiring judicial candidates, as the primary and general election periods following qualifying are relatively short.

**ATTACHMENT D**  
**Response to Question 32d.(iii)**

## **ATTACHMENT D**

### **Response to Question 32d.(iii)**

#### **32d.(iii). List citations of any opinions which have been published.**

All of these citations are elaborated decisions. I have not included per curiam affirmances where I was the primary judge assigned on the matter, nor have I included any matter—elaborated or unelaborated—where I was on the panel but not the author of the decision.

This list of opinions is organized into six categories. The first category consists of cases where I am identified as the author of the decision. The second category consists of opinions issued per curiam that I authored. The third category consists of my concurring opinions. The fourth category consists of my dissenting opinions. The fifth category consists of the en banc decision I authored. The final category consists of JEAC advisory opinions in which I participated. The JEAC opinions are available on the Florida Sixth Circuit's website at [www.jud6.org](http://www.jud6.org) under Opinions.

### **AUTHORED MAJORITY OPINIONS**

1. *Torre v. New Century Mortg. Corp.*, 935 So. 2d 1264 (Fla. 3d DCA 2006)
2. *Wallace v. State*, 939 So. 2d 1123 (Fla. 3d DCA 2006)
3. *Y.P. v. Dep't of Children & Family Servs.*, 939 So. 2d 1118 (Fla. 3d DCA 2006)
4. *Infantes v. State*, 941 So. 2d 432 (Fla. 3d DCA 2006)
5. *Smith v. State*, 941 So. 2d 479 (Fla. 3d DCA 2006)
6. *Roth v. Cohen*, 941 So. 2d 496 (Fla. 3d DCA 2006)
7. *Stoppa v. Sussco, Inc.*, 943 So. 2d 309 (Fla. 3d DCA 2006)
8. *Sanchez v. Century Everglades, LLC*, 946 So. 2d 563 (Fla. 3d DCA 2006)
9. *A.N. v. M.F.-A.*, 946 So. 2d 58 (Fla. 3d DCA 2006)
10. *Hernandez v. Sec. Windows & Doors, Inc.*, 946 So. 2d 81 (Fla. 3d DCA 2006)
11. *Jordan v. State*, 950 So. 2d 442 (Fla. 3d DCA 2007)
12. *Adams v. State*, 949 So. 2d 1125 (Fla. 3d DCA 2007)
13. *Kirlin v. Green*, 955 So. 2d 28 (Fla. 3d DCA 2007)
14. *Hammond v. DSY Developers, LLC*, 951 So. 2d 985 (Fla. 3d DCA 2007)
15. *Michael Schiffrin & Assocs., P.A. v. Koral*, 957 So. 2d 655 (Fla. 3d DCA 2007)
16. *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662 (Fla. 3d DCA 2007)
17. *Espirito Santo Bank v. Rego*, 990 So. 2d 1088 (Fla. 3d DCA 2007)
18. *Garcia v. Garcia*, 958 So. 2d 947 (Fla. 3d DCA 2007)
19. *L.D. v. Dep't of Children & Family Servs.*, 957 So. 2d 1203 (Fla. 3d DCA 2007)
20. *Haddad v. Hester*, 964 So. 2d 707 (Fla. 3d DCA 2007)
21. *Smith v. State*, 954 So. 2d 1191 (Fla. 3d DCA 2007)
22. *State v. J.Z.*, 957 So. 2d 45 (Fla. 3d DCA 2007)
23. *Bryan v. Dethlefs*, 959 So. 2d 314 (Fla. 3d DCA 2007)
24. *Ceradini v. IGT Servs., Inc.*, 959 So. 2d 348 (Fla. 3d DCA 2007)
25. *Clowers v. State*, 960 So. 2d 840 (Fla. 3d DCA 2007)

26. *Robinson v. Scott*, 974 So. 2d 1090 (Fla. 3d DCA 2007)
27. *State v. Lennon*, 963 So. 2d 765 (Fla. 3d DCA 2007)
28. *Pilevsky v. Morgans Hotel Grp. Mgmt., LLC*, 961 So. 2d 1032 (Fla. 3d DCA 2007)
29. *Williams v. Miami-Dade County, Florida*, 969 So. 2d 389 (Fla. 3d DCA 2007)
30. *Galarza v. State*, 962 So. 2d 985 (Fla. 3d DCA 2007)
31. *Nat'l Equity Recovery Servs., Inc. v. Williams*, 962 So. 2d 977 (Fla. 3d DCA 2007)
32. *Thornton v. State*, 963 So. 2d 804 (Fla. 3d DCA 2007)
33. *Billie v. State*, 963 So. 2d 837 (Fla. 3d DCA 2007)
34. *Carrillo v. State*, 962 So. 2d 1013 (Fla. 3d DCA 2007)
35. *Ocasio v. State*, 962 So. 2d 1025 (Fla. 3d DCA 2007)
36. *State v. Castro*, 965 So. 2d 216 (Fla. 3d DCA 2007)
37. *Ben-David v. Edud. Res. Inst., Inc.*, 974 So. 2d 1138 (Fla. 3d DCA 2008)
38. *Rincon v. State*, 974 So. 2d 1153 (Fla. 3d DCA 2008)
39. *P.N. v. State*, 976 So. 2d 90 (Fla. 3d DCA 2008)
40. *Cadle Co. v. Rhoades*, 978 So. 2d 833 (Fla. 3d DCA 2008)
41. *Dante v. Ryan*, 979 So. 2d 1122 (Fla. 3d DCA 2008)
42. *McKenzie v. Dep't of Revenue ex rel. Luma*, 981 So. 2d 1289 (Fla. 3d DCA 2008)
43. *Rodriguez v. State*, 982 So. 2d 1272 (Fla. 3d DCA 2008)
44. *Armstrong v. State*, 985 So. 2d 1156 (Fla. 3d DCA 2008)
45. *Idearc Media Corp. v. M.R. Friedman & G.A. Friedman, P.A.*, 985 So. 2d 1159 (Fla. 3d DCA 2008)
46. *Troutman v. State*, 985 So. 2d 1167 (Fla. 3d DCA 2008)
47. *Lopez v. State*, 987 So. 2d 750 (Fla. 3d DCA 2008)
48. *Baez v. State*, 985 So. 2d 1223 (Fla. 3d DCA 2008)
49. *Hollywood Injury Rehab Ctr. v. United Auto. Ins. Co.*, 985 So. 2d 1221 (Fla. 3d DCA 2008)
50. *Brinson v. State*, 988 So. 2d 665 (Fla. 3d DCA 2008)

51. *Tarver v. Fla. Parole Comm'n*, 990 So. 2d 577 (Fla. 3d DCA 2008)
52. *Branch v. State*, 990 So. 2d 585 (Fla. 3d DCA 2008)
53. *Garcia v. Dep't of Business & Prof'l Regulation, Div. of Real Estate*, 988 So. 2d 1199 (Fla. 3d DCA 2008)
54. *Smith v. State*, 990 So. 2d 1162 (Fla. 3d DCA 2008)
55. *State v. Wong*, 990 So. 2d 1154 (Fla. 3d DCA 2008)
56. *State v. Williams*, 992 So. 2d 330 (Fla. 3d DCA 2008)
57. *Ponce v. Ponce*, 997 So. 2d 1120 (Fla. 3d DCA 2008)
58. *Taylor v. State*, 994 So. 2d 385 (Fla. 3d DCA 2008)
59. *Dolgencorp, Inc. v. Winn-Dixie Stores, Inc.*, 2 So. 3d 325 (Fla. 4th DCA 2008)
60. *7550 Bldg., Inc. v. Atlantic Rack & Shelving, Inc.*, 999 So. 2d 663 (Fla. 3d DCA 2008)
61. *DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461 (Fla. 3d DCA 2008)
62. *State v. Sinclair*, 995 So. 2d 621 (Fla. 3d DCA 2008)
63. *State v. Terma*, 997 So. 2d 1174 (Fla. 3d DCA 2008)
64. *O'Neill v. Scher*, 997 So. 2d 1205 (Fla. 3d DCA 2008)
65. *Fleitas v. State*, 3 So. 3d 351 (Fla. 3d DCA 2008)
66. *SPS Corp. v. Kinder Builders, Inc.*, 997 So. 2d 1232 (Fla. 3d DCA 2008)
67. *Herranz v. Siam*, 2 So. 3d 1105 (Fla. 3d DCA 2009)
68. *State v. Rogers*, 2 So. 3d 1112 (Fla. 3d DCA 2009)
69. *Martinez v. Kurt*, 9 So. 3d 54 (Fla. 3d DCA 2009)
70. *Casa Inv. Co., Inc. v. Nestor*, 8 So. 3d 1219 (Fla. 3d DCA 2009)
71. *Johnson v. State*, 10 So. 3d 680 (Fla. 3d DCA 2009)
72. *Downrite Eng'g Corp. v. Overland Carriers, Inc.*, 8 So. 3d 1279 (Fla. 3d DCA 2009)
73. *Holmes v. State*, 11 So. 3d 444 (Fla. 3d DCA 2009)
74. *M.T. v. Dep't of Children & Families*, 10 So. 3d 1182 (Fla. 3d DCA 2009)
75. *Tropical Glass & Constr. Co. v. Gitlin*, 13 So. 3d 156 (Fla. 3d DCA 2009)
76. *Erickson v. Irving*, 16 So. 3d 868 (Fla. 3d DCA 2009)

77. *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, 14 So. 3d 1149 (Fla. 3d DCA 2009)
78. *Tapanes v. State*, 14 So. 3d 1143 (Fla. 3d DCA 2009)
79. *E. Atl. Realty & Inv. Inc. v. GSOMR LLC*, 14 So. 3d 1215 (Fla. 3d DCA 2009)
80. *Pines Props., Inc. v. Tralins*, 12 So. 3d 888 (Fla. 3d DCA 2009)
81. *Alcantara v. Alcantara*, 15 So. 3d 844 (Fla. 3d DCA 2009)
82. *United Auto. Ins. Co. v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009)
83. *Curry v. State*, 16 So. 3d 933 (Fla. 3d DCA 2009)
84. *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009)
85. *Clauro Enters., Inc. v. Aragon Galiano Holdings, LLC*, 16 So. 3d 1009 (Fla. 3d DCA 2009)
86. *Buroz-Henriquez v. De Buroz*, 19 So. 3d 1140 (Fla. 3d DCA 2009)
87. *State Farm Fire & Cas. Co. v. Lezcano*, 22 So. 3d 632 (Fla. 3d DCA 2009)
88. *Rodriguez v. State*, 22 So. 3d 833 (Fla. 3d DCA 2009)
89. *Nine Island Ave. Condo. Ass'n, Inc. v. Siegel*, 23 So. 3d 1248 (Fla. 3d DCA 2009)
90. *United Auto. Ins. Co. v. Friedman Chiropractic Ctr., P.A.*, 23 So. 3d 213 (Fla. 3d DCA 2009)
91. *United Auto. Ins. Co. v. Prof'l Med. Grp., Inc.*, 26 So. 3d 21 (Fla. 3d DCA 2009)
92. *Weatherly v. Louis*, 31 So. 3d 803 (Fla. 3d DCA 2009)
93. *Fields v. State*, 24 So. 3d 646 (Fla. 3d DCA 2009)
94. *Corey v. Corey*, 29 So. 3d 315 (Fla. 3d DCA 2009)
95. *Delancy v. Tobias*, 26 So. 3d 77 (Fla. 3d DCA 2010)
96. *Flagship Resort Dev. Corp. v. Interval Intern., Inc.*, 28 So. 3d 915 (Fla. 3d DCA 2010)
97. *Coastal Masonry, Inc. v. Gutierrez*, 30 So. 3d 545 (Fla. 3d DCA 2010)
98. *Biscayne Park, LLC v. Wal-Mart Stores E., LP*, 34 So. 3d 24 (Fla. 3d DCA 2010)
99. *Jean v. State*, 27 So. 3d 784 (Fla. 3d DCA 2010)
100. *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965 (Fla. 3d DCA 2010)

101. *Cruz-Govin v. Torres*, 29 So. 3d 393 (Fla. 3d DCA 2010)
102. *A.D. v. State*, 30 So. 3d 676 (Fla. 3d DCA 2010)
103. *Palmer Trinity Private Sch., Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. 3d DCA 2010)
104. *Craig v. State*, 45 So. 3d 1 (Fla. 3d DCA 2010)
105. *Venezia Lakes Homeowners Ass'n v. Precious Homes at Twin Lakes Prop. Owners Ass'n*, 34 So. 3d 755 (Fla. 3d DCA 2010)
106. *Child v. Child*, 34 So. 3d 159 (Fla. 3d DCA 2010)
107. *Hair v. Morton*, 36 So. 3d 766 (Fla. 3d DCA 2010)
108. *Jacobson v. Sklaire*, 50 So. 3d 1 (Fla. 3d DCA 2010)
109. *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178 (Fla. 3d DCA 2010)
110. *Carter v. State*, 37 So. 3d 377 (Fla. 3d DCA 2010)
111. *Medley Warehouses, LC v. Scottsdale Ins. Co.*, 39 So. 3d 440 (Fla. 3d DCA 2010)
112. *De La Rosa v. State*, 38 So. 3d 238 (Fla. 3d DCA 2010)
113. *Godoy v. Fla. Unemployment Appeals Comm'n*, 43 So. 3d 80 (Fla. 3d DCA 2010)
114. *Aulet v. Castro*, 44 So. 3d 140 (Fla. 3d DCA 2010)
115. *Velazquez v. Serrano*, 43 So. 3d 82 (Fla. 3d DCA 2010)
116. *Winkler v. Lawyers Title Ins. Corp.*, 41 So. 3d 414 (Fla. 3d DCA 2010)
117. *Acuna v. Dresner*, 41 So. 3d 997 (Fla. 3d DCA 2010)
118. *Bieda v. Bieda*, 42 So. 3d 859 (Fla. 3d DCA 2010)
119. *Bonilla v. Miami-Dade Police Dep't*, 41 So. 3d 1058 (Fla. 3d DCA 2010)
120. *Aguiluz v. State*, 43 So. 3d 800 (Fla. 3d DCA 2010)
121. *Fasani v. Kowalski*, 43 So. 3d 805 (Fla. 3d DCA 2010)
122. *United Auto. Ins. Co. v. Affiliated Healthcare Ctrs., Inc.*, 43 So. 3d 127 (Fla. 3d DCA 2010)
123. *Alfre Marble Corp. v. Twin Stone Designs & Installations, Inc.*, 44 So. 3d 193 (Fla. 3d DCA 2010)
124. *State Farm Fire & Cas. Co. v. Perdomo*, 44 So. 3d 1189 (Fla. 3d DCA 2010)

125. *Am. Educ. Enters., LLC v. Bd. of Trustees of Internal Imp. Tr. Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010)
126. *Porras v. United Auto. Ins. Co.*, 45 So. 3d 940 (Fla. 3d DCA 2010)
127. *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889 (Fla. 3d DCA 2010)
128. *Sorena v. Gerald J. Tobin, P.A.*, 47 So. 3d 875 (Fla. 3d DCA 2010)
129. *Alonzo v. State*, 46 So. 3d 1081 (Fla. 3d DCA 2010)
130. *Kurgan v. Morton D. Weiner/AMPAC, Inc.*, 49 So. 3d 342 (Fla. 3d DCA 2010)
131. *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228 (Fla. 3d DCA 2011)
132. *Haughey v. Royal Caribbean Cruises, Ltd.*, 55 So. 3d 697 (Fla. 3d DCA 2011)
133. *Lee v. State*, 56 So. 3d 113 (Fla. 3d DCA 2011)
134. *Citizens Prop. Ins. Corp. v. Gutierrez*, 59 So. 3d 177 (Fla. 3d DCA 2011)
135. *Puentes v. State*, 58 So. 3d 912 (Fla. 3d DCA 2011)
136. *Farah Real Estate & Inv., LLC v. Bank of Miami, N.A.*, 59 So. 3d 208 (Fla. 3d DCA 2011)
137. *Beltran v. Kalb*, 63 So. 3d 783 (Fla. 3d DCA 2011)
138. *Castillo v. Deutsche Bank Nat'l Tr. Co.*, 57 So. 3d 965 (Fla. 3d DCA 2011)
139. *W. & S. Life Ins. Co. v. Beebe*, 61 So. 3d 1215 (Fla. 3d DCA 2011)
140. *City of North Miami Beach v. Berrio*, 64 So. 3d 713 (Fla. 3d DCA 2011)
141. *Sneed v. State*, 99 So. 3d 514 (Fla. 3d DCA 2011)
142. *Coral Way Condo. Invs., Inc. v. 21/22 Condo. Ass'n, Inc.*, 66 So. 3d 1038 (Fla. 3d DCA 2011)
143. *Comprehensive Health Ctr., LLC v. United Auto. Ins. Co.*, 99 So. 3d 525 (Fla. 3d DCA 2011)
144. *State v. D.F.*, 92 So. 3d 216 (Fla. 3d DCA 2011)
145. *State, Dep't of Env'tl. Protection v. Garcia*, 99 So. 3d 539 (Fla. 3d DCA 2011)
146. *Medina v. State*, 88 So. 3d 187 (Fla. 3d DCA 2011)
147. *Skop v. P3 Group, L.L.C.*, 67 So. 3d 1194 (Fla. 3d DCA 2011)
148. *Flueras v. Royal Caribbean Cruises, Ltd.*, 69 So. 3d 1101 (Fla. 3d DCA 2011)
149. *Stock Bldg. Supply of Fla., Inc. v. Soares Da Costa Constr. Servs., LLC*, 76 So. 3d 313 (Fla. 3d DCA 2011)

150. *Incarnacion v. Thomas*, 88 So. 3d 246 (Fla. 3d DCA 2011)
151. *Investacorp, Inc. v. Evans*, 88 So. 3d 248 (Fla. 3d DCA 2011)
152. *KJB Village Prop., LLC v. Craig M. Dorne, P.A.*, 77 So. 3d 727 (Fla. 3d DCA 2011)
153. *Khutorsky v. Ilina*, 75 So. 3d 848 (Fla. 3d DCA 2011)
154. *State v. Estrada*, 76 So. 3d 371 (Fla. 3d DCA 2011)
155. *Chaviano v. State*, 75 So. 3d 1291 (Fla. 3d DCA 2011)
156. *Cliff Berry, Inc. v. State*, 116 So. 3d 394 (Fla. 3d DCA 2012)
157. *L.B. v. Naked Truth III, Inc.*, 117 So. 3d 1114 (Fla. 3d DCA 2012)
158. *Mejia v. United Auto. Ins. Co.*, 83 So. 3d 897 (Fla. 3d DCA 2012)
159. *A.L. v. State*, 84 So. 3d 1272 (Fla. 3d DCA 2012)
160. *Deutsche Bank Nat'l Tr. Co. v. Cagigas*, 85 So. 3d 1181 (Fla. 3d DCA 2012)
161. *Losh v. McKinley*, 86 So. 3d 1150 (Fla. 3d DCA 2012)
162. *De Campos v. Ferrara*, 90 So. 3d 865 (Fla. 3d DCA 2012)
163. *Glenn v. Roberts*, 95 So. 3d 271 (Fla. 3d DCA 2012)
164. *Pardo v. Goldberg*, 92 So. 3d 295 (Fla. 3d DCA 2012)
165. *Gen. Star Indem. Co. v. Atlantic Hospitality of Fla., LLC*, 93 So. 3d 501 (Fla. 3d DCA 2012)
166. *Valdes v. State*, 93 So. 3d 1163 (Fla. 3d DCA 2012)
167. *P.B. v. State*, 95 So. 3d 944 (Fla. 3d DCA 2012)
168. *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190 (Fla. 3d DCA 2012)
169. *Fla. Dep't of Agriculture & Consumer Servs. v. Lopez-Brignoni*, 114 So. 3d 1138 (Fla. 3d DCA 2012)
170. *Cardoza v. State*, 98 So. 3d 1217 (Fla. 3d DCA 2012)
171. *Cardiosonx Labs., Inc. v. Aguadilla Med. Servs., Inc.*, 100 So. 3d 285 (Fla. 3d DCA 2012)
172. *Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc.*, 105 So. 3d 579 (Fla. 3d DCA 2012)
173. *Simpson v. Tarmac Am., LLC*, 106 So. 3d 87 (Fla. 3d DCA 2013)
174. *J.P. v. State*, 111 So. 3d 198 (Fla. 3d DCA 2013)

175. *Mauna Loa Invs., LLC v. Santiago*, 38 Fla. L. Weekly D658 (Fla. 3d DCA Mar. 20, 2013)
176. *State, Dep't of Highway Safety & Motor Vehicles v. Fernandez*, 114 So. 3d 266 (Fla. 3d DCA 2013)
177. *Estrada v. Mercy Hosp., Inc.*, 121 So. 3d 51 (Fla. 3d DCA 2013)
178. *Neely v. State*, 126 So. 3d 342 (Fla. 3d DCA 2013)
179. *Kenz v. Miami-Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013)
180. *Dan Euser Waterarchitecture, Inc. v. City of Miami Beach*, 112 So. 3d 683 (Fla. 3d DCA 2013)
181. *Davis v. State*, 126 So. 3d 357 (Fla. 3d DCA 2013)
182. *Wells v. Castro*, 117 So. 3d 1233 (Fla. 3d DCA 2013)
183. *United Auto. Ins. Co. v. John S. Virga, D.C., P.A.*, 116 So. 3d 1288 (Fla. 3d DCA 2013)
184. *Akerman Senterfitt & Eidson, P.A. v. Value Seafood, Inc.*, 121 So. 3d 83 (Fla. 3d DCA 2013)
185. *Amcon Builders, Inc. v. Pardo*, 120 So. 3d 1254 (Fla. 3d DCA 2013)
186. *Casino Inv., Inc. v. Palm Springs Mile Assocs., Ltd.*, 123 So. 3d 98 (Fla. 3d DCA 2013)
187. *Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc.*, 122 So. 3d 487 (Fla. 3d DCA 2013)
188. *Mauna Loa Invs., LLC v. Santiago*, 122 So. 3d 520 (Fla. 3d DCA 2013)
189. *Thomas v. Pub. Health Tr. of Miami-Dade Cty.*, 124 So. 3d 1040 (Fla. 3d DCA 2013)
190. *Kuiken v. State*, 127 So. 3d 629 (Fla. 3d DCA 2013)
191. *Jones v. State*, 127 So. 3d 835 (Fla. 3d DCA 2013)
192. *Kling Corp. v. Hola Networks Corp.*, 127 So. 3d 833 (Fla. 3d DCA 2013)
193. *Adorno & Yoss, LLP v. Soltero*, 133 So. 3d 1124 (Fla. 3d DCA 2014)
194. *Do v. GEICO Gen. Ins. Co.*, 137 So. 3d 1039 (Fla. 3d DCA 2014)
195. *Small v. State*, 137 So. 3d 1123 (Fla. 3d DCA 2014)
196. *Turnier v. Stockman*, 139 So. 3d 397 (Fla. 3d DCA 2014)
197. *Burns v. Tondreau*, 139 So. 3d 481 (Fla. 3d DCA 2014)

198. *Bailey v. State*, 145 So. 3d 132 (Fla. 3d DCA 2014)
199. *Dorsett v. State*, 140 So. 3d 706 (Fla. 3d DCA 2014)
200. *Central Mortg. Co. v. Callahan*, 155 So. 3d 373 (Fla. 3d DCA 2014)
201. *Campbell v. State*, 143 So. 3d 1183 (Fla. 3d DCA 2014)
202. *Ledea v. State*, 146 So. 3d 91 (Fla. 3d DCA 2014)
203. *Brown v. State*, 152 So. 3d 619 (Fla. 3d DCA 2014)
204. *Molina v. State*, 150 So. 3d 1280 (Fla. 3d DCA 2014)
205. *GEICO Indem. Co. v. Gables Ins. Recovery, Inc.*, 159 So. 3d 151 (Fla. 3d DCA 2014)
206. *Walker v. State*, 154 So. 3d 448 (Fla. 3d DCA 2014)
207. *Casino Inv., Inc. v. Palm Springs Mile Assocs., Ltd.*, 201 So. 3d 46 (Fla. 3d DCA 2015)
208. *Lascaibar v. Lascaibar*, 156 So. 3d 547 (Fla. 3d DCA 2015)
209. *Paris v. State*, 156 So. 3d 578 (Fla. 3d DCA 2015)
210. *Mazine v. Branch Banking & Tr. Co.*, 156 So. 3d 579 (Fla. 3d DCA 2015)
211. *State v. Maldonado*, 156 So. 3d 589 (Fla. 3d DCA 2015)
212. *Two Islands Dev. Corp. v. Clarke*, 157 So. 3d 1081 (Fla. 3d DCA 2015)
213. *Joara Freight Lines, Inc. v. Perez*, 160 So. 3d 114 (Fla. 3d DCA 2015)
214. *Hessen v. Schimmel*, 182 So. 3d 1 (Fla. 3d DCA 2015)
215. *State v. Jimenez*, 173 So. 3d 1020 (Fla. 3d DCA 2015)
216. *Aspen Air Conditioning, Inc. v. Safeco Ins. Co. of Am.*, 170 So. 3d 892 (Fla. 3d DCA 2015)
217. *Gray v. State*, 170 So. 3d 890 (Fla. 3d DCA 2015)
218. *Hulse v. State*, 170 So. 3d 911 (Fla. 3d DCA 2015)
219. *Friedman v. State*, 173 So. 3d 1054 (Fla. 3d DCA 2015)
220. *Wadley v. State*, 178 So. 3d 424 (Fla. 3d DCA 2015)
221. *United Auto. Ins. Co. v. Comprehensive Health Ctr.*, 173 So. 3d 1061 (Fla. 3d DCA 2015)
222. *Key West Seaside, LLC v. Certified Lower Keys Plumbing, Inc.*, 208 So. 3d 718 (Fla. 3d DCA 2015)

223. *Brown v. State*, 201 So. 3d 137 (Fla. 3d DCA 2015)
224. *City of Miami v. Diocese of Newton Melkite Church*, 176 So. 3d 388 (Fla. 3d DCA 2015)
225. *Izquierdo v. State*, 177 So. 3d 1018 (Fla. 3d DCA 2015)
226. *Lezcano v. State*, 177 So. 3d 1024 (Fla. 3d DCA 2015)
227. *Wromas v. Jones*, 201 So. 3d 648 (Fla. 3d DCA 2015)
228. *Nationstar Mortg., LLC v. Sunderman*, 201 So. 3d 139 (Fla. 3d DCA 2015)
229. *Francis v. State*, 208 So. 3d 105 (Fla. 3d DCA 2015)
230. *Bryant v. Wells Fargo Bank, N.A.*, 182 So. 3d 927 (Fla. 3d DCA 2016)
231. *Dumel v. State*, 183 So. 3d 476 (Fla. 3d DCA 2016)
232. *Rolling v. State*, 218 So. 3d 911 (Fla. 3d DCA 2016)
233. *Abeid-Saba v. Carnival Corp.*, 184 So. 3d 593 (Fla. 3d DCA 2016)
234. *Charlemagne v. Guevara*, 183 So. 3d 1261 (Fla. 3d DCA 2016)
235. *Wells v. Halmac Dev., Inc.*, 184 So. 3d 620 (Fla. 3d DCA 2016)
236. *Gold King Apartments, LLC v. Dumornay*, 190 So. 3d 650 (Fla. 3d DCA 2016)
237. *LaFerte-Diaz v. Dep't of Corrections*, 187 So. 3d 908 (Fla. 3d DCA 2016)
238. *Coral Gables Chiropractic PLLC v. United Auto. Ins. Co.*, 199 So. 3d 292 (Fla. 3d DCA 2016)
239. *Catalina West Homeowners Ass'n, Inc. v. Fed. Nat'l Mortg. Ass'n*, 188 So. 3d 76 (Fla. 3d DCA 2016)
240. *C.P. Motion, Inc. v. Goldblatt*, 193 So. 3d 39 (Fla. 3d DCA 2016)
241. *Giller v. Giller*, 190 So. 3d 666 (Fla. 3d DCA 2016)
242. *Angler's Reef Prop. Owners' Ass'n v. Guirm Inv. LLC*, 196 So. 3d 507 (Fla. 3d DCA 2016)
243. *Campbell v. State*, 208 So. 3d 126 (Fla. 3d DCA 2016)
244. *Jimenez v. State*, 196 So. 3d 499 (Fla. 3d DCA 2016)
245. *Robles v. Baptist Health S. Fla., Inc.*, 197 So. 3d 1196 (Fla. 3d DCA 2016)
246. *Ivey v. State*, 199 So. 3d 378 (Fla. 3d DCA 2016)
247. *Rolling v. State*, 215 So. 3d 70 (Fla. 3d DCA 2016)
248. *Demir v. Schollmeier*, 199 So. 3d 442 (Fla. 3d DCA 2016)

249. *Grover Commercial Enters., Inc. v. Aspen Ins. UK, Ltd.*, 202 So. 3d 877 (Fla. 3d DCA 2016)
250. *Miami-Dade Cty. Bd. of Cty. Comm'rs v. An Accountable Miami-Dade*, 208 So. 3d 724 (Fla. 3d DCA 2016)
251. *Anderson v. Epstein*, 202 So. 3d 893 (Fla. 3d DCA 2016)
252. *Rudoy v. Rudoy*, 206 So. 3d 761 (Fla. 3d DCA 2016)
253. *Gonzalez v. State*, 208 So. 3d 143 (Fla. 3d DCA 2016)
254. *Allstate Fire & Cas. Ins. Co. v. Hradecky*, 208 So. 3d 184 (Fla. 3d DCA 2016)
255. *Bank of N.Y. Mellon v. Poker Run Acquisitions, Inc.*, 208 So. 3d 199 (Fla. 3d DCA 2016)
256. *Citizens Prop. Ins. Corp. v. Sosa*, 215 So. 3d 90 (Fla. 3d DCA 2016)
257. *Lawton v. State*, 207 So. 3d 359 (Fla. 3d DCA 2016)
258. *Lee v. Condell*, 208 So. 3d 253 (Fla. 3d DCA 2016)
259. *Amos v. Reich*, 208 So. 3d 796 (Fla. 3d DCA 2016)
260. *Pinnock v. Whyte*, 209 So. 3d 71 (Fla. 3d DCA 2016)
261. *Thompson v. State*, 208 So. 3d 1183 (Fla. 3d DCA 2017)
262. *Gomez v. State Farm Fla. Ins. Co.*, 208 So. 3d 1189 (Fla. 3d DCA 2017)
263. *Shotwell v. State*, 208 So. 3d 1192 (Fla. 3d DCA 2017)
264. *Fernandez-Andrew v. Fla. Peninsula Ins. Co.*, 208 So. 3d 835 (Fla. 3d DCA 2017)
265. *Bank of N.Y. Mellon Tr. Co., N.A. v. Fitzgerald*, 215 So. 3d 116 (Fla. 3d DCA 2017)
266. *Rolle v. Cold Stone Creamery, Inc.*, 212 So. 3d 1073 (Fla. 3d DCA 2017)
267. *Tender Loving Care Garden Supply, Inc. v. Jesher's, LLC*, 212 So. 3d 511 (Fla. 3d DCA 2017)
268. *Molina v. State*, 215 So. 3d 137 (Fla. 3d DCA 2017)
269. *Patel v. Shah*, 217 So. 3d 152 (Fla. 3d DCA 2017)
270. *HSBC Bank USA, etc. v. Buset*, 216 So. 3d 701 (Fla. 3d DCA 2017)
271. *Rios v. Miami's Garage, Inc.*, 217 So. 3d 232 (Fla. 3d DCA 2017)
272. *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017)
273. *Watkins v. State*, 217 So. 3d 1135 (Fla. 3d DCA 2017)

