APPLICATION FOR NOMINATION TO THE FIFTH DISTRICT COURT OF APPEAL

MARY ALICE "MOLLY" NARDELLA

OCTOBER 12, 2020

APPLICATION FOR NOMINATION

TO THE FIFTH DISTRICT COURT OF APPEAL

Instructions: *Respond fully to the questions asked below. Please make all efforts to include your full answer to each question in this document. You may attach additional pages, as necessary, however it is discouraged. In addition to the application, you must provide a recent color photograph to help identify yourself.*

Full Name: Mary Alice "Molly" Nardella **Social Security No.:** [redacted]

Florida Bar No.: 58896 **Date Admitted to Practice in Florida:** 10/1/2008

Cell Phone No.: (407) [redacted] **E-Mail:** molly.nardella@nardellalaw.com

1. Please state your current employer and title, including any professional position and any public or judicial office you hold, your business address and telephone number.

   Nardella & Nardella, PLLC
   Partner
   135 W. Central Blvd., Suite 300
   Orlando, FL 32801
   (407) 966-2680

2. Please state your current residential address, including city, county, and zip code. Indicate how long you have resided at this location and how long you have lived in Florida. Additionally, please provide a telephone number where you can be reached (preferably a cell phone number).

   Since approximately October 29, 2015, my family and I have lived in Orange County, Florida at [redacted]. I have resided in Florida my entire life. My cell phone number is (407) [redacted].

3. State your birthdate and place of birth.

   I was born on October 9, 1982, in Orlando, Florida.

4. Are you a registered voter in Florida (Y/N)?

   Yes

5. Please list all courts (including state bar admissions) and administrative bodies having special admissions requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have ever been suspended or resigned. Please explain the reason for any lapse in membership.

Court	Date of Admission
Supreme Court of the United States of America	April 29, 2015
United States District Court for the Northern District of Florida	July 31, 2012
United States District Court for the Middle District of Florida	November 4, 2009
United States District Court for the Southern District of Florida	February 1, 2013
Supreme Court of the State of Florida	October 29, 2008

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias.

   My parents gave me the nickname Molly. My maiden name was Mary Alice Cox, and I was commonly referred to as Molly Cox before 2014. Now, I am commonly known as Molly Nardella.

EDUCATION:

7. List in reverse chronological order each secondary school, college, university, law school or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, the date the degree was received, class standing, and graduating GPA (if your class standing or graduating GPA is unknown, please request the same from such school).

   University of Florida, Levin College of Law
   August 2005 to May 2008
   J.D. received on May 9, 2008
   Class Standing: 46/278
   GPA 3.55
   Honors: cum laude

   University of Florida
   January 2002 to May 2005
   B.A. received on April 13, 2005 with dual majors in History and Political Science
   Class Standing: Not given by institution after request.
   GPA 3.96
   Honors: cum laude

Valencia College
Summer of 2001 and 2002; Fall of 2001
No Degree sought or received.
Class Standing: Not given by institution after request.
GPA 3.81

Lake Highland Preparatory School
August 1997 to May 2001
High School Diploma received in the Spring of 2001.
Class Standing: Not given by institution after request.
GPA 4.194 weighted; 3.653 unweighted

8. List and describe any organizations, clubs, fraternities or sororities, and extracurricular activities you engaged in during your higher education. For each, list any positions or titles you held and the dates of participation.

Florida Blue Key
I was inducted into Florida Blue Key in 2007 and remain a member today. Florida Blue Key is an honorary leadership organization which focuses on public service to the University of Florida and to the State of Florida. While in law school, I was an active member in Florida Blue Key but did not hold any positions or titles.

The Gator Standard
I helped found The Gator Standard in the Spring 2002 and was a regular reporter for the newspaper for two years. The Gator Standard was a student newspaper dedicated to covering news events unreported by The Independent Florida Alligator. At its height, the paper published 15,000 copies weekly, eventually becoming the largest student-owned newspaper in the country. The Gator Standard broke stories later featured in the National Review.

Campaign Involvement
While at the University of Florida, I was involved in various political campaigns. I was vice chairwomen of University of Florida College Republicans in 2002. That year we were recognized by the College Republican National Committee as the national chapter. I was chairwomen of the College Republicans in 2003. The following year, 2004, I led Gators for Bush. In 2005, I joined the University of Florida Law School Republicans and remained a member until I graduated in the Spring of 2008. While in law school, I also co-chaired Gators for Crist.

University of Florida Trial Team
I was selected for the University of Florida Trial Team after winning the intramural mock trial competition. In addition to being a member of the winning team, I was selected as the team's best advocate by the Trial Team's sponsor law firm. The mock trial was presided over by United States District Judge Paul Huck. Thereafter, from 2006 to 2008, I represented my law school in competitions throughout the country and mentored younger trial team members. I also coached

teams competing at National Bar Association conferences, which association is the nation's oldest and largest national network of predominantly African-American attorneys and judges. During this time, I launched a weekly trial team workshop on evidence in a further effort to mentor younger members. For seven years after law school (approximately 2009 to 2015), I continued to support the University of Florida's Trial Team by travelling to Gainesville to judge the annual intramural mock trial.

Law School Faculty Recruitment Committee
At the request of law school administration, I served on the Faculty Recruitment Committee. Along with a handful of other law students, I welcomed and interviewed professors interested in an academic position at the law school and provided feedback to the administration on our evaluation of each candidate. To the best of my knowledge, I served on the Faculty Recruitment Committee from 2006 to 2008.

The Caring and Sharing Mentoring Project
At the request of a local charter school in Gainesville, Florida, I joined the Caring and Sharing Mentoring Project. My duties were to tutor an elementary school student. I met with my student once a week while she was in school to work on reading, math, and life skills. To the best of my knowledge, I volunteered as a tutor from the Fall of 2005 to the Spring of 2007.

Chomp the Vote
Chomp the Vote is a non-partisan organization at the University of Florida committed to registering students to vote. I helped build the organization in its inaugural year, which I believe was in 2004 or 2005. I have not participated since graduating in the Spring of 2005.

Intercollegiate Studies Institute
The motto of the Intercollegiate Studies Institute is "Educating for Liberty." I joined the Institute which provided me with access to a world class education on the foundations of Western culture and thought. The Institute also funded The Gator Standard's first issue. I believe I was a member of the Institute from 2002 to 2004.

Trinity Lutheran School Assistant Basketball Coach
Every summer while I was in college and law school, I led a weekly basketball practice as a volunteer assistant coach for middle school students at Trinity Lutheran School in Orlando, my alma mater. I led practices at the school facilities each summer from 2001 to either 2006 or 2007. I also ran a week-long basketball camp for the school one summer as well.

EMPLOYMENT:

9. List in reverse chronological order all full-time jobs or employment (including internships and clerkships) you have held since the age of 21. Include the name and address of the employer, job

title(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

Nardella & Nardella, PLLC
135 W. Central Blvd., Suite 300
Orlando, FL 32801
Job Title: Partner
Dates of Employment: February 2017 to Present

Rumberger, Kirk and Caldwell, P.A.
300 S. Orange Ave., Suite 1400
Orlando, FL 32801
Job Title: Associate Attorney
Dates of Employment: After graduating law school, I worked as an Associate Attorney from September 2008 to January 2017. Prior to graduating law school, I worked as a Summer Associate in the summers of 2006 and 2007.

McEwan, Martinez, Dukes & Hall, P.A.
108 E. Central Blvd.
Orlando, FL 32801
Job Title: Runner
Dates of Employment: Fall of 2001; Summers of 2002, 2003, 2004, and 2005

10. 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.

Estates and Trusts
I currently lead the Estates and Trusts department for Nardella & Nardella, PLLC. Presently, I focus on estate planning for personal assets and business planning for the succession of family businesses. I also focus on the proper funding and administration of trusts. In my practice, I often advise both fiduciaries and beneficiaries, and I oversee related litigation. Currently, my typical client is an individual or married couple seeking the creation of an orderly estate plan, protection of their assets and business, a plan for their potential incapacity, and the minimization of their tax burden.

In addition to leading the Estates and Trusts department for Nardella & Nardella, PLLC, I also assist in other departments, where my expertise is sought for litigation and appellate work.

Litigation
Before joining Nardella & Nardella, PLLC, my practice was 100% litigation. Working with a team of attorneys, I advised and defended some of America's largest corporations. One of my

focuses was on advising and defending insurance companies in questions of coverage and ultimately defending the same insurance companies in litigation, including class actions.

Insurer clients often asked me to file declaratory judgment actions related to the meaning of policy language. Considering my expertise in this area, I was also asked to review and advise on proposed, new policy language.

Florida also has a unique body of case law related to bad faith claims in the insurance context, which can result in liability to an insurer far in excess of policy limits. Another one of my focuses was to advise my insurer clients on how to avoid this liability and to litigate these claims when brought. To that end, my clients would ask me to review and analyze an underlying litigation in which my insurer client was providing a defense for an insured, but where there was risk of extracontractual liability. I was often hired to monitor the work of the underlying defense attorneys, which sometimes included attending the underlying trial. If the trial resulted in an excess verdict, I then defended the insurance company in the ensuing bad faith claim.

I also represented clients in complex, commercial litigation. Although my insurance clients often hired me to represent them in breach-of-contract claims brought by agents, my complex, commercial litigation practice was not limited to insurance clients. Through the years, I worked on product-liability cases for manufacturers, professional liability cases for lawyers and other professionals, medical malpractice cases for both doctors and patients, and fiduciary litigation in commercial contexts. In addition to my own cases, I always stepped in to support my colleagues away at trial and at home preparing appellate briefs. My assistance in one appellate case even led to the ABA publishing an article I co-wrote with attorney Richard Caldwell.

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

Court		Area of Practice	
Federal Appellate	_____ %	Civil	70 %
Federal Trial	30 %	Criminal	_____ %
Federal Other	_____ %	Family	_____ %
State Appellate	5 %	Probate	30 %
State Trial	65 %	Other	_____ %
State Administrative	_____ %		
State Other	_____ %		
TOTAL	100 %	TOTAL	100 %

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation:

Since leaving Rumberger, Kirk and Caldwell, P.A., my practice has changed substantially, but has been no less challenging. Switching to a primarily transactional practice has forced me to master a new area of law, a new type of client, and new skill set. My current practice means that I am less often in the courtroom. Instead, I spend my time developing and implementing strategies for my clients so that neither they nor their loved ones must resort to the courtroom.

12. In your lifetime, how many (number) of the cases that you tried to verdict, judgment, or final decision were:

Jury?	0	Non-jury?	0
Arbitration?	0	Administrative Bodies?	0
Appellate?	2		

13. Please list every case that you have argued (or substantially participated) in front of the United States Supreme Court, a United States Circuit Court, the Florida Supreme Court, or a Florida District Court of Appeal, providing the case name, jurisdiction, case number, date of argument, and the name(s), e-mail address(es), and telephone number(s) for opposing appellate counsel. If there is a published opinion, please also include that citation.

Fla. Cmty. Bank v. Wherrett, 242 So. 3d 1086 (Fla. 2d DCA 2018)

- Second District Court of Appeal
- Case No.: 2D17-1608
- Argument on February 21, 2018
- Opposing Appellate Counsel
    - John A. Anthony at janthony@anthonyandpartners.com and (813) 273-5616
    - Nicolas Lafalce at nlafalce@anthonyandpartners.com and (813) 273-5616
    - Dominic A. Isgro at disgro@anthonyandpartners.com and (813) 273-5616
    - James C. Valenti at jvalenti@vctta.com and (863) 937-6056

Buzan v. Fla. Dep't of Health, 11 So. 3d 357 (Fla. 1st DCA 2009)

- First District Court of Appeal
- Case No.: 1D09-779
- No Oral Argument
- Opposing Appellate Counsel
    - Patrick L. Butler at shisa2@gmail.com and (850) 980-8868
    - Brittany Adams Long at balong@radeylaw.com and (850) 425-6654

14. 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.

15.

No.

15. 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 full.

No.