- 274. *Pitts v. State*, 226 So. 3d 838 (Fla. 3d DCA 2017)
- 275. *Topic v. Topic*, 221 So. 3d 746 (Fla. 3d DCA 2017)
- 276. *Valencia v. State*, 225 So. 3d 876 (Fla. 3d DCA 2017)
- 277. *Bauer v. Ready Windows Sales & Serv. Corp.*, 221 So. 3d 761 (Fla. 3d DCA 2017)
- 278. *Tikhomirov v. Bank of N.Y. Mellon*, 223 So. 3d 1112 (Fla. 3d DCA 2017)
- 279. *Brown v. State*, 225 So. 3d 319 (Fla. 3d DCA 2017)
- 280. *Carlisle v. U.S. Bank, Nat’l Ass’n for Harborview 2005-10 Tr. Fund*, 225 So. 3d 893 (Fla. 3d DCA 2017)
- 281. *DMB Inv. Tr. v. Islamorada, Village of Islands*, 225 So. 3d 312 (Fla. 3d DCA 2017)
- 282. *Gulfstream Prop. & Cas. Ins. Co. v. Coley*, 225 So. 3d 906 (Fla. 3d DCA 2017)
- 283. *Mid-Continent Cas. Co. v. Flora-Tech Landscapes, Inc.*, 225 So. 3d 336 (Fla. 3d DCA 2017)
- 284. *Rahmings v. State*, 224 So. 3d 300 (Fla. 3d DCA 2017)
- 285. *Reid v. State*, 224 So. 3d 306 (Fla. 3d DCA 2017)
- 286. *Mendoza v. State*, 224 So. 3d 836 (Fla. 3d DCA 2017)
- 287. *Dearriba v. State*, 225 So. 3d 932 (Fla. 3d DCA 2017)
- 288. *Platinum Luxury Auctions, LLC v. Concierge Auctions, LLC*, 227 So. 3d 685 (Fla. 3d DCA 2017)
- 289. *Wells Fargo Bank, NA v. BH-NV Invs. 1, LLC*, 230 So. 3d 60 (Fla. 3d DCA 2017)
- 290. *Brown v. State*, 227 So. 3d 215 (Fla. 3d DCA 2017)
- 291. *Fla. Dep’t of Transp. v. Tropical Trailer Leasing, L.L.C.*, 227 So. 3d 715 (Fla. 3d DCA 2017)
- 292. *Walgreen Co. v. Rubin*, 229 So. 3d 418 (Fla. 3d DCA 2017)
- 293. *Hernandez v. Guerra*, 230 So. 3d 514 (Fla. 3d DCA 2017)
- 294. *Noel v. James B. Nutter & Co.*, 232 So. 3d 1112 (Fla. 3d DCA 2017)
- 295. *Alvarez v. State*, 230 So. 3d 625 (Fla. 3d DCA 2017)
- 296. *C.T. v. State*, 238 So. 3d 857 (Fla. 3d DCA 2017)

297. *Burks v. State*, 237 So. 3d 1060 (Fla. 3d DCA 2017)
298. *Evans v. State*, 237 So. 3d 1068 (Fla. 3d DCA 2017)
299. *Leonard v. State*, 237 So. 3d 1068 (Fla. 3d DCA 2017)
300. *Rodriguez v. State*, 237 So. 3d 1069 (Fla. 3d DCA 2017)
301. *Jordan v. State*, 237 So. 3d 1070 (Fla. 3d DCA 2017)
302. *K.M. v. Fla. Dep't of Health*, 237 So. 3d 1084 (Fla. 3d DCA 2017)
303. *Republic of Ecuador v. Dassum*, 43 Fla. L. Weekly D60 (Fla. 3d DCA Dec. 27, 2017)
304. *Aguilar v. State*, 239 So. 3d 108, (Fla. 3d DCA 2018)
305. *Ashear v. Sklarey*, 247 So. 3d 574 (Fla. 3d DCA 2018)
306. *Harris v. State*, 238 So. 3d 396 (Fla. 3d DCA 2018)
307. *Mitchell v. State*, 238 So. 3d 386 (Fla. 3d DCA 2018)
308. *Sampson Farm Ltd. P'ship v. Parmenter*, 238 So. 3d 387 (Fla. 3d DCA 2018)
309. *McKenzie v. State*, 238 So. 3d 404 (Fla. 3d DCA 2018)
310. *Ashear v. Sklarey*, 239 So. 3d 786 (Fla. 3d DCA 2018)
311. *Loor v. State*, 240 So. 3d 136 (Fla. 3d DCA 2018)
312. *Alvarez v. State*, 43 Fla. L. Weekly D676 (Fla. 3d DCA Mar. 28, 2018)
313. *Chiu v. Wells Fargo Bank, N.A.*, 242 So. 3d 461 (Fla. 3d DCA 2018)
314. *Garcia v. First Community Ins. Co.*, 241 So. 3d 254 (Fla. 3d DCA 2018)
315. *M.C. v. State*, 239 So. 3d 794 (Fla. 3d DCA 2018)
316. *Marques v. Garcia*, 245 So. 3d 900 (Fla. 3d DCA 2018)
317. *Gidwani v. Roberts*, 248 So. 3d 203 (Fla. 3d DCA 2018)
318. *Pacheco v. Gonzalez*, 43 Fla. L. Weekly D1084 (Fla. 3d DCA May 16, 2018)
319. *J.A. v. State*, 247 So. 3d 710 (Fla. 3d DCA 2018)
320. *Solomon v. Solomon*, 43 Fla. L. Weekly D1398 (Fla. 3d DCA June 20, 2018)
321. *Yampol v. Turnberry Isle S. Condo. Ass'n, Inc.*, 250 So. 3d 835 (Fla. 3d DCA 2018)
322. *Lane v. Lane*, 43 Fla. L. Weekly D1582 (Fla. 3d DCA July 11, 2018)
323. *U.S. Bank Nat'l Ass'n v. Amaya*, 43 Fla. L. Weekly D1637 (Fla. 3d DCA July 25, 2018)

324. *Brown v. BNB Inv. Holdings, LLC*, 43 Fla. L. Weekly D1648 (Fla. 3d DCA July 25, 2018)
325. *Gonzalez v. Fed. Nat'l Mortg. Ass'n*, 43 Fla. L. Weekly D1739 (Fla. 3d DCA Aug. 1, 2018)
326. *Ayesh v. State*, 43 Fla. L. Weekly D1749 (Fla. 3d DCA Aug. 1, 2018)
327. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 43 Fla. L. Weekly D1822 (Fla. 3d DCA Aug. 8, 2018)
328. *Wynder v. State*, 43 Fla. L. Weekly D1826 (Fla. 3d DCA Aug. 8, 2018)
329. *Chestnut v. Nationstar Mortgage LLC*, 34 Fla. L. Weekly D1867 (Fla. 3d DCA Aug. 15, 2018)
330. *Raimondi v. State*, 43 Fla. L. Weekly D1868 (Fla. 3d DCA Aug. 15, 2018)
331. *Chakra 5, Inc. v. City of Miami Beach*, 43 Fla. L. Weekly D1922 (Fla. 3d DCA Aug. 22, 2018)
332. *911 Dry Sols., Inc. v. Fla. Family Ins. Co.*, 43 Fla. L. Weekly D1929 (Fla. 3d DCA Aug. 22, 2018)
333. *Citizens Prop. Ins. Corp. v. Laguerre*, 43 Fla. L. Weekly D1934 (Fla. 3d DCA Aug. 22, 2018)
334. *Adams v. Utah Power Sys., LLC*, No. 3D18-1113, 2018 WL 4376822 (Fla. 3d DCA Sept. 24, 2018)
335. *Atlantic Civil, Inc. v. Swift*, No. 3D15-1594, 2018 WL 4762408 (Fla. 3d DCA Oct. 3, 2018)
336. *Pigna v. Messianu*, No. 3D18-414, 2018 WL 4762373 (Fla. 3d DCA Oct. 3, 2018)

#### **PER CURIAM MAJORITY OPINIONS**

1. *Ascencio-Savola v. Planas*, 937 So. 2d 183 (Fla. 3d DCA 2006)
2. *Paris v. State*, 937 So. 2d 184 (Fla. 3d DCA 2006)
3. *Elias v. Steele*, 940 So. 2d 495 (Fla. 3d DCA 2006)
4. *Lightbourne v. State*, 947 So. 2d 576 (Fla. 3d DCA 2007)
5. *Mason v. State*, 949 So. 2d 1127 (Fla. 3d DCA 2007)
6. *Shuler, Jr. v. State*, 949 So. 2d 324 (Fla. 3d DCA 2007)
7. *Curry v. State*, 994 So. 2d 1109 (Fla. 3d DCA 2007)

8. *Blanco v. State*, 26 So. 3d 1 (Fla. 3d DCA 2007)
9. *Holladay v. State*, 957 So. 2d 700 (Fla. 3d DCA 2007)
10. *United Auto. Ins. Co. v. Prof'l Med. Grp., Inc.*, 994 So. 2d 1121 (Fla. 3d DCA 2007)
11. *Howard v. State*, 962 So. 2d 350 (Fla. 3d DCA 2007)
12. *Symonette v. State*, 962 So. 2d 941 (Fla. 3d DCA 2007)
13. *Jerome v. State*, 963 So. 2d 274 (Fla. 3d DCA 2007)
14. *St. Michael's Acad., Inc. v. State, Dep't of Children & Families*, 965 So. 2d 169 (Fla. 3d DCA 2007)
15. *Carollo v. Carollo*, 972 So. 2d 930 (Fla. 3d DCA 2007)
16. *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So. 2d 997 (Fla. 3d DCA 2008)
17. *Hylton v. State*, 974 So. 2d 1151 (Fla. 3d DCA 2008)
18. *Williams v. State*, 976 So. 2d 83 (Fla. 3d DCA 2008)
19. *Domond v. State*, 981 So. 2d 603 (Fla. 3d DCA 2008)
20. *Gunter v. State*, 981 So. 2d 602 (Fla. 3d DCA 2008)
21. *Bauder v. State*, 983 So. 2d 1244 (Fla. 3d DCA 2008)
22. *Sanchez v. State*, 992 So. 2d 350 (Fla. 3d DCA 2008)
23. *Abraham v. State*, 11 So. 3d 968 (Fla. 3d DCA 2008)
24. *Jones v. State*, 991 So. 2d 444 (Fla. 3d DCA 2008)
25. *Edwards v. State*, 997 So. 2d 1128 (Fla. 3d DCA 2008)
26. *Milbrook v. State*, 126 So. 3d 255 (Fla. 3d DCA 2008)
27. *Redding v. State*, 4 So. 3d 1255 (Fla. 3d DCA 2009)
28. *Craig v. State*, 6 So. 3d 96 (Fla. 3d DCA 2009)
29. *Vega v. State*, 5 So. 3d 784 (Fla. 3d DCA 2009)
30. *Bauder v. Ruvin*, 5 So. 3d 787 (Fla. 3d DCA 2009)
31. *Webb v. State*, 7 So. 3d 642 (Fla. 3d DCA 2009)
32. *Cheekie Invs., LLC v. Point One, LLC*, 7 So. 3d 650 (Fla. 3d DCA 2009)
33. *Wright v. State*, 13 So. 3d 520 (Fla. 3d DCA 2009)
34. *Marsh v. State*, 14 So. 3d 1214 (Fla. 3d DCA 2009)
35. *Hanna v. Dep't of Revenue*, 16 So. 3d 879 (Fla. 3d DCA 2009)

36. *Francois v. State*, 14 So. 3d 1278 (Fla. 3d DCA 2009)
37. *Garcia v. State*, 13 So. 3d 1104 (Fla. 3d DCA 2009)
38. *Wilburn v. State*, 19 So. 3d 416 (Fla. 3d DCA 2009)
39. *Thomas v. State*, 19 So. 3d 431 (Fla. 3d DCA 2009)
40. *Sanchez v. State*, 18 So. 3d 1200 (Fla. 3d DCA 2009)
41. *Nelson v. State*, 20 So. 3d 979 (Fla. 3d DCA 2009)
42. *Mendoza v. State*, 20 So. 3d 986 (Fla. 3d DCA 2009)
43. *A.R. v. Dep't of Children & Family Servs.*, 21 So. 3d 162 (Fla. 3d DCA 2009)
44. *United Auto. Ins. Co. v. Total Health Care of Fla., Inc.*, 29 So. 3d 1145 (Fla. 3d DCA 2009)
45. *Davis v. State*, 22 So. 3d 827 (Fla. 3d DCA 2009)
46. *State v. Leyva*, 23 So. 3d 229 (Fla. 3d DCA 2009)
47. *United Auto Ins. Co. v. M.M.G.*, 23 So. 3d 872 (Fla. 3d DCA 2009)
48. *Craft v. State*, 23 So. 3d 1255 (Fla. 3d DCA 2009)
49. *West v. State*, 25 So. 3d 1253 (Fla. 3d DCA 2010)
50. *Varela v. State*, 29 So. 3d 398 (Fla. 3d DCA 2010)
51. *Bain v. State*, 34 So. 3d 115 (Fla. 3d DCA 2010)
52. *Evans v. State*, 34 So. 3d 114 (Fla. 3d DCA 2010)
53. *Rivera v. State*, 35 So. 3d 983 (Fla. 3d DCA 2010)
54. *Senatus v. State*, 40 So. 3d 878 (Fla. 3d DCA 2010)
55. *Magnum v. State*, 40 So. 3d 876 (Fla. 3d DCA 2010)
56. *Montesinos v. Zapata*, 43 So. 3d 97 (Fla. 3d DCA 2010)
57. *Mentor v. State*, 44 So. 3d 195 (Fla. 3d DCA 2010)
58. *Rodriguez v. State*, 45 So. 3d 938 (Fla. 3d DCA 2010)
59. *Flores v. Fla. Unemployment Appeals Commission*, 48 So. 3d 970 (Fla. 3d DCA 2010)
60. *Eason v. State*, 47 So. 3d 933 (Fla. 3d DCA 2010)
61. *Sotolongo v. Celebrity Cruises, Ltd.*, 49 So. 3d 862 (Fla. 3d DCA 2010)
62. *Terry v. State*, 50 So. 3d 96 (Fla. 3d DCA 2010)
63. *Galindo v. State*, 50 So. 3d 783 (Fla. 3d DCA 2010)

64. *State v. Bennett*, 53 So. 3d 368 (Fla. 3d DCA 2011)
65. *Costa v. Doehla*, 54 So. 3d 567 (Fla. 3d DCA 2011)
66. *Moreno v. Moreno*, 57 So. 3d 995 (Fla. 3d DCA 2011)
67. *Munoz v. State*, 61 So. 3d 1152 (Fla. 3d DCA 2011)
68. *Garcia v. Valladares*, 99 So. 3d 518 (Fla. 3d DCA 2011)
69. *T.H. v. State*, 62 So. 3d 1279 (Fla. 3d DCA 2011)
70. *Finch v. Dep't of Revenue ex rel. John-Jules*, 65 So. 3d 1150 (Fla. 3d DCA 2011)
71. *United Ins. Grp., Inc. v. Figueredo*, 65 So. 3d 1216 (Fla. 3d DCA 2011)
72. *Williams v. State*, 69 So. 3d 402 (Fla. 3d DCA 2011)
73. *Rodriguez-Faro v. M. Escarda Contractor, Inc.*, 69 So. 3d 1097 (Fla. 3d DCA 2011)
74. *Croston v. Yale Mortg. Corp.*, 75 So. 3d 338 (Fla. 3d DCA 2011)
75. *Gilchrist v. State*, 76 So. 3d 412 (Fla. 3d DCA 2012)
76. *Flint v. Fla. Unemployment Appeals Comm'n*, 79 So. 3d 115 (Fla. 3d DCA 2012)
77. *Tomasic v. State*, 81 So. 3d 564 (Fla. 3d DCA 2012)
78. *Capote v. State*, 87 So. 3d 68 (Fla. 3d DCA 2012)
79. *S.F. v. State*, 88 So. 3d 1076 (Fla. 3d DCA 2012)
80. *Karl v. Carefree Lifestyles, Inc.*, 95 So. 3d 289 (Fla. 3d DCA 2012)
81. *Barron v. State*, 100 So. 3d 230 (Fla. 3d DCA 2012)
82. *Herrera v. State*, 128 So. 3d 49 (Fla. 3d DCA 2012)
83. *Burrows v. OneWest Bank, FSB*, 103 So. 3d 283 (Fla. 3d DCA 2013)
84. *Sherin v. State, Dep't of Highway Safety & Motor Vehicles*, 104 So. 3d 391 (Fla. 3d DCA 2013)
85. *Jones v. State*, 106 So. 3d 88 (Fla. 3d DCA 2013)
86. *Wilson v. State*, 109 So. 3d 864 (Fla. 3d DCA 2013)
87. *Gomez v. Rendon*, 126 So. 3d 315 (Fla. 3d DCA 2013)
88. *Hernandez v. Reemployment Assistance Appeals Comm'n*, 114 So. 3d 407 (Fla. 3d DCA 2013)

89. *Foley v. State*, 129 So. 3d 1077 (Fla. 3d DCA 2013)
90. *Lopez v. U.S. Bank, N.A.*, 116 So. 3d 640 (Fla. 3d DCA 2013)
91. *Marshall v. Buttonwood Bay Condo. Ass'n, Inc.*, 118 So. 3d 901 (Fla. 3d DCA 2013)
92. *Scott v. Darling*, 118 So. 3d 268 (Fla. 3d DCA 2013)
93. *Kogan v. Mildenberger*, 127 So. 3d 831 (Fla. 3d DCA 2013)
94. *Angels Diagnostic Grp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 129 So. 3d 440 (Fla. 3d DCA 2013)
95. *Almonor v. JPMorgan Chase Bank, N.A.*, 132 So. 3d 1248 (Fla. 3d DCA 2014)
96. *Grove Isle Ass'n, Inc. v. Grove Isle Assocs, LLLP*, 137 So. 3d 1081 (Fla. 3d DCA 2014)
97. *Izquierdo v. Reemployment Assistance Appeals Comm'n*, 138 So. 3d 502 (Fla. 3d DCA 2014)
98. *Cano v. Cano*, 140 So. 3d 651 (Fla. 3d DCA 2014)
99. *Haas Automation, Inc. v. Fox*, 156 So. 3d 505 (Fla. 3d DCA 2014)
100. *Woods v. State*, 156 So. 3d 579 (Fla. 3d DCA 2015)
101. *Santos v. State*, 156 So. 3d 586 (Fla. 3d DCA 2015)
102. *Guevara v. Guevara*, 162 So. 3d 256 (Fla. 3d DCA 2015)
103. *Villa Lyan, Inc. v. Perez*, 159 So. 3d 940 (Fla. 3d DCA 2015)
104. *Wolfson v. Wolfson*, 159 So. 3d 394 (Fla. 3d DCA 2015)
105. *Witt v. State*, 162 So. 3d 1049 (Fla. 3d DCA 2015)
106. *Burstyn v. City of Aventura*, 159 So. 3d 1039 (Fla. 3d DCA 2015)
107. *Calderon v. State*, 162 So. 3d 1062 (Fla. 3d DCA 2015)
108. *Stripling v. State*, 165 So. 3d 43 (Fla. 3d DCA 2015)
109. *Ward v. State*, 167 So. 3d 461 (Fla. 3d DCA 2015)
110. *Figueroa v. State*, 165 So. 3d 802 (Fla. 3d DCA 2015)
111. *Ricardo v. Wells Fargo Bank Nat'l Ass'n*, 166 So. 3d 967 (Fla. 3d DCA 2015)
112. *Echemendia v. State*, 176 So. 3d 364 (Fla. 3d DCA 2015)
113. *Johnson v. State*, 201 So. 3d 652 (Fla. 3d DCA 2016)
114. *Lluis v. State*, 187 So. 3d 918 (Fla. 3d DCA 2016)

115. *Dominguez v. State*, 197 So. 3d 1199 (Fla. 3d DCA 2016)
116. *Taylor v. State*, 197 So. 3d 130 (Fla. 3d DCA 2016)
117. *Font v. Union Carbide Corp.*, 199 So. 3d 323 (Fla. 3d DCA 2016)
118. *Cobb v. State*, 202 So. 3d 885 (Fla. 3d DCA 2016)
119. *Brown v. State*, 208 So. 3d 771 (Fla. 3d DCA 2016)
120. *Blair v. State*, 209 So. 3d 70 (Fla. 3d DCA 2016)
121. *Reitzel v. Sch. Bd. of Monroe Cty.*, 212 So. 3d 452 (Fla. 3d DCA 2017)
122. *Mazzi v. State*, 212 So. 3d 472 (Fla. 3d DCA 2017)
123. *Rodriguez v. Wachovia Mortg., FSB*, 209 So. 3d 687 (Fla. 3d DCA 2017)
124. *Deutsche Bank Nat'l Tr. Co. v. SFL Prop. Holding LLC*, 237 So. 3d 1125 (Fla. 3d DCA 2018)
125. *Johnson v. State*, 242 So. 3d 460 (Fla. 3d DCA 2018)
126. *M.K. v. Dep't of Children & Families*, No. 3D18-1802 (Fla. 3d DCA Oct. 3, 2018)

#### **CONCURRING OPINIONS**

1. *Fisher v. Perez*, 947 So. 2d 648 (Fla. 3d DCA 2007)
2. *Santiago v. State*, 147 So. 3d 1057 (Fla. 3d DCA 2014)
3. *Solomon v. Solomon*, 43 Fla. L. Weekly D1398 (Fla. 3d DCA June 20, 2018)

#### **DISSENTING OPINIONS**

1. *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177 (Fla. 3d DCA 2011)
2. *Marshall, Amaya & Anton v. Arnold-Dobal*, 76 So 3d 998 (Fla. 3d DCA 2011)
3. *S. Fla. Coastal Elec., Inc. v. Treasures on the Bay II Condo Ass'n, Inc.*, 89 So. 3d 264 (Fla. 3d DCA 2012)
4. *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013)
5. *Norona v. State*, 137 So. 3d 1096 (Fla. 3d DCA 2014)
6. *Michaels v. Loftus*, 139 So. 3d 324 (Fla. 3d DCA 2014)

#### **EN BANC OPINIONS**

1. *Royal Caribbean Cruises, Ltd. v. Cox*, 137 So. 3d 1157 (Fla. 3d DCA 2014)

## **JEAC OPINIONS**

- |                                    |                                    |
|------------------------------------|------------------------------------|
| 1. Fla. JEAC Op. 11-15             | 29. Fla. JEAC Op. 12-23            |
| 2. Fla. JEAC Op. 11-16             | 30. Fla. JEAC Op. 12-24            |
| 3. Fla. JEAC Op. 11-17             | 31. Fla. JEAC Op. 12-25 (Election) |
| 4. Fla. JEAC Op. 11-18             | 32. Fla. JEAC Op. 12-26            |
| 5. Fla. JEAC Op. 11-19             | 33. Fla. JEAC Op. 12-27            |
| 6. Fla. JEAC Op. 11-21             | 34. Fla. JEAC Op. 12-28            |
| 7. Fla. JEAC Op. 12-01 (Election)  | 35. Fla. JEAC Op. 12-29            |
| 8. Fla. JEAC Op. 12-02             | 36. Fla. JEAC Op. 12-30            |
| 9. Fla. JEAC Op. 12-03 (Election)  | 37. Fla. JEAC Op. 12-31            |
| 10. Fla. JEAC Op. 12-04            | 38. Fla. JEAC Op. 12-32            |
| 11. Fla. JEAC Op. 12-05            | 39. Fla. JEAC Op. 12-33            |
| 12. Fla. JEAC Op. 12-06 (Election) | 40. Fla. JEAC Op. 12-34            |
| 13. Fla. JEAC Op. 12-07            | 41. Fla. JEAC Op. 12-35            |
| 14. Fla. JEAC Op. 12-08            | 42. Fla. JEAC Op. 12-36            |
| 15. Fla. JEAC Op. 12-09            | 43. Fla. JEAC Op. 12-37            |
| 16. Fla. JEAC Op. 12-10            | 44. Fla. JEAC Op. 12-38            |
| 17. Fla. JEAC Op. 12-11            | 45. Fla. JEAC Op. 13-01            |
| 18. Fla. JEAC Op. 12-12            | 46. Fla. JEAC Op. 13-02            |
| 19. Fla. JEAC Op. 12-13 (Election) | 47. Fla. JEAC Op. 13-03            |
| 20. Fla. JEAC Op. 12-14 (Election) | 48. Fla. JEAC Op. 13-04            |
| 21. Fla. JEAC Op. 12-15 (Election) | 49. Fla. JEAC Op. 13-05            |
| 22. Fla. JEAC Op. 12-16            | 50. Fla. JEAC Op. 13-06            |
| 23. Fla. JEAC Op. 12-17 (Election) | 51. Fla. JEAC Op. 13-07            |
| 24. Fla. JEAC Op. 12-18 (Election) | 52. Fla. JEAC Op. 13-08            |
| 25. Fla. JEAC Op. 12-19 (Election) | 53. Fla. JEAC Op. 13-09            |
| 26. Fla. JEAC Op. 12-20 (Election) | 54. Fla. JEAC Op. 13-10            |
| 27. Fla. JEAC Op. 12-21 (Election) | 55. Fla. JEAC Op. 13-11            |
| 28. Fla. JEAC Op. 12-22            | 56. Fla. JEAC Op. 13-12            |

57. Fla. JEAC Op. 13-13  
58. Fla. JEAC Op. 13-14  
59. Fla. JEAC Op. 13-15  
60. Fla. JEAC Op. 13-16  
61. Fla. JEAC Op. 13-17  
62. Fla. JEAC Op. 13-18  
63. Fla. JEAC Op. 13-19  
64. Fla. JEAC Op. 13-20  
65. Fla. JEAC Op. 13-21  
66. Fla. JEAC Op. 13-22  
67. Fla. JEAC Op. 13-23  
68. Fla. JEAC Op. 14-02  
69. Fla. JEAC Op. 14-04  
70. Fla. JEAC Op. 14-05  
71. Fla. JEAC Op. 14-06  
72. Fla. JEAC Op. 14-07  
73. Fla. JEAC Op. 14-08  
74. Fla. JEAC Op. 14-09  
75. Fla. JEAC Op. 14-10 (Election)  
76. Fla. JEAC Op. 14-11 (Election)  
77. Fla. JEAC Op. 14-12 (Election)  
78. Fla. JEAC Op. 14-13  
79. Fla. JEAC Op. 14-14 (Election)  
80. Fla. JEAC Op. 14-15  
81. Fla. JEAC Op. 14-16  
82. Fla. JEAC Op. 14-17  
83. Fla. JEAC Op. 14-18  
84. Fla. JEAC Op. 14-19  
85. Fla. JEAC Op. 14-20

86. Fla. JEAC Op. 14-21  
87. Fla. JEAC Op. 14-22  
88. Fla. JEAC Op. 14-23  
89. Fla. JEAC Op. 14-24  
90. Fla. JEAC Op. 14-25  
91. Fla. JEAC Op. 14-26  
92. Fla. JEAC Op. 14-27  
93. Fla. JEAC Op. 15-01  
94. Fla. JEAC Op. 15-02  
95. Fla. JEAC Op. 15-03  
96. Fla. JEAC Op. 15-04  
97. Fla. JEAC Op. 15-05  
98. Fla. JEAC Op. 15-06  
99. Fla. JEAC Op. 15-07  
100. Fla. JEAC Op. 15-08  
101. Fla. JEAC Op. 15-09  
102. Fla. JEAC Op. 15-10  
103. Fla. JEAC Op. 15-11  
104. Fla. JEAC Op. 15-12  
105. Fla. JEAC Op. 15-13  
106. Fla. JEAC Op. 15-14  
107. Fla. JEAC Op. 15-15  
108. Fla. JEAC Op. 16-01  
109. Fla. JEAC Op. 16-02  
110. Fla. JEAC Op. 16-03  
111. Fla. JEAC Op. 16-04  
112. Fla. JEAC Op. 16-05 (Election)  
113. Fla. JEAC Op. 16-06 (Election)  
114. Fla. JEAC Op. 16-07 (Election)

115. Fla. JEAC Op. 16-08 (Election)  
116. Fla. JEAC Op. 16-09 (Election)  
117. Fla. JEAC Op. 16-10 (Election)  
118. Fla. JEAC Op. 16-11  
119. Fla. JEAC Op. 16-12  
120. Fla. JEAC Op. 16-13  
121. Fla. JEAC Op. 16-14  
122. Fla. JEAC Op. 16-15 (Election)  
123. Fla. JEAC Op. 16-16  
124. Fla. JEAC Op. 16-17  
125. Fla. JEAC Op. 16-18  
126. Fla. JEAC Op. 16-19  
127. Fla. JEAC Op. 16-20  
128. Fla. JEAC Op. 16-21  
129. Fla. JEAC Op. 16-22  
130. Fla. JEAC Op. 17-01  
131. Fla. JEAC Op. 17-02  
132. Fla. JEAC Op. 17-03  
133. Fla. JEAC Op. 17-04  
134. Fla. JEAC Op. 17-05  
135. Fla. JEAC Op. 17-06  
136. Fla. JEAC Op. 17-07  
137. Fla. JEAC Op. 17-08  
138. Fla. JEAC Op. 17-09  
139. Fla. JEAC Op. 17-10  
140. Fla. JEAC Op. 17-11  
141. Fla. JEAC Op. 17-12  
142. Fla. JEAC Op. 17-13  
143. Fla. JEAC Op. 17-14 (Election)

144. Fla. JEAC Op. 17-15  
145. Fla. JEAC Op. 17-16 (Election)  
146. Fla. JEAC Op. 17-17  
147. Fla. JEAC Op. 17-18  
148. Fla. JEAC Op. 17-19  
149. Fla. JEAC Op. 17-20  
150. Fla. JEAC Op. 17-21  
151. Fla. JEAC Op. 17-22  
152. Fla. JEAC Op. 17-23  
153. Fla. JEAC Op. 17-24 (Election)  
154. Fla. JEAC Op. 17-25 (Election)  
155. Fla. JEAC Op. 17-26 (Election)  
156. Fla. JEAC Op. 18-01  
157. Fla. JEAC Op. 18-02 (Election)  
158. Fla. JEAC Op. 18-03  
159. Fla. JEAC Op. 18-04 (Election)  
160. Fla. JEAC Op. 18-05  
161. Fla. JEAC Op. 18-06  
162. Fla. JEAC Op. 18-07  
163. Fla. JEAC Op. 18-08  
164. Fla. JEAC Op. 18-09  
165. Fla. JEAC Op. 18-10  
166. Fla. JEAC Op. 18-11  
167. Fla. JEAC Op. 18-12  
168. Fla. JEAC Op. 18-13  
169. Fla. JEAC Op. 18-14 (Election)  
170. Fla. JEAC Op. 18-15  
171. Fla. JEAC Op. 18-16 (Election)  
172. Fla. JEAC Op. 18-17

- 173. Fla. JEAC Op. 18-18
- 174. Fla. JEAC Op. 18-19
- 175. Fla. JEAC Op. 18-20 (Election)
- 176. Fla. JEAC Op. 18-21 (Election)
- 177. Fla. JEAC Op. 18-22

**ATTACHMENT E**  
**Response to Question 32d.(iv)**

## ATTACHMENT E

### Response to Question 32d.(iv)

**32d.(iv). List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases, and tell why you believe them to be significant. Give dates tried and names of attorneys involved.**

In response to this question, I have selected appellate cases rather than cases I tried or litigated as an attorney, as, I believe, my work as an appellate judge is more relevant to an assessment of my qualifications to serve on the Supreme Court of Florida. These cases demonstrate my analytical approach to a variety of legal issues that have come before me during my twelve years on the Third District Court of Appeal, including my firmly settled approach to statutory construction and to constitutional and common law issues. Although this selection of cases is necessarily limited, I hope that the variety of the issues addressed gives the Commission and the Governor as wide a view as possible of the issues and qualities that will guide their ultimate decision. These cases are attached for ease of reference.