16. For your last six cases, which were tried to verdict or handled on appeal, either before a jury, judge, appellate panel, arbitration panel or any other administrative hearing officer, list the names, e-mail addresses, and telephone numbers of the trial/appellate counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Fla. Cmty. Bank v. Wherrett, 242 So. 3d 1086 (Fla. 2d DCA 2018)

- Second District Court of Appeal
- Case No.: 2D17-1608
- Appellant was represented by:
  - John A. Anthony at janthony@anthonyandpartners.com and (813) 273-5616
  - Nicolas Lafalce at nlafalce@anthonyandpartners.com and (813) 273-5616
  - Dominic A. Isgro at disgro@anthonyandpartners.com and (813) 273-5616
  - James C. Valenti at jvalenti@vctta.com and (863) 937-6056
- Appellees Paul Stefan and Edson O. Trevizan were represented by me and:
  - Michael A. Nardella at mnardella@nardellalaw.com and (407) 966-2680
  - John J. Bennett at jbennett@nardellalaw.com and (407) 966-2680
- Co-Appellees were represented by:
  - Joseph A. Geary at jgeary@cclmlaw.com and (863) 647-5337
  - August J. Stanton, III, at aj@gse-law.com and (407) 423-5203
  - Michael Gasdick at mick@gse-law.com and (407) 423-5203

Buzan v. Fla. Dep't of Health, 11 So. 3d 357 (Fla. 1st DCA 2009)

- First District Court of Appeal
- Case No.: 1D09-779
- No Oral Argument
- Appellant was represented by me and:

- Francis H. Sheppard at fsheppard@rumberger.com and (407) 839-4541
- Appellee was represented by:
  - Patrick L. Butler at shisa2@gmail.com and (850) 980-8868
  - Brittany Adams Long at balong@radeylaw.com and (850) 425-6654

17. For your last six cases, which were either 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). *This question is optional for sitting judges who have served five years or more.*

Fla. Cmty. Bank v. Wherrett, 242 So. 3d 1086 (Fla. 2d DCA 2018)

- Trial Counsel
  - Plaintiff was represented by:
    - John A. Anthony at (813) 273-5616
    - Nicolas Lafalce at (813) 273-5616
    - Dominic A. Isgro at (813) 273-5616
    - James C. Valenti at (863) 937-6056
  - Defendants Paul Stefan and Edson O. Trevizan were represented by me and:
    - Michael A. Nardella at (407) 966-2680
    - John J. Bennett at (407) 966-2680
  - Co-Defendants were represented by:
    - Joseph A. Geary at (863) 647-5337
    - August J. Stanton, III, at (407) 423-5203
    - Michael Gasdick at (407) 423-5203
- Case No.: 2009-CA-005228, Circuit Court in and for Polk County, Florida
- Case No.: 2D17-1608, Second District Court of Appeal
- *Fla. Cmty. Bank v. Wherrett*, 242 So. 3d 1086 (Fla. 2d DCA 2018)

Guzy v. Johnson Controls Holding Co., Inc.

- Trial Counsel
  - Plaintiff was represented by Paul Zeniewicz at (407) 500-3979
  - Defendant was represented by me, Larry Roth at (407) 585-6056, and Damien Orato at (407) 872-7300
- Case No.: 2013-CA-002996, Circuit Court in and for Seminole County, Florida

*I withdrew from this case after the proposal for settlement was served, which was accepted by the plaintiff shortly after I left Rumberger, Kirk and Caldwell, P.A.

Paul Norton-Smith and Jane Norton-Smith v. Dionisio Flores, M.D. and Central Florida Surgical Specialists, P.A.

- Trial Counsel
  - Plaintiffs were represented by me and Francis H. Sheppard at (407) 839-4541
  - Defendants were represented by Gregory D. Ringer at (407) 841-3800
- Case No.: 2013 CA 4423, Circuit Court in and for Orange County, Florida

Maria Gomez v. Sea World

- Trial Counsel
  - Plaintiffs were represented by Joel Piedra at (407) 352-3535 and the Honorable Diego Madrigal at (407) 742-2556
  - Defendant was represented by me and LaShawnda Jackson at (407) 298-7768
- Case No.: 2012 CA 017219, Circuit Court in and for Orange County, Florida

Jones v. Esurance Insurance Company

- Trial Counsel
  - Plaintiff was represented by Ian Boettcher at (954) 327-5356 and Richard Slawson at (561) 659-7700
- Case No. 2:14-cv-262, Middle District of Florida

Maria Consuelo v. Kia Motors America, Inc.

- Trial Counsel
  - Plaintiff was represented by Henry N. Didier, Jr. at (407) 895-3401
  - Defendant was represented by me, Larry Roth at (407) 585-6056, and Damien Orato at (407) 872-7300
- Case No.: 2014 CA 001731, Circuit Court in and for Hillsborough County, Florida

18. During the last five years, on average, how many times per month have you appeared in Court or at administrative hearings? If during any period you have appeared in court with greater frequency than during the last five years, indicate the period during which you appeared with greater frequency and succinctly explain.

Three years ago, I left my litigation practice at Rumberger, Kirk and Caldwell, P.A., and transitioned to a largely estate planning practice at Nardella & Nardella, PLLC. When I was a litigator, I appeared in Court an average of three times a month.

19. If Questions 16, 17, and 18 do not apply to your practice, please list your last six major transactions or other legal matters that were resolved, listing the names, e-mail addresses, and telephone numbers of the other party counsel.

Below are the last six estate planning and various business matters that I handled for my clients:

- Resolved pre-suit a dispute between my clients and an international accounting firm regarding the preparation of a trust's 2019 tax return. The international accounting firm handled with internal counsel.

- Amended trusts for husband and wife after husband became a lawful permanent resident of the United States of America, thereby effecting the application of inheritance and estate tax laws. This was a non-adversarial matter and did not involve other party counsel.

- Prepared accumulation trust for client's retirement benefits. This was a non-adversarial matter and did not involve other party counsel.

- Prepared a revocation of a prenuptial agreement and two revocable trusts for husband and wife, including sub-chapter S trusts for business interests and descendant's trusts to place conditions on disbursement. To fund the trusts, I prepared deeds transferring the ownership of real property and assignments transferring membership interests in separate limited liability companies. I also advised on changes to corporate documents. This was a non-adversarial matter and did not involve other party counsel.

- Resolved pre-suit a dispute between the settlor of an irrevocable trust and her out-of-state corporate trustee regarding discretionary distributions. The corporate trustee did not involve its general counsel in our negotiations.

- Revised operating agreement for closely held business with locations in major American cities and Canada. General counsel for the business was Adam Losey at alosey@losey.law and (407) 906-1605.

20. During the last five years, if your practice was greater than 50% personal injury, workers' compensation or professional malpractice, what percentage of your work was in representation of plaintiffs or defendants?

N/A

21. List and describe the five most significant cases which you personally litigated giving the case style, number, court and judge, the date of the case, the names, e-mail addresses, and telephone numbers of the other attorneys involved, 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.

MRI Associates of St. Pete, Inc. d/b/a Saint Pete MRI., as assignee, individually and on behalf of those similarly situated v. Allstate Property & Casualty Insurance Company.
Case No.: 8:10-cv-815-T-30TGW, Middle District of Florida
Citation: *MRI Assocs. of St. Pete, Inc. v. Allstate Prop. & Cas. Ins. Co.*, No. 8:10-cv-815-T-30TGW, 2010 U.S. Dist. LEXIS 101580 (M.D. Fla. Sep. 14, 2010).

In this case, I represented Allstate Property & Casualty Insurance Company (Allstate) in a $19,000,000.00 class action lawsuit brought by a Florida healthcare provider. The provider claimed on behalf of a putative class that Allstate underpaid certain medical bills by failing to pay claims based on the mandatory "reasonable amount" methodology required by section 627.736(1)(a) and (5)(a), Florida Statutes. The provider argued that Allstate incorrectly paid in accordance with an alternative permissive rate methodology described in section 627.736(5)(a) through (f), without explaining its "choice" in the insurance policy.

The purported class consisted of all providers who received reimbursement based on the lower permissive rate methodology rather than the higher "reasonable rate" plan from January 1, 2008, until March 19, 2010. Because the amount in controversy exceeded, in the aggregate, $19,000,000.00, we removed the case to federal court and argued that the case met the jurisdictional requirements of the Class Action Fairness Act of 2005 (CAFA). At the time of removal, it was unsettled in the Eleventh Circuit Court of Appeals whether CAFA's aggregate requirement was in addition to the amount in controversy requirement of 28 U.S.C. 1332(a).

In addition to the interesting jurisdictional issues we litigated, the case is significant because it laid the groundwork for Allstate's arguments moving forward on this issue which was critical for its business. At the time this class action lawsuit was brought, Florida's county courts were deciding many cases in which providers were making the same argument, frequently with success. A negative ruling in this class action lawsuit would have added to the momentum of the argument that every major insurer in the state incorrectly paid medical bill claims since January 1, 2008.

After a successful change in jurisdiction, we filed a motion to dismiss laying forth our argument that, based upon established canons of construction, section 627.736(5)(a)(2) expressly authorized Allstate's use of fee schedule limitations and that such limitations were also contractually included in Allstate's policy language. At that point, the provider dismissed the class action and returned to litigating individual cases in Florida's county courts.

This case was one of several class actions filed against various motor-vehicle insurers we represented. In addition to performing the research and analyzing the operative policy and statutory language, I helped draft the pleadings and dispositive motions which set forth the arguments that Allstate would make moving forward. In addition to the class action cases, I also supervised county court cases to ensure that Allstate was making uniform arguments in every case.

This case is also significant because seven years after making our argument in District Court, the Florida Supreme Court in *Allstate Insurance Company v. Orthopedic Specialists, etc.*, 212 So.3d

973 (2017), agreed with our analysis. Using the same canons of construction we applied years earlier, the Court found that that "[t]he endorsement to Allstate's policy clearly and unambiguously states that '(a)ny amounts payable' for medical expense reimbursements 'shall be subject to any and all limitations, authorized by (state law), . . . including . . . all fee schedules."

- Plaintiff was represented by:
  - David M. Caldeville at dcaldevilla@dgfirm.com and (813) 229-2775
  - Scott R. Jeeves at sjeeves@jeeveslawfroup.com and (727) 894-2929
  - Craig E. Rothburg at crothburd@e-rlaw.com and (813) 251-8800
- Allstate was represented by me and:
  - Lori J. Caldwell at lcaldwell@rumberger.com and (407) 839-4546
  - Peter J. Valeta at pvaleta@cozen.com and (312) 474-7895
- The case was presided over by the Honorable Judge James S. Moody, Jr., United States District Judge for the Middle District of Florida.

Peter Lam, an individual, Leonardo Arellano, an individual, Bernhard Very, an individual, et al. v. Kimberly Thompson, an individual, Elbert Cecil Wright, III, an individual, Gary Wright, an individual, Elbert Cecil Wright, IV, an individual, Orlando Appraisal Co., Inc. d/b/a Certified Appraisal Service
Case No.: 2010-CA-023209-O, Circuit Court in and for Orange County, Florida

Prior to the real estate market collapse of 2008, ninety-eight plaintiffs purchased condominium units in the Orlando Cay Club Resort and Academy. They believed that the developer would convert the units into high-end luxury condominiums in a five-star resort community next to a state-of-the-art IMG Academy sports facility. According to the developers, the sports academy would attract student athletes from across the country interested in training with IMG. Those students would in turn rent the condominium units, thus guaranteeing prospective purchasers an income producing asset. As part of the pitch, the developers distributed to prospective purchasers so-called "sample appraisals" prepared by my clients to prove that, even before conversion, the condominium units had built-in equity, making this a "no-lose investment." On this belief, many plaintiffs bought multiple condominium units, often by borrowing money from an approved lender who ordered an appraisal from my clients before processing and approving the loan.

Unfortunately, the facilities depicted in glossy sales brochures never materialized, and the improvements to many of the individual condominiums were never made. After collecting $70,000,000.00 in sales and fees, the developer disappeared. When the market collapsed, plaintiffs' built-in equity disappeared too. While a criminal investigation into the actions of the developer was ongoing, plaintiffs hired Keith "Kit" Belt of Birmingham, Alabama, to bring causes of action for negligent misrepresentation, professional negligence under the Restatement (Second) of Torts Sec. 552, and negligent supervision and training against appraisers who prepared the

"sample appraisals" for the developer and the "actual appraisals" for lender. At the time of our lawsuit, Mr. Belt was also representing similarly situated plaintiffs in a pending class action lawsuit against Cay Clubs International for condominiums purchased in Las Vegas, Nevada.

Along with attorney Francis H. Sheppard, I represented four professional appraisers and their employer. I preformed the research, helped craft the strategy, conducted the written discovery, and drafted the pleadings and dispositive motions. This was one of several cases in which I defended appraisers against a significant number plaintiffs who purchased condominium-hotel units in the Orlando area before the downward spiral of the real estate market.

After winning multiple motions to dismiss which successfully narrowed the claims at issue, and after completing initial discovery into each plaintiff's alleged reliance, we asked Judge Blackwell to divide plaintiffs' into trial groups of ten to ensure a fair trial for all five defendants. We believed that a jury would struggle to sit through the presentation of ninety-eight distinct claims against four different appraisers without imputing the facts from one plaintiff's alleged reliance to the other. Although calendaring and conducting ten separate trials was less efficient, Judge Blackwell agreed with our proposed management of the case.