**1) *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 43 Fla. L. Weekly D1822 (Fla. 3d DCA Aug. 8, 2018).**

Appellants: Duty Free World, Inc., Duty Free World Inflight, Inc., Mayra Del Valle, and Leylani Cardoso (collectively, “Duty Free”). Represented by J. Raul Cosio and Rebecca M. Placencia of Holland & Knight LLP, Miami.

Appellees: Doral International Products, LLC and Miami Perfume Junction, Inc. (collectively, “Doral”). Represented by Gerald B. Cope, Ilana Tabacnic, and Erika R. Shuminer of Akerman LLP, Miami.

Date Opinion Issued: August 8, 2018.

Duty Free appealed from an order denying its motion to compel arbitration. The parties’ commercial contract at issue contained a mandatory arbitration clause. Like many such clauses, it carved out an exception to the arbitration mandate that permitted the parties to seek equitable or emergency relief in state or federal court. Duty Free initiated an arbitration proceeding pursuant

to the parties' contract. Doral answered and filed a counterclaim in the arbitration proceeding. Doral also filed a separate complaint in circuit court that was based on the same facts supporting its arbitration counterclaim and that asserted a claim for unjust enrichment. The trial court denied Duty Free's motion to compel arbitration, concluding that the civil lawsuit fell within the arbitration clause's exception because claims for unjust enrichment are equitable in nature.

This case provided an opportunity to clarify an area of the law that has widespread application to commercial arbitration contracts. The distinction between law and equity sometimes is viewed as an arcane artifact of an earlier legal era, but it retains its vitality in a number of areas of our jurisprudence, ranging from the Seventh Amendment right to a jury trial in civil cases to the nature of remedies available to civil litigants. While Florida cases consistently affirm that a claim for unjust enrichment is "equitable in nature," those cases also state that the use of the term "equitable" denotes fairness, *i.e.*, what makes an enrichment "unjust," and does not refer to the equity side of the court. A determination of whether Doral's claim was subject to mandatory arbitration therefore required an analysis of the nature of the relief sought by Doral (legal or equitable), and not simply a reliance on the description of unjust enrichment as "equitable in nature." Based on *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), the relief sought by Doral was legal in nature, *i.e.*, reimbursement to be paid from Duty Free's general assets, as opposed to a uniquely identifiable fund over which a constructive trust or other form of equitable relief could be imposed. As a result, the claim was subject to mandatory arbitration, and the motion to compel arbitration should have been granted.

This case is significant because arbitration clauses are commonly used in domestic and international commercial contracts, and Florida law uniformly favors their enforcement. Those clauses often have an exception for equitable relief, and absent an understanding of the distinction between legal and equitable relief, that exception has the potential to expand beyond what the parties intended at the time they entered into their contract. This was an area of the law where Florida's appellate courts had not provided significant guidance, and, hopefully, this opinion will assist both the trial courts and parties in future disputes in determining what claims are subject to arbitration in Florida.

**2) *Chakra 5, Inc. v. City of Miami Beach*, 43 Fla. L. Weekly D1922 (Fla. 3d DCA Aug. 22, 2018).**

Appellants: Chakra 5, Inc., 1501 Ocean Drive, LLC, and Haim Turgman (collectively, “Chakra 5”). Represented by Harley S. Tropin, Thomas A. Ronzetti, and Tal J. Lifshitz of Kozyak Tropin & Throckmorton, Coral Gables.

Appellee: City of Miami Beach (the “City”). Represented by Raul Aguila and Robert F. Rosenwald, City Attorney’s Office, Miami Beach, and by Alix Cohen, Carlton Fields Jordan Burt, P.A., Miami.

Date Opinion Issued: August 22, 2018.

Chakra 5 appealed from the trial court’s final order dismissing with prejudice its claims against the City. Chakra 5 owned and operated a nightclub on Miami Beach. In its complaint, Chakra 5 alleged that members of the City’s code and zoning enforcement department initiated a campaign of harassment that involved improper citations, inspections, and cease-and-desist orders. Chakra 5 sued the City pursuant to 42 U.S.C. § 1983, asserting claims for breach of procedural and substantive due process. The questions presented on appeal were whether Chakra 5’s claims were time barred and whether Chakra 5 failed to state a claim for violation of its due process rights. I concluded that the right identified by Chakra 5 was not entitled to substantive due process protection, although Chakra 5 could proceed with its procedural due process claims that were not otherwise time barred.

The case is significant because of the opportunity it provided to explain the difference between procedural and substantive due process and the proper role of the judicial branch in our tripartite system of constitutional governance. Florida and federal precedents provide that the constitutional guarantee of due process has both a procedural and a substantive component. Procedural due process is the bread-and-butter of our legal system—the requirement that the government provide fair procedures, *e.g.*, notice, an opportunity to be heard, and a neutral decision maker, before depriving a person of life, liberty or property. Courts often are called upon to determine whether a particular procedure comports with this constitutional due process requirement. Regardless of the outcome of a particular case, judicial determinations regarding procedural due process recognize the legitimate exercise of executive and legislative authority in the relevant subject area. The notion of

substantive due process, however, is fundamentally different. A judicial determination that a particular right merits substantive due process protection will insulate that right against certain government actions regardless of the fairness of the procedures used to implement them. For that reason, and particularly with regard to rights that are not enumerated in the federal or Florida constitutions, courts asked to address a substantive due process claim should proceed cautiously in considering whether a right qualifies for this type of protection. There are at least two reasons for this caution. First, there is the obvious separation of powers concern. Substantive due process removes certain matters from legislative or executive action, and the doctrine can easily result in improper judicial encroachment into the “lanes” of the other two branches. Second, and related, substantive due process raises issues regarding judicial legitimacy. One of the unique characteristics of the judicial branch is its obligation to provide a public explanation for the results that it reaches, *i.e.*, an explanation founded on fealty to constitutional and statutory language, precedent, and reason. Courts rightfully have expressed their concern that the application of the doctrine of substantive due process could lead to judicial intervention based solely on the particular preferences of those judges who happen to be hearing the case at that moment, thereby aggregating to the judicial branch a policy role reserved to the other two branches and undermining the legitimacy of the judicial branch.

**3) *United Automobile Insurance Company v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009).**

Appellant: United Automobile Insurance Company (“United”). Represented by Michael J. Niemand, Office of the General Counsel (United), Miami.

Appellee: Oscar Salgado. Represented by Christian Carrazana, Panter, Panter & Sampedro, Miami.

Date Opinion Issued: August 5, 2009.

United sought second-tier certiorari review of a county court declaratory decree that PIP coverage existed notwithstanding Salgado’s misrepresentation on his insurance application. Salgado submitted certain medical expenses to his PIP insurer related to his injuries from a car accident. After conducting an investigation that disclosed Salgado’s failure to provide material information in his insurance application, United notified Salgado that it was cancelling the policy. Salgado then filed suit in county court seeking a declaration that

coverage existed. The county court entered summary judgment in Salgado's favor, and the circuit court appellate division affirmed. On petition to our court, the primary issue was whether Florida's Motor Vehicle No-Fault Law abrogated an insurer's statutory right to rescission under Florida's insurance code. This issue had application to a large number of cases, as our Court had already received another appeal from a circuit court appellate division decision relying on that division's decision relating to Salgado.

Determination of this issue required analysis of two issues: first, the construction of Florida's insurance code (chapter 627, Florida Statutes) and its Motor Vehicle No-Fault Law, and, second, the difference between rescission and cancellation of a contract. This case is significant because it reflects my approach to statutory construction, particularly as discussed in Section IV of the opinion. Additionally, it clearly defines the difference between rescission of a contract, which abrogates the contract *ab initio*, and cancellation of a contract, which terminates the contract as of the effective date of the cancellation. This case has been cited numerous times, particularly by federal courts, regarding the application of recessionary principles under Florida law.

**4) *Harris v. State*, 238 So. 3d 396 (Fla. 3d DCA 2018)/*Aguilar v. State*, 239 So. 3d 108 (Fla. 3d DCA 2018).**

(A). Appellant: Bryan Harris. Represented by Jeffrey S. Weiner, Annabelle H. Nahre, and Diego Wiener, Jeffrey S. Weiner, P.A., Miami.

Appellee: State of Florida. Represented by Pamela Bondi and Michael W. Mervine, Office of the Florida Attorney General, Miami.

(B). Appellant: Juan Aguilar. Represented by Carlos J. Martinez and Natasha Baker-Bradley, Office of the Public Defender, Miami.

Appellee: State of Florida. Represented by Pamela Bondi and Kayla H. McNab, Office of the Florida Attorney General, Miami.

Date Opinions Issued: January 17, 2018.

I am listing *Harris* and *Aguilar* together because they were released on the same day and both involved exceptions to the search warrant requirement of the Fourth Amendment to the United States Constitution. Harris appealed the

trial court's denial of his motion to suppress the results of a search of his backpack after his arrest for reckless driving and driving an unregistered vehicle (a dirt bike). Aguilar appealed his conviction and sentence for DUI crimes, and in particular, the admission of the results of blood alcohol tests performed on blood draws obtained from Aguilar while hospitalized for injuries sustained in a multi-vehicle accident.

The case law developed under the Fourth Amendment recognizes a number of exceptions to the warrant requirement. In Harris's case, the exceptions at issue related to searches incident to arrest and searches of automobiles/compartments of automobiles incident to arrest. In Aguilar's case, the exception at issue concerned exigent circumstances relating to blood alcohol tests and DUI cases. These cases are significant for several reasons. First, both illustrate the careful analysis of sometimes-conflicting strands of jurisprudence necessary to clearly articulate the controlling rule of law in a case involving the Fourth Amendment. In Harris's case, this required an analysis of a line of United States Supreme Court cases beginning with *Chimel v. California*, 395 U.S. 752 (1969), and running through *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arizona v. Gant*, 556 U.S. 332 (2009). In Aguilar's case, it required an analysis of United States Supreme Court cases involving blood alcohol tests and DUIs, beginning with *Schmerber v. California*, 384 U.S. 757 (1966), and more recently reconsidered in *Missouri v. McNeely*, 569 U.S. 141 (2013). Second, they exemplify one of the important qualifications of a jurist, *i.e.*, an unwavering commitment to follow the law. In crafting these two opinions, I read and thoroughly researched Fourth Amendment cases to guide each opinion's analysis, and they illustrate my diligence as an appellate judge, as well as my aptitude for clear legal thinking.

**5) *Pacheco v. Gonzalez*, 43 Fla. L. Weekly D1084 (Fla. 3d DCA May 16, 2018).**

Appellants: Ramon Pacheco and Ramon Pacheco & Associates, Inc. (collectively, "Pacheco"). Represented by Raoul G. Cantero, White & Case LLP, Miami, and Kathryn L. Ender and George Truitte, Cole Scott & Kissane, Miami.

Appellee: R. Randy Gonzalez. Represented by Jeffrey B. Crockett and Kevin C. Kaplan, Coffey Burlington, P.L., Miami.

Date Opinion Issued: May 16, 2018.

Pacheco appealed from the final judgment of attorney's fees in favor of Gonzalez. Prior to trial, Gonzalez served on Pacheco a joint proposal for settlement, pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. Pacheco did not accept the proposal for settlement and the case proceeded. Following a bench trial and entry of judgment in his favor on the underlying issues, Gonzalez filed a motion for attorney's fees based on the rejected proposal for settlement. The trial court found that Gonzalez was entitled to fees and ultimately entered a final judgment for fees in the amount of \$232,440.

This case is significant because it highlights an issue that generates significant confusion and litigation in Florida's courts today. As noted above, this case involved the validity of a joint proposal for settlement served pursuant to section 768.79 and Rule 1.442. Florida law authorizes a party to serve a proposal for settlement up to forty-five days prior to trial. Rejection of a valid proposal exposes the recipient to liability for all of the offeror's fees and costs incurred after the rejection, depending on the amount of the judgment entered in the underlying action. Thus, a party that prevails on the underlying issues nevertheless may face significant liability for the other party's fees if the judgment amount triggers liability under the proposal for settlement statute. As noted by Florida courts, the Florida Legislature intended proposals for settlement to encourage settlements and end the parties' involvement in the judicial system. Unfortunately, the opposite has occurred. As Florida case law interpreting the procedural rule implementing the statute—Rule 1.442—has developed, it has become increasingly challenging for even the most diligent attorney to draft a valid joint proposal for settlement. As a result, attorneys cannot consistently advise their clients regarding their exposure to post-judgment fees, the Legislature's goal of encouraging settlements through its statutory mechanism is frustrated, and questions regarding the validity of proposals for settlement generate a significant amount of ancillary post-judgment litigation. In this case, the validity of the proposal for settlement depended on the application of the Florida Supreme Court's decision in *Attorneys' Title Insurance Fund, Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010). In *Gorka*, the Florida Supreme Court concluded that a particular joint offer was invalid and articulated a rule for analyzing joint offers in the future. Justice Polston, writing in dissent, noted that the *Gorka* rule effectively eliminated the ability to make joint offers. As I noted in this case, as a practical matter Justice Polston's prediction was correct, and I therefore cautioned counsel

about the pitfalls likely to befall them until there is further clarification in the law regarding joint proposals for settlement.

2018 WL 3747725

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida, Third District.

DUTY FREE WORLD, INC., et al., Appellants,  
v.

MIAMI PERFUME JUNCTION,  
INC., et al., Appellees.

No. 3D18-478

|  
Opinion filed August 8, 2018

### Synopsis

**Background:** After cosmetics retailer sought arbitration of claim that wholesaler violated the parties' supply agreement, wholesaler brought action against retailer for unjust enrichment, and retailer moved to compel arbitration under their agreement's mandatory arbitration clause. The Circuit Court, Miami-Dade County, [Daryl E. Trawick](#), J., denied retailer's motion. Retailer appealed.

**Holdings:** The District Court of Appeal, [Lagoa](#), J., held that:

[1] wholesaler's unjust enrichment claim was not equitable; and

[2] wholesaler's action did not constitute a claim for disgorgement.

Reversed.

West Headnotes (14)

### [1] Appeal and Error



The Court of Appeal reviews an order granting or denying a motion to compel arbitration de novo.

[Cases that cite this headnote](#)

### [2] Alternative Dispute Resolution



When considering a motion to compel arbitration, three factors need to be considered: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived.

[Cases that cite this headnote](#)

### [3] Alternative Dispute Resolution



Arbitration provisions are contractual in nature and remain a matter of contractual interpretation.

[Cases that cite this headnote](#)

### [4] Alternative Dispute Resolution



The intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration.

[Cases that cite this headnote](#)

### [5] Alternative Dispute Resolution



In considering a motion to compel arbitration, all doubts should be resolved in favor of arbitration.

[Cases that cite this headnote](#)

### [6] Alternative Dispute Resolution



No party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate.

[Cases that cite this headnote](#)

**[7] Alternative Dispute Resolution**

Where parties bargain for and/or contemplate exceptions to arbitration in their contracts, their intentions should control.

[Cases that cite this headnote](#)

**[8] Implied and Constructive Contracts**

The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff.

[Cases that cite this headnote](#)

**[9] Implied and Constructive Contracts**

The basis of the remedy of unjust enrichment is to provide restitution where one person has been unjustly enriched at the expense of another.

[Cases that cite this headnote](#)

**[10] Implied and Constructive Contracts**

The “equitable” nature of an unjust enrichment claim denotes only that quality which makes an enrichment unjust, and is not a reference to the equity side of the court.

[Cases that cite this headnote](#)

**[11] Implied and Constructive Contracts**

Cosmetics wholesaler's unjust enrichment claim against cosmetics retailer based on retailer's failure to fulfill wholesaler's purchase orders did not constitute a claim for equitable relief, and thus carve-out provision of

mandatory arbitration clause in agreement allowing parties to seek equitable relief in court did not apply, where wholesaler's claim sought only monetary compensation and did not allege that money retailer owed it for unfulfilled purchase orders could clearly be traced to particular funds or property in retailer's possession.

[Cases that cite this headnote](#)

**[12] Equity**

Disgorgement is an equitable remedy intended to prevent unjust enrichment.

[Cases that cite this headnote](#)

**[13] Equity**

The equitable remedy of disgorgement is measured by the defendant's ill-gotten profits or gains rather than the plaintiff's losses.

[Cases that cite this headnote](#)

**[14] Alternative Dispute Resolution**

Cosmetics wholesaler's action against cosmetics retailer based on retailer's failure to fulfill wholesaler's purchase orders did not constitute a claim for disgorgement, for purposes of carve-out provision of mandatory arbitration clause of parties' agreement allowing them to seek equitable relief in court, even though wholesaler indicated in its prayer for relief that it sought disgorgement, where wholesaler's claim did not seek profits produced by payments made under the purchase orders.

[Cases that cite this headnote](#)

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, [Daryl E. Trawick](#), Judge. Lower Tribunal No. 17-25827

**Attorneys and Law Firms**

Holland & Knight LLP, and [J. Raul Cosio](#) and [Rebecca M. Plasencia](#), Miami, for appellants.

Akerman LLP, and [Gerald B. Cope, Jr.](#), [Ilana Tabacnic](#), and [Erika R. Shuminer](#), Miami, for appellees.

Before [LAGOA](#), [EMAS](#), and [FERNANDEZ](#), JJ.

**Opinion**

[LAGOA](#), J.

\*1 Duty Free World Inc. (“DFW”), Duty Free World Inflight, Inc. (“Inflight”) (collectively, “the DFW Companies”), Mayra Del Valle, and Leylani Cardoso appeal the trial court's order denying their motion to compel arbitration. For the following reasons, we hold that the trial court erred in denying the motion to compel arbitration and reverse.

**I. FACTUAL AND PROCEDURAL HISTORY**

Doral International Products, LLC (“Doral”), and Miami Perfume Junction, Inc. (“MPJ”), are affiliated entities engaged in the purchase and sale of cosmetics, perfumes, and similar products on a wholesale basis. The DFW Companies are also engaged in the purchase and sale of cosmetics, perfumes, and similar products on a wholesale and retail basis. The DFW Companies obtain their products directly from the vendor or manufacturer and, in turn, sell the products to other companies, such as Doral and MPJ.

As of November 21, 2012, the DFW Companies were indebted to Doral in the total amount of \$6,000,000. On November 21, 2012, the DFW Companies and Doral entered into a Supply Agreement and a Reimbursement Agreement (the “2012 Agreements”) for the purpose of addressing the DFW Companies' repayment of their \$6,000,000 obligation to Doral.<sup>2</sup> Under the Supply Agreement between Doral and DFW, DFW agreed to make available to Doral a minimum of \$6,000,000 of products in each calendar quarter, and Doral agreed to purchase a minimum of \$6,000,000 of products in each calendar quarter (referred to as “the Minimum Purchase Requirement”). The Supply Agreement also provided that fifteen percent of the purchase price of the ordered products would be paid by crediting that percentage

against the balance of the DFW's \$6,000,000 obligation. The credit was subsequently reduced to ten percent. Under the Reimbursement Agreement between Doral and the DFW Companies, the DFW Companies acknowledged their joint and several liability to Doral for the \$6,000,000 and agreed that the obligation would be paid to Doral pursuant to the terms of the 2012 Agreements. As a result of the 2012 Agreements, the \$6,000,000 obligation was reduced to \$633,615.90 as of February 10, 2017.

The 2012 Agreements contain an identical arbitration clause. That clause states that the parties will first attempt to mediate “any claim, controversy or dispute among the parties with respect to the construction, application or enforcement of this Agreement or arising out of a breach hereof ....” If mediation is unsuccessful, the dispute must be submitted to binding arbitration. The arbitration clause contains an exception that provides the parties the right to seek equitable relief in the state or federal courts in Miami-Dade County:

\*2 If the parties are unable to amicably resolve their disputes within 30 days of submitting the dispute to mediation, the dispute, except actions seeking injunctive or emergency relief shall be submitted, at the request of either party, to binding arbitration by a single arbitrator .... **Notwithstanding the foregoing**, each party shall have the right to seek **equitable** or emergency **relief** in the state or federal courts in Miami-Dade County, Florida, in order to protect any rights enforceable by injunctive or other equitable relief. ... The parties hereby waive any bond requirements for obtaining equitable relief, without bond.

(emphasis added).

On October 2, 2017, DFW initiated an arbitration proceeding against Doral, claiming that Doral breached the Supply Agreement “by failing to purchase products from DFW in accordance with the terms and conditions specified by the Supply Agreement.” On November 6, 2017, Doral filed a counterclaim in the arbitration proceeding alleging breach of contract, civil theft,

conversion, and fraudulent misrepresentation. In its breach of contract count, Doral claimed that between October 3, 2016, and February 10, 2017, Doral ordered, and MPJ pre-paid for, products from the DFW Companies pursuant to the Supply Agreement. Doral alleged that MPJ paid \$2,683,252.80 for products that were never delivered and that “[t]he DFW Companies substantially and materially breached the 2012 Agreements by, among other things, failing to deliver products to Doral after receiving Purchase Orders for goods along with the requisite payments.” Doral claimed that it incurred “actual and substantial damages.”

On the same day that Doral filed its counterclaim in the arbitration proceeding, Doral and MPJ filed a complaint in the circuit court for Miami-Dade County asserting a claim for unjust enrichment against the DFW Companies. By way of summary, Doral and MPJ alleged that the DFW Companies' representations and omissions induced Doral and MPJ to place purchase orders for products between October 3, 2016, and February 10, 2017, but that the DFW Companies delivered only a fraction of the products ordered. As a result, Doral and MPJ allegedly paid \$2,683,252.80 for undelivered products. Doral and MPJ alleged that “it would be inequitable for the DFW Companies to retain [Doral and MPJ's] monies, without delivering the requisite products to [Doral and MPJ],” and sought a judgment against the DFW Companies “for equitable relief, including disgorgement.”

The DFW Companies filed a motion to compel arbitration in the circuit court, arguing that Doral and MPJ's unjust enrichment claim was subject to the mandatory arbitration clause contained in the 2012 Agreements. In their response in opposition, Doral and MPJ argued that their unjust enrichment claim falls squarely within the arbitration clause's exception providing that the parties have the right to “seek equitable ... relief” in the circuit court.

The trial court conducted a hearing on February 27, 2018. On March 7, 2018, the trial court entered its Order Denying Defendants' Motion to Compel Arbitration. The trial court found that “Plaintiffs' claim for unjust enrichment is not subject to arbitration based on the express carve-out contained within the Arbitration Clause which permits Plaintiffs to ‘seek equitable relief’ from this Court.” The DFW Companies' timely appeal ensued.<sup>3</sup>

## II. STANDARD OF REVIEW

[1] This Court reviews an order granting or denying a motion to compel arbitration de novo. [Mukamal v. Marcum, LLP](#), 223 So.3d 422, 425 n.3 (Fla. 3d DCA 2017); [Apartment Inv. & Mgmt. Co. v. Flamingo/South Beach 1 Condo. Ass'n](#), 84 So.3d 1090, 1092 (Fla. 3d DCA 2012); [Roth v. Cohen](#), 941 So.2d 496, 499 (Fla. 3d DCA 2006).

## III. ANALYSIS

\*3 [2] [3] [4] [5] [6] [7] “When considering a motion to compel arbitration, three factors need to be considered: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived.” [Roth](#), 941 So.2d at 499 (citing [Seifert v. U.S. Home Corp.](#), 750 So.2d 633, 636 (Fla. 1999) ). “Arbitration provisions are contractual in nature and remain a matter of contractual interpretation. The intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration.” [Jackson v. Shakespeare Found., Inc.](#), 108 So.3d 587, 593 (Fla. 2013) (citation omitted). In considering a motion to compel arbitration, “all doubts should be resolved in favor of arbitration.” [CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc.](#), 201 So.3d 85, 90 (Fla. 3d DCA 2015); accord [Apartment Inv. & Mgmt. Co.](#), 84 So.3d at 1092. It is equally true, however, “that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate.” [Seifert](#), 750 So.2d at 636; see also [Regency Grp., Inc. v. McDaniels](#), 647 So.2d 192, 193 (Fla. 1st DCA 1994) (“The agreement of the parties determines the issues subject to arbitration.”). Thus, “ ‘where parties bargain for and/or contemplate exceptions to arbitration in their contracts, their intentions should control.’ ” [Apartment Inv. & Mgmt. Co.](#), 84 So.3d at 1092 (quoting [Rath v. Network Mktg., L.C.](#), 790 So.2d 461, 465 (Fla. 4th DCA 2001) ).

The instant case concerns the second factor to be considered on a motion to compel arbitration whether an arbitrable issue exists. Specifically, the issue before us is whether Doral and MPJ's unjust enrichment claim falls within the arbitration clause's exception permitting the parties to “seek equitable ... relief” in the circuit court.

[8] [9] “ ‘The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff.’ ” [Agritrade, LP v. Quercia](#), So.3d , , 42 Fla. L. Weekly D2514, D2516 (Fla. 3d DCA Nov. 29, 2017) (quoting [Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla.](#), 667 So.2d 876, 879 (Fla. 3d DCA 1996) ), *rev. denied*, No. SC17-2294, 2018 WL 1256501 (Fla. Mar. 12, 2018). The basis of the remedy of unjust enrichment is to provide restitution where one person has been unjustly enriched at the expense of another. See *id.* (“ ‘At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other.’ ” (quoting [Gonzalez v. Eagle Ins. Co.](#), 948 So.2d 1, 3 (Fla. 3d DCA 2006) )); see also [Ala v. Chesser](#), 5 So.3d 715, 718 (Fla. 1st DCA 2009) (“A claim for unjust enrichment seeks restitution from a party allegedly unjustly enriched.”); [Circle Fin. Co. v. Peacock](#), 399 So.2d 81, 84 (Fla. 1st DCA 1981) (“Unjust enrichment is characterized as the effect of a failure to make restitution for property received by one under such circumstances as to give rise to a legal or equitable obligation, thereby requiring such person to account for his retention of the property.”); [Moore Handley, Inc. v. Major Realty Corp.](#), 340 So.2d 1238, 1239 (Fla. 4th DCA 1976) (finding that a count seeking a judgment for monies wrongfully received states a cause of action for “ ‘restitution’ to prevent ‘unjust enrichment’ ”).

We begin our analysis with an acknowledgment that this Court and others have stated that “the theory of unjust enrichment is equitable in nature.” [Bowleg v. Bowe](#), 502 So.2d 71, 72 (Fla. 3d DCA 1987); accord [Tooltrend, Inc. v. CMT Utensili, SRL](#), 198 F.3d 802, 805 (11th Cir. 1999) (“A claim for unjust enrichment is an equitable claim ....”); [CEMEX Constr. Materials Fla., LLC v. Armstrong World Indus., Inc.](#), No. 3:16-CV-186-J-34JRK, 2018 WL 905752, at \*12 (M.D. Fla. Feb. 15, 2018) (“A claim for unjust enrichment is equitable in nature ....”); [Ala](#), 5 So.3d at 719-20 (“Remedying unjust enrichment is affording equitable relief.”); [Hall v. Humana Hosp. Daytona Beach](#), 686 So.2d 653, 656 (Fla. 5th DCA 1996) (“An action for money had and received, or the more modern action for unjust enrichment, is an equitable remedy requiring proof that money had been paid due to fraud, misrepresentation,

imposition, duress, undue influence, mistake, or as a result of some other grounds appropriate for intervention by a court of equity.”(citation omitted) ).

\*4 As the Fourth District Court of Appeal explained in [Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc.](#), 695 So.2d 383 (Fla. 4th DCA 1997) (en banc), however, the use of the term “equitable” in reference to an unjust enrichment claim denotes fairness and does not mandate that unjust enrichment be construed as seeking only an equitable, as opposed to a legal, remedy. In [Commerce Partnership](#), the Fourth District addressed the difference between a contract implied in fact and a contract implied in law. In discussing the legal history of contracts implied in law, the court stated that under the common law “[t]he action of assumpsit was available for the ‘recovery of damages for the breach or non-performance of a simple contract ... or upon a contract implied by law from the acts or conduct of the parties.’ ” *Id.* at 386-87 (quoting [Hazen v. Cobb](#), 96 Fla. 151, 117 So. 853, 857 (1928) ). In reversing a judgment entered in favor of the subcontractor against the owner on the subcontractor's claim for “quantum meruit,” the court found that cases from other states that “rely on the principle that there can be no remedy in equity when the [construction] lien statute provides an adequate remedy at law” do not apply in Florida because:

[t]hese cases turn on the determination that unjust enrichment is an equitable cause of action. However, in Florida, as was demonstrated above, all implied contract actions were part of the action of assumpsit, which was an action at law under the common law. **Although some Florida courts have described quasi contracts as being “equitable in nature,” the term has been used in the sense of “fairness,” to describe that quality which makes an enrichment unjust, and not as a reference to the equity side of the court.**

*Id.* at 389-90 (emphasis added) (citations omitted).

Indeed, the principle set forth in [Commerce Partnership](#) that unjust enrichment is an action at law has been applied in cases where the plaintiff sought damages for

unjust enrichment. See [M.I. Indus. USA Inc. v. Attorneys' Title Ins. Fund, Inc.](#), 6 So.3d 627, 629 (Fla. 4th DCA 2009) (finding that trial court erred in denying motion to dissolve injunction preventing transfer of funds in bank account where plaintiff sought damages for unjust enrichment and stating that, in denying motion for rehearing, "this court has squarely held that an action for unjust enrichment is an action at law"); [American Safety Ins. Serv., Inc. v. Griggs](#), 959 So.2d 322, 331 (Fla. 5th DCA 2007) (stating that compensatory damages under a claim for quasi contract cannot be awarded simply by appealing to the court's powers in equity and that "an action for unjust enrichment is an action at law, not in equity"); [Della Ratta v. Della Ratta](#), 927 So.2d 1055, 1060 (Fla. 4th DCA 2006) (finding that claim seeking an award of damages for unjust enrichment measured by the value of the repairs and capital improvements made to condominium "was an action at law" for damages).

Our analysis does not end here, however, because unlike the cases cited above where the plaintiff sought damages, Doral and MPJ purport to seek a judgment for "equitable relief, including disgorgement." Because "[a] claim for unjust enrichment seeks restitution," [Ala](#), 5 So.3d at 718, we turn for guidance to the United States Supreme Court's decision in [Great-West Life & Annuity Insurance Co. v. Knudson](#), 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), which addressed the difference between legal and equitable forms of restitution.<sup>4</sup>

\*5 In [Great-West](#), the respondent was severely injured in a car accident. [Id.](#) at 207, 122 S.Ct. 708. The respondent's medical expenses were paid by an insurance plan provided by the respondent's husband's employer. [Id.](#) The insurance plan "covered \$411,157.11 of [respondent's] medical expenses, of which all except \$75,000 was paid by petitioner Great-West Life & Annuity Insurance Co. ("Great-West Life") pursuant to a 'stop-loss' insurance agreement with the [insurance] Plan" and included a reimbursement provision stating that the plan "shall have 'the right to recover from the [beneficiary] any payment for benefits' paid by the Plan that the beneficiary is entitled to recover from a third party." [Id.](#) The insurance plan assigned to petitioner Great-West Life its rights under the reimbursement provision. [Id.](#) The respondent subsequently obtained a settlement in a tort action, the proceeds of which were disbursed to a special needs trust and into respondent's attorney's trust fund in order to pay respondent's creditors. [Id.](#) at 207-08, 122 S.Ct. 708.

The petitioners<sup>5</sup> sought relief under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), which authorizes a civil action " 'by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates ... the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of ... the terms of the plan.' " [Great-West](#), 534 U.S. at 209, 122 S.Ct. 708 (alteration in original) (quoting 29 U.S.C. § 1132(a)(3) (1994) ). Specifically, the petitioner, Great-West Life sought "injunctive and declaratory relief under § 502(a)(3) to enforce the reimbursement provision of the Plan by requiring the [respondent] to pay the Plan \$411,157.11 of any proceeds recovered from third parties." [Id.](#) at 208, 122 S.Ct. 708.

The issue before the Supreme Court, therefore, was whether the petitioners' claim for restitution constituted "equitable relief" available under section 502(a)(3) of ERISA or legal relief not available under that section. See [id.](#) at 218, 122 S.Ct. 708 ("Respecting Congress's choice to limit the relief available under § 502(a)(3) to 'equitable relief' requires us to recognize the difference between legal and equitable forms of restitution."). The Supreme Court explained:

[N]ot all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. See, e.g., 1 Dobbs § 1.2, at 11; [id.](#), § 4.1(1), at 556; [id.](#), § 4.1(3), at 564-565; [id.](#), §§ 4.2-4.3, at 570-624; 5 Corbin § 1102, at 550; Muir, [ERISA Remedies: Chimera or Congressional Compromise?](#), 81 Iowa L. Rev. 1, 36-37 (1995); Redish, [Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making](#), 70 Nw. U.L. Rev. 486, 528 (1975). Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the *nature of the underlying remedies sought*. [Reich v. Continental Casualty Co.](#), 33 F.3d 754, 756 (C.A.7 1994) (Posner, J.).

In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant

had received from him,” the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. 1 Dobbs § 4.2(1), at 571. *See also* Muir, *supra*, at 37. In such cases, *the plaintiff's claim was considered legal because he sought “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.”* *Restatement of Restitution* § 160, Comment a, pp. 641-642 (1936). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

\*6 *Id.* at 212-13, 122 S.Ct. 708 (emphasis added). In contrast, “where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession,” a plaintiff could seek restitution in equity. *Id.* at 213, 122 S.Ct. 708.

A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where “the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,” and the plaintiff “cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].” *Restatement of Restitution*, *supra*, § 215, Comment a, at 867. *Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.*

*Id.* at 213-14, 122 S.Ct. 708 (alteration in original) (emphasis added).

The Supreme Court held that because the petitioners were “seeking legal relief the imposition of personal liability on respondents for a contractual obligation to pay money § 502(a)(3) does not authorize this action.” *Id.* at 221, 122 S.Ct. 708. In reaching its conclusion the Supreme Court reasoned:

Here, the funds to which petitioners claim an entitlement under the Plan's reimbursement provision the proceeds from the settlement of respondents' tort action are not

in respondents' possession.... The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable the imposition of a constructive trust or equitable lien on particular property but legal the imposition of personal liability for the benefits that they conferred upon respondents.

*Id.* at 214, 122 S.Ct. 708 (emphasis in original).

[10] [11] Applying these principles to the instant case, we conclude that Doral and MPJ's unjust enrichment claim does not fall within the arbitration clause's exception for “equitable ... relief” such that the claim may properly proceed in circuit court. At the outset, we agree with the Fourth District's reasoning in *Commerce Partnership* that the “equitable” nature of an unjust enrichment claim denotes only “that quality which makes an enrichment unjust, and [is] not ... a reference to the equity side of the court.” 695 So.2d at 390. An examination of the substantive allegations of the complaint shows that Doral and MPJ do not seek equitable relief. Specifically, Doral and MPJ allege that they conferred a benefit upon the DFW Companies by paying \$2,683,252.80 under specific purchase orders for products the DFW Companies refused to deliver. They also allege that despite “multiple requests and a formal demand letter, the DFW Companies have refused to deliver the products that Plaintiffs have paid for (or to return Plaintiffs' money), which is the subject of this action.” Doral and MPJ further allege that “it would be inequitable for the DFW Companies to retain Plaintiffs' monies, without delivering the requisite products to Plaintiffs.” (emphasis added). Doral and MPJ's unjust enrichment claim, therefore, seeks nothing more than money to compensate them for payments made under the purchase orders. In other words, Doral and MPJ seek “the imposition of personal liability for the benefits that they conferred upon [the DFW Companies].” *Great-West*, 534 U.S. at 214, 122 S.Ct. 708. Under these circumstances, Doral and MPJ's unjust enrichment claim seeks legal, rather than equitable, relief. *See id.* at 213, 122 S.Ct. 708 (stating that action for

restitution was considered legal where plaintiff “sought ‘to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money’ ” and that “[s]uch claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied)” (quoting [Restatement of Restitution § 160](#) cmt. a (1936) ); [Restatement \(Third\) of Restitution and Unjust Enrichment § 4](#) cmt. d (Am. Law Inst. 2011) (“The standard legal remedy for a liability based on unjust enrichment is a judgment for money, to be satisfied from the assets of the defendant by the ordinary procedures of execution.”).

\*7 Critical to our conclusion that Doral and MPJ do not seek equitable relief is the fact that that Doral and MPJ do not allege that the \$2,683,252.80 can “clearly be traced to particular funds or property in [the DFW Companies] possession.” [Great-West](#), 534 U.S. at 213, 122 S.Ct. 708. As the Supreme Court explained in [Great-West](#), a claim for restitution in equity ordinarily takes the form of a constructive trust or an equitable lien in order “to restore to the plaintiff particular funds or property in the defendant's possession.” [Id.](#) at 213-14, 122 S.Ct. 708. Here, Doral and MPJ do not allege that the DFW Companies hold the particular funds paid under the purchase orders or that the DFW Companies possess particular property “identified as belonging in good conscience to” Doral and MPJ. Indeed, Doral and MPJ allege that “their funds were used in part to pay wholly unrelated outstanding obligations of the DFW Companies rather than to pay the suppliers for the products ordered by Plaintiffs.” Where “‘the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,’ ” and restitution will not lie in equity. [Id.](#) (alterations in original) (quoting [Restatement of Restitution § 215](#) cmt. a (1936) ).

[12] [13] Finally, the fact that Doral and MPJ's prayer for relief seeks “equitable relief, including disgorgement” does not alter our conclusion. “Disgorgement is an equitable remedy intended to prevent unjust enrichment.” [S.E.C. v. Monterosso](#), 756 F.3d 1326, 1337 (11th Cir. 2014); see also [Cushman & Wakefield, Inc. v. Office Depot, Inc.](#), No. 08-80321-CIV-MIDDLEBROOKS/JOHNSON, 2008 WL 11409887, at \*3 (S.D. Fla. Nov. 3, 2008) (“Disgorgement is a remedy for an unjust enrichment action, and not an independent cause of action.”); [Montage Grp., Ltd. v. Athle Tech Comp. Sys., Inc.](#), 889 So.2d 180, 196 (Fla. 2d DCA 2004) (finding

remedy of disgorgement was appropriate for unjust enrichment claim). The equitable remedy of disgorgement is measured by the defendant's ill-gotten profits or gains rather than the plaintiff's losses. See [S.E.C. v. Levin](#), 849 F.3d 995, 1006 (11th Cir. 2017) (concluding that disgorgement amount was properly based upon the defendant's gains and not the investors' losses); [Ellett Bros. v. U.S. Fid. & Guar. Co.](#), 275 F.3d 384, 388 (4th Cir. 2001) (“Restitution and disgorgement require payment of the defendant's ill-gotten gain, not compensation of the plaintiff's loss.”); [Restatement \(Third\) of Restitution and Unjust Enrichment § 49](#) cmt. a (“[D]isgorgement rules ... shift the focus of the remedy from measuring the value of a benefit to measuring the profits derived from wrongful conduct ....”); see also [Waldrop v. Southern Co. Serv., Inc.](#), 24 F.3d 152, 157 (11th Cir. 1994) (“[D]amages are equitable when ‘they are restitutionary, such as in ‘action[s] for disgorgement of improper profits.’ ” (quoting [Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry](#), 494 U.S. 558, 570, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) ) ); [King Mountain Condo. Ass'n v. Gundlach](#), 425 So.2d 569, 572 (Fla. 4th DCA 1982) (holding that disgorgement of secret profits as a remedy for breach of fiduciary duty is equitable in nature).

[14] Doral and MPJ's factual allegations do not support their characterization of the relief sought as disgorgement. As Doral and MPJ acknowledged at oral argument, they do not plead any untoward profit to the DFW Companies in their complaint. As alleged in their complaint, what Doral and MPJ seek is the restitution of the benefit they allegedly conferred upon the DFW Companies, i.e., the \$2,683,252.80 paid to the DFW Companies by placing the purchase orders. At oral argument, Doral and MPJ argued, for the first time, that to the extent the DFW Companies used the payments to buy other products and subsequently made a resulting profit, Doral and MPJ are entitled to that profit. This argument, however, is belied by the allegations in the complaint. Doral and MPJ allege that the DFW Companies used the payments made under the purchase orders “to pay wholly unrelated outstanding obligations of the DFW Companies.” Thus, Doral and MPJ's factual allegations establish that their unjust enrichment claim does not seek the profits (if any) produced by the payments made under the purchase orders and therefore does not seek the equitable remedy of disgorgement.

#### IV. CONCLUSION

\*8 For the foregoing reasons, we find that Doral and MPJ's unjust enrichment claims seeks legal, rather than equitable, relief and therefore the arbitration clause's exception permitting the parties to seek "equitable ... relief" in Miami-Dade state court does not apply here. Accordingly, we hold that the trial court erred in denying the DFW Companies' motion to compel arbitration, and we further hold that Doral and MPJ's unjust enrichment

claim may proceed only in the parties' arbitration proceeding.

Reversed.

#### All Citations

--- So.3d ----, 2018 WL 3747725, 43 Fla. L. Weekly D1822

#### Footnotes

- 1 During the pendency of this appeal, the parties agreed that the claims against the individual defendants, Mayra Del Valle and Leylani Cardoso, would proceed in arbitration. Our discussion is therefore limited to the issues concerning the corporate entities.
- 2 Although not a signatory to the 2012 Agreements, MPJ concedes in its Answer Brief that a reversal of the trial court's order denying the DFW Companies' motion to compel arbitration means that "both plaintiffs' claims must proceed in arbitration."
- 3 On March 27, 2018, the trial court entered an order staying the proceedings below until the conclusion of the instant appeal.
- 4 See also [Restatement \(Third\) of Restitution and Unjust Enrichment § 4 \(Am. Law Inst. 2011\)](#) (discussing the legal versus equitable nature of restitution and unjust enrichment, and noting in Reporter's Note comment b that "[t]he mixed [legal and equitable] ancestry of modern-day restitution and unjust enrichment is recognized correctly by some current decisions" such as the United States Supreme Court's decision in [Great-West](#), which "distinguish[ed] 'restitution *at law* through an action derived from the common-law writ of *assumpsit*' from 'restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien'" (quoting [Great-West](#), 534 U.S. at 213, 122 S.Ct. 708) ).
- 5 In an amended complaint, Great-West Life added both the Respondent's husband's employer and the Plan as plaintiffs.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

2018 WL 3999130

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida, Third District.

CHAKRA 5, INC., et al., Appellants,

v.

The CITY OF MIAMI BEACH, Appellee.

No. 3D16-2569

|

Opinion filed August 22, 2018

Lower Tribunal No. 13-17885, An Appeal from the Circuit Court for Miami-Dade County, Gisela Cardonne Ely, Judge.

#### Attorneys and Law Firms

Kozyak Tropin & Throckmorton, LLP, and [Thomas A. Tucker Ronzetti](#), [Harley S. Tropin](#), and [Tal J. Lifshitz](#), Miami, for appellants.

Raul J. Aguila, City Attorney, and [Robert F. Rosenwald, Jr.](#), First Assistant City Attorney; Carlton Fields Jorden Burt, P.A., and [Alix Cohen](#), Miami, for appellee.

Before [LAGOA](#), [EMAS](#), and [SCALES](#), JJ.

#### Opinion

[LAGOA](#), J.

\*1 Appellants, Chakra 5, Inc. (“Chakra 5”), 1501 Ocean Drive, LLC (“1501”), and Haim Turgman (“Turgman”) (collectively, “Appellants”), appeal the trial court’s final order dismissing with prejudice their claims against the City of Miami Beach (the “City”). Additionally, the City has moved to dismiss the appeal with respect to Chakra 5 and 1501 because of their administrative dissolution by the Florida Secretary of State. For the reasons set forth below, we deny the City’s motion to dismiss the appeal. In addition, we affirm in part and reverse in part the trial court’s final order. Specifically, we affirm the trial court’s dismissal with prejudice with respect to claims based on injuries alleged to have occurred before May 20, 2009, as they are time barred. Additionally, we affirm the dismissal with prejudice of any claims asserting a

violation of substantive due process, regardless of when the underlying events occurred. Finally, we reverse the dismissal with prejudice with respect to claims asserting a violation of procedural due process based on injuries alleged to have occurred after May 20, 2009.

#### **I. FACTUAL AND PROCEDURAL BACKGROUND**

In early 2006, Turgman organized 1501 and Chakra 5 to purchase and operate an entertainment complex located in Miami Beach (the “Club”). The purchase was financed in part by a loan from a bank, which took a security interest in the Club. Appellants allege that, shortly after they took ownership of the Club, the City, through its code enforcement department, initiated a “campaign of harassment” against the Appellants, with the aim to extort bribes from them.

As alleged, City code enforcement inspectors unfairly enforced the City’s existing building, zoning, fire and tax regulations against the Club. Prior to May 20, 2009, City inspectors allegedly:

- (1) delayed, from July 4, 2006, through December 11, 2006, the issuance of a conditional use permit required for the Club to open;
- (2) conducted “successive, pre-textual inspections” after the Club opened in December 2006;
- (3) shut the Club down for operating past midnight on January 26, 2007, even though the Club’s permit authorized it to be open until 5:00 a.m., and required Turgman to pay \$3445 to operate until 5:00 a.m.;
- (4) visited the Club several times per week during the first half of 2007 and issued two citations during this time period one for violating the City’s noise ordinance when the Club was not open and one for not turning on a rooftop sign;
- (5) after a lull in inspection activity after Turgman changed the Club’s name and management staff, the City code enforcement staff resumed their prior level of inspections in September 2008 after discovering Turgman’s continuing involvement with the Club;

\*2 (6) on November 20, 2008, City code enforcement issued a cease and desist order prohibiting the Club’s operations for not having code-compliant fire exits, even though the City had approved the construction

plans of a neighboring establishment to remove the Club's fire exits; and

(7) after Turgman notified the City in writing of his intent to sue for the closure of the Club, the City monitored every event held at the Club, and in many instances, City inspectors orally ordered Turgman to not let people inside or to shut down the Club.<sup>2</sup>

The following actions allegedly occurred after May 20, 2009:

(1) in February 2010, a City official informed organizers planning an event at the Club that the Club would be shut down the night of their event, due to a failure to pay past due resort taxes; Appellants subsequently entered into a payment plan with the City to avoid the closure;

(2) Turgman was fined \$1800 for event flyer litter violations resulting from a March 2010, Winter Music Conference event over a month after that event occurred; and

(3) on June 3, 2011, the City's Lead Code Compliance Officer, code inspector Jose Alberto, solicited an initial bribe from Turgman, followed by numerous other bribes Turgman paid to various City employees.<sup>3</sup>

Finally, at a date not specifically alleged in the amended complaint, City officials decided they wanted to permanently put the Club out of business and directed code enforcement to do whatever was necessary to achieve that goal.<sup>4</sup> Appellants allege that this decision was due to Turgman's unwillingness to contribute to certain City officials' election campaigns or to provide them favors.

Allegedly as a result of the City's actions, Appellants suffered significant financial losses, and in 2010, defaulted on the loan secured by the Club. The lender subsequently took possession of the Club and sold it at a May 26, 2012, auction.

On May 20, 2013, Appellants filed the instant action against the City and the seven City employees involved in the alleged extortion scheme. On October 23, 2015, Appellants filed their amended complaint, which included two counts against the City under 42 U.S.C. § 1983 (2012) asserting deprivation of their rights to substantive and procedural due process.

In response to the amended complaint, the City filed a motion to dismiss, asserting that: (1) Appellants failed to state a cause of action; (2) the statute of limitations barred Appellants' injuries prior to May 20, 2009; and (3) Chakra 5 and 1501 could not proceed with their claims because they had been administratively dissolved. After holding a hearing on the matter, the trial court entered a final order dismissing the counts against the City with prejudice and dismissing the City from the case.<sup>5</sup> This appeal ensued.

## II. STANDARD OF REVIEW

\*3 We review de novo an order granting a motion to dismiss with prejudice. [Falkinburg v. Village of El Portal](#), 183 So.3d 1189, 1191 (Fla. 3d DCA 2016). We are bound by the same restrictions the trial court faced when it ruled on the motion to dismiss, and we therefore treat as true all of the well-pled allegations of the complaint, including its incorporated attachments, and “look no further than the complaint and its attachments.” [Id.](#)

## III. ANALYSIS

We first consider the City's argument that because Chakra 5 and 1501 were administratively dissolved by the Florida Secretary of State, this appeal with respect to those entities should be dismissed or, alternatively, the trial court's order should be affirmed under the “tipsy coachman” doctrine. Second, we address whether Appellants' claims are barred by the statute of limitations and whether they fail to state a claim.<sup>6</sup>

### A. Administrative Dissolution of the Entity Appellants

Chakra 5 and 1501 are a Florida corporation and a Florida limited liability company, respectively. Although not relied upon by the trial court in dismissing the City from the instant case, the City has argued, both here and below, that Chakra 5 and 1501 cannot maintain suit either in the trial court or on appeal because they have been administratively dissolved by the Florida Secretary of State. Accordingly, the City argues that their appeal should be dismissed or, alternatively, that the trial court's dismissal as to these two entities should be affirmed under the “tipsy coachman” doctrine, i.e., that the trial court was right for the wrong reason. E.g., [Porter v. Porter](#), 913 So.2d 691, 694 (Fla. 3d DCA 2005).

Appellants' appendix to their reply includes two certificates of status, which we take judicial notice of,<sup>7</sup> from the Florida Secretary of State showing that both Chakra 5 and 1501 have been reinstated and are now active. As this Court has previously stated:

The sanctions authorized for failing to file an annual report involuntary dissolution and the inability to carry on any business, including bringing or defending a lawsuit, other than that necessary to wind up its affairs under sections 607.1420 and 607.1421 are intended to benefit the State, not third parties outside the corporation/State relationship. Hence, the [defendants], “who are strangers to the dealings between plaintiff and the State, should not be allowed to take advantage of the plaintiff's default ... to escape their own obligations to the plaintiff.”

Allied Roofing Indus., Inc. v. Venegas, 862 So.2d 6, 9 (Fla. 3d DCA 2003) (quoting Cosmopolitan Distributions, Inc. v. Lehnert, 470 So.2d 738, 739-40 (Fla. 3d DCA 1985) ); see also Bldg. B1, LLC v. Component Repair Servs., Inc., 224 So.3d 785, 788 (Fla. 3d DCA 2017). Venegas is clear that when the issue of an entity's status with the Florida Secretary of State is raised, the appropriate course by a trial court is to abate the action for a brief period of time to permit compliance with the statute; only after a failure to comply within a reasonable time may sanctions such as dismissal be considered. Venegas, 862 So.2d at 9.

\*4 Accordingly, as Chakra 5 and 1501 are now reinstated, the litigious disability has been cured. E. Invs., LLC v. Cyberfile, Inc., 947 So.2d 630, 631-32 (Fla. 3d DCA 2007) (“The language of the statute suggests that any failure to comply simply prevents a plaintiff from prosecuting the action, a disability that can be remedied at any point.”); Indus. Nat'l Mortg. Co. v. Blake, 406 So.2d 103, 104 (Fla. 3d DCA 1981) (“Industrial National could have overcome its litigious disability by the simple expedient of filing the overdue reports and paying the back taxes.”); accord § 607.1422(3), Fla. Stat. (2013) (“When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.”); § 605.0715(4), Fla. Stat. (2013) (“When reinstatement under this section becomes effective: (a) [t]he reinstatement relates back to and takes effect as of the effective date of the administrative dissolution; and] (b) [t]he limited liability company may resume its activities

and affairs as if the administrative dissolution had not occurred.”). Accordingly, we conclude that dismissal of the appeal is inappropriate on this ground.<sup>8</sup>

The issue remains, however, whether the trial court, at the time it issued its final order, would have been correct in dismissing the entities' claims due to their administrative dissolution, as Chakra 5 and 1501 were reinstated only after this appeal was taken. Based on our review of the record, the City first raised this issue in its motion to dismiss the amended complaint, and the record does not show that the trial court granted the entities a period of time in which to correct the deficiency. Under Venegas, dismissal by the trial court would not have been appropriate, and we therefore reject application of the “tipsy coachman” doctrine as a basis to affirm the trial court's dismissal order.

#### B. The Dismissal of Appellants' Amended Complaint

In their amended complaint, Appellants brought two claims against the City under 42 U.S.C. § 1983, alleging violations of their constitutional rights to substantive and procedural due process. The trial court dismissed the case against the City with prejudice, finding that “[a]ny amendment as to the City would be futile since, among other grounds, the alleged acts occurred more than four years before plaintiff filed its original complaint.” Upon review of the record, the trial court's phrase “other grounds” appears to refer to the City's argument that Appellants failed to state a claim under § 1983. Accordingly, we address each ground separately. First, we address the application of the statute of limitations. Second, we address whether the Appellants stated a claim under § 1983.

##### 1. Statute of Limitations

Section 1983 provides for concurrent state and federal court jurisdiction. While § 1983 provides a federal cause of action, “in several respects ... federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts.” Wallace v. Kato, 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). In Florida, the limitations period for a § 1983 claim is four years. Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003).

The application of the statute of limitations to a claim is a question of fact. [Saltponds Condo. Ass'n v. McCoy](#), 972 So.2d 230, 231 (Fla. 3d DCA 2007). As our sister court has concluded:

the statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted. Since the statute of limitation[s], being an affirmative defense, may be avoided by facts alleged in a reply, in order to grant the motion to dismiss the allegations of the complaint must also conclusively negate any ability on the part of the plaintiff to allege facts in avoidance of the applicable statute of limitations by way of the reply.

\*5 [Rigby v. Liles](#), 505 So.2d 598, 601 (Fla. 1st DCA 1987) (citations omitted); accord [Saltponds](#), 972 So.2d at 231. Thus, we must review the specific allegations of the amended complaint to determine whether the trial court could adjudicate the limitations issue via a motion to dismiss.

As set forth above, Appellants allege that several injuries occurred before May 20, 2009 (i.e., four years before filing of the complaint), some after May 20, 2009, and others at an unknown date. Appellants' claims based on injuries alleged to have occurred after May 20, 2009, fall within Florida's four-year limitations period and the trial court should not have dismissed them as time barred. Additionally, the trial court should not have dismissed the claims based on injuries for which no date is alleged in the amended complaint as time barred, as it was not conclusive on the face of the amended complaint that those injuries occurred outside of the limitations period.

With respect to injuries that allegedly occurred before May 20, 2009, we must determine whether claims based on those injuries accrued outside the limitations period and are therefore time barred. “[T]he accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.” [Wallace](#), 549 U.S. at 388, 127 S.Ct. 1091 (emphasis in original). Under federal law, “[a] cause of action under [§ 1983] will not accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury.” [Chappell](#), 340 F.3d at 1283. Appellants do not contend that, upon occurrence of each injury, they did not immediately know of the injury and who had inflicted it. Thus, on the face of the amended complaint, the claims against the City based on injuries occurring prior to May 20, 2009, fall outside the limitations period and are therefore time barred, absent the application of some doctrine that would save the claims with respect to those injuries.

In this regard, we find [Amin Ijbara Equity Corp. v. Village of Oak Lawn](#), 860 F.3d 489 (7th Cir. 2017), instructive in its application of the federal accrual rule. In [Amin](#), a mall owner brought a § 1983 action against the city and two of its officials, alleging that the city harassed it by, inter alia, issuing baseless citations and requiring costly renovations. [Id.](#) at 492. As a result, the financial health of the mall and its corporate owner deteriorated until the lender foreclosed on the property and took possession of the property. [Id.](#) The defendants moved to dismiss the case as time barred based on the complaint's allegations. [Id.](#) The district court dismissed the case, and the Seventh Circuit affirmed. [Id.](#) at 492, 494. In determining when the cause of action accrued under the federal rule, the Seventh Circuit found that each act of harassment “inflicted a cognizable injury almost immediately: he was forced to make costly and unnecessary repairs and sustained losses in revenue from tenants.” [Id.](#) at 493. As such, the claim accrued when those injuries occurred, and certainly no later than when the owner lost possession of the mall during the foreclosure when a receiver was appointed. [Id.](#) The Seventh Circuit specifically rejected the contention that the owner's claim accrued when the final judgment of foreclosure was entered, almost a year after the receiver was appointed. [Id.](#) at 493-94. Because the owner filed suit more than two years (the applicable limitations period in Illinois) after the receiver was appointed and possession was lost, the Seventh Circuit concluded that the trial court

was correct in dismissing the case on statute of limitations grounds. Id.

\*6 In response, Appellants assert that the doctrine of continuing tort applies with respect to those injuries outside the limitations period. In applying this doctrine to § 1983 actions, we look to Florida law. Mullinax v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987). Florida law provides that “[a] continuing tort is ‘established by continual tortious acts, not by continual harmful effects from an original, completed act.’” Effs v. Sony Pictures Home Entm’t, 197 So.3d 1243, 1245 (Fla. 3d DCA 2016) (quoting Suarez v. City of Tampa, 987 So.2d 681, 686 (Fla. 2d DCA 2008)). “‘When a defendant’s damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.’” Suarez, 987 So.2d at 686 (quoting In re Med. Review Panel for Claim of Moses, 788 So.2d 1173, 1183 (La. 2001)). A continuing tort is thus perhaps best understood as a tort in which the wrong cannot be described as a discrete event. See Effs, 197 So.3d at 1244-45; cf. Amin Ijbara Equity, 860 F.3d at 493 (finding that each act of harassment “inflicted a cognizable injury almost immediately”). Applied to this case, Appellants have not alleged a continuing tort, but instead a series of discrete acts of varying kinds. As noted above, each act constituted a separate, cognizable injury to Appellants that Appellants could have sued on at the time each incident occurred. The fact that multiple discrete acts occurred over a period of time does not convert those acts into a continuing tort under Florida law. Instead, successive causes of action accrued from each alleged violation of Appellants’ due process rights. The continuing tort doctrine therefore does not apply to Appellants’ claims, and their claims based on injuries occurring before May 20, 2009, are untimely.

Thus, with respect to the statute of limitations, the trial court correctly concluded that Appellants’ claims based on injuries occurring before May 20, 2009, were untimely, but erred in determining that the portion of Appellants’ claims based on injuries occurring after May 20, 2009, as well as injuries without a clearly alleged date, were untimely.

## 2. Due Process Claims

We now turn to whether Appellants stated a claim under § 1983. “Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating

federal rights elsewhere conferred.’” Albright v. Oliver, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)). A plaintiff asserts a claim under § 1983 against a municipality by alleging: (1) a deprivation of a constitutional right; (2) the municipality had a policy that amounts to “deliberate indifference” to that right; and (3) the policy caused the constitutional violation. See City of Canton v. Harris, 489 U.S. 378, 388-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); Exec. 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991).

As noted by the United States Supreme Court, the first step in assessing any such claim “is to identify the specific constitutional right allegedly infringed.” Albright, 510 U.S. at 271, 114 S.Ct. 807. Here, Appellants assert that the City violated their rights to substantive and procedural due process. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a State shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The Supreme Court’s interpretation of this clause “explicates that the amendment provides two different kinds of protection: procedural due process and substantive due process.” McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994) (en banc) (citing Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)).

### a. Substantive Due Process

As noted by the United States Court of Appeals for the Eleventh Circuit, the “substantive component of the Due Process Clause protects those rights that are ‘fundamental,’ that is, rights that are ‘implicit in the concept of ordered liberty.’” McKinney, 20 F.3d at 1556 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). The United States Supreme Court has cautioned that “[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). As stated by the Court in Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989):

\*7 It is an established part of our constitutional jurisprudence that the term “liberty” in the Due Process

Clause extends beyond freedom from physical restraint. Without that core textual meaning as a constraint, defining the scope of the Due Process Clause ‘has at times been a treacherous field for this Court,’ giving “reason for concern lest the only limits to ... judicial intervention become the predilections of those who happen at the time to be Members of this Court.

Id. at 121, 109 S.Ct. 2333 (citations omitted) (quoting Moore v. East Cleveland, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion)).

Substantive due process analysis has two features. First, as noted above, the Due Process Clause “specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and traditions,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’ ” Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations omitted) (quoting Moore, 431 U.S. at 503, 97 S.Ct. 1932, and Palko, 302 U.S. at 325-26, 58 S.Ct. 149). Second, substantive due process analysis requires a “‘careful description’ of the asserted fundamental liberty interest.” Id. at 721, 117 S.Ct. 2258. “A finding that a right merits substantive due process protection means that the right is protected ‘against a certain government action regardless of the fairness of the procedures used to implement them.’ ” McKinney, 20 F.3d at 1556 (quoting Collins, 503 U.S. at 125, 112 S.Ct. 1061).

As noted by the Eleventh Circuit in McKinney, the United States Supreme Court has deemed most of the rights enumerated in the Bill of Rights to be fundamental, as well as certain unenumerated rights not found in the constitutional text. 20 F.3d at 1556. Regarding those unenumerated rights, the United States Supreme Court has noted that the “protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” Albright, 510 U.S. at 272, 114 S.Ct. 807; see also Washington, 521 U.S. at 720, 117 S.Ct. 2258.