Plaintiffs, no longer able to have one monolithic trial for all ninety-eight plaintiffs, now were faced with multiple trials where each had to prove defendants knew each individual plaintiff would receive and rely upon the "sample appraisal" in making a decision to purchase their condominium unit. Consequently, plaintiffs settled.

This case is significant because at the time it was decided, plaintiffs' attorneys across the country whose clients had been injured by a developer's false promises were searching for a way to attach liability to third party professionals who carried insurance. In each of the cases I handled, attorneys brought plaintiffs' claims *en masse*. Despite this strategy, we were able to keep plaintiffs from expanding the scope of an appraiser's duty of care. Had plaintiffs' theories been accepted by the court, it would have fundamentally changed the risk each appraiser assumes when he or she accepts an assignment, as well as the cost of the appraisal produced. It likely would have had a chilling effect on other professionals who routinely produce a product for a particular client that may be used for a separate purpose by another person not in privity.

- Plaintiffs were represented by Keith T. Belt, Jr. at keithb@beltlawfirm.com and (205) 933-5000
- Defendants were represented by me and Francis H. Sheppard at fsheppard@rumberger.com and (407) 872-7300
- The case was presided over by the Honorable Judge Alice Blackwell, in the Ninth Judicial Circuit's Business Court Division

---

Flanigan & Assocs. Ins. v. Allstate Ins. Co.,
Case No.: 8:12-CV-00029-EAK-EAJ, Middle District of Florida
Citation: *Flanigan & Assocs. Ins. v. Allstate Ins. Co.*, 2013 U.S. Dist. LEXIS 196255, at *2 (M.D. Fla. Mar. 25, 2013)

Flanigan & Associates Insurance (FAI) was an exclusive agency of Allstate Insurance Company (Allstate), representing and selling Allstate products for many years in the Tampa Bay area. In 2011, FAI and Allstate parted ways. Under the terms of their exclusive agency agreement (EA Agreement), both parties owed the other certain obligations when the agency relationship ended. Allstate owed FAI termination payments exceeding a quarter of a million dollars. In turn, FAI had to stop using Allstate's confidential client information and stop soliciting Allstate clients. As important, FAI had to stop selling products in competition with Allstate *from the exact same location* it previously sold Allstate products for a period of one year.

FAI refused to comply with all three of its major obligations, and when termination payments were suspended awaiting FAI's compliance, FAI sued Allstate in state court. We removed the case to federal court and counterclaimed for breach of contract, misappropriation of trade secrets, and unfair competition. When FAI continued to use Allstate's marks while the case was pending, we successfully moved to amend its counterclaim to also include claims for Trademark Infringement under 32(a) of the Lanham Act, 15 U.S.C. 1114(1)(a), Unfair Competition under 43(a) of the Lanham Act, 15 U.S.C. 1125(a), Counterfeiting under 35 of the Lanham Act, 15 U.S.C. 116(d), Dissolution under 43(a) of the Latham Act, 15 U.S.C. 1125(c), Trademark Infringement under Florida common law, and Trademark Infringement under Florida Statute 495.131.

This case is significant because Allstate expends substantial resources advertising, marketing, and promoting its products. If Allstate's terminated agent had been allowed to continue using Allstate's marks it would have set a negative precedent for the thousands of other agents and created confusion in the marketplace, diluting the value of Allstate's brand.

- Plaintiff was represented by J. Stanford Lifsey at lifseyjspa@gmail.com and (813) 251-2121
- Defendant/Counter Claimant was represented by me and Joshua R. Brown at brownjr@gtlaw.com and (407) 254-2609 and Lori J. Caldwell at lcaldwell@rumberger.com and (407) 839-4511
- This case was presided over by District Judge Elizabeth A. Kovachevich and Magistrate Judge Elizabeth A. Jenkins

---

Louis Schwarz, et al. v. The Village Center Community Development District, Sumpter Landing Community Development District and The Villages Charter School, Inc., d/b/a The Villages Lifelong Learning College
Case No. 5:12-CV-177-MMH-TBS, Middle District of Florida

Plaintiffs were thirty-two deaf residents of The Villages, an age-restricted community in Central Florida. My client was The Villages Charter School, Inc., a private, domestic, not for profit corporation (Charter School Corporation). The Charter School Corporation operated three charter schools, including an elementary school, middle school, and high school (Villages Charter Schools) under a contract with the Sumter County District School Board. In addition to the three charter schools, the Charter School Corporation also operated three fee-based programs – an early childhood development program, an after-school program, and a lifelong learning program, The Villages Lifelong Learning College (LLC). At issue in this case was whether the LLC – not the Villages Charter Schools – had to provide American Sign Language (ASL) interpreters for deaf residents who wished to take enrichment classes offered by the LLC.

Plaintiffs brought two claims against the Charter School Corporation: (1) a violation of Title II of the Americans with Disabilities Act (ADA) and (2) a violation of section 504 of the Rehabilitation Act. The Charter School Corporation successfully moved for summary judgment on the ADA claim on the basis that the Charter School Corporation was not a public entity as defined under Title II of the ADA. The Court correctly held that even where a private entity contracts with a government to perform a traditional and essential government function, it remains a private company, not a public entity.

Unfortunately, the Charter School Corporation was not successful in arguing that providing ASL interpreters was an undue hardship to the LLC. As a result, the LLC was found to have violated section 504 of the Rehabilitation Act, an act which only applied to the LLC because of discrete federal funding received by the Villages Charter Schools to provide free lunches for low income students.

I entered an appearance in the case on August 13, 2015, after this case had already been litigated for some time. I researched the legal issues for the trial, drafted the motions *in limine* and responses to same, drafted the joint pre-trial statement, and prepared the jury instructions. I attended hearings and successfully argued that my client should be entitled to present evidence of funding limitations and the plaintiffs' motion to the contrary was an untimely motion for partial summary judgement disguised as a motion *in limine*.

Despite the LLC's argument at trial that plaintiffs were relying upon uncertain and speculative sources of income, the LLC lost. This case is significant for two reasons. First, plaintiffs were able to attach liability under the Rehabilitation Act to a program which takes no federal funding, because of an unexpectedly broad definition of the term "program or activity" within the Rehabilitation Act. Second, plaintiffs were able to use speculative sources of income to counter

LLC's argument that plaintiffs request would create an undue hardship. As a result, the LLC could not afford to continue and shut down operations.

- Plaintiffs were represented by:
  - Lisa L. Daniels at lld@ldanielslaw.com and (561) 955-1950
  - Paul K. Kim at paul@condo-laws.com and (954) 983-9112
  - Andrew Miller at amiller@simonandeisenberg.com and (212) 969-8114
  - Eric Baum at ebaum@eandblaw.com and (212) 969-8114
  - Andrew Rozynski at arozynski@eandblaw.com and (212) 969-8114
  - Sagar Shah at sshah@andblaw.com and (212) 969-8114
  - Brittany Shrader at brittany.shrader@nad.org and (212) 353-8700
  - Leah Wiederhorn at leah.wiederhorn@nad.org and (212) 353-8700
- Defendant, The Village Center Community Development District and Sumpter Landing Community Development District were represented by:
  - Michael J. Roper at mroper@bellroperlaw.com and (407) 897-5150
  - Michael H. Bowling at mbowling@bellroperlaw.com and (407) 897-5150
  - Dale A. Scott at Dscott@bellroperlaw.com and (407) 897-5150
- Defendant, The Villages Charter School, Inc., d/b/a The Villages Lifelong Learning College was represented at various times by me and:
  - Francis H. Sheppard at fsheppard@rumberger.com and (407) 872-7300
  - Leonard J. Dietzen, III at ldietzen@rumberger.com and (850) 222-6500
  - Sarah McDonald at sarah.mcdonald@cityoforlando.net and (407) 246-3470
  - John David Marsey at dmarsey@rumberger.com and (850) 222-6550
  - Lauren Carmody at laurencarmody@gmail.com and (850) 509-5390
  - Matthew Carson at mcarson@sniffenlaw.com and (850) 205-1996
  - Sally Culley at sculley@rumberger.com and (407) 872-7300
- This case was presided over by the District Judge Marcia Morales Howard. However, the trial was presided over by visiting District Judge George Caram Steeh, III, Senior United States District Judge for the Eastern District of Michigan.

Henry Rivera, as the personal representative for the Estate of Charity Rivera v. Suzuki Motor of America, Inc., a California Corporation, and Pasco County Cycles, Inc., a Florida corporation.
Case No.: 2014 CA 002112, Circuit Court in and for Pasco County, Florida
Citation: *Rivera v. Suzuki Motor of Am., Inc.*, 186 So. 3d 1034 (Fla. 2d DCA 2016)

In the summer of 2012, Charity Rivera died while driving a motorcycle manufactured and distributed by American Suzuki Motor Corporation (ASMC). A few months later, ASMC filed for Chapter 11 protection with the United States Bankruptcy Court in and for the Central District of California. The estate of Charity Rivera never filed a claim with the Bankruptcy Court. Shortly after the Bankruptcy Court issued an Order Confirming ASMC's Plan of Liquidation, the estate of

Charity Rivera brought a claim for wrongful death, against my client, Suzuki Motor of America, Inc. (SMAI), who was the purchaser of ASMC's assets at a bankruptcy sale which was done free and clear of liens and interests. Under the Plaintiff's theory, SMAI was nevertheless the successor to the undischarged liabilities of ASMC under state law.

I represented SMAI, along with attorneys Larry Roth and Michael Begey. I performed the research, analyzed the effect of the bankruptcy proceedings, and helped craft the strategy pursued. Ultimately, agreeing with our arguments, Judge Linda Babb granted summary judgment for SMAI, with prejudice.

This case is significant because, had plaintiff succeeded in its argument, it would have opened SMAI up to product liability claims across the county for products manufactured or distributed by ASMC. Plaintiff's argument, that SMAI in purchasing the assets of ASMC also succeeded to its liabilities, put the future of SMAI at stake, a major manufacturing concern. If the plaintiff had been successful in attaching ASMC's liabilities to SMAI, SMAI would have potentially been responsible for significant, unknown, and unknowable damages. The case involved the interplay of federal and state law, questions of jurisdiction, questions related to the Supremacy Clause, and questions of interpretation of statutes and orders.

- Plaintiff was represented by:
  - Nicole Sivils Smith at tampageico@geico.com and (813) 415-5433
  - Chris M. Limberopoulos at chris@thefloridalawgroup.com and (813) 463-8880
  - Audrey Hildes Schechter at audreyschechterlaw@gmail.com and (727) 223-2178
- Defendant SMAI was represented by me and:
  - Larry M. Roth at lroth@roth-law.com and (407) 585-6056
  - Michael Begey at mbegey@rumberger.com and (407) 873-7300
- This case was presided over by the Honorable Linda Babb, Circuit Court for Pasco County.

22. Attach at least two, but no more than three, examples of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach a writing sample for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

Writing Sample No. 1

I represented a local attorney and his firm sued for malpractice by a client unhappy with his handling of her first party insurance claim. I wrote the attached Motion for Summary Judgment. After it was filed, the plaintiff offered to enter a stipulation for dismissal with prejudice which stated as follows, "[p]laintiff agrees to dismiss this entire cause of action with prejudice and admits it should never have been filed against Defendants."

Writing Sample No. 2

I represented Allstate Property & Casualty Insurance Company in a class action lawsuit brought by a Florida healthcare provider. Along with attorneys Lori J. Caldwell and Peter Valeta, I wrote the attached Motion to Dismiss and/or Strike Class Allegations.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE

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

No.

24. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name(s) of the commission, the approximate date(s) of each submission, and indicate if your name was certified to the Governor's Office for consideration.

N/A

25. List any prior quasi-judicial service, including the agency or entity, dates of service, position(s) held, and a brief description of the issues you heard.

N/A

26. If you have prior judicial or quasi-judicial experience, please list the following information:

(i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;
(ii) the approximate number and nature of the cases you handled during your tenure;
(iii) the citations of any published opinions; and
(iv) descriptions of the five most significant cases you have tried or heard, identifying the citation or style, attorneys involved, dates of the case, and the reason you believe these cases to be significant.

N/A

27. Provide citations and a brief summary of all of your orders or opinions where your decision was reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, attach copies of the opinions.

N/A

28. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, attach copies of the opinions.

N/A

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

N/A

30. Have you ever held an attorney in contempt? If so, for each instance state the name of the attorney, case style for the matter in question, approximate date and describe the circumstances.

N/A

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

No.

NON-LEGAL BUSINESS INVOLVEMENT

32. 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.

I am involved in the management of Nardella & Nardella, PLLC, a local law firm. My duties include running the estates and trusts department for the firm and general management. I also participate in strategic discussions about firm finances, goals, human resources, and logistics. I will resign immediately upon appointment.

33. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, explain and provide dates. If you received any compensation of any kind outside the practice of law during this time, please list the amount of compensation received.

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.

My husband and father-in-law are practicing attorneys. I would recuse myself in any cases involving them or my current firm. Otherwise, there are no types of cases, groups of entities, or extended relationships or associations which would limit the cases which I would hear.

PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES

35. List the titles, publishers, and dates of any books, articles, reports, letters to the editor, editorial pieces, or other published materials you have written or edited, including materials published only on the Internet. Attach a copy of each listed or provide a URL at which a copy can be accessed.

American Bar Association Newsletter
I co-wrote an article with Richard Caldwell about the process for appealing orders denying qualified immunity. The article was published in the Winter/Spring 2011 Edition of the ABA Newsletter, Section of Litigation, Committee on Pre-trial Practice & Discovery. The article was entitled, *Litigating a Claim Against a Government Official After Denial of a Dispositive Motion Raising Qualified Immunity*.

https://rumberger.com/wp-content/uploads/2019/11/Dick-Caldwell-and-Molly-Cox-article.pdf

The Gator Standard
While at the University of Florida, I helped launch a conservative student newspaper called, "The Gator Standard." I wrote for the newspaper on a regular basis. Unfortunately, I no longer have copies of the newspaper and I have been unable to find any of my articles on the internet. To the best of my recollection, the newspaper was in print from approximately 2001 or 2002 to 2003 or 2004.

36. List any reports, memoranda or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. Provide the name of the entity, the date published, and a summary of the document. To the extent you have the document, please attach a copy or provide a URL at which a copy can be accessed.

N/A

37. List any speeches or talks you have delivered, including commencement speeches, remarks, interviews, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place they were delivered, the sponsor of the presentation, and a

summary of the presentation. If there are any readily available press reports, a transcript or recording, please attach a copy or provide a URL at which a copy can be accessed.

Civil Liberties
I interviewed National Review columnist Andrew McCarthy on April 28, 2020, for the first virtual meeting of the Tiger Bay Club of Central Florida, Inc., following the COVID-19 pandemic. The topic of my interview was "The Preservation of Civil Liberties During Times of Emergency."

http://www.tigerbayclub.org/virtual-events.html

Women in Leadership
To celebrate the life and legacy of Martin Luther King, on January 17, 2019, the Orange County Bar Association Foundation, in conjunction with the Delta Xi Lambda Chapter of Alpha Phi Alpha, Fraternity Inc., FAMU Law School and the City of Orlando sponsored a panel on women in leadership. I was asked to join a four-person panel on "The Year of the Women."

Debate on the Florida Supreme Court
On January 28, 2019, I joined WMFE's Matthew Peddie and analyst Jason Henry to discuss the Florida Supreme Court. The program can be found on the link below.

https://www.wmfe.org/intersection-a-more-conservative-florida-supreme-court-newspaper-unionizations-zora-festival/96456

Debate on Gubernatorial Race
On August 31, 2018, I joined WMFE's Matthew Peddie and analyst Jason Henry to weigh in on the gubernatorial race. The program can be found on the link below.

https://www.wmfe.org/intersection-what-the-primary-results-mean-for-floridas-democratic-and-republican-parties/90790

Debate on Primary Race and Second Amendment Issues
On June 15, 2018, I joined WMFE's Matthew Peddie and analyst Carol Cox to weigh in on the primary race. The conversation turned into a debate primarily on second amendment issues. The program can be found on the link below.

https://www.wmfe.org/intersection-governors-race-and-second-amendment-issues/88083

Investiture Speaker
I was privileged to speak at the Investiture of my friend, the Honorable Paige Hardy Gillman, on April 26, 2019, at the Palm Beach County Courthouse. My speech was about Paige's exemplary service throughout her life.

Christian Legal Society, University of Florida Chapter
I returned to the University of Florida to speak with members of the Christian Legal Society about how faith in God provides perspective when your law practice seems overwhelming.

Commencement Speech
I delivered a commencement speech for the middle school graduates of Trinity Lutheran School in downtown Orlando. The ceremony took place in the Sanctuary of Trinity Lutheran Church. The graduating class chose Jeremiah 29:11 as their class verse, which I used as the basis of my address. To the best of my knowledge, the address was given in the Spring of 2014.

Claims Handling Presentations
Periodically, while working at Rumberger, Kirk & Caldwell, P.A., I gave presentations to educate claims adjusters regarding various developments in Florida case law concerning bad faith claims.

Practicing with Professionalism
Early in my career, I served both as a panelist and a moderator for this CLE course young lawyers were required to take after passing the bar exam. I believe I moderated a panel of judges for this CLE in 2009 and spoke on a panel in 2010 and 2011.

Oath of Admission Ceremony
I received one of the highest scores on the Florida Bar Exam in the summer of 2008, and consequently I was selected to speak on behalf of the new admittees to The Florida Bar at the induction ceremony held on October 6, 2008. The judges of the Fifth District Court of Appeal presided over the program. My address encouraged fellow colleagues to be courageous, to continue the collegiality we enjoyed in law school, and to use our God-given gifts to serve others.

38. Have you ever taught a course at an institution of higher education or a bar association? If so, provide the course title, a description of the course subject matter, the institution at which you taught, and the dates of teaching. If you have a syllabus for each course, please provide.

No.

39. List any fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement. Include the date received and the presenting entity or organization.

Florida Super Lawyers "Rising Star"
For the last eight years, I have been selected as a Rising Star. From 2012 to 2016, my peers nominated me for this award in field of Insurance Coverage. In 2017, I began receiving the Rising Star designation as a "Top Rated Estate Planning & Probate Attorney."

Florida Trend Magazine "Florida's Legal Elite-Up and Comer"
I was recognized as an Up and Comer in Florida Trend Magazine in 2011 and 2013.

The Order of the Barristers
In the Spring of 2008, I was selected a National Member of the Order of the Barristers in recognition of my achievements in the art of courtroom advocacy.

Outstanding Graduate
In the Spring of 2008, the membership at large of the University of Florida Trial Team selected me as the organization's Outstanding Graduate.

Book Award
In the Spring of 2007, I received the Book Award in Trial Practice presented by the University of Florida Levin College of Law and sponsored by Vaka, Larson & Johnson, P.L.

Ronald Reagan Future Leader
In approximately 2003 and 2004, I was recognized as a Ronald Reagan Future Leader for my work to advance the cause of liberty on my college campus. Scholarship money accompanied the award. In total, I believe I received $7,500.00 in scholarship funds. Unfortunately, I do not recall, and have been unable to locate, the sponsoring organization.

Florida Blue Key
I was inducted into Florida Blue Key in 2007 and remain a member today. Florida Blue Key is a leadership honorary organization, which focuses on public service to the University of Florida and to the State of Florida.

Bright Futures Scholar
After graduating high school in 2001, I received the 100% Bright Futures Scholarship from the State of Florida based on a combination of GPA, college entrance exam scores, and community service hours.

40. Do you have a Martindale-Hubbell rating? If so, what is it and when was it earned?

No.

41. List all bar associations, legal, and judicial-related committees of which you are or have been a member. For each, please provide dates of membership or participation. Also, for each indicate any office you have held and the dates of office.

The Florida Bar (2008 to present)

The Real Property, Probate & Trust Section of the Florida Bar (2017 to Present)

Orange County Bar Association (2008 to 2017, 2020)

The Federalist Society (2017 to Present)

Christian Legal Society (2017 to Present)

Judicial Nominating Commission, Ninth Judicial Circuit (2014 to 2020)

- I was vice chair in 2016.
- I was chair in 2017.

Central Florida Estate Planning Council (2018 to 2019)

George C. Young American Inn of Court (2012 to 2017)

Orange County Young Lawyers (2008 to 2013)

Central Florida Association of Women Lawyers (2008 to 2009, 2011, 2013 to 2015, and 2020)

42. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in the previous question to which you belong, or to which you have belonged since graduating law school. For each, please provide dates of membership or participation and indicate any office you have held and the dates of office.

The Tiger Bay Club of Central Florida (2015 to Present)

- I am currently on the Board of Directors and have been since 2016.

Citrus Civitan (2013 to Present)

- In 2016 I served as President-Elect.
- In 2017 I served as President.

Central Florida Gator Club (2009 to 2012)

Orange County Young Republicans (2009 to 2012 and 2015 to 2016)

- I served as the Executor Director on or around 2015.

Orange County Republican Executive Committee (approximately 2009 to 2010)

The University Club of Orlando (2019 to Present)

Hope Church (2020 to Present)

Mosaic Church (2015 to 2020)

St. Luke's United Methodist Church (2008 to 2015)

43. Do you now or have you ever belonged to a 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 (other than a church, synagogue, mosque or other religious institution), national origin, or sex

(other than an educational institution, fraternity or sorority)? If so, state 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.

No.

44. Please describe any significant pro bono legal work you have done in the past 10 years, giving dates of service.

Domestic Violence
In 2014, while a member of the George C. Young Inns of Court, I worked with a team led by Judge Alice Blackwell to create a pool of trained attorneys willing to handle domestic violence cases in partnership with the Legal Aid Society of the Orange County Bar Association. During that time, I offered to take several pro bono cases representing victims of domestic violence seeking assistance at the Harbor House of Central Florida. [redacted] is a victim/survivor I represented in 2015. [redacted]

In addition to working to improve services to victim/survivors of domestic violence and their families, I also worked with my team to engage in community outreach programs and provide information to the community about the resources available. I felt like this was important work, and I was glad to be a part of it.

Probate
I represented Jean-Nathan Leon, who was appointed personal representative of the estate of his mother, Rithe Francois Leon. Ms. Leon died on June 29, 2014, leaving behind five children, two of whom were minors. Three years after her death, the youth pastor of a local church asked me to help Ms. Leon's middle son, which I did without charging for my time. Unfortunately, Ms. Leon's affairs were not in order when she died. Her home was in foreclosure, no one knew where she banked, or if she had a retirement plan or life insurance policy. It was unknown if she owned stocks, bonds, or held a note. Due to the dearth of information, I worked with Mr. Leon from April of 2017 to May 2018 to identify and collect assets owed to the estate. We successfully secured the equity in the home and distributed it to the heirs.

Estate Planning
In the last three years I prepared estate planning documents at no cost for two elderly Floridians and four couples. Based upon the ethical rule of lawyer-client confidentiality, I am restricted from voluntarily disclosing any more information relating to my representation.

Homeowner's Coverage
Two years ago, I represented a homeowner whose insurance company denied coverage after receiving notice that a minor was injured at his house while riding as a passenger in the family golf cart.

Election Integrity
I have spent the last decade coordinating and training poll watchers, working with our supervisor of elections to resolve issues, and attending canvassing board meetings as well as machine and

manual recounts. Although this work is very time consuming, it also very rewarding and important for our system.

45. Please describe any hobbies or other vocational interests.

My hobbies include playing and coaching basketball, leading a middle-school girls' bible study, and most of all, spending time with my friends and family.

46. Please state whether you have served or currently serve in the military, including your dates of service, branch, highest rank, and type of discharge.

N/A

47. Please provide links to all social media and blog accounts you currently maintain, including, but not limited to, Facebook, Twitter, LinkedIn, and Instagram.

https://www.facebook.com/molly.cox.9237/

https://twitter.com/molly_nardella

https://www.linkedin.com/in/mary-a-molly-nardella-21b185a7/

https://www.linkedin.com/in/mary-a-molly-cox-14bb7b8/

Instagram username: mollynardella

FAMILY BACKGROUND

48. Please state your current marital status. If you are currently married, please list your spouse's name, current occupation, including employer, and the date of the marriage. If you have ever been divorced, please state for each former spouse their name, current address, current telephone number, the date and place of the divorce and court and case number information.

I married Michael A. Nardella on March 29, 2014. He is an attorney at Nardella & Nardella, PLLC.

49. If you have children, please list their names and ages. If your children are over 18 years of age, please list their current occupation, residential address, and a current telephone number.

Michael and I have two children, [redacted] Nardella, aged [redacted], and [redacted] Nardella, aged [redacted].

CRIMINAL AND MISCELLANEOUS ACTIONS

50. Have you ever been convicted of a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

51. Have you ever pled nolo contendere or guilty to a crime which is a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date

of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

52. Have you ever been arrested, regardless of whether charges were filed? If so, please list and provide sufficient details surrounding the arrest, the approximate date and jurisdiction.

No.

53. Have you ever been a party to a lawsuit, either as the plaintiff, defendant, petitioner, or respondent? If so, please supply the case style, jurisdiction/county in which the lawsuit was filed, case number, your status in the case, and describe the nature and disposition of the matter.

No.

54. To your knowledge, has there ever been a complaint made or filed alleging malpractice as a result of action or inaction on your part?

No.

55. To the extent you are aware, have you or your professional liability carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the name of the client(s), approximate dates, nature of the claims, the disposition and any amounts involved.

No.

56. 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, provide the particulars of each finding or investigation.

No.

57. To your knowledge, within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers, clients, or the like, ever filed a formal complaint or accusation of misconduct including, but not limited to, any allegations involving sexual harassment, creating a hostile work environment or conditions, or discriminatory behavior against you with any regulatory or investigatory agency or with your employer? If so, please state the date of complaint or accusation, specifics surrounding the complaint or accusation, and the resolution or disposition.

No.

58. 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.

59. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you, this includes any corporation or business entity that you were involved with? If so, please provide the case style, case number, approximate date of disposition, and any relevant details surrounding the bankruptcy.

No.

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

No.

61. Please explain whether you have complied with all legally required tax return filings. To the extent you have ever had to pay a tax penalty, or a tax lien was filed against you, please explain giving the date, the amounts, disposition, and current status.

My husband and I file our taxes jointly and paid penalties for tax filings for the years 2017 and 2019. For the 2017 tax year, we paid an estimated tax amount timely, but accrued $3,560 in penalties and $1,055 in interest for filing the return late as we switched accountants. For the 2019 tax year, we paid $467 in penalties as we had paid an estimated tax amount but underestimated the amount due. There were no tax liens or actions of any kind and all is and has been resolved.

HEALTH

62. Are you currently addicted to or dependent upon the use of narcotics, drugs, or alcohol?

No.

63. 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? 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.

No.

64. 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 two

or three nights, experiencing periods of hyperactivity, spending money profusely with extremely poor judgment, suffering 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. If yes, please explain.

No.

65. 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? If yes please explain the limitation or impairment and any treatment, program or counseling sought or prescribed.

No.

66. 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, provide full details as to court, date, and circumstances.

No.

67. 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 or State law provisions.)

No.

68. 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 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.

69. 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.

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

No.

SUPPLEMENTAL INFORMATION

71. Describe any additional education or experiences you have which could assist you in holding judicial office.

My experience serving on the Judicial Nominating Commission for the Ninth Judicial Circuit would assist me in holding judicial office. I served on this JNC for six years. In that time, I reviewed over 200 applications and participated in hundreds of interviews. During those interviews, I listened to smart lawyers and judges answer questions requiring them to, among other things, interpret texts, grapple with the edges of common law, and analyze complicated jurisdictional and Supremacy Clause issues. Throughout the process, I heard applicants with a variety of perspectives and philosophies explain how they would approach the difficult questions put to them. After seeing so many applicants and comparing the different approaches, the experience cemented my appreciation of the importance of having a fully formed, consistent, thoughtful, and neutral approach to tackling legal issues.

In addition, my experience helping build a law firm would also assist me in holding judicial office. For the last three years, I have helped build a law firm that represents businesses, organizations, individuals, and families in a wide variety of civil matters. I have trained attorneys and paralegals, created firmwide policies and procedures, and secured office space and infrastructure for the firm to grow. Having worked in the management of a growing firm, I now better understand how important budgets, planning, priority management, and teamwork are. In these last three years, the firm grew from four lawyers to ten, with all of the attendant hard work that goes into absorbing that growth and creating new systems. I have done that while also mastering a new practice area. My experience here would bring to the bench both a background in management and in a broader range of practice areas.

72. Explain the particular contribution you believe your selection would bring to this position and provide any additional information you feel would be helpful to the Commission and Governor in evaluating your application.

After receiving the Florida bar exam results, the then Chief Judge of the Fifth District Court of Appeal, William D. Palmer, sent me a letter asking if I would speak to my incoming class of attorneys at the Oath of Admission Ceremony. I agreed, and after much thought prepared a speech focused on three themes, one of which was courage. I stand by today what I said then about the courage required to practice law with integrity. If appointed to the Fifth District Court of Appeal my focus on courage would not change.

To me, judicial courage means appreciating the limited, but important role of the judiciary and then steadfastly adhering to that role in every case. History has shown that our liberty's most powerful protection is the separation of powers inherent in our structure of government. As recognized by James Madison in *Federalist 51*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." In other words, absolute power corrupts absolutely.

But despite this well-known maxim, concentration of power is the unfortunate tendency of human nature. It takes courage to stand up for a system where power is not concentrated but is diffused. People instinctively want the efficiency of concentrated power. History shows that it takes discipline and patience to trust that the system will eventually self-correct, and that for a judge, often discretion is the better part of valor. In fact, it is the *inefficiency* of the separation of powers that protects our liberty. And it takes courage for members of the judicial branch of government—the branch which has the least structural oversight—to withstand the pressure from parties and from well-meaning colleagues who would seek to invoke the judicial power to cut through the inefficiencies of our system.

Not all laws are good laws, and the pressure is always great to reach a result that feels inherently just. But to protect the integrity of our system, judges must have the courage of their convictions and apply the law as it is, not how they would like it to be. After conducting hundreds of interviews of candidates during my tenure on the Ninth Judicial Circuit JNC, I saw how rare it really was, even among so many experienced applicants, to have a deep and fully integrated understanding of the principles of our system. It was that experience that led me to seek this appointment, and if appointed to the Fifth District Court of Appeal, I would bring to the bench an appreciation for the structure of our government and the courage to stand up for it.

I would also bring to this job the courage and experience to take on the most complicated, intellectual cases. For years, I worked with some of this state's best lawyers on complex, high-risk, and nuanced legal work. I was trusted to develop strategies and to defend Fortune 100 companies, bank presidents, and professionals. These cases required intense study and focus, particularly as the stakes were high and opposing counsel formidable. I spent almost a decade of my career working on what I believe were some of the most interesting cases in the region.

While that experience was essential and critical for my development as a lawyer, it was mostly limited to a certain class of client. In the last three years of my practice, I have counseled new types of clients, clients who are not just employees of large corporations, but who are business owners and entrepreneurs, and who have more personal stakes in the legal services I am providing. Rather than simply litigating within the four corners of a complaint and counterclaim, now I must review the whole universe of a client's portfolio and apply a broad range of laws to the strategies I work to implement. To do this successfully, I had to greatly expand my general knowledge of the law and learn new practice areas. This required humility, as I had to step far out of my comfort zone. But, although it was both hard and humbling, learning new areas of law, and learning how to help a different class of clients, has given me a breadth of perspective that I did not have before and that I believe would be a contribution to the bench.

Just as a judge without courage will always be tempted to reach the popular result, a judge without humility will always be tempted to substitute his wisdom for that of the lawmakers, to stop listening when an advocate's argument sounds familiar, and to allow pride to keep him from rethinking a position. It is humility which prompts a judge to engage meaningfully in an exchange

with counsel and to listen with an open mind to a colleague's opinion. I would bring to the appellate bench the same work ethic and humility which was required to successfully change my fields of practice.

Finally, my life is, like all our lives, a partial reflection of my upbringing. I grew up in Pine Hills, an Orlando suburb. My mother was an insurance claims adjuster, and my father owned a small electrical business. I began playing basketball at a young age and grew up in the gymnasium. My basketball teammates became my closest friends, and despite our differences we worked every day toward a common goal. Ultimately, success in basketball took me from my assigned public high school, Maynard Evans, to Lake Highland Preparatory School (LHPS), one of Orlando's most prestigious private schools, where I was given a full scholarship. I was grateful for the chance to study at LHPS, and I was determined to earn my keep. I led the basketball team for four years, bringing home a state championship and a state runner-up, and I helped the cross-county and track teams win state runner-up. For a time, I even held the school record in the 800 meters. I wanted to give the administration a return on their investment.

I have been given many gifts in this life, and I am grateful for each. I am also determined to give back more than I receive. If given the opportunity to serve on the Fifth District Court of Appeal, I would bring a different perspective and a different set of experiences that I believe would allow me to serve the people of this District and make a contribution back to my community which has invested so much in me.

REFERENCES

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

The Honorable Jamie R. Grosshans
500 S Duval St.
Tallahassee, FL 32399
grosshansj@flcourts.org
[redacted]

The Honorable Meredith Sasso
300 S. Beach St.
Daytona Beach, FL 32114-5002
sassom@flcourts.org
[redacted]

The Honorable Paetra T. Brownlee
425 N. Orange Ave.
Orlando, FL 32801
ctjupb1@ocnjcc.org
[redacted]

The Honorable Paige Gillman
200 West Atlantic Ave.
Delray Beach, FL 33444
pgillman@pbcgov.org
[redacted]

Mr. Glenton "Glen" Gilzean, Jr.
2804 Belco Dr.
Orlando, FL 32808
glen@glengilzean.com
(407) 841-7654

Christopher Carmody, Esq.
301 East Pine St., Suite 1400
Orlando, FL 32801
chris.carmody@gray-robinson.com
(407) 843-8880

Eduardo Jose "Eddie" Fernandez, Esq.
135 W. Central Blvd., Suite 300
Orlando, FL 32801
ejfc@fernandez-legal.com
(407) 574-5979

Daniel J. Gerber, Esq.
300 S. Orange Ave., Suite 1400
Orlando, FL 32801
dgerber@rumberger.com
(407) 872-7300

Patrick Kilbane, Esq.
Ullmann Wealth Partners
1540 The Greens Way
Jacksonville Beach, FL 32250
pkilbane@ullmannwealthpartners.com
(904) 280-3700

Nicholas Primrose, Esq.
Jacksonville Port Authority
2831 Talleyrand Ave.
Jacksonville, FL 32206
nicholas.primrose@jaxport.com
(904) 357-3132

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 11 day of October, 2020

Mary A. Nardella
Printed Name

Mary Nardella
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: $44,190.00

Last Three Years: 2019: $60,978 2018: $53,412 2017: $4,012

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: $44,190.00

Last Three Years: 2019: $60,978 2018: $53,412 2017: $4,012

3. State the gross amount of income or loses 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: $1,250 (Interest on Accounts)

Last Three Years: 2019: $1,216 2018: $1,843 2017: $3,040

4. State the amount 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: $1,250 (Interest on Accounts)

Last Three Years: 2019: $1,216 2018: $1,843 2017: $3,040

5. 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: $1,250 (Interest on Accounts)

Last Three Years: 2019: $1,216 2018: $1,843 2017: $3,040

FORM 6
FULL AND PUBLIC DISCLOSURE OF FINANCIAL INTEREST

PART A – NET WORTH

Please enter the value of your net worth as of December 31 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 October 10, 2020 was $1,393,552.79.

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.

The aggregate value of my household goods and personal effects (described above) is $45,000.00.

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
[redacted]	$587,513.00
Bank Accounts (Wells Fargo)	$591,302.93
Bank Account (Venmo)	$1,221.58
Marketable Securities (Edward Jones)	$103,738.05
IRA (Edward Jones)	$50,190.94
IRA (Charles Schwab)	$25,844.61

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
American Express (charge card paid monthly)	$7,412.01
Chase Credit Card (credit card paid monthly)	$3,886.31

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: **NAME AND ADDRESS OF CREDITOR**	**AMOUNT OF LIABILITY**
N/A	

PART D - INCOME

You may ***EITHER*** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments,* ***OR*** (2) file a sworn statement identifying each separate source and amount of income which exceeds $1,000 including secondary sources of income, by completing the remainder of Part D, below.

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

PRIMARY SOURCE OF INCOME (See instructions on page 5):

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
Nardella & Nardella, PLLC	135 W. Central Blvd., Suite 300, Orlando, FL 32801	$60,978.00
Wells Fargo	131 N. Orange Ave, Suite 105, Orlando, FL 32801	$1,216.00

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

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

PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY			
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			

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

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.

Mary A. Nardella
SIGNATURE

STATE OF FLORIDA

COUNTY OF Orange

Sworn to (or affirmed) and subscribed before me this 11 day of 10, 2020 by Mary A. Nardella

(Signature of Notary Public—State of Florida)

Stephen Nardella
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ✓ *OR* Produced Identification _____

Type of Identification Produced _____

STEPHEN W. NARDELLA
Notary Public-State of Florida
Commission # GG 344407
My Commission Expires
June 12, 2023

INSTRUCTIONS FOR COMPLETING FORM 6:

PUBLIC RECORD: The disclosure form and everything attached to it is a public record. **Your Social Security Number is not required and you should redact it from any documents you file.** If you are an active or former officer or employee listed in Section 119.071(4)(d), F.S., whose home address is exempt from disclosure, the Commission is required to maintain the confidentiality of your home address ***if you submit a written request for confidentiality.***

PART A – NET WORTH

Report your net worth as of December 31 or a more current date, and list that date. This should be the same date used to value your assets and liabilities. In order to determine your net worth, you will need to total the value of all your assets and subtract the amount of all of your liabilities. Simply subtracting the liabilities reported in Part C from the assets reported in Part B will not result in an accurate net worth figure in most cases.