Here, Appellants do not allege a violation of a right enumerated in the Bill of Rights and applied to the States via the Fourteenth Amendment. Instead, Appellants assert that they have a constitutionally protected interest to pursue an occupation, an unenumerated right differing in kind from those mentioned in Albright and Washington. As noted earlier, substantive due process

analysis requires a “careful description” of the asserted interest at issue. Thus, as discussed below, we believe that Appellants have mischaracterized the interest at stake here, which is more properly viewed as a case challenging the improper enforcement of a municipality’s zoning or land use regulations. Nonetheless, Appellants’ substantive due process claims fail under either characterization.

In Conn v. Gabbert, 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999), the United States Supreme Court acknowledged that “[i]n a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable governmental regulation.” Id. at 291-92, 119 S.Ct. 1292 (citing Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889), and Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915)); see also Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”)

\*8 We find these cases offer little support to Appellants’ claims here. In Conn, the Court concluded that the use of a subpoena to temporarily interfere with a lawyer’s ability to represent his client “whether calculated to annoy or even to prevent [the attorney’s] consultation with a grand jury witness” did not violate the Fourteenth Amendment. 526 U.S. at 293, 119 S.Ct. 1292. In Greene, unlike here, the plaintiff alleged a complete inability to obtain work in his desired occupation.

Moreover, this Court, in the context of a procedural due process case, has already considered the scope of the constitutionally protected interest in an individual’s ability to follow a chosen trade or profession. In International Longshoremen’s Ass’n, Locals 1416, et al. v. Miami-Dade County, 926 So.2d 433 (Fla. 3d DCA 2006), plaintiffs challenged the county’s temporary revocation of their port security clearances without process. Id. at 434. In concluding that no constitutionally protected interest was implicated by the county’s summary action, we stated that “Appellants were not deprived of their right to engage in a chosen trade or profession as they were not precluded from obtaining employment at another port facility.”

Id. at 436. A fortiori, the right claimed here will not support Appellants' claim of a violation of substantive due process. Cf. Ammons v. Okeechobee County, 710 So.2d 641, 645 (Fla. 4th DCA 1998) (rejecting a claim of violation of substantive due process based on allegedly wrongful revocation of occupational license, as “[t]he denial of such a license does not prevent a business owner from pursuing a lawful occupation,” but “merely prevents the business from operating at a particular location”) Appellants' allegations do not support a claim that they were prohibited from engaging in their chosen trade or profession or that they were unable to operate the Club at another location. Thus, to the extent Appellants' substantive due process claims are based on the right to pursue a chosen trade or profession, the trial court's order dismissing those claims with prejudice must be affirmed.

That being said, we do not agree with Appellants that their claims implicated a broad, and relatively undefined, right to pursue one's trade or profession. Instead, Appellants allege the serial misuse and abuse of the City's existing zoning, fire and tax regulations by City code enforcement officers. Properly described, Appellants' claims are based on the allegedly unfair and corrupt application of the City's zoning and other business regulations, and are therefore governed by the Eleventh Circuit's landmark en banc decision in McKinney and its progeny, an analysis adopted by this Court and our sister Florida appellate courts. See Jacobi v. City of Miami Beach, 678 So.2d 1365, 1366-67 (Fla. 3d DCA 1996) (adopting McKinney and its progeny for purposes of substantive due process analysis); see also, e.g., Ammons, 710 So.2d at 645.

In McKinney, the plaintiff alleged that his pretextual termination by the board of county commissioners violated his right to substantive due process. 20 F.3d at 1555. The Eleventh Circuit, sitting en banc, receded from its prior precedent and held that the plaintiff had only procedural, not substantive, due process claims available to him when alleging harm based on an executive deprivation of a state-created right. Id. at 1558-59. In setting forth the new standard to govern substantive due process claims, the Eleventh Circuit stated that:

\*9 areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because “substantive due process rights are created only by the Constitution.” As a result, these state law based

rights constitutionally may be rescinded so long as the elements of procedural not substantive due process are observed.

Id. at 1556 (citation omitted) (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) ). In its analysis, the Eleventh Circuit emphasized the distinction between “legislative” and “executive” actions when considering an alleged violation of substantive due process. Id. at 1557 n.9. Executive acts “apply to a limited number of persons ... [and] typically arise from the ministerial or administrative activities of ... the executive branch” while legislative acts “generally apply to a larger segment of ... society,” such as laws and broad executive regulations. Id. “The analysis, and the substantive/procedural distinction ..., that is appropriate for executive acts is *inappropriate* for legislative acts.” Id. (emphasis in original). The court thus concluded that “in non-legislative cases, only procedural due process claims are available to pretextually terminated employees” and overruled its prior decisions to the extent they were contrary to the rule announced in McKinney. Id. at 1560.

In DeKalb Stone, Inc. v. County of DeKalb, Georgia, the Eleventh Circuit reiterated its holding in McKinney that “a plaintiff did not present a substantive due process claim when he alleged an executive deprivation of a state-created right.” 106 F.3d 956, 960 (11th Cir. 1997). In DeKalb Stone, the plaintiff brought a substantive due process claim based on an alleged deprivation of the right to use its land as a nonconforming use under existing zoning laws. Id. at 958. The Eleventh Circuit stated that “land use rights, as property rights generally, are state-created rights” and that “enforcement of existing zoning regulations is an executive, not legislative, act.” Id. at 959. Noting that McKinney's analysis had been applied to state education rights and state-created land use rights other than zoning regulations, e.g., issuance of a certificate of occupancy, the court in DeKalb Stone concluded that the plaintiff had alleged “an executive violation of a state-created property right, not a deprivation of any constitutional right.” Id. at 960. As a result, the plaintiff could not proceed on a claimed violation of substantive due process.

Indeed, claims similar to Appellants have been rejected in Eisenberg v. City of Miami Beach, 54 F.Supp.3d 1312 (S.D. Fla. 2014). In Eisenberg, the plaintiff alleged that City code enforcement officials, including some of

the same allegedly corrupt officials at issue in this case, embarked on a scheme to shut down the plaintiff's hotel using a series of code violation citations. *Id.* at 1316-19. As in this case, bribes were solicited by the City officials, but apparently the plaintiff in *Eisenberg* did not pay any of them. Relying on *McKinney* and its progeny, the court in *Eisenberg* concluded that plaintiff's substantive due process claim for constitutional deprivation of their liberty and/or property interests did not survive. See *id.* at 1325-27. That conclusion is consistent with the federal and Florida state courts that have considered and rejected substantive due process claims based on the enforcement or application of a host of land use, zoning, and other similar regulations. See, e.g., *DeKalb Stone*, 106 F.3d at 960 (rejecting a challenge to denial of nonconforming use exemption to local zoning laws); *Boatman v. Town of Oakland, Florida*, 76 F.3d 341, 346 (11th Cir. 1996) (rejecting a claim that town executives arbitrarily and capriciously refused to issue certificate of occupancy); *Nantucket Enterprises, Inc. v. City of Palm Beach Gardens*, No. 10-81549-CIV, 2013 WL 3927834, at \*2, \*7-9 (S.D. Fla. July 29, 2013) (finding no cognizable substantive due process claim for a corporate entity's eviction from a commercial leasehold based on allegations that the city improperly "red tagged" plaintiff for failing to obtain a certificate of occupancy, and that the city forced plaintiff out of the leasehold without a court order at the request of the purported owners and landlords of the property); *Reserve, Ltd. v. Town of Longboat Key*, 933 F.Supp. 1040, 1044 (M.D. Fla. 1996) (finding plaintiffs did not possess a cognizable substantive due process claim for their state-created property interest in a revoked building permit where "both the issuance and revocation of the building permit constitute 'executive' and not 'legislative' acts."); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861, 866-70 (Fla. 4th DCA 2003) (rejecting a substantive due process claim based on allegations that the city, as part of attempt to "kill" a restaurant's development project, improperly delayed issuing building permits, improperly revoked building permits, improperly delayed permitting reviews, and attempted to repeal an existing special exemption); *Ammons*, 710 So.2d at 645 (rejecting a substantive due process claim based on revocation of commercial occupational license that had been improperly issued under existing zoning regulations); *Jacobi*, 678 So.2d at 1366-68 (rejecting a substantive due process claim based on the city's refusal to allow reconfiguration of lots under municipal zoning regulations). These decisions

are persuasive, and we find no basis to vary from their conclusions.<sup>9</sup> Accordingly, we conclude that, regardless of whether time barred or not, Appellants failed to state a claim for a violation of substantive due process, and we affirm that aspect of the trial court's final order dismissing those claims with prejudice.

#### b. *Procedural Due Process*

\*10 To state a claim for violation of procedural due process, Appellants must allege "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006). As noted by the Eleventh Circuit in *McKinney*, deprivation of state-created rights that do not give rise to a claim for violation of substantive due process may nonetheless give rise to a claim for violation of procedural due process. 20 F.3d at 1556, 1560.

The City asserts that the lack of factual detail in the amended complaint regarding the sufficiency of process afforded to the Appellants, as well as discovery responses provided by Appellants, establishes that Appellants cannot maintain a claim for violation of their procedural due process rights. While that ultimately may be true, this matter came before the trial court via a motion to dismiss, and the City's argument relies too much on inferences drawn from silences in the Appellants' amended complaint and discovery responses outside the four corners of that pleading, which are more appropriately considered via summary judgment. We therefore conclude that the trial court erred in dismissing with prejudice Appellants' claims for violations of procedural due process arising from those injuries that are not time barred. We express no opinion regarding the merits of those claims, nor do we express any opinion regarding Appellants' ability, on remand, to amend their pleading with respect to those particular claims.<sup>0</sup>

#### IV. **CONCLUSION**

We deny the City's motion to dismiss the appeal. Regarding the merits, the trial court correctly concluded that Appellants' claims based on events that occurred before May 20, 2009 are time barred. In addition, regardless of when the injuries occurred, Appellants' claim for violation of their substantive due process rights fails to state a claim and was properly dismissed with

prejudice as well. The trial court erred, however, in dismissing with prejudice Appellants' claim for violation of their procedural due process rights based on events that occurred after May 20, 2009 (or events for which no date is alleged in the amended complaint). Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part.

[SCALES, J.](#), concurs.

[EMAS, J.](#), concurring in part and dissenting in part.

I join in that portion of the majority opinion reversing the trial court's dismissal of Appellants' claims for violation of their procedural due process rights, and affirming the dismissal of Appellants' claims for violation of their substantive due process rights.

**\*11** However, I respectfully dissent from that portion of the majority opinion affirming the trial court's order to the extent it dismissed claims based on events occurring before May 20, 2009. I believe that Appellants have alleged a continuing tort sufficient to overcome a statute of limitations affirmative defense asserted at this stage of the proceedings.

Procedurally, the trial court entered its order at the motion-to-dismiss stage. We therefore review this order *de novo* and, as the majority acknowledges, we must accept the factual allegations in the complaint as true, and construe all well-pleaded allegations in a light most favorable to Appellants. See maj. op. at , n. 1. Applying that standard, I conclude that the trial court and the majority incorrectly concluded that, to the extent Appellants' claims are based on events that occurred before May 20, 2009, they are time barred.

The majority makes a valiant effort to parse out those events occurring before May 20, 2009 and those occurring after May 20, 2009. However, and contrary to the majority's conclusion, the operative complaint does not merely allege a discrete or individual act or event engaged in by Appellees. Indeed, the complaint alleges an ongoing scheme, consisting of a course of conduct by Appellees which began with the harassment of Appellants through false and wrongful taxes, fines, penalties and

closures; followed by extortionate demands of cash from Appellants to allow them to operate their business without harassment or false and wrongful taxes, fines, penalties and closures; and accompanied by threats to close down Appellants' business if they did not comply with the extortionate demands.

“A cause of action accrues when the last element constituting the cause of action occurs.” [§ 95.031\(1\), Fla. Stat. \(2013\)](#). Broadly speaking, in a suit for damages in tort, a cause of action generally accrues and the limitations period begins to run on the date when the plaintiff suffers injury. [Sellers v. Miami-Dade Cty. School Bd.](#), 788 So.2d 1086, 1087 (Fla. 3d DCA 2001) (quoting [Dep't of Transp. v. Soldovere](#), 519 So.2d 616, 617 (Fla. 1988) ). Under the continuing torts doctrine, however, where the tortious conduct is ongoing in nature, the cause of action does not accrue, and the statute of limitations does not begin to run, until the tortious conduct ceases. [Effs v. Sony Pictures Home Entm't, Inc.](#), 197 So.3d 1243, 1244-45 (Fla. 3d DCA 2016); [Pearson v. Ford Motor Co.](#), 694 So.2d 61 (Fla. 1st DCA 1997); [Halkey-Roberts Corp. v. Mackal](#), 641 So.2d 445, 447 (Fla. 2d DCA 1994); [Spadaro v. City of Miramar](#), 855 F.Supp.2d 1317, 1330 (S.D. Fla. 2012); [Laney v. American Equity Inv. Life Ins. Co.](#), 243 F.Supp.2d 1347, 1357 (M.D. Fla. 2003). The continuing tort doctrine, as an exception to the statute of limitations, has long been recognized in Florida. See [Seaboard Air Line R.R. v. Holt](#), 92 So.2d 169 (Fla. 1956); [Suarez v. City of Tampa](#), 987 So.2d 681 (Fla. 2d DCA 2008); [Mackal](#), 641 So.2d at 447.

Note that the premise for the continuing tort doctrine is not the continuing (or recurring) nature of the damages suffered, but rather the continuing or recurring nature of the tortious conduct: “A continuing tort ‘is established by continual tortious *acts*, not by continual harmful effects from an original, completed act.’ ” [Suarez](#), 987 So.2d at 686 (quoting [Horvath v. Delida](#), 213 Mich.App. 620, 540 N.W.2d 760, 763 (1995) ).

**\*12** This court's decision in [Effs](#), 197 So. 3d at 1245, is instructive. There, we held that the continuing torts doctrine did not apply to an action for tortious interference with a business relationship, relying in part upon decisions from other jurisdictions:

Assuming that [the defendant] unjustifiably interfered with [the plaintiffs'] business relationship, [the defendant's] tortious conduct was

complete when it induced or caused the breach. The wrong, therefore, was not continuing. The damage or injury that had been inflicted may have continued to develop during successive tax periods, but it did not result from repeating wrongful conduct.

Id. (quoting D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P., 129 S.W.3d 25, 30 (Mo. Ct. App. 2004) ) (emphasis added). See also Bankcard Sys., Inc. v. Retriever Indus., Inc., 2003 WL 204717, \*7 (Tex. App. Jan. 30, 2003) (cited with approval in Effs, 197 So. 3d at 1245, as “declining to apply the continuing tort doctrine to the plaintiffs' claim for tortious interference with a business relationship where there is no ‘ongoing wrong’; noting that the ‘continuing loss of residual fees that may have resulted from that alleged wrongful conduct does not toll the statute of limitations’ ”).

I would agree with the majority that the continuing torts doctrine would not apply in this case if the complaint merely alleged an “original, completed act,” resulting in “continual harmful effects.” See Suarez, 987 So.2d at 686. However, that is not the case. Rather, the instant complaint alleges an ongoing course of conduct, and a series of interrelated and recurring acts perpetrated by Appellees, leading ultimately to the loss of Turgman's business.

Specifically, the operative complaint alleges:

- “[A] long-standing and persistent pattern and practice of extortion, bribery, and harassment [of plaintiffs] by the City of Miami Beach”;
- Actions by the City, through its government officials, which for years “has levied unlawful taxes, fines, penalties, and business closures on victims who refuse to go along with the City's demands”;
- The “harassment that the City of Miami Beach inflicted on Plaintiffs was the subject of a nearly year-long undercover FBI investigation that produced wiretaps, video, and audio recording evidence all of which was marshalled and presented by the United States Attorney's Office for the Southern District of Florida culminating in the prosecution and sentencing of all of the individual defendants,

and the resignation of Miami Beach City Manager Jorge Gonzalez”;

- In January 2006 Turgman created 1501 Ocean Drive, LLC to purchase the Club property, and incorporated Chakra 5, Inc. as the operational entity for the Club. Turgman capitalized 1501 Ocean Drive, LLC with \$2 million from his personal finances;
- In March 2006, 1501 Ocean Drive, LLC completed its purchase of the Club for \$5.6 million (Turgman's \$2 million plus a loan of \$3.6 million by Citrus Bank (and secured by the Club property) );
- The Club opened in Miami Beach in December 2006 as a restaurant, nightclub and entertainment complex. Following the Club's opening, “the City immediately began harassing the Club with successive, pre-textual inspections by the City's code Compliance Department”;
- \*13 - “At midnight on January 26, 2007, the City shut down the Club for being open past midnight even though the conditional use permit authorized the Club to be open until 5 a.m. The City required Turgman to pay an additional \$3,445.00 to operate until 5:00 a.m.”;
- “Beginning the Friday night of Super Bowl weekend, the harassing inspections started and continued incessantly”;
- By the summer of 2007, Turgman concluded that the harassment from the City was going to eventually cause the Club to fail;
- Believing that the City's harassment was the result of Turgman's involvement in the venture, he eventually assembled a management team to take over the Club's operation and changed the name of the Club to Dolce Ultra Lounge;
- However, in September 2008, City officials discovered that Turgman was still the owner of the facility and was operating the nightclub, and “[t]he inspections immediately returned to their previous harassing levels”;
- In November 2008, the City improperly issued a cease and desist order, prohibiting the Club from operating. The Club was forced to close during the holiday season, and Turgman hired a contractor to

perform additional work to obtain authorization for the Club to reopen;

- In November and December 2008 Turgman sent a letter to the City Attorney and to City officials, complaining of the improper cease and desist order and closure of the Club;
- “From that point (December 2008) forward, the City monitored every event held at the Club. As soon as the Club's doors would open, code inspectors would be there. In many instances, Turgman was orally told not to let people in, and in some cases the inspectors would just shut the Club down”;
- As a result of the City's conduct, Turgman and the Club lost substantial income and forced to reopen the Club as an events-only rental facility;
- “In February 2010, Turgman contracted with a gay rights fundraising organization to hold its annual fundraiser party at the Club. Before the event, City officials contacted the event organizers and warned them that the City would shut the Club down on the night of the party”;
- Turgman met with the City's Chief Finance Officer to ask why the City would shut the Club down, and was told the Club “owed the City \$36,000 in back resort taxes and the only way that the Club would be allowed to continue operating would be to pay the City immediately”;
- Turgman requested an itemized list of the monies owed to the City, but the Chief Finance Officer refused his request. Ultimately, and “desperate for the income the event would generate in light of years of the City's misconduct, [Turgman] entered into a payment plan ... to pay the City”;
- “In March 2010, the Winter Music Conference organization contracted with Turgman to have an awards ceremony at the Club .... Thousands attended. Over a month after the event took place, Turgman received a citation for \$1800 for flyer violations.” Turgman called the City regarding the fine and was advised to pay \$125 and write a letter to the Special Master;
- On June 3, 2011, following a Memorial Day Weekend event at the Club, Turgman called to follow up on the

status of the \$1800 fine from the 2010 event. He spoke with the City's Lead Code Compliance Officer, Jose Alberto. “Alberto told him that he needed to speak with him in person immediately because Chakra 5, Inc. was going to be assessed a \$50,000 fine for flyers related to the Memorial Day weekend party”;

- \*14 - Alberto came to Turgman's office and “told him that he could take care of the fines for \$3000, which he would use to take care of 10-11 of ‘his guys’ ”;
- “The following Monday, June 6, 2011, Alberto called Turgman and told him that the situation was worse than he [Alberto] had thought and that they needed to meet right away”;
- Alberto came to the Club “and told Turgman that the fines were likely to be around \$60,000”; “Alberto demanded \$3,000 again, but made it clear the payment needed to be in cash and paid directly to him by Friday, June 10.” Turgman asked for Alberto to give him until Monday, June 13, and Alberto agreed;
- “The following day, June 7, 2011, Alberto appeared again at the Club. Alberto told Turgman that the City of Miami Beach officials despised Turgman and wanted the Club shut down.” Turgman assured Alberto that he would pay the \$3,000 by June 13;
- On June 9, 2011, Turgman reported the incident to the FBI;
- Thereafter, Turgman began assisting the FBI in an investigation into corruption in the City's Code Compliance Division. His assistance included wearing a recording device for future meetings with Alberto;
- On June 11, 2011, Turgman met with Alberto at the Club, where their meeting was monitored and recorded by the FBI. At the meeting, Turgman gave Alberto \$2,500 and begged Alberto not to allow the Club to be shut down. “Alberto then assured Turgman that there would be no further problems with fines from the flyers”;
- Shortly thereafter, Alberto and Turgman reached an agreement by which Turgman “would pay Alberto \$1,500 every Monday, or \$1,000 if he was open

only on Friday night.” The weekly meetings were monitored and recorded by the FBI;

- In the weeks that followed, Turgman made numerous extortionate payments to Alberto in exchange for allowing Turgman to continue “operating without any unwarranted inspections or fines from the City Code Compliance Department”;
- In August of 2011, the FBI brought in an undercover agent, posing as the manager of the Club, to make the payments to Alberto, relieving Turgman of that responsibility and the accompanying stress and anxiety from participating in the investigation;
- “The City acted with the goal of causing the business of the Club to fail.”
- Plaintiffs were told “by the City's Lead Code Compliance Inspector Jose Alberto that City officials wanted the Club to be permanently put out of business and that he had been directed to use the Code Compliance Division to do whatever was necessary to achieve that goal”;
- As a result of the actions of the City and City officials, the \$3.6 million loan to the Club went into default in 2010, and ultimately Citrus Bank took possession of the Club, and was sold at auction in May 2012;
- “The Club failed as the proximate result of being targeted by the City of Miami Beach”;
- “The City's conduct proximately caused Plaintiffs to suffer damages, including but not limited to, the payment of fraudulent fines to the City of Miami Beach, payment of fraudulent tax bills to the City of Miami Beach, lost profits, and loss of the Club”;
- In 2012, “each of the Individual Defendants confessed to participating in the scheme to extort Plaintiffs”;
- \*15 - Also in 2012, defendants “Jose Alberto, Willie E. Grant, Orlando E. Gonzalez, Ramon D. Vasallo, Vicente L. Santiesteban, Henry L. Bryant, and Chai D. Footman were arrested on charges of conspiracy to commit extortion and attempt to commit extortion for their involvement in the extortion of Plaintiffs”;
- “All of the Individual Defendants have been prosecuted and sentenced”;

- It was the custom or practice of the Defendant City of Miami Beach to allow its officials and employees to coerce and harass Miami Beach businesses into paying illegal bribes and extortion monies to the City, City officials, and City employees, and to provide goods and services to City officials and City employees free of charge or at a substantially reduced rate”;
- “Under this custom or practice, the City's final policy makers the City Commission and former City Manager Jorge Gonzalez delegated their final policymaking authority to subordinate code inspectors and other City officials”;
- “Under this custom or practice, subordinate City code inspectors and other City officials used their final policy making authority to harass business owners by conducting Code inspections at harassing times or intervals, issuing unwarranted or excessive finds, issuing fraudulent tax bills, improperly exercising discretionary decision making for the purpose of delaying or denying permits, reducing allowed occupancy levels, and improperly ordering clubs to close.”

Accepting the above allegations as true, the four corners of the complaint set forth a continuing tort, and the law dictates (at least at this stage of the proceedings below) that the statute of limitations does not bar the action or any portion thereof. The trial is generally the appropriate venue for making the fact-intensive determination of whether Appellees engaged in a continuing tort, and thus whether the affirmative defense of the statute of limitations bars any portion of Appellants' claims. *See, e.g., Goodwin v. Sphatt*, 114 So.3d 1092, 1094 (Fla. 2d DCA 2013) (recognizing that the continuing torts doctrine, as an exception to a statute of limitations defense, “presents a factual question that would also preclude dismissal of the complaint”); *Mackal*, 694 So.2d at 68-69 (holding: “Whether the continuing torts doctrine applies to the facts of a case is for a trier of fact to decide”); *Halkey-Roberts*, 641 So.2d at 447 (reversing summary judgment and holding that the “question of whether [defendant's] actions constituted continuing torts precludes the granting of summary judgment as to counts I and II. To what extent, if any, the concept applies to this case is an issue for the trier of fact to decide.”)

We do not and cannot know whether the evidence may ultimately bear out the allegations of a continuing tort. But our review at this stage depends not on ultimate proof, but upon the allegations of the complaint. Accepting those allegations as true as we must Appellants have sufficiently alleged a continuing tort such that the trial court erred in dismissing claims based on events occurring before May 20, 2009 (i.e., more than four years before the

filing of the complaint). I would reverse that portion of the trial court's order.

I therefore respectfully concur in part and dissent in part.

#### All Citations

--- So.3d ----, 2018 WL 3999130, 43 Fla. L. Weekly D1922

#### Footnotes

- 1 Our summary of the factual background comes from the amended complaint. On review of a motion to dismiss, we view the factual allegations in the complaint in the light most favorable to the plaintiffs. See [Cortez v. Palace Resorts, Inc.](#), 123 So.3d 1085, 1088 (Fla. 2013); [Siegle v. Progressive Consumers Ins. Co.](#), 819 So.2d 732, 734-35 (Fla. 2002).
- 2 In the amended complaint, Appellants do not allege specific dates where the Club was improperly forced to shut down after the City's monitoring began.
- 3 The amended complaint alleges that many of these officials who received bribes were convicted in federal court as a result of an FBI investigation.
- 4 When City officials allegedly committed this act is unclear, but Appellants allege they learned about it in 2011 when they were solicited for bribes.
- 5 Although a third count against certain individual defendants remains pending below, we treat the order as a partial final judgment immediately appealable pursuant to [Florida Rule of Appellate Procedure 9.110\(k\)](#).
- 6 In its order, the trial court dismissed the counts against the City with prejudice because "[a]ny amendment as to the City would be futile since, *among other grounds*, the alleged acts occurred more than four years before plaintiff filed its original complaint." (emphasis added) We therefore address whether Appellants failed to state a claim, as the City argued it below and the trial court expressly referred to "other grounds" supporting dismissal with prejudice in its final order.
- 7 See [Schriver v. Tucker](#), 42 So.2d 707, 709 (Fla. 1949) ("This court will take judicial notice ... of the records of extradition proceedings on file in the office of the Secretary of State. And the failure of the lower court to take judicial notice of these records does not necessarily prevent this court from so doing." (citation omitted) ); see also [§ 90.202\(5\), \(12\), Fla. Stat. \(2018\)](#) (permitting a court to take judicial notice of "[o]fficial actions of the ... executive ... department[ ] ... of any state ... of the United States" and "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned").
- 8 Because Chakra 5 and 1501 have been reinstated, we need not address the ancillary argument raised by the City that the instant suit is not the sort of suit that is permitted as part of winding up.
- 9 Appellants' reliance on [Espanola Way Corp. v. Meyerson](#), 690 F.2d 827 (11th Cir. 1982) is unavailing. First, [Espanola Way](#) predates [McKinney](#), and its application to a substantive due process claim in light of [McKinney](#) and its progeny is highly questionable. Second, it is unclear whether [Espanola Way](#) involved a claim asserting a violation of substantive due process, procedural due process, or perhaps, both. Indeed, in [Post v. City of Fort Lauderdale](#), 7 F.3d 1552, 1560 (11th Cir. 1993), another pre-[McKinney](#) case, the Eleventh Circuit appeared to treat [Espanola Way](#) as relevant to a procedural due process claim. We note that in [McKinney](#), the Eleventh Circuit acknowledged that a number of its prior decisions had not adequately distinguished between substantive and procedural due process rights, 20 F.3d at 1560, and in light of that we find [Espanola Way](#) to be of little persuasive value. Finally, to the extent that [Espanola Way](#) involved a claim relating to substantive due process and continues to have some persuasive value in light of [McKinney](#), it appears that the actions in [Espanola Way](#) may have involved "legislative" and not "executive" actions, as the city commission was alleged to be taking action against an entire category of businesses. 690 F.2d at 828-29. In any event, as noted by the Eleventh Circuit in both [Espanola Way](#) and [Post](#), the factual record in [Espanola Way](#) is too sparse to draw many conclusions from it. Simply put, [Espanola Way](#) cannot overcome the consistent conclusions of the courts applying [McKinney](#), which supports the trial court's dismissal of the substantive due process claims with prejudice.
- 10 We note that this was only Appellants' first amended complaint. As is oft repeated one way or the other: As set forth in [Florida Rule of Civil Procedure 1.190\(a\)](#), "[l]eave of court [to amend a pleading] shall be given freely when justice so requires." While our courts have recognized that there is no "magic number" as to the number of amendments that should be allowed, under the facts of this case, the trial court should have afforded Annex the opportunity to amend

its first amended complaint, particularly in light of the fact that the complaint had been amended only once. "Leave to amend should not be denied unless the privilege has been abused or the complaint is clearly not amendable."

[Annex Indus. Park, LLC v. City of Hialeah](#), 218 So.3d 452, 453 (Fla. 3d DCA 2017) (alterations in original) (quoting [Osborne v. Delta Maint. & Welding, Inc.](#), 365 So.2d 425, 427 (Fla. 2d DCA 1978) ).

22 So.3d 594  
District Court of Appeal of Florida,  
Third District.

UNITED AUTOMOBILE  
INSURANCE COMPANY, Petitioner,  
v.  
Oscar SALGADO, Respondent.

No. 3D07-461.

|  
Aug. 5, 2009.

|  
Rehearing and Rehearing En  
Banc Denied Dec. 17, 2009.

### Synopsis

**Background:** Insured injured in car accident filed action against automobile insurer seeking declaration that policy provided personal injury protection (PIP) coverage despite misrepresentation in insurance application. The County Court for Miami Dade County granted insured summary judgment, and insurer appealed. The Circuit Court for Miami Dade County, Appellate Division, [Arthur L. Rothenberg](#), [Celeste H. Muir](#), [Thomas S. Wilson, Jr., JJ.](#), affirmed, and insurer filed petition for writ of certiorari.

**Holdings:** The District Court of Appeal, [Lagoa, J.](#), held that:

[1] exercise of second-tier certiorari was appropriate;

[2] insurers' statutory right of rescission when an insured made a misrepresentation that materially affected the insurer's risk applied to the Motor Vehicle No-Fault Law;

[3] insurer did not waive statutory right to rescind by not sending a notice of cancellation 45 days prior to the effect date of cancellation; and

[4] statute requiring insurer to report cancellation of PIP coverage 45 days prior to the effective date of cancellation did not abrogate insurer's statutory right to rescind.

Petition granted and opinion quashed.

West Headnotes (20)

### [1] Certiorari

#### 🔑 Scope and Extent in General

The District Court of Appeal's standard of review for a decision rendered by the circuit court in its appellate capacity is whether the circuit court's decision is either a departure from the essential requirements of the law or did not afford procedural due process. [U.S.C.A. Const.Amend. 14.](#)

[1 Cases that cite this headnote](#)

### [2] Certiorari

#### 🔑 Errors and irregularities

Certiorari review should only be granted when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

[Cases that cite this headnote](#)

### [3] Certiorari

#### 🔑 Errors and irregularities

Clearly established law, for purposes of certiorari review of a decision rendered by the circuit court in its appellate capacity, may derive from legal sources, including recent controlling case law, rules of court, statutes, and constitutional law.

[Cases that cite this headnote](#)

### [4] Certiorari

#### 🔑 Errors and irregularities

In addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.

[Cases that cite this headnote](#)

### [5] Certiorari

 [Particular proceedings in civil actions](#)

District Court of Appeal's exercise of second-tier certiorari of decision rendered by circuit court in its appellate capacity, finding that automobile insurer could not cancel personal injury protection (PIP) coverage despite insured's material misrepresentation in insurance application, was appropriate, as decision potentially affected a large number of PIP claims processed by insurers and violated clearly established law.

[1 Cases that cite this headnote](#)

**[6] Insurance** [Representations](#)

Statute providing insurers with the right to rescission due to a misrepresentation by an insured if the misrepresentation was material to the acceptance of the risk by the insurer or if the insurer in good faith would not have issued the policy under the same terms and premium, is an unambiguous codification of the principle of law that a contract issued on a mutual mistake of fact is subject to being voided, and defines the circumstances for the application of the principle. [West's F.S.A. § 627.409](#).

[4 Cases that cite this headnote](#)

**[7] Statutes** [Absence of Ambiguity;Application of Clear or Unambiguous Statute or Language](#)**Statutes** [Exceptions, Limitations, and Conditions](#)

Courts cannot grant an exception to an unambiguous statute nor construe an unambiguous statute different from its plain meaning.

[Cases that cite this headnote](#)

**[8] Insurance** [Nature and effect in general](#)**Insurance** [Materiality](#)**Insurance** [Reliance](#)

Where a misstatement or omission materially affects the insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, the statute on an insurer's right to rescission may preclude recovery by an insured. [West's F.S.A. § 627.409\(1\)\(a\)](#).

[4 Cases that cite this headnote](#)

**[9] Statutes** [Construing together;harmony](#)

All parts of a statute must be read together in order to achieve a consistent whole.

[1 Cases that cite this headnote](#)

**[10] Statutes** [Construing together;harmony](#)**Statutes** [Superfluoussness](#)

Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.

[1 Cases that cite this headnote](#)

**[11] Insurance** [Automobile Insurance](#)

Insurers' statutory right to rescission, when a misstatement or omission materially affects the insurer's risk or would have changed the insurer's decision whether to issue the policy, applies to the Motor Vehicle No-Fault Law, as Motor Vehicle No-Fault Law policies are not expressly excluded from the Part of the Chapter in which the statutory right to rescission is found. [West's F.S.A. §§ 627.401, 627.409](#).

[2 Cases that cite this headnote](#)

**[12] Statutes**

🔑 Express mention and implied exclusion;  
expressio unius est exclusio alterius

A general principle of statutory construction is that the mention of one thing implies the exclusion of another, “expressio unius est exclusio alterius”; hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

1 Cases that cite this headnote

[13] **Insurance**

🔑 Reliance

**Insurance**

🔑 Duty to investigate

An insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to further investigate.

2 Cases that cite this headnote

[14] **Insurance**

🔑 Duty to investigate

**Insurance**

🔑 Failure to make objection or assert  
forfeiture in general

Automobile insurer did not waive its statutory right to rescind personal injury protection (PIP) coverage, due to insured's failure in insurance application to list his brother as a member of his household, because insurer did not send insured a notice of cancellation 45 days prior to the effective date of the cancellation, as an insurer's denial of coverage under the statutory right to rescission when a misstatement or omission materially affected the insurer's risk was a viable defense even in the absence of an effective cancellation, and insurer had a right to rely on an applicant's representations in an application and was under no duty to investigate further. [West's F.S.A. §§ 627.409, 627.728.](#)

2 Cases that cite this headnote

[15] **Insurance**

🔑 Failure to make objection or assert  
forfeiture in general

An insurer's failure to rescind a policy in accordance with statutory cancellation procedures does not preclude or abrogate an insurer's ability to void the policy ab initio pursuant to insurers' statutory right to rescind if there is a material misrepresentation by an insured. [West's F.S.A. §§ 627.409, 627.728.](#)

8 Cases that cite this headnote

[16] **Insurance**

🔑 Notice in general

**Insurance**

🔑 Public officers

**Insurance**

🔑 Automobile Insurance

Statute requiring insurers to report, to the Department of Highway Safety and Motor Vehicles, the renewal, cancellation or nonrenewal of personal injury protection (PIP) coverage within 45 days of the effective date of the renewal, cancellation or nonrenewal, did not abrogate automobile insurer's statutory right to rescind insured's PIP coverage due to insured's failure in insurance application to list his brother as a member of his household; because PIP coverage was rescinded it was as if the coverage never existed, and there was no coverage for insurer to cancel. [West's F.S.A. § 627.409; F.S.2003, § 627.736\(9\)\(a\).](#)

Cases that cite this headnote

[17] **Statutes**

🔑 Undefined terms

When a term is undefined by statute, courts are required to give a statutory term its plain and ordinary meaning.

1 Cases that cite this headnote

**[18] Statutes** **Dictionaries**

When necessary, the plain and ordinary meaning of a statutory term can be ascertained by reference to a dictionary.

[1 Cases that cite this headnote](#)

**[19] Courts** **Previous Decisions as Controlling or as Precedents**

In the absence of a statutory definition, courts can resort to definitions of the same term found in case law.

[Cases that cite this headnote](#)

**[20] Insurance** **Materiality****Insurance** **Reliance**

If a misrepresentation of an insured was material to the acceptance of the risk by the insurer or, if the insurer in good faith would not have issued the policy under the same terms and premium, then rescission of the policy by the insurer is proper. [West's F.S.A. § 627.409](#).

[6 Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*596** [Michael J. Neimand](#), Office of the General Counsel, for petitioner.

[Panter, Panter & Sampedro](#) and [Christian Carrazana](#), Miami, for respondent.

Before [WELLS](#) and [LAGOA, JJ.](#), and [SCHWARTZ](#), Senior Judge.

**Opinion**

[LAGOA](#), Judge.

Petitioner, United Automobile Insurance Company (“United”), seeks certiorari review of the circuit court appellate division's opinion affirming a final declaratory decree entered by the county court in favor of the Respondent, Oscar Salgado, Jr. (“Salgado”). Because we find that, absent an express exclusion by the legislature, the right of rescission contained in [section 627.409, Florida Statutes \(2003\)](#), applies to PIP insurance contracts issued pursuant to the Florida Motor Vehicle No Fault Law, we conclude that the circuit court sitting in its appellate capacity departed from the essential requirements of the law. Accordingly, we grant the petition for certiorari and quash the opinion of the circuit court appellate division.

**I. FACTUAL AND PROCEDURAL HISTORY**

The Florida Motor Vehicle No Fault Law, [sections 627.730 627.7405, Florida Statutes \(2003\)](#), mandates certain types of no-fault insurance coverage for drivers. Here, United issued to Salgado a no-fault **\*597** motor vehicle policy to be in effect from December 18, 2003, until December 18, 2004. The insurance application contained two separate provisions that relate to a misrepresentation of material fact. In the section entitled “Driver and Resident Information,” the application states:

All persons 14 years or older, licensed or not, who reside with the applicant(s) must be listed below whether or not they are operators of the vehicles listed. *Failure to provide this information shall constitute a material misrepresentation, which shall result in all insurance coverages being void.*

(emphasis added).

Additionally, above the applicant's signature, the application provides:

The undersigned by signature hereto, represents the statements and answers made herein to be true, complete and correct and agrees that any policy may be issued or renewed in reliance upon the truth, completeness and correctness of such statements

and answers and understands that falsity, incompleteness, or incorrectness may jeopardize the coverage under such policy so issued or renewed Fla. St. 627.409. *It is also hereby agreed and understood that misrepresentation of a material fact on this application may cause this coverage to be declared null and void as of the effective date Fla. St. 627.409.*

(emphasis added).

During the policy's effective period, Salgado was injured in a car accident. After receiving treatment, Salgado submitted his medical expenses to United for reimbursement. After conducting an investigation, United determined that Salgado had failed to list his brother as a member of his household on his insurance application, and notified Salgado that, as a result of this material misrepresentation, his policy was cancelled as of its effective date.

Upon receipt of the cancellation notice, Salgado filed a complaint for declaratory relief to determine if coverage existed notwithstanding the misrepresentation made in his insurance application. In its answer and affirmative defenses, United asserted that Salgado's failure to list all residents of his household as required in his insurance application constituted a material misrepresentation pursuant to [section 627.409, Florida Statutes \(2003\)](#).

Subsequently, Salgado filed a motion for summary judgment contending that United failed to cancel the policy in accordance with [section 627.728, Florida Statutes \(2003\)](#). At the summary judgment hearing, Salgado asserted that United could not deny coverage on the basis that the policy did not exist at the time of the loss because Florida's Motor Vehicle No Fault Law provides that an insurer's remedy for a material misrepresentation is to cancel the policy pursuant to [section 627.728\(3\)\(a\), Florida Statutes \(2003\)](#), which requires a forty-five day prospective cancellation notice, rather than to cancel the policy as void *ab initio*.

In granting Salgado's motion for summary judgment, the trial court found that “[s]ections [627.730](#) 7405, Florida Statutes (2003), when viewed *in pari materia*

with [§ 627.728, Florida Statutes \(2003\)](#), are in derogation of Defendant's common law right to unilaterally rescind personal injury protection coverage for material misrepresentation; [and] as such, Defendant's common law right to rescind personal injury \*598 protection coverage is abrogated by the Florida Statutes.” The trial court further reasoned that, because [section 627.736\(9\)\(a\), Florida Statutes \(2003\)](#), mandated United to report cancellation or nonrenewal of PIP coverage to the Department of Highway Safety Motor Vehicles within forty-five days from the effective date of cancellation or non-renewal, United did not comply with the statute when it cancelled Salgado's policy retroactively to the date of inception. The trial court further concluded that the notice of cancellation did not comply with [section 627.728](#), which required that notice of cancellation be given to the insured forty-five days prior to the effective date of cancellation. The trial court, therefore, found that Salgado's policy was valid at the time of the accident on January 31, 2004. United appealed the decision to the circuit court sitting in its appellate capacity, and the circuit court affirmed without opinion. This petition followed.

## II. STANDARD OF REVIEW ON SECOND TIER CERTIORARI

[1] [2] [3] [4] Our standard of review for a decision rendered by the circuit court in its appellate capacity is whether the circuit court's decision is either a departure from the essential requirements of the law or did not afford procedural due process. See [Williams v. Miami Dade County](#), 969 So.2d 389 (Fla. 3d DCA 2007) (“[W]e are confined to determining whether the lower court provided due process and followed the correct law.”); [Loguercio v. Dep't of Highway Safety & Motor Vehicles](#), 907 So.2d 1267 (Fla. 3d DCA 2005). Certiorari review should only be granted when “there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.” [Allstate Ins. Co. v. Kaklamanos](#), 843 So.2d 885, 889 (Fla.2003). Clearly established law may derive from “legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.” *Id.* at 890.

[5] Additionally, because the appellate division's ruling potentially affects a large number of PIP claims processed by insurers, exercise of certiorari jurisdiction is also

appropriate. See *Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So.2d 1281, 1286 (Fla. 2d DCA 2005) (“In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings.”). We further note that the circuit court appellate division's per curiam decision in this case was followed by another trial court in another case involving the same issue.<sup>2</sup>

Accordingly, because we find that there has been a violation of a clearly established principle of law resulting in a \*599 miscarriage of justice with the potential to impact a significant number of other cases, we conclude that the exercise of second-tier certiorari is appropriate.

### III. RESCISSION OF INSURANCE CONTRACTS UNDER CHAPTER 627

We begin our analysis by discussing the general rule of rescission and its application to insurance contracts under Florida law. Chapter 627, Florida Statutes, governs insurance rates and contracts in the State of Florida. Part II of Chapter 627, sections 627.401–627.442, is entitled “The Insurance Contract” and lays out the rules governing insurance contracts except those expressly excluded from its scope. The statutory right to rescission is set forth in section 627.409.

Section 627.409, Florida Statutes (2003), provides that misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under a policy unless they are: (1) fraudulent; (2) material to the risk assumed by the insurer; or (3) the insurer in good faith would not have issued the policy or would have done so only on different terms if the insurer had known the true facts.<sup>3</sup>

[6] [7] [8] As explained by the Supreme Court in *Continental Assurance Co. v. Carroll*, 485 So.2d 406, 409 (Fla.1986), this section is an unambiguous codification of the principle of law that “a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant an exception to a statute nor can we construe an unambiguous statute different from its plain meaning.” *Id.* (footnote omitted). Accordingly, where a misstatement or omission materially affects the

insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, the statute may preclude recovery. See § 627.409(1)(a), Fla. Stat. (2003); *Carroll*, 485 So.2d at 409; see also *Gonzalez v. Eagle Ins. Co.*, 948 So.2d 1, 2 (Fla. 3d DCA 2006) (“Florida law indeed gives an insurer the unilateral right to rescind its insurance policy on the basis of misrepresentation in the application of insurance.”); *Union Am. Ins. Co. v. Fernandez*, 603 So.2d 653, 653 (Fla. 3d DCA 1992) (reversing and remanding for trial on issue of material misrepresentation in insurance application; stating that “[i]f such a material misrepresentation is established at trial, the subject insurance policy would be void *ab initio* \*600 and, accordingly, there would be no liability insurance coverage for the subject accident”).

### IV. DOES THE FLORIDA MOTOR VEHICLE NO FAULT LAW ABROGATE THE RIGHT OF RESCISSION

[9] [10] We now turn to the question of whether the Florida Motor Vehicle No Fault Law abrogates United's statutory right of rescission. In considering this question, we are guided by the rule of statutory construction that “all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.” *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla.1992).

[11] Although both the Florida Motor Vehicle No Fault Law and the statutory right of rescission are found in Chapter 627, Salgado argues that section 627.409 does not apply to the Florida Motor Vehicle No Fault Law. We disagree. The only categories of insurance specifically excluded from Part II of Chapter 627 are:

- (1) Reinsurance.
- (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.
- (3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.
- (4) Title insurance, except ss. 627.406, 627.415, 627.416, 627.419, 627.427, and 627.428.

(5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

§ 627.401, Fla. Stat. (2003).

[12] “It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expression unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.” *Thayer v. State*, 335 So.2d 815, 817 (Fla.1976); see also *Young v. Progressive Se. Ins. Co.*, 753 So.2d 80, 85 (Fla.2000) (“Under the principle of statutory construction, expression unius est exclusio alterius, the mention of one thing implies the exclusion of another.”).

Following that principle, we must conclude that if the Legislature had intended to exclude no-fault insurance from Part II, Chapter 627, it would have included that type of insurance in the list enumerated in section 627.401. See *Vargas v. Enter. Leasing Co.*, 993 So.2d 614, 618 (Fla. 4th DCA 2008) (“ ‘The starting point for [the] interpretation of a statute is always its language,’ so that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’ ” (quoting *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F.Supp.2d 821, 829 30 (M.D.Fla.2007), *aff’d*, 540 F.3d at 1242 (11th Cir.2008))); *Haskins v. City of Ft. Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005) (“A basic canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’ ” (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992))).

As such, “[w]here, as here, the language of the statute is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain and obvious meaning.” *City of Miami v. Valdez*, 847 So.2d 1005, 1008 (Fla. 3d DCA 2003). In this case, the express language \*601 of section 627.401 directly refutes Salgado's position that United's right of rescission under 627.409 is abrogated by the Florida Motor Vehicle No Fault Law. For this Court to conclude otherwise would be a usurpation of the legislative function. Because Florida Motor Vehicle No Fault Law policies are not expressly

excluded from Part II of Chapter 627, they are, therefore, governed by that part, including section 627.409.

V. AN INSURER'S FAILURE TO COMPLY WITH SECTION 627.728 DOES NOT ABROGATE AN INSURER'S ABILITY TO VOID THE POLICY AB INITIO PURSUANT TO SECTION 627.409

[13] [14] We now address the trial court's finding that because United's notice did not comply with section 627.728,<sup>4</sup> which required that notice of cancellation be given to the insured forty-five days prior to the effective date of cancellation, the policy was valid at the time of the accident. The trial court's finding in practice, would require that an insurer undertake a forty-five day investigation period after the effective date of such a policy in order to ascertain if the application contained any material misrepresentations. That finding, however, is contrary to well established law that “an insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to further investigate.” See *N. Miami Gen. Hosp. v. Cent. Nat’l Life Ins. Co.*, 419 So.2d 800, 802 (Fla. 3d DCA 1982); see also *Indep. Fire Ins. Co. v. Arvidson*, 604 So.2d 854, 856 (Fla. 4th DCA 1992) (“An insurer is entitled, as a matter of law, to rely upon the accuracy of the information contained in the application and has no duty to make additional inquiry.”). While it may be better public policy to require such a practice, it is not the province of this Court to effectuate such a policy change by way of case law.

Additionally, this Court, along with others, has stated that an insurer's denial of coverage under section 627.409 is “a viable defense even in the absence of effective cancellation.” *Motors Ins. Corp. v. Woodcock*, 394 So.2d 485, 488 (Fla. 3d DCA 1981). In *Motors Insurance Corp. v. Marino*, 623 So.2d 814 (Fla. 3d DCA 1993), this Court held that an insurer's failure to comply with section 627.728's cancellation procedure did not waive the insurer's right to rescind the policy under section 627.409. This Court found that the summary judgment entered in the plaintiffs' favor was reversible error because the insurer had pled a “conclusively established affirmative defense of misrepresentation in the insurance application.” *Id.* at 815. Specifically, this Court reasoned that “[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify any policy issued and

is an absolute defense to enforcement of the policy. *Fla. Stat.*, Section 627.409; *Continental Insurance [Assurance] Company v. Carroll*, 485 So.2d 406, 409 (Fla.1986).” *Id.* at 815 (emphasis added).

\*602 Similarly, in *Sauvageot v. Hanover Insurance Co.*, 308 So.2d 583 (Fla. 2d DCA 1975), the Second District concluded that section 627.409's predecessor applied to all policies and therefore could be raised by an insurer to deny PIP insurance even where the insurer had not cancelled the policy pursuant to section 627.728's predecessor. In affirming the trial court, the Second District reasoned, “[t]here is nothing in s 627.0852 [the predecessor to section 627.728] ... that indicates the legislature intended to preclude an insurer from defending a suit upon the policy on the statutory grounds prescribed in s 627.01081 [the predecessor to section 627.409], which are applicable to all policies.” *Id.* at 585 (emphasis added).

Moreover, the Second District in *Progressive American Insurance Co. v. Papasodero*, 587 So.2d 500 (Fla. 2d DCA 1991), addressed a similar situation in the context of the Claims Administration Statute. In that case, the insurer sought a declaration that the automobile policy issued to the insured was void *ab initio* because the insured had made a material misrepresentation as to who would operate her automobile and also failed to list a person who resided in her household. The insured argued that the insurer could not deny her coverage because it had failed to comply with the requirements of the Claims Administrative Statute, section 627.426, *Florida Statutes* (1989). The trial court agreed that the insured had made a material misrepresentation on the policy application but held that the insurer had to provide coverage for the claims made because it had failed to comply with the Claims Administration Statute. The Second District reversed, concluding that because the material misrepresentation voided the policy, any failure by the insurer in carrying out the requirements of the Claims Administration Statute was a nullity. The Second District held that the finding by the trial court that there had been a material misrepresentation rendered the “policy null and void from the date of inception.” *Papasodero*, 587 So.2d at 502. Therefore, adherence to the Claims Administration Statute was irrelevant. “The Claims Administration Statute was not intended to create coverage under a liability insurance policy that never provided coverage.” *Id.* Although the effect of the Claims Administration Statute is to bar an insurance company

from denying coverage, in this case, “there was no coverage in the first instance.” *Id.* See also *Independent Fire Ins. Co. v. Arvidson*, 604 So.2d 854 (Fla. 4th DCA 1992) (adherence to Claims Administration Statute was irrelevant as policy was null and void from date of inception due to material misrepresentation).

[15] As such, we conclude that an insurer's failure to rescind a policy in accordance with statutory cancellation procedures does not preclude or abrogate an insurer's ability to void the policy *ab initio* pursuant to section 627.409.

#### VI. APPLICATION OF SECTION 627.736(9)(a)

[16] [17] [18] [19] We turn now to Salgado's argument that section 627.736(9)(a) abrogates an insurer's right to rescission.<sup>5</sup> This section states in pertinent part:

Each insurer which has issued a policy providing personal injury protection benefits shall report the renewal, cancellation, or nonrenewal thereof to the Department of Highway Safety and Motor Vehicles within 45 days from the effective date of the renewal, cancellation, or nonrenewal.

\*603 Based on the plain and unambiguous language of this section, we find Salgado's argument unpersuasive. First, we find that section 627.736(9)(a) applies only to “renewal[s], cancellation[s] or nonrenewal[s].” While section 627.728(1)(b) defines the term “renewal,”<sup>6</sup> which is not applicable in this case, the term “cancellation” is undefined by chapter 627. “When a term is undefined by statute, ‘[o]ne of the most fundamental tenets of statutory construction’ requires that we give a statutory term ‘its plain and ordinary meaning.’ When necessary, the plain and ordinary meaning ‘can be ascertained by reference to a dictionary.’ Further, it is well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law.” *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954, 961 (Fla.2005) (quoting *Rollins v. Pizzarelli*, 761 So.2d 294, 298 (Fla.2000) (citations omitted)).

The term “cancellation” has been defined to mean “the termination by the insured or by the insurer or both of insurance in accordance with the specific terms of a policy.” *Webster's Third New International Dictionary*

325 (1986); *see also Black's Law Dictionary* 259 (4th ed. 1968) (defining "cancellation" to mean "abandonment of contract"). The term "rescission," however, has been defined to mean "[a]nnulling or abrogation or unmaking of [a] contract and the placing of the parties to it in status quo." *Black's Law Dictionary* 1472 (4th ed. 1968); *see also Borck v. Holewinski*, 459 So.2d 405, 405 (Fla. 4th DCA 1984) ("The effect of rescission is to render the contract abrogated and of no force and effect from the beginning."); *Webster's Third New International Dictionary* 1930 (1986) (term "rescind" defined to mean "to abrogate (a contract) by tendering back or restoring to the opposite party what one has received from him (as in cases of fraud, duress, mistake or minority)").

As such, the terms "cancellation" and "rescission" refer to two separate and distinct actions that operate to create different legal consequences.

A rescission avoids the contract *ab initio* whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective. In other words, cancellation of a policy operates prospectively, while rescission, in effect, operates retroactively to the very time that the policy came into existence; the distinction is similar to that between divorce and annulment.

2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 30:3 (3d ed. 1995).

Because "the effect of a rescission is to render the contract abrogated and of no force and effect from the beginning," we conclude that [section 627.736\(9\)\(a\)](#) does not apply where as here the policy was rescinded as opposed to cancelled. When a contract is rescinded, it is as if the contract never existed in the first place. Accordingly, as

the policy never came into existence, there was no contract for United to cancel.

#### \*604 VII. CONCLUSION

[20] In concluding that United's only remedy was to cancel the policy prospectively under [section 627.728](#), the trial court and the circuit court appellate division in its affirmance departed from the essential requirements of the law. First, rescission under [section 627.409](#) for a material misrepresentation has been previously applied to statutorily mandated PIP policies. *See Flores v. Allstate Ins. Co.*, 819 So.2d 740 (Fla.2002). Moreover, the "law is well settled that if the misrepresentation of the insured were material to the acceptance of the risk by the insurer or, if the insurer in good faith would not have issued the policy under the same terms and premium, then rescission of the policy by the insurer is proper." *New York Life Ins. Co. v. Nespereira*, 366 So.2d 859, 861 (Fla. 3d DCA 1979). Here, the record establishes that Salgado provided United with grounds to rescind the policy.

Moreover, because the Florida legislature has chosen not to exempt the Florida Motor Vehicle No Fault Law from [section 627.409](#), we further conclude that the trial court applied the incorrect law when it determined that the Florida Motor Vehicle No Fault Law is in derogation of United's right to unilaterally rescind the policy *ab initio* based on the undisputed material misrepresentations contained in Salgado's application.

Accordingly, we grant the writ, quash the opinion of the circuit court appellate division affirming the final declaratory decree entered in Salgado's favor, and remand with directions to enter judgment in favor of United.

Petition granted.

#### All Citations

22 So.3d 594, 34 Fla. L. Weekly D1578

#### Footnotes

- 1 In their respective depositions, United's Underwriting Supervisor and PIP Litigation Adjuster testified that Salgado's failure to list his brother as a member of his household on his insurance application constituted a material misrepresentation as the unknown risk would have resulted in a higher premium.
- 2 Salgado argues that certiorari review is inappropriate as the appellate court's decision was per curiam. This Court, however, has previously granted relief from the circuit court appellate division's per curiam affirmances. *See Auerbach v. City of Miami*, 929 So.2d 693, 694 (Fla. 3d DCA 2006) (granting relief from a per curiam affirmance of circuit court

appellate division); *State v. Bock*, 659 So.2d 1196 (Fla. 3d DCA 1995) (granting petition for writ of certiorari from circuit court appellate division per curiam affirmance); *State v. Richard*, 610 So.2d 107, 107–08 (Fla. 3d DCA 1992) (holding the trial court applied the wrong version of Florida Rule of Criminal Procedure 3.191 and granting relief from a per curiam affirmance); *Kneale v. Jay Ben Inc.*, 527 So.2d 917 (Fla. 3d DCA 1988) (granting certiorari from per curiam affirmance of circuit court appellate division).

3 Specifically, [section 627.409, Florida Statutes \(2003\)](#), states:

627.409. Representations in applications; warranties

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

(b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

(2) A breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefor does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

4 Specifically, [section 627.728\(3\)\(a\), Florida Statutes \(2003\)](#) states:

No notice of cancellation of a policy to which this section applies shall be effective unless mailed or delivered by the insurer to the named insured and to the named insured's insurance agent at least 45 days prior to the effective date of cancellation, except that, when cancellation is for nonpayment of premium, at least 10 days' notice of cancellation accompanied by the reason therefore shall be given. No notice of cancellation of a policy to which this section applies shall be effective unless the reason or reasons for cancellation accompany the notice of cancellation.

5 [Section 627.736\(9\)](#) was amended in 2007 and moved to [section 324.0221, Florida Statutes \(2008\)](#). Chapter 324 is entitled "Financial Responsibility."

6 Specifically, [section 627.728\(1\)\(b\), Florida Statutes \(2003\)](#) provides:

"Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term. Any policy with a policy period or term less than 6 months or any policy with no fixed expiration date shall for the purpose of this section be considered as if written for successive policy periods or terms of 6 months.

238 So.3d 396

District Court of Appeal of Florida, Third District.

Bryan HARRIS, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D16–1101

|

Opinion filed January 17, 2018

**Synopsis**

**Background:** Following denial of his motion to suppress, defendant pleaded guilty in the Circuit Court, Miami Dade County, No. 15 24324, [Daryl E. Trawick, J.](#), to possession of marijuana, oxycodone, and drug paraphernalia. Defendant appealed.

**Holdings:** The District Court of Appeal, [Lagoa, J.](#), held that:

[1] defendant's backpack was not in the area within defendant's immediate control at the time of search, and therefore search did not fall under the search incident to arrest exception to the Fourth Amendment's warrant requirement;

[2] defendant's backpack was not a container on defendant's person at time of his arrest, and therefore search of backpack did not fall under the search incident to arrest exception to the Fourth Amendment's warrant requirement; and

[3] defendant's backpack was not part of the dirt bike driven by defendant nor was it stored in the dirt bike, and therefore the search did not fall under the automobile exception to the Fourth Amendment's warrant requirement.

Reversed and remanded.

West Headnotes (12)

[1] **Criminal Law**

 **Review De Novo**

**Criminal Law**

 **Reception of evidence**

In reviewing a trial court's ruling on motions to suppress, appellate courts accord a presumption of correctness to the trial court's determination of historical facts, but review de novo mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth Amendment. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[2] **Courts**

 **Supreme Court decisions**

In considering the relevant case law on a search and seizure issue, Florida courts are required to adhere to the interpretations of the United States Supreme Court, but are not bound to follow the decisions of other federal courts. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[3] **Courts**

 **Previous Decisions as Controlling or as Precedents**

**Courts**

 **Decisions of United States Courts as Authority in State Courts**

If no United States Supreme Court precedent is factually or legally on point, courts may review Florida state precedent, as well as other state and federal decisions for guidance on a search and seizure issue. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[4] **Searches and Seizures**

 **Necessity of and preference for warrant, and exceptions in general**

Warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

**[5] Arrest**

 [Search](#)

Searches conducted incident to the arrest of a person are one exception to warrant requirement of Fourth Amendment. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

**[6] Arrest**

 [Search](#)

While the purpose of the search incident to arrest exception to search warrant requirement is for officer safety and preservation of evidence, no showing that either exists is necessary for a search to fall within the exception. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

**[7] Automobiles**

 [Compartments and closed containers](#)

Defendant's backpack was not in the area within defendant's immediate control at the time of the search following his arrest, and therefore search did not fall under the search incident to arrest exception to the Fourth Amendment's warrant requirement, where defendant was handcuffed at time of search, and five feet away from the car hood on which officer examined backpack. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

**[8] Automobiles**

 [Compartments and closed containers](#)

Defendant's backpack was not a container on defendant's person at the time of his arrest for reckless driving and driving an unregistered vehicle, and therefore search of backpack did not fall under the search incident to arrest exception to the Fourth Amendment's warrant requirement, where police had reduced backpack to their exclusive

control, and defendant had no possibility of accessing the backpack. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

**[9] Automobiles**

 [Compartments and closed containers](#)

Defendant's backpack was not part of the dirt bike driven by defendant nor was it stored in the dirt bike, and therefore officer's search of backpack after defendant's arrest for reckless driving did not fall under the automobile exception to the Fourth Amendment's warrant requirement, even assuming dirt bike qualified as vehicle for purposes of the exception, where backpack had been worn on the back of defendant riding the bike, and the backpack was separated from defendant and the bike at the time defendant was put into handcuffs prior to the search. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

**[10] Criminal Law**

 [Theory and Grounds of Decision in Lower Court](#)

District Court of Appeal could not affirm trial court's denial of defendant's motion to suppress under the tipsy coachman doctrine, based on theory that defendant had consented to search of his backpack following arrest, where trial court made no factual findings regarding whether defendant consented to search, given that it had already incorrectly concluded that the search was a valid search incident to arrest. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

**[11] Searches and Seizures**

 [Validity of consent](#)

**Searches and Seizures**

 [Questions of law or fact](#)

While a warrant is not required to conduct a search if the individual validly consents to the search, the State has the burden of

proving by a preponderance of the evidence that the consent was freely and voluntarily given, and the issue of voluntary consent is a question of fact based upon the totality of the circumstances. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

## [12] Criminal Law

 [Theory and Grounds of Decision in Lower Court](#)

The tipsy coachman doctrine, under which appellate court affirms a right result in trial court even if that result was reached for wrong reasons, is inapplicable where a lower court has not made factual findings on an issue. [U.S. Const. Amend. 4](#).