To total the value of your assets, add:

(1) The aggregate value of household goods and personal effects, as reported in Part B of this form;

(2) The value of all assets worth over $1,000, as reported in Part B; and

(3) The total value of any assets worth less than $1,000 that were not reported or included in the category of "household goods and personal effects."

To total the amount of your liabilities, add:

(1) The total amount of each liability you reported in Part C of this form, except for any amounts listed in the "joint and several liabilities not reported above" portion; and,

(2) The total amount of unreported liabilities (including those under $1,000, credit card and retail installment accounts, and taxes owed).

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

The value of your household goods and personal effects may be aggregated and reported as a lump sum, if their aggregate value exceeds $1,000. The types of assets that can be reported in this manner are described on the form.

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

Provide a description of each asset you had on the reporting date chosen for your net worth (Part A), that was worth more than $1,000 and that is not included as household goods and personal effects, and list its value. Assets include: interests in real property; tangible and intangible personal property, such as cash, stocks, bonds, certificates of deposit, interests in partnerships, beneficial interest in a trust, promissory notes owed to you, accounts received by you, bank accounts, assets held in IRAs, Deferred Retirement Option Accounts, and Florida Prepaid College Plan accounts. You are not required to disclose assets owned solely by your spouse.

How to Identify or Describe the Asset:

— Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information.

— Intangible property: Identify the type of property and the business entity or person to which or to whom it relates. **Do not list simply "stocks and bonds" or "bank accounts."** For example, list "Stock (Williams Construction Co.)," "Bonds (Southern Water and Gas)," "Bank accounts(First

National Bank)," "Smith family trust," Promissory note and mortgage (owed by John and Jane Doe)."

How to Value Assets:

— Value each asset by its fair market value on the date used in Part A for your net worth.

— Jointly held assets: If you hold real or personal property jointly with another person, your interest equals your legal percentage of ownership in the property. However, assets that are held as tenants by the entirety or jointly with right of survivorship must be reported at 100% of their value.

— Partnerships: You are deemed to own an interest in a partnership which corresponds to your interest in the equity of that partnership.

— Trusts: You are deemed to own an interest in a trust which corresponds to your percentage interest in the trust corpus.

— Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.

— Marketable securities which are widely traded and whose prices are generally available should be valued based upon the closing price on the valuation date.

— Accounts, notes, and loans receivable: Value at fair market value, which generally is the amount you reasonably expect to collect.

— Closely-held businesses: Use any method of valuation which in your judgment most closely approximates fair market value, such as book value, reproduction value, liquidation value, capitalized earnings value, capitalized cash flow value, or value established by "buy-out" agreements. It is suggested that the method of valuation chosen be indicated in a footnote on the form.

— Life insurance: Use cash surrender value less loans against the policy, plus accumulated dividends.

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

List the name and address of each creditor to whom you were indebted on the reporting date chosen for your net worth (Part A) in an amount that exceeded $1,000 and list the amount of the liability. Liabilities include: accounts payable; notes payable; interest payable; debts or obligations to governmental entities other than taxes (except when the taxes have been reduced to a judgment); and judgments against you. You are not required to disclose liabilities owned *solely* by your spouse.

You do not have to list on the form any of the following: credit card and retail installment accounts, taxes owed unless the taxes have been reduced to a judgment), indebtedness on a life insurance policy owned to the company of issuance, or contingent liabilities. A "contingent liability" is one that will become an actual liability only when one or more future events occur or fail to occur, such as where you are liable only as a partner (without personal liability) for partnership debts, or where you are liable only as a guarantor, surety, or endorser on a promissory note. If you are a "co-maker" on a note and have signed as being jointly liable or jointly and severally liable, then this is not a contingent liability.

How to Determine the Amount of a Liability:

— Generally, the amount of the liability is the face amount of the debt.

— If you are the only person obligated to satisfy a liability, 100% of the liability should be listed.

— If you are jointly and severally liable with another person or entity, which often is the case where more than one person is liable on a promissory note, you should report here only the portion of the liability that corresponds to your percentage of liability. *However*, if you are jointly and severally liable for a debt relating to property you own with one or more others as tenants by the entirely or jointly, with right of survivorship,

report 100% of the total amount owed.

— If you are only jointly (not jointly and severally) liable with another person or entity, your share of the liability should be determined in the same way as you determined your share of jointly held assets.

Examples:

— You owe $10,000 to a bank for student loans, $5,000 for credit card debts, and $60,000 with your spouse to a saving and loan for the mortgage on the home you own with your spouse. You must report the name and address of the bank ($10,000 being the amount of that liability) and the name and address of the savings and loan ($60,000 being the amount of this liability). The credit cards debts need not be reported.

— You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability. If your liability for the loan is only as a partner, without personal liability, then the loan would be a contingent liability.

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

List in this part of the form the amount of each debt, for which you were jointly and severally liable, that is not reported in the "Liabilities in Excess of $1,000" part of the form. Example: You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability, as you reported the other 50% of the debt earlier.

PART D – INCOME

As noted on the form, you have the option of either filing a copy of your latest federal income tax return, including all schedules, W2's and attachments, with Form 6, or completing Part D of the form. If you do not attach your tax return, you must complete Part D.

PRIMARY SOURCES OF INCOME:

List the name of each source of income that provided you with more than $1,000 of income during the year, the address of that source, and the amount of income received from that source. The income of your spouse need not be disclosed; however, if there is a joint income to you and your spouse from property you own jointly (such as interest or dividends from a bank account or stocks), you should include all of that income.

"Income" means the same as "gross income" for federal income tax purposes, even if the income is not actually taxable, such as interest on tax-free bonds. Examples of income include: compensation for services, gross income from business, gains from property dealings, interest, rents, dividends, pensions, IRA distributions, distributive share of partnership gross income, and alimony, but not child support. Where income is derived from a business activity you should report that income to you, as calculated for income tax purposes, rather than the income to the business.

Examples:

— If you owned stock in and were employed by a corporation and received more than $1,000 of income (salary, commissions, dividends, etc.) from the company, you should list the name of the company, its address, and the total amount of income received from it.

— If you were a partner in a law firm and your distributive share of partnership gross income exceeded $1,000, you should list the name of the firm, its address, and the amount of your distributive share.

— If you received dividend or interest income from investments in stocks and bonds, list only each individual company from which you received more than $1,000. Do not aggregate income from all of these investments.

— If more than $1,000 of income was gained from the sale of property, then you should list as a source of income the name of the purchaser, the purchaser's address, and the amount of gain from the sale. If the purchaser's

identity is unknown, such as where securities listed on an exchange are sold through a brokerage firm, the source of income should be listed simply as "sale of (name of company) stock," for example.

— If more than $1,000 of your income was in the form of interest from one particular financial institution (aggregating interest from all CD's, accounts, etc., at that institution), list the name of the institution, its address, and the amount of income from that institution.

SECONDARY SOURCE OF INCOME:

This part is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which you own an interest. It is not for reporting income from second jobs. That kind of income should be reported as a "Primary Source of Income." You will ***not*** have anything to report ***unless***:

(1) You owned (either directly or indirectly in the form of an equitable or beneficial interest) during the disclosure period, more than 5% of the total assets or capital stock of a business entity (a corporation, partnership, limited partnership, LLC, proprietorship, joint venture, trust, firm, etc., doing business in Florida); and

(2) You received more than $1,000 in gross income from that business entity during the period.

If your ownership and gross income exceeded the two thresholds listed above, then for that business entity you must list every source of income to the business entity which exceeded 10% of the business entity's gross income (computed on the basis of the business entity's more recently completed fiscal year), the source's address, the source's principal business activity, and the name of the business entity in which you owned an interest. You do not have to list the amount of income the business derived from that major source of income.

Examples:

— You are the sole proprietor of a dry cleaning business, from which you received more than $1,000 in gross income last year. If only one customer, a uniform rental company, provided more than 10% of your dry cleaning business, you must list the name of your business, the name of the uniform rental company, its address, and its principal business activity (uniform rentals).

— You are a 20% partner in a partnership that owns a shopping mall and your gross partnership income exceeded $1,000. You should list the name of the partnership, the name of each tenant of the mall that provided more than 10% of the partnership's gross income, the tenant's address and principal business activity.

PART E – INTERESTS IN SPECIFIED BUSINESS

The types of businesses covered in this section include: state and federally chartered banks; state and federal savings and loan associations; cemetery companies; insurance companies; mortgage companies, credit unions; small loan companies; alcoholic beverage licensees; pari-mutuel wagering companies; utility companies; and entities controlled by the Public Service Commission; and entities granted a franchise to operate by either a city or a county government.

You are required to make this disclosure if you own or owned (either directly or indirectly in the form of an equitable or beneficial interest) at any time during the disclosure period, more than 5% of the total assets or capital stock of one of the types of business entities listed above. You also must complete this part of the form for each of these types of business for which you are, or were at any time during the year an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process).

If you have or held such a position or ownership interest in one of these types of businesses, list: the name of the business, its address and principal business activity, and the position held with the business (if any). Also, if you own(ed) more than a 5% interest in the business, as described above, you must indicate that fact and describe the nature of your interest.

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 11, 2020

JNC Submitting To: Fifth District Court of Appeal

Name (please print): Mary Alice Nardella

Current Occupation: Attorney

Telephone Number: 407-966-2680 Attorney No.: 58896

Gender (check one): ☐ Male ☒ Female

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

County of Residence: Orange

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.

Mary A. Nardella

Printed Name of Applicant

Mary Nardella

Signature of Applicant

Date: October 11, 2020

WRITING SAMPLES

Filing # 21960945 Electronically Filed 12/24/2014 01:39:35 PM

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

JILL NEAT, an individual,

Plaintiff,

vs. CASE NO.: 2013-CA-003421-09P-W

MICHAEL B. BREHNE, ESQ.,
an individual, and LAW OFFICES
OF MICHAEL B. BREHNE, P.A.,
a professional association,

Defendants.
_____/

DEFENDANTS', MICHAEL B. BREHNE AND LAW OFFICE OF MICHAEL B. BREHNE, P.A., MOTION FOR FINAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

This is an action for legal malpractice ("malpractice lawsuit") filed by Plaintiff Jill Neat ("Neat") against Michael B. Brehne ("attorney Brehne") and Law Offices of Michael B. Brehne, P.A ("law firm") (collectively "Defendants"). Based solely upon the undisputed facts, Defendants are entitled to a judgment as a matter of law in this malpractice lawsuit for three reasons:

1. Neat is seeking phantom damages;

2. Neat is seeking damages she could not have recovered in the underlying lawsuit; and

3. Neat is seeking damages which were not factually or proximately caused by Defendants, and for which Plaintiff has not, and cannot, produce any record evidence connecting an action or omission of Defendants to an injury sustained by Plaintiff.

Accordingly, Defendants move for a final summary judgment pursuant to Rule 1.510(a) of the Florida Rules of Civil Procedure and state as follows.

I. UNDISPUTED MATERIAL FACTS

In 2008, Neat owned a home in Oviedo, Florida insured by Royal Palm Insurance Company ("Royal Palm").[1] The home was co-owned by Neat's then-husband, Douglas Neat.[2] After Tropical Storm Fay damaged the home in August of 2008[3], the Neats made a claim for benefits under their homeowner's policy with Royal Palm.[4]

Royal Palm offered the Neats only $3,933.52 on their claim, leading Mr. and Mrs. Neat to hire Defendants to pursue additional funds for repairs.[5] Defendants took the Neats' case and ultimately recovered approximately $31,525.00[6] before withdrawing in October of 2010 based upon the growing acrimony between Neat and her then-husband.[7] This malpractice lawsuit—brought solely by Jill Neat against Defendants—alleges Defendants mishandled Neat's claim and subsequent lawsuit against Royal Palm ("insurance lawsuit").[8] Neat's former husband, Douglas Neat, is not a party to this malpractice lawsuit. [9]

In this malpractice lawsuit, Neat claims that Defendants breached their duty of care in the earlier insurance lawsuit in two ways.[10] First, Neat alleges that "Defendant filed a first party lawsuit against Royal Palm Insurance Company, **when the language of the insurance policy required disputes to be submitted to an appraisal process**. . ."[11] (emphasis added). Neat claims that she was required to pay Royal Palm's attorney's fees and costs as a result. [12] Second, Neat alleges that Defendants "failed to make a claim on behalf of [Neat] for the living expenses

---

[1] Ex. 1 to J. Neat Deposition. Also attached to this Motion as Exhibit "A"
[2] J. Neat Deposition at p. 19, ll. 9-12
[3] J. Neat Deposition at p. 21, ll. 3-8.
[4] J. Neat Deposition at p. 29, ll. 12-13.
[5] J. Neat Deposition at p. 41, ll. 1-7; p. 64, ll. 10-12.
[6] J. Neat Deposition at p. 99, ll. 19-22
[7] J. Neat Deposition at p. 111, l. 3 - p. 112, l. 5; *See also* Order Granting Motion to Withdraw in 2009-CA-001675, attached as Exhibit "C"
[8] Am Compl ¶ 6.
[9] Am Compl.
[10] Am. Compl. ¶ 10(a) and (b).
[11] Am. Compl. ¶ 10.
[12] Am. Compl. ¶ 12.

she incurred as a result of having to live elsewhere during the remediation/repair process to the home."[13] Neat claims that she owes her parents the sum of $52,000.00 in rent as a result.[14]

Based upon the undisputed facts, there is no support for either allegation of negligence in the Amended Complaint. Moreover, there is no record evidence that any alleged act of negligence factually or proximately caused damage to Neat.