[1 Cases that cite this headnote](#)

**\*397** An Appeal from the Circuit Court for Miami Dade County, [Daryl E. Trawick](#), Judge. Lower Tribunal No. 15 24324

### Attorneys and Law Firms

[Carlos J. Martinez](#), Public Defender, and Natasha Baker Bradley, Assistant Public Defender, for appellant.

[Pamela Jo Bondi](#), Attorney General, and Kayla H. McNab, Assistant Attorney General, for appellee.

Before [SUAREZ](#), [LAGOA](#), and [SCALES](#), JJ.

### Opinion

[LAGOA](#), J.

**\*398** Appellant, Bryan Harris (“Harris”), appeals his final judgment of conviction and sentence, challenging the denial of his motion to suppress physical evidence from the warrantless search of his backpack following his arrest. Because the warrantless search was not valid as either a search incident to arrest or an automobile search, we reverse and remand for further proceedings.

## I. FACTUAL AND PROCEDURAL HISTORY

About 10:44 a.m. on Thanksgiving Day 2015, Miami Gardens Police Officers Blanco and Santiesteban were patrolling the residential area of NW 191st Street and 32nd Avenue in an unmarked vehicle. The area is known for dirt bikes being illegally driven on the streets.

The officers heard the loud noise of such a dirt bike and observed Harris driving one in their direction. The dirt bike lacked headlights, taillights, turn signals, rearview mirrors, and a tag. Officer Santiesteban, the driver, conducted a U-turn and followed Harris. When Harris ran a red light, the officers activated their lights and siren in order to conduct a traffic stop of Harris. Harris attempted to drive away, but this ended quickly as Harris fell off the dirt bike. Officer Blanco, the passenger, then exited the unmarked police vehicle and arrested Harris for reckless driving and driving an unregistered vehicle. Officer Blanco removed a backpack from Harris's person, handcuffed Harris, and placed the backpack on the hood of the unmarked police vehicle. Officer Blanco then directed Harris, who was handcuffed, to sit on the grass approximately five feet from the officers' vehicle.

In their attempt to identify Harris and the dirt bike, Officer Blanco asked Harris if he had any proof of ownership. Harris stated he had paperwork in his backpack and told Officer Blanco to look in the small front compartment of the backpack. Officer Blanco admitted that upon opening the front compartment, he found paperwork for the dirt bike.<sup>2</sup> Officer Blanco further testified that Harris specifically told him not to open the main compartment of the backpack.<sup>3</sup> When Officer Blanco opened **\*399** the smaller compartment, he smelled marijuana and, based on that smell, proceeded to search the remainder of the bag, eventually finding marijuana, oxycodone, and drug paraphernalia.

Harris was subsequently charged with possession of marijuana, oxycodone, and drug paraphernalia. Harris filed a motion to suppress the physical evidence found within his backpack. At the two-day suppression hearing, the State presented the testimony of Officer Blanco and a portion of the deposition of Officer Santiesteban. The trial court denied the motion to suppress, finding that there was probable cause to stop Harris and that there was a valid search incident to arrest and determining the other presented arguments were either irrelevant or moot in light of the first two findings. Based on the trial court's ruling,

Harris entered a plea of guilty and reserved his right to appeal the denial of his motion to suppress. This appeal timely followed.

## II. STANDARD OF REVIEW

[1] [2] [3] In reviewing a trial court's ruling on motions to suppress, “appellate courts ... accord a presumption of correctness ... to the trial court's determination of historical facts,” but review de novo “mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth ... Amendment.” Connor v. State, 803 So.2d 598, 608 (Fla. 2001). In considering the relevant case law, we are required “to adhere to the interpretations of the United States Supreme Court,” but are “not bound to follow the decisions of other federal courts.” State v. Markus, 211 So.3d 894, 902 (Fla. 2017); accord Smallwood v. State, 113 So.3d 724, 730 (Fla. 2013). If no U.S. Supreme Court precedent is factually or legally on point, we may review “Florida state precedent, as well as other state and federal decisions for guidance on a search and seizure issue.” Markus, 211 So.3d at 902.

## III. ANALYSIS

On appeal, Harris challenges the trial court's determination that the search of his backpack was valid as a search incident to his arrest. In response, the State supports affirmance of the trial court's determination, and also argues, in the alternative, that Harris consented to the search of his backpack.

### A. Search Incident to Arrest

[4] [5] Warrantless searches “are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.” Arizona v. Gant, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Searches conducted incident to the arrest of a person are one such exception. See United States v. Robinson, 414 U.S. 218, 224 25, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). However, as the Supreme Court has acknowledged, this exception has been applied inconsistently. See, e.g., Gant, 556 U.S. at 350, 129 S.Ct. 1710 (noting the “checkered history of the search-incident-to-arrest \*400 exception”); Chimel v. California, 395 U.S. 752, 755, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (“The decisions of this Court bearing

upon that question have been far from consistent, as even the most cursory review makes evident.”).

The State contends that the trial court was correct in finding that Officer Blanco's search of Harris's backpack was incident to arrest. First, the State argues that the backpack was a container within Harris's reach both at the time of his arrest and through the time of the search. See Chimel, 395 U.S. at 762 63, 89 S.Ct. 2034. Second, the State argues that, as a container on Harris's person at the time of his arrest, the backpack was subject to search even if it was removed from Harris's reach. Robinson, 414 U.S. at 236, 94 S.Ct. 467. Third, the State argues that the backpack was searchable under the automobile exception as most recently iterated by Gant. Finally, the State argues that under the *tipsy coachman* doctrine this Court may affirm the trial court's ruling by finding that Harris consented to the search of the back pack. We address each argument in turn.

### 1. Within Harris's Reach

[6] Modern jurisprudence delineating the search incident to arrest exception begins with Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In Chimel, the Court held that when an individual is arrested, the police officer may search the arrestee's person and the area within his immediate control, the latter being “the area from within which he might gain possession of a weapon or destructible evidence.” Id. at 763, 89 S.Ct. 2034. While the purpose of the exception is for officer safety and preservation of evidence, no showing that either exists is necessary for the search to fall within the exception. Robinson, 414 U.S. at 235, 94 S.Ct. 467. Instead, subsequent litigation has mostly dealt with the concept of the area within the control of the arrestee.

[7] In the instant case, Harris's backpack was not in the area within his immediate control at the time of the search. As noted, Officer Blanco removed the backpack from Harris, handcuffed him, and then sat him down against a fence five feet from the car's hood. Officer Blanco placed the backpack on the hood, and within five minutes, examined it. Even if Harris was a combination of “an acrobat [or] Houdini,”<sup>4</sup> we do not see how Harris could have gained access to the backpack following his arrest. Thus, we find that Harris's backpack was outside his area of control. See State v. K.S., 28 So.3d 985, 987 (Fla. 2d DCA 2010) (finding an arrestee out of reach of car

where he had been separated from car, handcuffed, and was under supervision of other officers). Accordingly, the search of the backpack cannot be upheld under this theory.

## 2. A Container on Harris's Person

As part of the search incident to arrest exception, courts have faced difficulty in determining whether a container on or near an arrestee may be searched. The basic premise is that an officer may seize, inspect, and search any container found on the arrestee's person during a search incident to arrest. See Robinson, 414 U.S. at 236, 94 S.Ct. 467. In Robinson, an officer conducting a search incident to arrest \*401 found a crumpled package of cigarettes. Id. at 223, 94 S.Ct. 467. Seizing it, he inspected it and found heroin. Id. The Court concluded that “[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct.” Id. at 236, 94 S.Ct. 467; see also Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). Robinson thereby opened the door for the search of containers found incident to arrest.

The Supreme Court revisited this doctrine a few years later in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), abrogated on other grounds by California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). In Chadwick, federal narcotics agents received intelligence that a particular footlocker contained marijuana. Id. at 3 4, 97 S.Ct. 2476. After tracking down the footlocker, a trained dog alerted the agents that the footlocker contained marijuana. Id. at 4, 97 S.Ct. 2476. The agents arrested the three individuals in possession of the footlocker and seized the footlocker. Id. An hour and a half after the arrests, the agents opened the footlocker without a warrant. Id. at 5, 97 S.Ct. 2476. After holding that the Fourth Amendment applied to the footlocker, the Court addressed whether the warrantless search was permissible. Id. at 11 16, 97 S.Ct. 2476. Reaching the search incident to arrest exception, the Court noted that “warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the ‘search is remote in time or place from the arrest,’ or no exigency exists.” Id. at 15, 97 S.Ct. 2476 (quoting Preston v. United States, 376 U.S. 364, 367,

84 S.Ct. 881, 11 L.Ed.2d 777 (1964)). The Supreme Court further stated:

Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Id. Based on the federal agent's control of the footlocker, the Court held that the warrantless search violated the Fourth Amendment. Id. at 15 16, 97 S.Ct. 2476.

We need not, however, analyze the facts of this case based on Chadwick, as the Supreme Court's decision in Gant applies to the instant case. Although Gant focused on the issue of searching automobiles, it held that once an arrestee has been secured, both justifications for the search incident to arrest exception—officer safety and preservation of evidence—are absent, as “there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search.” Gant, 556 U.S. at 339, 343, 129 S.Ct. 1710 (rejecting the Court's previous precedent in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which interpreted Chimel to authorize “a vehicle search incident to every recent occupant's arrest,” and holding that “the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within distance of the passenger compartment at the time of the search.”); accord Smallwood v. State, 113 So.3d 724, 735 (Fla. 2013). Indeed, the Florida Supreme Court interpreted Gant to exactly do that:

Gant demonstrates that while the search-incident-to-arrest warrant exception \*402 is still clearly valid, once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply.

[Smallwood](#), 113 So.3d at 735; see also [Ancrum v. State](#), 146 So.3d 1217 (Fla. 2d DCA 2014) (invalidating a search of a jacket from which the defendant had been separated by applying [Gant](#) and [Smallwood](#) in holding that the search of an item from which a defendant has been physically separated cannot be upheld as a search incident to the defendant's arrest); [State v. K.S.](#), 28 So.3d 985 (Fla. 2d DCA 2010) (invalidating a search of a glovebox as incident to arrest where defendant had been secured and where arrest had been for fleeing and eluding).

The State argues that [Brown v. State](#), 24 So.3d 671 (Fla. 5th DCA 2009), which was decided after [Gant](#), applies to the instant case. We find [Brown](#) distinguishable from the instant case. In [Brown](#), the Fifth District Court of Appeal held that the search incident to arrest is valid “when the offense of arrest of an occupant of a vehicle is ... for a crime that might yield physical evidence,” and the “police may search the passenger compartment of the vehicle, including containers, to gather evidence, irrespective of whether the arrestee has access to the vehicle at the time of the search.” [Id.](#) at 681. The court in [Brown](#), however, explicitly distinguished the crime of theft, which the [Brown](#) defendant committed, from an arrest for traffic violations, which Harris committed in the instant case. Specifically, the Fifth District concluded that “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.” [Id.](#) at 677 (quoting [Gant](#), 556 U.S. at 343, 129 S.Ct. 1710).

Likewise, the only post-[Gant](#), non-automobile Florida case that differs in result is easily distinguishable. In [State v. Bultman](#), 164 So.3d 144 (Fla. 2d DCA 2015), the police went to Bultman's house to search for a suspect in an unrelated case. [Id.](#) at 145. Although Bultman consented to the search, the police grew increasingly suspicious of her due to the smell of marijuana and the presence of methamphetamine on the premises. [Id.](#) The officers asked Bultman for identification, which she retrieved from her purse. [Id.](#)

However, Bultman then attempted to hide her purse from the officers, and when they asked to search the purse, she refused. The officers repeatedly asked Bultman to place the purse on the hood of their police car for officer safety and twice

had to remove it from her person. The officers arrested Bultman for resisting their commands to leave the purse on the hood of the car and conducted a search of her purse incident to arrest, wherein they found drugs and paraphernalia.

[Id.](#) Although upon arresting Bultman the officers had arguably reduced the purse to their control, it was the officers' concern about a weapon and Bultman's refusal to separate herself from the purse that led to the arrest in the first place. In contrast to an arrest on an unrelated event and a search of the purse, Bultman's arrest was directly caused by her actions towards her purse.

[8] Applying [Smallwood](#), [Gant](#), and [Chadwick](#) to the instant case, it is clear that the police officers had reduced Harris's backpack to their exclusive control and that Harris had no possibility of accessing the backpack. Having so secured the backpack, the police officers were not entitled to search the backpack without a warrant as a search incident to arrest.

### \*403 3. [Automobile Search](#)

In addition to clarifying the application of [Chimel](#) in the automobile context, [Gant](#) also explained that an exception unique to the automobile context and independent of [Chimel](#) existed. [Gant](#), 556 U.S. at 343 44, 129 S.Ct. 1710. Specifically, the Court held that, even when [Chimel](#) would not authorize a search incident to arrest of a vehicle, a search of the vehicle incident to the arrest will be upheld when “it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” [Id.](#) at 343, 129 S.Ct. 1710 (quoting [Thornton v. United States](#), 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)); accord [Davis v. United States](#), 564 U.S. 229, 234 35, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

[9] Assuming a dirt bike qualifies as a vehicle for purposes of this exception, the facts are clear that Harris's backpack was not a part of the dirt bike nor stored on or in it. Instead, the backpack was worn by Harris, and after Harris and the dirt bike were separated, Officer Blanco separated Harris from his backpack. Accordingly, Harris's backpack could not be searched as a part of the vehicle of the arrestee exception established in [Gant](#).

B. Consent to Search

[10] [11] Lastly, the State argues that this Court may affirm the trial court's denial of the motion to suppress based on the assertion that Harris consented to the search of the backpack. While it is true that a warrant is not required to conduct a search if the individual validly consents to the search, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the State has the burden of proving by a preponderance of the evidence that the consent was freely and voluntarily given, and the issue of voluntary consent “is a question of fact based upon the totality of the circumstances.” Wilson v. State, 952 So.2d 564, 569 (Fla. 5th DCA 2007).

[12] In the instant case, the trial court made no finding that Harris consented to the search, as it had already concluded that the search was a valid search incident to arrest. The State, therefore, asks this Court to affirm based on the tippy coachman doctrine. This doctrine, however, is inapplicable “where a lower court has not made factual findings on an issue.” See Bueno v. Workman, 20 So.3d 993, 998 (Fla. 4th DCA 2009). Accordingly, we cannot affirm the denial of the motion to suppress based on a

factual question not reached below. See Powell v. State, 120 So.3d 577, 590 91 (Fla. 1st DCA 2013), modified on reh'g. On remand, the trial court may consider the question upon proper motion by the parties. As this Court only addressed the search incident to arrest issue, either party may raise below other exceptions to the Fourth Amendment's warrant requirement.

IV. CONCLUSION

Based on the foregoing, we find that the search of Harris's backpack was not a valid search incident to arrest and was not a valid search under Gant's automobile exception. Additionally, because the trial court made no factual findings regarding the issue of consent, it would be improper for us to consider this argument on appeal. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

All Citations

238 So.3d 396, 43 Fla. L. Weekly D187

## Footnotes

- 1 On cross-examination, Officer Blanco acknowledged that Harris “directed [him] to the front zip pocket of the back pack.”
- 2 Specifically, Officer Blanco testified:
 

Q. Okay.

And you opened the backpack the front pocket where he told you to go?

A. Correct.

Q. And inside that front zip pocket you saw paperwork concerning the dirt bike?

A. To a dirt bike, correct.

Q. To a dirt bike?

A. Correct.
- 3 Specifically, Officer Blanco testified:
 

Q. And at what point did you go back to the backpack?

A. We asked him if he had any proof of ownership to the dirt bike. He stated that he had paperwork to it in his backpack and also I went through his backpack to open it up. He stopped me and directed me as I was going to open the main compartment. He stopped me, directed me to the front smaller compartment which I opened up.

\* \* \* \*

Q. So once you discovered that there was paperwork for the dirt bike that's when you opened the main pouch of the backpack?

A. That's when I opened the small zipper and I smelled marijuana coming out of it then I opened the main compartment.

\* \* \* \*

Q. He specifically told you do not open the larger container, right?

A. Correct.

Q. But regardless of what he said according to you his consent or non-consent at that point would have been irrelevant, right?

A. Correct.

Q. No matter what, you would have searched that backpack at that point?

A. Correct. I would have searched it for inventory.

Q. Inventory search no matter what you were going to search that backpack?

A. Inventory to arrest.

- 4 [United States v. Lyons](#), 706 F.2d 321, 330 (D.C. Cir. 1983) (“To determine whether a warrantless search incident to an arrest exceeded constitutional bounds, a court must ask: was the area in question, at the time it was searched, conceivably accessible to the arrestee-assuming that he was neither ‘an acrobat [nor] a Houdini’?” (footnote omitted) (quoting [United States v. Mapp](#), 476 F.2d 67, 80 (2d Cir.1973))).

---

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

239 So.3d 108

District Court of Appeal of Florida, Third District.

Juan AGUILAR, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D13-2167

|

Opinion filed January 17, 2018.

**Synopsis**

**Background:** Following the denial of his motions to suppress blood test results by the Circuit Court, Miami-Dade County, Miguel M. de la O, J., 2013 WL 2186987, defendant was convicted in the Circuit Court of various driving under the influence (DUI) crimes arising out of a multi-vehicle accident that resulted in the death of one person at the scene and serious bodily injury to two others. Defendant appealed.

**[Holding:]** The District Court of Appeal, Lagoa, J., held that exigent circumstances existed to justify warrantless blood test.

Affirmed in part and reversed in part.

West Headnotes (4)

**[1] Criminal Law**

🔑 Illegally obtained evidence

**Criminal Law**

🔑 Reception of evidence

In reviewing a trial court's ruling on motions to suppress, appellate courts accord a presumption of correctness to the trial court's determination of historical facts, but independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth Amendment. [U.S. Const. Amend. 4](#).

Cases that cite this headnote

**[2] Searches and Seizures**

🔑 Necessity of and preference for warrant, and exceptions in general

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. [U.S. Const. Amend. 4](#).

Cases that cite this headnote

**[3] Searches and Seizures**

🔑 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

One well-recognized exception to the warrant requirement applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. [U.S. Const. Amend. 4](#).

Cases that cite this headnote

**[4] Automobiles**

🔑 Grounds or cause;necessity for arrest

Exigent circumstances existed to justify warrantless blood test after defendant was involved in multi-vehicle accident that resulted in death of one person at scene and serious bodily injury to two others; accident occurred at scene of prior accident, further complicating accident scene investigation, defendant himself was seriously injured, taken to hospital for treatment, and induced into coma and intubated, at both accident scene and later at hospital, defendant smelled of alcohol and exhibited symptoms consistent with drunkenness, blood sample was taken about 90 minutes after accident, and testimony provided by State was that warrant would have taken at least four hours to obtain from time process began. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

An Appeal from the Circuit Court for Miami Dade County, Miguel M. de la O, Judge. Lower Tribunal No. 08 23160

**Attorneys and Law Firms**

Jeffrey S. Weiner, P.A., and [Jeffrey S. Weiner](#), [Annabelle H. Nahra](#), and Diego Weiner, for appellant.

[Pamela Jo Bondi](#), Attorney General, and [Michael W. Mervine](#), Assistant Attorney General, for appellee.

Before [LAGOA](#), [SALTER](#), and [EMAS](#), JJ. \*

**Opinion**

[LAGOA](#), J.

\***109** Juan Aguilar (“Aguilar”) appeals his conviction and sentence for various driving under the influence (“DUI”) crimes arising out of a multi-vehicle accident that resulted in the death of one person at the scene and serious bodily injury to two others. Aguilar primarily challenges the admission of the results of a blood alcohol test performed on blood samples obtained from him at Ryder Trauma Center following his transport there for his injuries. Because we find no error in the admission of the blood test results, we affirm as to Counts I, III, and V. We reverse, however, with respect to Counts II and IV based on the State’s proper concession of a violation of the double jeopardy clause. We affirm as to all other issues raised by Aguilar.

**I. FACTUAL AND PROCEDURAL HISTORY**

On Sunday, December 9, 2007, at approximately 3:00 a.m., a three-car accident occurred in the four westbound lanes of State Road 836 near the 27th Avenue exit. At approximately 3:11 a.m., Florida Highway Patrol Trooper Bobadilla (“Trooper Bobadilla”) received a dispatch regarding this accident. When he arrived at the scene, Miami Dade Expressway Authority (“MDX”) Road Rangers had closed all but the far-left lane in order to allow law enforcement, fire rescue units, and tow trucks to safely operate and clear the accident scene. A board

with an arrow pointing left was set up to notify drivers of the lane closures.

After investigating the scene, Trooper Bobadilla returned to his vehicle, which had its emergency lights activated. At the same time, at approximately 4:22 a.m., an MDX Road Ranger adjusting traffic cones observed a black Ford Mustang, driven by Aguilar, and another car racing at a high rate of speed westbound into the single, open left lane near the scene of the original accident. Within seconds, Trooper Bobadilla heard screeching tires and witnessed Aguilar losing control of his Mustang, which careened into the original accident scene, striking multiple cars and persons one who died almost instantly, two who suffered serious bodily injuries, and one who suffered minor injuries. After the collision, Trooper Bobadilla walked the scene and observed skid marks consistent with the driving pattern of Aguilar’s Mustang that were not present prior to the second accident.

Florida Highway Patrol Trooper Christopher Adkinson (“Trooper Adkinson”) made contact with Aguilar at the scene of the accident, testifying that Aguilar “was somewhat unresponsive, incoherent,” had “blood shot watery eyes,” “slurred speech,” and “had odor of alcohol” coming from his person and his vehicle. Trooper Adkinson gathered identification information from Aguilar, who was subsequently extracted from his Mustang by a fire rescue unit and transported to Ryder Trauma Center at Jackson Memorial Hospital with serious injuries, including a collapsed lung. Medical personnel at Ryder Trauma Center induced Aguilar into a coma and intubated him shortly after his arrival.

As there were “significant indicators” that Aguilar was displaying an “alcohol related impairment,” Trooper Adkinson arrived at Ryder Trauma Center at approximately 5:09 a.m., in order to get a “blood draw.” Trooper Adkinson testified no effort was made to get a warrant because of “time restraints,” including waiting for contact with the primary traffic homicide investigator who would obtain the warrant, and traveling to the hospital. At Ryder Trauma Center, Trooper Adkinson again smelled an odor of alcohol emanating from Aguilar’s face, which was “flushed,” and noticed Aguilar’s “bloodshot and watery” \***110** eyes. Soon thereafter, Trooper Adkinson directed a nurse to obtain a nonconsensual blood sample from Aguilar. The blood sample, taken at 5:42 a.m., showed that Aguilar’s blood alcohol level was 0.112.

Aguilar was arrested and charged with DUI Manslaughter (Count I), two counts of DUI causing serious bodily injury (Counts III, IV), and two counts of DUI with person or property damage (Counts II, V). Aguilar filed several motions to suppress, including one to suppress the blood draw test results due to lack of probable cause and lack of a warrant.

On May 15, 2013, the trial court heard evidence on the suppression motions. In addition to Trooper Adkinson's testimony, the State introduced testimony that to obtain a warrant would have taken at least four hours, due to the time needed for information and evidence gathering, preparing the affidavit, sending that affidavit to the Assistant State Attorney for verifying probable cause, and then driving to the emergency judge's house. The State argued that because of the natural metabolism of alcohol in the bloodstream, there were time constraints creating an exigent circumstance to justify an exception to the warrant requirement. The trial court found this evidence was sufficient to establish probable cause to order a nonconsensual blood sample from Aguilar and thus denied the suppression motions.

At trial, Aguilar moved for a judgment of acquittal and direct verdict, which the trial court denied. Subsequently, the jury returned a guilty verdict as to Counts I, III, and V. As to Counts II and IV, the jury found Aguilar guilty of the lesser included offense of DUI. Aguilar was sentenced to fifteen years in state prison as to Count I, six months in the Dade County Jail as to Counts II and IV, five years in state prison as to Count III, and 364 days in the Dade County Jail as to Count V. This appeal followed.

## II. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on motions to suppress, “appellate courts ... accord a presumption of correctness ... to the trial court's determination of historical facts,” but “independently review [de novo] mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth Amendment.” [Connor v. State](#), 803 So.2d 598, 605, 608 (Fla. 2001).

## II. ANALYSIS

We write primarily to address Aguilar's argument that the warrantless blood test violated the Fourth Amendment

such that his motion to suppress should have been granted. For reasons stated below, we find that the trial court properly denied Aguilar's motion to suppress and affirm as Counts I, III, and V, but reverse as to Counts II and IV due to violations of the prohibition on double jeopardy.

### A. Admission of Blood Test Results

[2] [3] “ ‘[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.’ ” [Arizona v. Gant](#), 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (emphasis in original) (footnote omitted) (quoting [Katz v. United States](#), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (1967)). “One well-recognized exception applies \*111 when ‘the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’ ” [Kentucky v. King](#), 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (quoting [Mincey v. Arizona](#), 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). The Supreme Court has twice addressed the applicability of this exigency exception to blood testing in DUI cases.<sup>2</sup>

In [Schmerber v. California](#), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), a blood test was administered to the drunk driver despite his objections. [Id.](#) at 759, 86 S.Ct. 1826. After concluding the Fourth Amendment applied to DUI blood tests, the Court considered whether the police officer could make the probable cause determination or whether it must be made by a magistrate, who, in turn, would issue a warrant for the blood test. [Id.](#) at 767, 770, 86 S.Ct. 1826. The Court concluded that even if a warrant from a magistrate was required, an emergency

the delay necessary to obtain a warrant under the circumstances threatened the destruction of evidence existed to excuse the warrantless search. [Id.](#) at 770 71, 86 S.Ct. 1826. In making this determination, the Court reasoned that because “the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system,” there was no time to secure a warrant due to the time to take the accused to a hospital and investigate the accident scene. [Id.](#) at 770 71 Additionally, the Court noted “[t]he police officer who arrived at the scene shortly after the

accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, sort of a glassy appearance,' " and within two hours, he again observed the petitioner showing "similar symptoms of drunkenness" at the hospital. *Id.* at 768 69, 86 S.Ct. 1826. "Given these special facts," the Court concluded that "the attempt to secure evidence of blood-alcohol content in this case was ... appropriate [due to the emergency]." *Id.* at 771, 86 S.Ct. 1826.

More recently, the Court again addressed warrantless DUI blood tests in exigent circumstances in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In *McNeely*, the Court held that the natural dissipation of alcohol in the bloodstream was not a per se exigency, but one factor to consider in the totality of the circumstances test. *Id.* at 156, 164 65, 133 S.Ct. 1552. The Court noted its *Schmerber* decision relied not only on the natural dissipation of alcohol, but also the delay to secure a warrant after investigating the scene of the accident and transporting the injured suspect to the hospital. *Id.* at 150 52, 133 S.Ct. 1552. The Court clarified that in "drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so," but recognized "that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* at 1561.

We further find instructive *Goodman v. State*, No. 4D14-4479, 2017 WL 3168979 (Fla. 4th DCA July 26, 2017). In *Goodman*, the Fourth District Court of Appeal found exigent circumstances existed to justify a \*112 warrantless blood test where: (1) the defendant "absented himself from the scene [of the accident] for over an hour" but returned; (2) the defendant went on his own accord to the hospital for treatment before investigators found the defendant's vehicle and the victim's body; (3) "nearly four hours had passed since the time of the crash" when the investigator reached the hospital; and (4) "[t]he investigator testified that it would have taken an additional two hours to obtain a search warrant." *Id.* at 13. As the Fourth District noted,

[t]his was not a 'routine DUI' once the victim's body was discovered. Although the Supreme Court noted that 'the natural dissipation of alcohol in the bloodstream

does not constitute an exigency in *every* case,' the Court clearly signaled that in some cases the destruction of evidence by the natural dissipation of alcohol could constitute an exigent circumstance.

*Id.* (emphasis in original) (quoting *McNeely*, 569 U.S. at 165, 133 S.Ct. 1552).

[4] Factually, the instant case is akin to *Schmerber* and not to *McNeely*. Applying the totality of the circumstances test to the facts here makes it clear that the trial court did not err in finding that exigent circumstances were present to justify a warrantless blood test. Aguilar's accident occurred at approximately 4:22 a.m. on a Sunday. The accident was serious, resulting in the instantaneous death of one pedestrian, and caused serious bodily injuries to two more pedestrians. The accident occurred at the scene of a prior accident, further complicating the accident scene investigation. Aguilar himself was seriously injured, taken to a hospital for treatment, and induced into a coma and intubated. At both the accident scene and later at the hospital, Aguilar smelled of alcohol and exhibited symptoms consistent with drunkenness. The blood sample was taken at 5:42 a.m., about ninety minutes after the accident. And the testimony provided by the State was that a warrant would have taken *at least* four hours to obtain from the time the process began.<sup>3</sup> As such, we find no Fourth Amendment violation and conclude that the trial court properly denied the motion to suppress.<sup>4</sup>

### B. Double Jeopardy Issue

We turn now to address Aguilar's argument that double jeopardy precludes his conviction under Counts II and IV. Aguilar was convicted of DUI Manslaughter (Count I), one count of DUI causing serious \*113 bodily injury (Count III), one count of DUI causing damage to property or person (Count V), and two counts of DUI (Counts II, IV). Aguilar contends that double jeopardy precludes his convictions under Counts II and IV. The State concedes that Aguilar is correct. *See* Art. I, § 9, Fla. Const. (double jeopardy clause); § 775.021(4)(b)(3), Fla. Stat. (2007) (codifying that defendants are not to be convicted of "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense"); *Labovick v. State*, 958 So.2d 1065, 1068 (Fla. 4th DCA 2007) (holding that DUI is a necessarily lesser-included offense of DUI manslaughter). Accordingly, based on the State's

proper concession, we direct the trial court to vacate Aguilar's convictions for DUI (Counts II and IV).

the trial court however, to vacate Aguilar's convictions for DUI. We affirm as to all other issues without discussion.

Affirmed in part, reversed in part.

### III. CONCLUSION

Based on the totality of the circumstances, we affirm Aguilar's conviction and sentence for DUI Manslaughter, DUI causing seriously bodily injury, and DUI causing damage to property or person. We reverse and remand to

### All Citations

239 So.3d 108, 43 Fla. L. Weekly D179, 43 Fla. L. Weekly D309

### Footnotes

\* Judge Emas did not participate in oral argument.

1 Counsel for Aguilar conceded at oral argument that Appellant was not arguing or relying on a violation of Florida's implied consent law. Accordingly, the warrantless blood test was statutorily valid due to Aguilar's implied consent.

2 The Court has also addressed blood tests under the search incident to arrest exception, [Birchfield v. North Dakota](#), — U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), but that particular exception is not applicable here.

3 We note that ninety minutes after the crash, Aguilar's blood test results showed a BAC of 0.112. Based on the testimony below, a warrant would have taken four hours to obtain. Assuming, in the light most favorable to Aguilar, that this meant four hours from the accident, it would have taken another two-and-a-half hours after the actual test result time to obtain the warrant, thus allowing Aguilar's BAC to continue dropping. More likely though, as the testimony suggests, the four hours would have begun running when the homicide detective arrived at the scene at approximately 5:30 a.m., over an hour after the accident, allowing Aguilar's BAC to continue dropping even further.

4 We note that the case of [State v. Liles](#), 191 So.3d 484, 488–89 (Fla. 5th DCA 2016), [review denied](#), No. SC16-1096, 2016 WL 4245500 (Fla. Aug. 11, 2016), and [review denied sub nom.](#), [Willis v. State](#), No. SC16-1118, 2016 WL 4247056 (Fla. Aug. 11, 2016), [cert. denied](#), — U.S. —, 137 S.Ct. 688, 196 L.Ed.2d 528 (2017), is distinguishable from the instant case. In [Liles](#), the Fifth District Court of Appeal declined to uphold warrantless blood searches based on exigent circumstances. [Id.](#) However, the Fifth District did so not on any legal ground relevant here, but because the State had failed to present sufficient evidence to the trial court that exigent circumstances existed even though it had the burden of doing so. [See id.](#) In the instant case, by contrast, the State met its evidentiary burden regarding the existence of exigent circumstances.

2018 WL 2224163

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida, Third District.

Ramon PACHECO, et al., Appellants,

v.

R. Randy GONZALEZ, Appellee.

No. 3D16-355

|

Opinion filed May 16, 2018

### Synopsis

**Background:** Homeowner brought action against home design firm and its owner, alleging air conditioning in home was defectively designed, and served a proposal to both defendants to settle all claims that was not accepted. In a bench trial, the Circuit Court, Miami-Dade County, [Jerald Bagley, J.](#), determined that both firm and its owner were individually liable to homeowner. Homeowner appealed, and the District Court of Appeal affirmed in part, reversed in part and remanded, [170 So.3d 13](#). On remand, the Circuit Court, Miami-Dade County, [Bagley, J.](#), entered an amended findings of fact and conclusions of law, making the same findings as to liability for defendants, and entered an order finding that homeowner was entitled to attorney's fees. Defendants appealed.

**Holdings:** The District Court of Appeal, [Lagoa, J.](#), held that:

[1] rule governing joint settlement proposals, did not apply to homeowner's action since the trial court found that firm and its owner were each directly liable, and

[2] proposal for settlement was invalid and unenforceable when the proposal sought apportioned payments from firm and its owner, but was not structured to permit either defendant to independently evaluate or settle.

Reversed.

West Headnotes (8)

### [1] **Compromise and Settlement**

#### 🔑 **Making and Form of Agreement**

The rule governing proposals for settlement does not require that a stipulation of voluntary dismissal or release be attached to a proposal for settlement when served on a party. [Fla. R. Civ. P. 1.442](#).

[Cases that cite this headnote](#)

### [2] **Appeal and Error**

#### 🔑 **Effect of offer of judgment or pretrial deposit or tender**

The District Court of Appeal reviews de novo a trial court's determination as to eligibility to receive attorney's fees under the statute and rule governing offers of judgment. [Fla. Stat. Ann. § 768.79](#); [Fla. R. Civ. P. 1.442](#).

[Cases that cite this headnote](#)

### [3] **Costs**

#### 🔑 **Offer of judgment in general**

#### **Costs**

#### 🔑 **Effect of offer of judgment or pretrial deposit or tender**

Florida courts must strictly construe the statute governing offers of judgment and the rule delineating the procedures that implement the statutory provision governing offers of judgment as they are in derogation of the common law rule that each party pay its own fees. [Fla. Stat. Ann. § 768.79](#); [Fla. R. Civ. P. 1.442](#).

[Cases that cite this headnote](#)

### [4] **Costs**

#### 🔑 **Offer of judgment in general**

Proposals for settlements made under the rule and statute governing offers of judgment must be sufficiently clear and definite to allow the offeree to make an informed

decision without needing clarification, and any drafting deficiencies will be construed against the drafter. [Fla. Stat. Ann. § 768.79](#); [Fla. R. Civ. P. 1.442](#).

[Cases that cite this headnote](#)

## [5] Costs

### 🔑 Offer of judgment in general

The plain language of the rule governing a joint proposal for settlement limits its application to scenarios where a party's liability is alleged to be solely vicarious or otherwise indirect, and the focus of the exception contained in the rule is not whether a party is liable for the full amount of damages, but rather, it is whether the claims against the party are direct claims or solely claims of vicarious or other forms of indirect liability. [Fla. R. Civ. P. 1.442\(c\)\(4\)](#).

[1 Cases that cite this headnote](#)

## [6] Costs

### 🔑 Effect of offer of judgment or pretrial deposit or tender

Rule providing that when a party is alleged to be solely liable, a joint settlement proposal made by or served on such a party need not state the apportionment or contribution as to that party, and that acceptance of a settlement offer by any party is without prejudice to rights of contribution or indemnity, did not apply to homeowner's action against home design firm and its owner, where the trial court found that firm and its owner were each directly liable. [Fla. R. Civ. P. 1.442\(c\)\(4\)](#).

[1 Cases that cite this headnote](#)

## [7] Evidence

### 🔑 Judicial Proceedings and Records

An appellate court can take judicial notice of its own files and records.

[Cases that cite this headnote](#)

## [8] Costs

### 🔑 Effect of offer of judgment or pretrial deposit or tender

Homeowner's proposal for settlement with home design firm and its owner was invalid and unenforceable in homeowner's dispute with firm and owner regarding an air conditioning system installed in home that was allegedly defectively designed, where the proposal sought apportioned payments from the firm and its owner, but was not structured to permit either defendant to independently evaluate or settle, did not clearly state how much each defendant would have to pay if either wanted to settle the claim individually, and clearly conditioned settlement on the defendants' mutual acceptance of the offer and joint action in accordance with its terms. [Fla. R. Civ. P. 1.442\(c\)\(4\)](#).

[1 Cases that cite this headnote](#)

An Appeal from the Circuit Court for Miami Dade County, [Jerald Bagley](#), Judge. Lower Tribunal No. 10 46125

### Attorneys and Law Firms

Cole, Scott & Kissane, P.A., and [Kathryn L. Ender](#) and [George R. Truitt](#); White & Case LLP, and [Raoul G. Cantero](#), for appellants.

Coffey Burlington, P.L., and [Jeffrey B. Crockett](#) and [Kevin C. Kaplan](#), for appellee.

Before [LAGOA](#), [LOGUE](#), and [SCALES](#), JJ.

### Opinion

[LAGOA](#), J.

\*1 Appellants, Ramon Pacheco ("Pacheco") and Ramon Pacheco and Associates, Inc. (the "Corporation"), appeal the trial court's final judgment for attorneys' fees in the amount of \$232,440 in favor of appellee, R. Randy Gonzalez ("Gonzalez"), based upon a Proposal for Settlement (the "Proposal") served pursuant to [section 768.79, Florida Statutes \(2011\)](#), and [Florida Rule of Civil Procedure 1.442](#). Because the conditional nature of the Proposal divested Pacheco and

the Corporation of their ability to independently evaluate and accept the Proposal irrespective of the other party's decision, we hold that the Proposal was invalid under [Attorneys' Title Insurance Fund, Inc. v. Gorka](#), 36 So.3d 646 (Fla. 2010), and reverse.

## I. FACTUAL AND PROCEDURAL BACKGROUND

[1] On August 24, 2010, Gonzalez filed suit against Pacheco and the Corporation, among others, seeking damages for the defective design of an air conditioning system in his new home. The complaint alleged claims against Pacheco and the Corporation, which the complaint referred to collectively as the “PACHECO Defendants,” for breach of contract (Count I), negligence (Count II), and negligent misrepresentation (Count III). On September 27, 2011, Gonzalez served the Proposal on “Defendants RAMON PACHECO and RAMON PACHECO AND ASSOCIATES, INC. (collectively, ‘PACHECO DEFENDANTS’)” pursuant to [rule 1.442](#) and [section 768.79, Florida Statutes](#). Making no distinction between Pacheco and the Corporation, the Proposal stated that it was made to the “PACHECO DEFENDANTS” and was offered to resolve all claims against the “PACHECO DEFENDANTS.” The Proposal stated, in part:

### 4. Total amount of proposal:

The monetary amount of this Proposal is payment by the PACHECO DEFENDANTS to Plaintiff in the total amount of \$300,000.00, which shall include payment for all alleged damages of any kind, compensatory, punitive or otherwise, which may be awarded in a final judgment in this action against the PACHECO DEFENDANTS, including costs and prejudgment interest upon the total damages, and is to settle all claims which have been brought or which could have been brought by Plaintiff against the PACHECO DEFENDANTS in the above-styled matter. The payment shall be allocated as follows: \$150,000.00 from Defendant RAMON PACHECO, and \$150,000.00 from Defendant RAMON PACHECO AND ASSOCIATES, INC.

5. Except as provided herein, Plaintiff and the PACHECO DEFENDANTS will otherwise bear their own respective attorneys' fees and costs.

6. Acceptance of this Proposal: Upon acceptance of this offer by the PACHECO DEFENDANTS, Plaintiff and the PACHECO DEFENDANTS shall authorize their counsel to sign and file a stipulation of voluntary dismissal with prejudice in the form attached hereto as Exhibit “A.”

Attached as Exhibit A to the Proposal was a Stipulation of Voluntary Dismissal With Prejudice (the “Stipulation”), stating that the “PACHECO DEFENDANTS dismiss with prejudice all claims, counterclaims and third-party claims that were brought or could have been brought by them in this action” and that “Plaintiff voluntarily dismisses with prejudice all claims that were brought or could have been brought in this action against the PACHECO DEFENDANTS.” The Proposal was not accepted.

\*2 The matter proceeded to a bench trial. The trial court entered Findings of Fact and Conclusions of Law and held “that both Ramon Pacheco, individually, and Ramon Pacheco and Associates, Inc., are liable to Mr. Gonzales [sic] for the defective system.” The trial court further found “[b]oth Pacheco individually and the [Corporation] are responsible pursuant to the Contract” and that Pacheco signed the contract in his own name, without corporate designation. Alternatively, the trial court found both Pacheco and the Corporation responsible under principles of negligence and negligent misrepresentation. Gonzalez appealed to this Court, arguing that the trial court erred in failing to award him loss of use damages. Pacheco and the Corporation cross-appealed, arguing that the trial court erred in holding Pacheco individually liable under the contract and on the negligence counts. This Court reversed and remanded for the trial court to determine loss of use damages, but affirmed the trial court's findings as to Pacheco's individual liability. [Gonzalez v. Barrenechea](#), 170 So.3d 13 (Fla. 3d DCA 2015).

On remand, the trial court entered a Third Amended Final Judgment Against Ramon Pacheco and Ramon Pacheco and Associates, Inc., ordering that Gonzalez recover from Pacheco and the Corporation, jointly and severally, the amount of \$377,019.45. The trial court also entered an Amended Findings of Fact and Conclusions of Law, making the same findings as to liability for Pacheco and the Corporation.

Gonzalez filed a Motion for Attorney's Fees and to Tax Costs, seeking attorney's fees pursuant to [section 768.79](#). Gonzalez argued that he had filed the Proposal “and offered to resolve all outstanding claims against Pacheco Defendants for a settlement payment of \$300,000.00 by the Pacheco Defendants to Gonzalez.” In a footnote, Gonzalez further stated that “Gonzalez’ [sic] offer included the following terms: Ramon Pacheco, individually, and Ramon Pacheco and Associates, Inc., would each pay Gonzalez \$150,000.00.” Pacheco and the Corporation filed a response to Gonzalez’s motion for attorney’s fees, arguing that the proposal was facially invalid and unenforceable under [rule 1.442](#) and that Gonzalez was not entitled to fees under [section 768.79](#) because, among other things, the Proposal improperly required acceptance by both Pacheco and the Corporation and failed to provide each with the ability to independently accept the Proposal.

The trial court conducted a hearing on Gonzalez’s motion for fees and costs and entered an order finding that Gonzalez was entitled to attorney’s fees. The parties stipulated to the amount of fees. The trial court subsequently entered a final judgment for attorney’s fees ordering that Gonzalez recover from Pacheco and the Corporation, jointly and severally, the amount of \$232,440 in attorney’s fees. This appeal followed.

## II. STANDARD OF REVIEW

[2] We review de novo a trial court’s determination as to eligibility to receive attorney’s fees under [section 768.79](#) and [rule 1.442](#). [Pratt v. Weiss](#), 161 So.3d 1268, 1271 (Fla. 2015); [Miami Dade County v. Ferrer](#), 943 So.2d 288, 290 (Fla. 3d DCA 2006).

## III. ANALYSIS

[3] [4] “[Section 768.79, Florida Statutes](#), governs offers of judgment, and [rule 1.442](#) delineates the procedures that implement this statutory provision.” [Audiffred v. Arnold](#), 161 So.3d 1274, 1277 (Fla. 2015). The Florida Supreme Court has made clear that Florida courts must strictly construe the statute and the rule as they “are in derogation of the common law rule that each party pay its own fees.” [Willis Shaw Express, Inc. v. Hilyer Sod, Inc.](#), 849 So.2d 276, 278 (Fla. 2003); accord [Kuhajda v. Borden Dairy Co. of Ala., LLC.](#), 202 So.3d 391, 394 (Fla. 2016); [Pratt](#), 161 So.3d at 1271. Moreover, proposals for settlements made under the rule and statute must “be sufficiently clear and

definite to allow the offeree to make an informed decision without needing clarification.” [State Farm Mut. Auto. Ins. Co. v. Nichols](#), 932 So.2d 1067, 1079 (Fla. 2006). “[A]ny drafting deficiencies [will be] construed against the drafter.” [Paduru v. Klinkenberg](#), 157 So.3d 314, 318 (Fla. 1st DCA 2014). An extensive body of case law construing proposals for settlements made under these provisions has developed, further narrowing the grounds upon which attorneys’ fees may be awarded for a failure to accept a settlement offer. The instant case, however, is controlled by only one: [Attorneys’ Title Insurance Fund, Inc. v. Gorka](#), 36 So.3d 646 (Fla. 2010).

\*3 [Gorka](#) concerned an offer made by a single offeror to two offerees that was conditioned on mutual acceptance<sup>2</sup> within the context of [rule 1.442\(c\)\(3\)](#).<sup>3</sup> The Florida Supreme Court held that joint offers “conditioned on the mutual acceptance of all joint offerees” are “invalid and unenforceable because it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal.” [Id.](#) at 647. In reaching its conclusion, the Florida Supreme Court explained that:

we have drawn from the plain language of [rule 1.442](#) the principle that to be valid and enforceable a joint offer must (1) state the amount and terms attributable to each party, and (2) state with particularity any relevant conditions. A review of our precedent reveals that *this principle inherently requires that an offer of judgment must be structured such that either offeree can independently evaluate and settle his or her respective claim by accepting the proposal irrespective of the other parties’ decisions*. Otherwise, a party’s exposure to potential consequences from the litigation would be dependently interlocked with the decision of the other offerees.

[Id.](#) at 650 (emphasis added) (citation omitted); see also [Pratt](#), 161 So.3d at 1272 (discussing that the purpose of [rule 1.442\(c\)\(3\)](#) “is to allow each offeree to evaluate the terms and the amount of the offer as it pertains to him

or her” and stating that in [Gorka](#), “[w]e held that the proposal ... was invalid because the conditional nature of the offer divested each plaintiff of independent control over the decision to settle”); [Audiffred](#), 161 So.3d at 1279 80. The Court's holding in [Gorka](#) was based on the principle that “[a]n offer that cannot be unilaterally accepted to create a binding settlement is an illusory offer.” [Gorka](#), 36 So.3d at 652.

The rule articulated in [Gorka](#) has two significant limitations. First, [Gorka](#) does not apply to a proposal for settlement made by multiple offerors to a single offeree. As our sister court, the Fourth District Court of Appeal, explained in [Hoang Dinh Duong v. Ziadie](#), 153 So.3d 354 (Fla. 4th DCA 2014)<sup>4</sup>:

Unlike [Gorka](#), which involved an offer to multiple offerees conditioned on acceptance of all the offerees, this case involves an offer to a single offeree, conditioned on that single offeree accepting the offer as to all of the multiple offerors.... [W]here there is only one offeree, it is the offeree's decision alone to accept or reject the proposal, without the decision being dependent on any other party. Thus, [Gorka](#)'s concern that the offer there “divest[ed] each party [i.e., offeree] of independent control of the decision to settle” was not implicated.

\*4 *Id.* at 359 (emphasis in original); accord [Wolfe v. Culpepper Constructors, Inc.](#), 104 So.3d 1132, 1134 35 (Fla. 2d DCA 2012) (concluding that [Gorka](#) did not control where joint proposal was made by two offerors to a single offeree because [Gorka](#) involved a single offeror and joint offerees).

The second limitation on [Gorka](#), which Gonzalez asserts applies to the facts of this case, is set forth in [rule 1.442\(c\) \(4\)](#) and applies to cases involving vicarious liability. [Rule 1.442\(c\)\(4\)](#) provides:

Notwithstanding subdivision (c) (3) [requiring a joint proposal to state the amount and terms attributable to each party], when a party is alleged to be *solely vicariously, constructively, derivatively, or technically liable*, whether by operation of law or by contract, a joint proposal made by or served on such a party

*need not state the apportionment or contribution as to that party.* Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

[Fla. R. Civ. P. 1.442\(c\)\(4\)](#) (emphasis added). Gonzalez argues that because apportionment is not required under subsection (c)(4), the intent of the subsection was to permit “all-or-nothing” offers where a party is alleged to be vicariously liable. Gonzalez further asserts that because the liability of Pacheco and the Corporation was vicarious, the Proposal was valid and enforceable. [Rule 1.442 \(c\)\(4\)](#), however, does not apply to the facts of this case.

[5] The plain language of [rule 1.442\(c\)\(4\)](#) limits its application to scenarios where a party's liability is alleged to be solely vicarious or otherwise indirect. Indeed, “[t]he focus of the exception contained in [rule 1.442\(c\)\(4\)](#) is not whether a party is liable for the full amount of damages, but rather, it is whether the claims against the party are direct claims or solely claims of vicarious or other forms of indirect liability.” [Saterbo v. Markuson](#), 210 So.3d 135, 138 (Fla. 2d DCA 2016) (footnote omitted). Compare [Saterbo](#), 210 So.3d at 139 (holding that “apportionment was not necessary pursuant to [rule 1.442\(c\)\(4\)](#)” where claim against one of two offerees was based solely on vicarious liability as owner of vehicle), and [Miley v. Nash](#), 171 So.3d 145, 150 (holding that no apportionment in joint proposal was necessary under [rule 1.442\(c\)\(4\)](#) where one of two defendants was sued solely for vicarious liability as vehicle's owner), with [Haas Automation, Inc. v. Fox](#), 43 Fla. L. Weekly D725, D728, So.3d , , 2018 WL 1612578 (Fla. 3d DCA April 4, 2018) (holding that [rule 1.442\(c\)\(4\)](#)'s exception to [rule 1.442\(c\) \(3\)](#)'s apportionment requirement did not apply where joint offerors did not have indirect liability for their claims against single offeree).

\*5 [6] [7] Here, a review of Gonzalez's claims against Pacheco and the Corporation shows that neither “is alleged to be solely vicariously, constructively, derivatively, or technically liable.” Although the complaint refers to Pacheco and the Corporation collectively as the “PACHECO Defendants,” and alleges claims against the “PACHECO Defendants” for breach of contract (Count I), negligence (Count II), and negligent misrepresentation (Count III), the complaint does not allege that either party is vicariously liable. Significantly,

after a bench trial, the trial court held “that both Ramon Pacheco, individually, and Ramon Pacheco and Associates, Inc., are liable to Mr. Gonzales [sic] for the defective system.” The trial court further found that “[b]oth Pacheco individually and the [Corporation] are responsible pursuant to the Contract,” and that each had breached their duty to properly design the air conditioning system and thus were responsible under principles of negligence and negligent misrepresentation. In their plenary appeal to this Court, Pacheco and the Corporation specifically argued that the trial court erred in holding Pacheco individually liable under both the contract count and the negligence counts.<sup>5</sup> This Court rejected that argument and affirmed the trial court's findings. [Gonzalez](#), 170 So.3d at 15 n.1; see also [id.](#) at 19 (Suarez, J., concurring in part and dissenting in part) (joining “the majority in affirming the trial court's findings as to the architect's liability”).

Thus, contrary to Gonzalez's assertion on this appeal that there was “no distinction” between the liability of Pacheco and the Corporation, Gonzalez's complaint alleged that Pacheco and the Corporation were each directly liable, the trial court made findings of fact that Pacheco and the Corporation were each directly liable, and this Court affirmed the trial court's findings in that earlier appeal. Accordingly, Gonzalez's assertion that [rule 1.442\(c\)\(4\)](#) applies fails, as the plain language of the rule only applies “when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract.”

[8] Turning to the question of whether the Proposal is valid under [Gorka](#), we find the Proposal to be invalid and unenforceable.<sup>6</sup> The Proposal seeks “payment by the PACHECO DEFENDANTS to Plaintiff in the total amount of \$300,000.00” in order to settle Gonzalez's claims. Although the Proposal provides that the \$300,000 offer be apportioned as a \$150,000 payment from Pacheco and a \$150,000 payment from the Corporation, it is unclear how much Pacheco or the Corporation would have to pay if either wanted to settle Gonzalez's claim individually. As a result, the Proposal is not structured to permit either Pacheco or the Corporation to “independently evaluate or settle his ... respective claim by accepting the proposal.” See [Gorka](#), 36 So.3d at 647. Moreover, the Proposal clearly conditions settlement on Pacheco and the Corporation's “mutual acceptance of the offer and joint action in accordance with its

terms.”<sup>7</sup> See [Schantz](#), 60 So.3d at 446. For example, the Proposal requires “acceptance of this offer by the PACHECO DEFENDANTS,” and that the “PACHECO DEFENDANTS shall authorize their counsel to sign and file a stipulation of voluntary dismissal with prejudice.”<sup>8</sup> Because the Proposal deprived Pacheco and the Corporation of the ability to evaluate and independently act to resolve Gonzalez's claims, the Proposal is invalid under [Gorka](#) and cannot form the basis of an award of attorney's fees under section 760.79 and pursuant to [rule 1.442](#).

#### IV. CONCLUSION

\*6 While “[p]roposals for settlement are intended to end judicial labor, not create more,” [Nichols](#), 932 So.2d at 1079 (quoting [Lucas v. Calhoun](#), 813 So.2d 971, 973 (Fla. 2d DCA 2002)), the opposite has occurred, and proposals for settlement made under [section 768.79](#) and [rule 1.442](#) have instead generated significant ancillary litigation and case law. See [Paduru](#), 157 So.3d at 318 (“[M]any jurists have lamented that the offer of judgment statute has had the unfortunate and unintended consequence of spawning additional litigation, even though the statute was enacted to have exactly the opposite effect.”). Indeed, even in a case where the results obtained at the trial court suggest that fees should be awarded, we remain bound by the principle set forth in [Gorka](#), and as a result, joint proposals have become a trap for the wary and unwary alike. Justice Polston, in his [Gorka](#) dissent, warned that the majority's opinion “effectively eliminates the ability to make joint offers.” [Gorka](#), 36 So.3d at 654 (Polston, J., dissenting). Justice Polston's warning proved prescient. See, e.g., [Schantz](#), 60 So.3d at 446 (invalidating joint offer even where offer apportioned the settlement amount among the parties and stating that “the new rule announced in [Gorka](#) ... we believe, ‘effectively eliminates the ability to make joint offers’” (emphasis added) (quoting [Gorka](#), 36 So.3d at 654 (Polston, J., dissenting)))). If we were writing on a blank slate, we may have reached a different result than the rule articulated in [Gorka](#). However, until the law is further clarified or corrected, we caution counsel in our district to avoid joint proposals lest a similar fate befall them. Accordingly, we reverse the trial court's award of attorney's fees to Gonzalez.

REVERSED.

## All Citations

--- So.3d ---, 2018 WL 2224163, 43 Fla. L. Weekly D1084

## Footnotes

- 1 We note that [rule 1.442](#) does not require that a stipulation of voluntary dismissal or release be attached to a proposal for settlement when served on a party. See [State Farm Mut. Auto. Ins. Co. v. Nichols](#), 932 So.2d 1067, 1079 (Fla. 2006) (stating that “a summary of the proposed release can be sufficient to satisfy [rule 1.442](#)”).
- 2 In [Gorka](#), the defendant, Attorneys' Title Insurance Fund, Inc., served a proposal for settlement on the two plaintiffs, Gorka and Larson, who were husband and wife. See [Attorneys' Title Ins. Fund, Inc. v. Gorka](#), 989 So.2d 1210, 1211 (Fla. 2d DCA 2008). “The proposal offered payment of \$12,500 to Gorka and payment of \$12,500 to Larson in full settlement of all claimed damages, attorneys' fees, and costs.” [Id.](#) at 1212. The proposal also stated that it was “ ‘conditioned upon the offer being accepted by both John W. Gorka and Laurel Lee Larson. In other words, the offer can only be accepted if both John W. Gorka and Laurel Lee Larson accept and neither Plaintiff can independently accept the offer without their co-plaintiff joining in the settlement.’ ” [Id.](#)
- 3 [Rule 1.442\(c\)\(3\)](#) provides: “A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.”
- 4 In [Duong](#), plaintiffs made a proposal for settlement to a single defendant-offeree. The proposal offered a settlement in the total amount of \$1,000,000, with specific amounts of the total allocated to individual plaintiffs. [Id.](#) at 356. After trial, the offerors moved for attorney's fees pursuant to the proposal for settlement. The offeree argued that the proposal was invalid under [Gorka](#) because it deprived him of the ability to evaluate the offer with respect to each of the offerors. [Id.](#) at 357. The trial court granted the motion for fees. In affirming the trial court's award of attorney's fees, the Fourth District held that the proposal “was an appropriate ‘all or nothing’ proposal to which [Gorka](#) did not apply,” [id.](#) at 358, and that there was “no obligation for the claimants in this case to make individual offers to a single offeree,” [id.](#) at 359.
- 5 An appellate court can take judicial notice of its own files and records. See [Miami Stage Lighting, Inc. v. Budget Rent–A–Car Systems, Inc.](#), 712 So.2d 1135, 1137 n.2 (Fla. 3d DCA 1998); [Buckley v. City of Miami Beach](#), 559 So.2d 310, 313 n.1 (Fla. 3d DCA 1990).
- 6 While [Gorka](#) involved a proposal explicitly conditioned on mutual acceptances of joint offerees, we find no logical basis to prevent [Gorka](#) from applying to proposals for settlement where the text, though not explicitly requiring mutual acceptance, clearly prevents either offeree from independently evaluating the settlement offer. See, e.g., [Chastain v. Chastain](#), 119 So.3d 547, 550 (Fla. 1st DCA 2013) (finding the proposal invalid under [Gorka](#) where the proposal “did not expressly require joint acceptance,” but it was “clear from the proposal in this case that there was one offer in the amount of \$5,002 and that the offer ... was conditioned on joint acceptance”); [Schantz v. Sekine](#), 60 So.3d 444, 446 (Fla. 1st DCA 2011) (“Although not as direct as the wording of the settlement offer in [Gorka](#), the ... language [stating that ‘Plaintiffs shall execute a general release’ and that ‘Plaintiffs shall dismiss this case’]... conditions settlement on Appellants’ mutual acceptance of the offer and joint action in accordance with its terms.”).
- 7 Gonzalez states in his answer brief that the Stipulation was also drafted “to cover the situation in which the joint offer would be accepted by both defendants.” Specifically, the Stipulation provides that the “PACHECO DEFENDANTS dismiss with prejudice all claims, counterclaims and third-party claims that were brought or could have been brought by them in this action” and that “Plaintiff voluntarily dismisses with prejudice all claims that were brought or could have been brought in this action against the PACHECO DEFENDANTS.”
- 8 Gonzalez's counsel acknowledged at the fee hearing that the Proposal was based on an assumption that both Pacheco and the Corporation would accept the offer:  

We did have [an] apportionment and yes, the form that we granted [sic] was on the assumption they both would accept, but if only one had called us and said “we will accept only on the company or only on the personal,” they could have and we would have just changed the signature from plural to singular, so that's not—they had that right under the law.

**ATTACHMENT F**  
**Response to Question 51**

## ATTACHMENT F

### Response to Question 51

**51. Explain the particular potential contribution you believe your selection would bring to this position.**

Given my experience as a private practitioner in small and large firms, my experience as a federal prosecutor, and my twelve year tenure on the appellate court, there may not be another applicant who shares my experience in the numerous, specific areas relevant to the work of the Florida Supreme Court.

First, the Florida Supreme Court does not just decide cases. The Court administers the judicial branch. I have served twelve years as an appellate judge and handled over 11,000 cases in that time. I have had significant experience in private practice—both at small and large law firms—handling complex commercial litigation. I have practiced in the criminal law area as an Assistant United States Attorney. I have tried jury cases and arbitrated commercial disputes. I firmly believe that the legal body administering our entire court system benefits from a justice with significant experience as a lawyer practicing in both the private and public sectors, as well as significant tenure as an appellate judge. I possess that experience.

Second, the Court, in its role as head of the judicial branch, must interact with both the legislative and executive branches on behalf of the judiciary. As a member of the Florida District Court of Appeal Budget Commission, I have significant experience with that process with respect to the judiciary's budget issues. In addition, I served on the Third District Court of Appeal during the recent economic recession. The Florida Conference of District Court of Appeal Judges spent a significant amount of time determining how to make appropriate cuts at our courts as a result of the budget shortfall, while at the same time maintaining the basic level of service needed to administer justice to litigants. Should the judicial branch face similar challenges in the future, I will bring the lessons we learned from that experience to the Court.

Third, the Court is responsible for handling ethical issues with respect to judges under the Code of Judicial Conduct and lawyers under the Rules of Professional Conduct. My seven years on the JEAC advising judges and judicial candidates of their responsibilities under the Code of Judicial Conduct have prepared me for this duty.

Fourth, the Court works with The Florida Bar and its many committees in fulfilling its rule-making and other branch administrative duties. I have served on Bar committees throughout my career and am prepared to fulfill this commitment.

Fifth, the Court ultimately decides most important Florida constitutional law issues. I have handled both Florida and federal constitutional issues during my twelve years as an appellate judge, and have demonstrated my ability to address and resolve the kinds of complex legal issues that come before the Court.

Sixth, my years in private practice give me an important perspective into the need for clarity in legal opinions. Lawyers need to be able to advise their clients on the likelihood of prevailing or the extent of potential exposure in a case. Moreover, I have firsthand knowledge of the significant costs associated with modern civil practice, particularly the costs of civil discovery, and the effects of those costs on clients' litigation decisions. I believe the Court would benefit from another justice with significant experience in private practice.

Finally, after twelve years on the appellate bench, I have a proven track record that both the Commission and the Governor can readily review to conclude with certainty that I not only have the ability to address the complex legal issues that come before the Florida Supreme Court, but that I will do so in a manner consistent with the rule of law and that fulfills my oath to uphold the constitutions of the United States and the State of Florida. Anyone who applies for this position can say that they are committed to the separation of powers, the ideal of judicial restraint when deciding cases properly before them, and following the law rather than personal preference. I do not know if another applicant will have such an extensive track record proving a commitment to these ideals. Throughout my career—both as a practitioner and as a judge—I have demonstrated my commitment to professionalism and treating lawyers and litigants in a fair, unbiased, and respectful manner, and I would bring this commitment with me to this position.