II. SUMMARY JUDGMENT STANDARD

Florida Rule of Civil Procedure 1.510(c) requires summary judgment where "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A material fact is "a fact that is essential to the resolution of the legal questions raised in the case." *Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000). The movant bears the initial "burden of demonstrating that there is no genuine issue on any material fact." *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 783 (Fla. 1965). Once the movant "tenders competent evidence to support his motion, the opposing party must come forward with counter evidence sufficient to reveal a genuine issue" to avoid summary judgment. *Publix Supermkts., Inc. v. Austin*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995). Critically, "it is not sufficient for the opposing party merely to assert that an issue does exist," and "where the material facts are not in dispute and the moving party is entitled to a judgment as a matter of law, it is the court's duty to enter summary judgment." *Harvey*, 175 So. 2d at 783 (Fla. 1965); *Castellano v. Raynor*, 725 So. 2d 1197, 1199 (Fla. 2d DCA 1999).

---

[13] Am. Compl. ¶ 10

[14] J. Neat's Answer to Interrogatories, ¶ 6, February 5, 2014.

III. LEGAL ARGUMENT

This malpractice lawsuit consists of a single count. In that count, Neat claims that Defendants breached their duty of care in two ways. First, Neat alleges that "Defendant filed a first party lawsuit against Royal Palm Insurance Company, **when the language of the insurance policy required disputes to be submitted to an appraisal process**. . ."[15] (emphasis added). Second, Neat alleges that Defendants "failed to make a claim on behalf of [Neat] for the living expenses she incurred as a result of having to live elsewhere during the remediation/repair process to the home."[16] Both alleged breaches are without merit for three reasons:

1. Neat is seeking phantom damages;

2. Neat is seeking damages she could not have recovered from Royal Palm in the underlying lawsuit; and

3. Neat is seeking damages which were not legally caused by Defendants, and for which Plaintiff has not, and cannot, produce any record evidence connecting an action or omission of Defendants to an injury sustained by Plaintiff.

Accordingly, Defendants are entitled to judgment as a matter of law on both alleged breaches, each alleged breach is examined separately below.

A. NEAT'S CLAIM FOR ADDITIONAL LIVING EXPENSES SEEKS PHANTOM DAMAGES NEAT COULD NOT HAVE RECOVERED IN THE INSURANCE LAWSUIT

In her Amended Complaint, Neat alleges that Defendants "failed to make a claim on behalf of the Plaintiff for the living expenses she incurred as a result of having to live elsewhere during the remediation/repair process to the home."[17] As a result, Neat claims in her Answers to

---

[15] Am. Compl. ¶ 10.
[16] Am. Compl. ¶ 10
[17] Am. Compl. ¶10(b)

Interrogatories, that she **owes** her parents the sum of $52,000.00 in rent for the period of time the [she] was unable to live in her house.[18]

On Neat's claim for Additional Living Expenses, Defendants are entitled to a judgment as a matter of law for two independent reasons. Each reason standing alone demands that Neat's claim for Additional Living Expenses be rejected. First, Neat is seeking phantom damages; Neat is seeking damages for a loss she never sustained. Second, there is no record evidence that "but-for" Defendants actions or omissions Neat would have recovered Additional Living Expenses in the insurance lawsuit. In fact, based upon the plain language of Neat's policy with Royal Palm, Neat could not have recovered Additional Living Expenses in the insurance lawsuit.

(i) NEAT IS SEEKING PHANTOM DAMAGES

Neat has not been damaged by Defendants alleged failure to pursue Additional Living Expenses, in this case rent, because Neat never paid rent to her parents and does not owe them rent. The undisputed, material facts regarding Neat's claim for Additional Living Expenses are as follows:

1. Neat's insurance policy, which is attached as Exhibit "A", provides coverage for "additional expenses you **incur**".[19]

2. In her Second Amended Complaint, Neat alleges that Defendants "failed to make a claim on behalf of [Neat] for the living expenses she incurred as a result of having to live elsewhere during the remediation/repair process to the home."[20]

3. Tropical Storm Fay damaged Neat's home in August of 2008.[21]

4. After filing a Temporary Restraining Order against her husband, Neat and her daughter moved into her parents' home, where Neat and her daughter resided continuously until August of 2012.[22]

---

[18] J. Neat's Answer to Interrogatories, ¶ 6, February 5, 2014.
[19] Policy at Form entitled, Special Provisions for Florida, RPI HO 09 SP 05 06 at p. 3, under Coverage D-LOSS OF USE, attached as Exhibit "A"
[20] Am. Compl. 10(b)¶
[21] J. Neat Deposition at p. 21, ll. 3-8.

5. Neat's husband did not reside in the home of Neat's parents.[23]

6. Instead, Neat and her husband separated.[24]

7. Neat believes her husband resided in their home, which Neat vacated when she moved into her parents' home.[25]

8. Neat's parents never asked her to pay rent to live in their home.[26]

9. **Neat never paid rent to her parents.**[27] (emphasis added)

10. After Neat learned that she "had additional living expenses in [her] homeowner's policy," she prepared a rental agreement to be signed by herself and her father.[28]

11. Neat searched online for a generic rental agreement.[29]

12. After finding a rental agreement online, Neat changed the verbiage to say that rent would be payable to her parents upon settlement with Royal Palm.[30]

13. More specifically, the Residential Lease Agreement states that "Tenant(s) agree(s) to lease this dwelling for $1600) (sic) per month, payable upon legal settlement from Royal Palm Insurance Company to Robert Sherrod (Owner(s))".[31]

14. Neat has never paid rent pursuant to the rental agreement.[32]

15. Further, Neat does not believe her obligation to pay her parents has ever come due.[33]

16. It is Neat's position that under the rental agreement she does not owe any money to her parents until she receives a legal settlement from Royal Palm for Additional Living Expenses.[34]

---

[22] J. Neat Deposition at p. 47, ll. 7-10.
[23] J. Neat Deposition at p. 37, ll. 9-22.
[24] J. Neat Deposition at p. 37, ll. 9-22.
[25] J. Neat Deposition at p. 37, ll. 9-22.
[26] J. Neat Deposition at p. 62, ll. 6-7; p. 74, ll. 8-10.
[27] J. Neat Deposition at p. 62, ll. 8-10
[28] J. Neat Deposition at p. 63, ll. 2-6; p. 77, ll. 16-18.
[29] J. Neat Deposition at p. 67, ll. 18-23.
[30] J. Neat Deposition at p. 67, ll. 18-23.
[31] J. Neat Deposition, Exhibit 3 to Deposition (Residential Lease Agreement).
[32] J. Neat Deposition at p. 75, ll. 1-3.
[33] J. Neat Deposition at p. 76, l. 21 - p. 77, l. 8.
[34] J. Neat Deposition p. 85, ll. 9-17.

17. Neat's parents agree.

18. Neat's parents never made any effort to evict her for nonpayment.[35]

19. Neat's parents have never told her that she owed them any money.[36]

20. In fact, Neat's father does not believe any money is currently owed, or may be owed to him in the future from Neat for the time she lived in his home.[37]

In her deposition, Neat admits that she never paid her parents rent. To recover damages for rent she never paid, Neat claims that she owes her parents the exorbitant sum of $52,000.00 in rent. Neat is wrong and she knows it.

Neat's Residential Lease Agreement with her farther contains a clear and unambiguous condition precedent. Specifically, the Residential Lease Agreement states that rent is "payable upon legal settlement from Royal Palm Insurance Company to Robert Sherrod (Owner(s))."[38] The language in the Residential Lease Agreement means as a matter of law that if there is no settlement from Royal Palm Insurance Company to Robert Sherrod, then there is no rent due. *Arvida Realty Sales, Inc. v. William R. Tinnerman & Co.*, 536 So. 2d 1041, 1042 (Fla. 4th DCA App. 1988) ("We hold that this language [payable at closing] is clear and unambiguous, and as a matter of law, means no closing, no commission."); *See generally In re Harrell*, 351 B.R. 221, 242 (Bankr. M.D. Fla. 2006) (When a contract contains a condition precedent, obligations under the contract do not mature until after the condition precedent has occurred.)

Even Neat in her deposition acknowledged that, at this time, she does not owe her parents rent.

> Question: So your entire claim for additional living expenses against Royal Palm Insurance Company is based upon this lease agreement; is that correct, ma'am?

---

[35] J. Neat Deposition at p. 75, ll. 9-12.
[36] J. Neat Deposition at p. 76, ll. 18-20.
[37] R. Sherrod Deposition at p. 53, l. 22 - p. 55, l. 5.
[38] J. Neat Deposition, Exhibit 3 to Deposition (Residential Lease Agreement) and attached as Exhibit "B".

Answer: Correct.

J. Neat Deposition at p. 95, ll. 19-22.

Question: Now, have your parents ever sued you under this lease agreement?

Answer: No.

Question: You were never evicted; right?

Answer: Correct.

Question: You have never been told that you owe them any money; is that correct?

Answer: That's correct.

Question: So when did this become due and owing to your parents, if ever?

Answer: When I got the settlement from my additional living expenses.

Question: Did you get a settlement for your additional living expenses?

Answer: Not yet.

Question: So, at this point, you've never had to pay them any money; is that correct?

Answer: Correct.

Question: And you don't owe them anything under the lease at this time; is that correct?

Answer: Correct.

J. Neat Deposition at p. 76, ll. 13-25 and p. 77, ll. 1-8.

Her parents, the alleged creditors, agree. Jill Neat's Mother, Paula Sherrod and her father, Robert Sherrod, both testified that Neat never paid rent and does not owe rent.

Question: For Jill Neat and Peyton Neat to reside in your home, did you require that Jill Neat pay rent?

Answer: Did I require it?

Question: Yeah.

Answer: No, I did not require it.

Question: Did you expect Jill Neat to pay you rent?

Answer: I never asked for rent.

Question: Did you want Jill Neat to pay you rent?

Answer: I wanted her to make sure she could keep up with her mortgage on her home and pay that.

P. Sherrod Deposition at p. 45, ll. 23-15 and p. 45, ll. 1-7.

Question: Has Jill Neat ever paid you any money toward rent for living at your home located at Crossbeam Circle at any time?

Answer: No.

Question: Have you at any time ever sent Jill Neat a bill for past due rent?

Answer: No.

Question: Have you at any time ever sent Jill Neat a letter demanding past due rent?

Answer: No.

Question: That's a no?

Answer: That is a no.

Question: Have you at any time ever sent Jill Neat a legal notice for rent due?

Answer: No.

Question: Have you ever taken any action to collect rent from Jill Neat?

Answer: No.

Question: Do you intend to send Jill Neat a bill for past due rent?

Answer: No, I don't think so. I don't know.

Question: Do you intend to send Jill Neat a letter demanding past due rent?

Answer: No.

Question: Do you intend to send Jill Neat a legal notice for past due rent?

Answer: No.

Question: Do you intend to do anything to collect rent from Jill Neat directly?

Answer: No.

Question: Is that a no?

Answer: No.

Question: Do you have any expectation that Jill Neat will pay you rent?

Answer: I can't answer that.

Question: Can you tell me why you can't answer it? Maybe I can draft a better question.

Answer: Well, I can't speak for Jill.

Question: Regarding your expectations, do you expect Jill Neat to pay you rent for the time she lived in your Crossbeam Circle home?

Answer: That's up to Jill.

Question: If Jill Neat chose not to pay you rent for the time she lived in your Crossbeam Circle home, would you take any legal action to collect rent from Jill Neat?

Answer: No.

Question: Besides this lease agreement, which we've been talking about and was marked as Exhibit 1 to your husband's deposition --

Answer: Yes.

Question: -- are you aware of any other agreement between you and Jill Neat or you and your husband and Jill Neat regarding Jill Neat staying at the Crossbeam home?

Answer: An agreement? What kind of agreement?

Question: A rental agreement.

Answer: No. I've never -- like I said, I've never even seen this.

Question: That may have been a poor question. Is there any oral agreement between you and Jill Neat regarding Jill Neat staying at your Crossbeam home?

Answer: She was welcome as long as she needs to stay there.

Question: Was that a no, there was no oral agreement?

Answer: Well, I can't answer that as far as just her -- she and [her minor daughter], the door was open.

Question: Would you allow them to continue to reside in your home without executing a residential lease agreement?

Answer: Yes.

P. Sherrod Deposition at p.45, ll. 17-26; p. 46, ll. 1-25; p. 47, ll. 1-25; p. 48, ll. 1-7 and p. 61, ll. 18-21.

Question: Did you expect your daughter to pay rent to reside at your residence at the Crossbeam Circle home?

Answer: No.

R. Sherrod Deposition at p. 51, ll. 9-11.

Question: Yes, sir. If your daughter had recovered additional living expenses from Royal Palm Insurance Company, would you have required her to pay you rent for living in your Crossbeam home?

Answer: No.

Question: If your daughter did not recover any living expenses from Royal Palm Insurance Company, did you expect her to pay you rent for living in your Crossbeam Circle home?

Answer: No.

Question: Does your daughter currently owe you rent for living in your Crossbeam Circle home?

Answer: No.

Question: Have you ever sent your daughter a bill for rent for living at your Crossbeam Circle home?

Answer: No.

Question: Have you ever sent your daughter a notice for unpaid rent for living at your Crossbeam Circle home?

Answer: No.

Question: Do you have any intention to send your daughter a bill for rent for living at your Crossbeam Circle home?

Answer: No.

Question: Do you have any intention of sending your daughter a notice of unpaid rent for living at your Crossbeam Circle home?

Answer: No.

Question: Have you taken any action to collect rent from Jill Neat?

Answer: No.

Question: Do you intend to take any action to collect rent from Jill Neat?

Answer: No.

R. Sherrod Deposition at p. 53, l. 22 - p. 55, l. 5.

In their depositions Neat's parents admitted that Neat does not owe them rent. Moreover, both Neat and parents agree that the Residential Lease Agreement contains a condition precedent, i.e., Neat does not have to pay her parents rent until Royal Palm pays Neat Additional Living Expenses.[39] Further, the only document which obligates Neat to pay her parents rent is the Residential Lease Agreement. The Residential Lease Agreement states . . .

> Tenant(s) agree(s) to lease this dwelling for $1600) (sic) per month, payable upon legal settlement from Royal Palm Insurance Company to Robert Sherrod (Owner(s))"

In sum, Neat is asking Defendants to pay phantom damages; Neat is demanding compensation for damages she will never sustain. Neat is not entitled to recover phantom damages for a loss she never sustained. *MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 995 So. 2d 221, 224 (Fla. 2008) ("The purpose of compensatory damages is not to bestow a windfall on the plaintiff.").

Although Neat's claim for damages is unusual, she is not the first plaintiff in Florida to try and recover damages never sustained. In 2008, the Florida Supreme Court was confronted with a claim from MCI Worldcom Network Servs., Inc ("MCI") for loss-of-use damages caused when an excavation company accidently severed a telecommunications cable. As a result of the accident, MCI could not use the cable for almost a 100 hours. Fortunately, for MCI and its customers, MCI had a spare cable it was able to use to redirect telecommunications traffic while repairs paid for by the excavation company were completed. Because MCI had a spare cable, MCI did not suffer any disruption of its service. Nevertheless, MCI sued the excavation company for loss-of-use damages based upon the amount MCI would have spent to rent the use of an equivalent cable for approximately 100 hours. MCI argued that it was unfair that the

[39] R. Sherrod Deposition at p. 51, l. 5 - p. 53, l. 5.

excavation company would benefit from MCI's foresight, planning and prior purchase of a spare cable. *Id* at 222-23. The Florida Supreme Court rejected MCI's claim for phantom damages, stating that MCI's loss-of-use claim was "purely theoretical." *Id* at 229. The Florida Supreme Court held that "because MCI did not actually suffer the loss of use of its telecommunications service, damages for loss of use measured by the rental replacement value would result in a windfall to MCI." *Id.*

Likewise, Neat's damages are purely theoretical. She did not pay rent. She does not owe rent. Her parents do not even expect rent. Thus, Neat has not actually suffered a loss.

(ii) NEAT IS SEEKING DAMAGES SHE COULD NEVER HAVE RECOVERED IN THE UNDERLYING INSURANCE LAWSUIT

Neat could not have recovered Additional Living Expenses in the underlying insurance lawsuit because she never **incurred** Additional Living Expenses as required by her policy. Neat's policy provides limited coverage for "Additional Living Expenses" but only if the insured incurs those expenses.[40]

To prevail on her malpractice claim, Neat must prove that she would have prevailed on her claim for Additional Living Expenses in the underlying action but for the alleged negligence of Defendants. 4 Fla. Jur 2d Attorneys at Law § 499; *See also Tarleton v. Arnstein & Lehr,* 719 So.2d 325, 328 (Fla. 4th DCA 1998); *See KJB Vill. Prop., LLC v. Craig M. Dorne, P.A.,* 77 So.3d 727, 730 (Fla. 3d DCA 2011).

The undisputed evidence, however, shows that Neat never incurred Additional Living Expenses. Again, Neat never paid rent to live with her parent's during the remediation/repair of her home. Rather she agreed to pay her parents additional living expenses only if she recovered

[40] Policy at Form entitled, Special Provisions for Florida, RPI HO 09 SP 05 06 at p. 3, under Coverage D-LOSS OF USE, attached as Exhibit "A"

same from Royal Palm Insurance Company. *See* Rental Agreement attached as Exhibit "B". Due to the structure of her agreement, her claim for additional living expenses never materialized because the damages were never incurred. Neat's insurance policy does not cover Additional Living Expenses unless the expenses are **actually incurred**. *See also Citizens Property Ins. Corp. v. Ceballo*, 934 So.2d 536 (Fla. 3d DCA 2006) (approved by Florida Supreme Court in *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007)) (insured is not entitled to payment under additional coverage unless insured "actually incurs the covered expense"). In this case, expenses were not incurred and therefore, Neat would not have recovered Additional Living Expenses in her underlying insurance lawsuit.

B. NEAT IS SEEKING DAMAGES NOT FACTUALLY OR PROXIMATELY CAUSED BY DEFENDANTS

Neat claims Defendants subjected her to attorney's fees and costs by filing a lawsuit instead of abiding by the terms of her insurance policy with Royal Palm. Neat is wrong for a plethora of reasons including: (1) filing suit was not prohibited by specific language in Neat's policy with Royal Palm; (2) even if it was, Neat, not Defendants, decided to file suit; and (3) there is no record evidence that the trial court ordered Neat to pay Royal Palm Insurance Company's attorney's fees because Neat filed a lawsuit against Royal Palm. The undisputed, material facts regarding Neat's claim for attorneys fees and costs assessed against her are as follows:

1. In her Amended Complaint, Neat alleges that "Defendant filed a first party lawsuit against Royal Palm Insurance Company, when the language of the insurance policy **required** disputes to be submitted to an appraisal process. . ."[41] (emphasis added).

[41] Am. Compl. ¶ 10.

2. Consequently, Neat claims that she was required to pay Royal Palm's attorney's fees and costs.[42]

3. The applicable insurance policy between Neat and Royal Palm is attached as Exhibit "A".

4. The insurance policy states that if Royal Palm and Neat "fail to agree on the amount of the loss, either **may**: . . . Demand an appraisal of the loss . . ." (emphasis added).[43]

5. Royal Palm and Neat failed to agree on the amount of the loss resulting from Tropical Storm Fay.[44]

6. Despite inspecting the Neats' home, Royal Palm offered the Neats only $3,993.52 to perform repairs.[45]

7. Neat desired more.[46]

8. On January 21, 2009, attorney Brehne emailed Neat, asking Neat if she wanted to give Royal Palm a third opportunity to inspect her home, or if she would prefer to file a lawsuit and compel payments based upon inspections Royal Palm had already performed.[47]

9. A day later, January 22, 2009, Neat responded to attorney Brehne's email stating that she was "not willing to wait for another inspection from the insurance company. I feel as if they are stalling for more time and wanting to delay the process even more...please proceed with filing the lawsuit as I think it is the appropriate next step in this process."[48]

10. On February 24, 2009, on behalf of the Neats, Defendants filed suit against Royal Palm.[49]

11. On July 10, 2009, five months after the Neats filed their Complaint, Royal Palm filed a Motion to Dismiss or Abate the Neats' suit and asked the Court to compel appraisal for the first time.

12. The suit was then abated for the Neats and Royal Palm to participate in appraisal.

---

[42] Am. Compl. ¶ 12
[43] J. Neat Deposition, Exhibit 1 to Deposition, also Policy at Form RPI HO O9 SP 0f 06 p. 6, attached to this Motion as Exhibit "A"
[44] J. Neat Deposition, Exhibit 4 to Deposition (Emails)
[45] J. Neat Deposition, p. 64, ll. 10-12
[46] J. Neat Deposition, p. 41, ll. 1-7; Exhibit 4 to Deposition (Emails)
[47] J. Neat Deposition, Exhibit 4 to Deposition (Emails).
[48] J. Neat Deposition, Exhibit 4 to Deposition (Emails).
[49] Complaint filed by J. Neat in 2009-CA-001675, attached as Exhibit "D".

13. At appraisal Neat was awarded $31,525.76 for the Neats' dwelling.

14. After the appraisal award was entered, Defendants learned that the Neats were divorcing and that a serious conflict had arisen between them.[50]

15. Accordingly, Defendants informed Neat that Defendants had to withdraw.

16. On November 9, 2010, the Court granted Defendants' Motion to Withdraw and gave the Neats sixty (60) days to find a new attorney. [51]

17. Neat did not hire a new attorney within the sixty (60) day period provided by the Court.[52]

18. After the sixty (60) day period expired, Royal Palm sent a letter directly to the Neats pursuant to Florida Statute, Section 57.105, also known as a safe-harbor letter. The letter insisted that the Neats, who had already been paid $31,525.76 for damages to their dwelling, withdraw their remaining claim for Additional Living Expenses within 21 days. [53]

19. The safe-harbor letter was sent to Neat at her parent's address via Regular and Certified Mail. The safe-harbor letter was also sent via Regular and Certified Mail to Douglas Neat at a separate address.[54]

20. Royal Palm did not send the safe-harbor letter to Defendants.[55]

21. After receiving the safe-harbor letter by certified mail, Neat did not send the safe-harbor letter to Defendants.[56]

22. In fact, Neat never informed Defendants that the safe-harbor letter existed.[57]

23. Neat did not make any effort to hire another attorney to review the safe harbor letter.[58]

24. After the time for withdraw their remaining Neat hired attorney Frank Remsen to represent her at the hearing on Royal Palm's Motion for Entitlement to Attorney's Fees and Costs.

---

[50] J. Neat Deposition p. 111, ll. 12-17.
[51] Order Granting Motion to Withdraw in 2009-CA-001675, attached as Exhibit "C".
[52] J. Neat Deposition at p. 112, ll. 6-9; p. 117, ll. 14-22; p. 122, ll. 9-11.
[53] J. Neat Deposition, p. 120-122; Exhibit 8 to Deposition (safe-harbor letter)
[54] J. Neat Deposition, p. 120-122; Exhibit 8 to Deposition (safe-harbor letter)
[55] J. Neat Deposition, p. 120-122; Exhibit 8 to Deposition (safe-harbor letter)
[56] J. Neat Deposition at p. 121, ll. 9-11.
[57] J. Neat Deposition at 121, ll. 12-14.
[58] J. Neat Deposition at p. 122. ll. 6-8; p. 143, ll. 20-24.

25. On September 6, 2011, the Court granted Royal Palm's request for "reasonable attorney's fees and costs after the payment of the appraisal award on April 19, 2010."[59]

26. Absent from the Order is any basis for the ruling awarding Royal Palm's request for attorney's fees and costs.

(i) NEAT'S POLICY WITH ROYAL PALM DOES NOT PROHIBIT AN INSURED FROM FILING SUIT BEFORE DEMANDING APPRAISAL

Oddly, Neat asserts in her Amended Complaint that filing a lawsuit rather than submitting to the appraisal process was prohibited by specific language in policy.[60] Neat is wrong. Nowhere in Neat's policy with Royal Palm is there a provision which requires an insured to demand appraisal before filing suit. In fact, the very provision cited by Neat begins with the word "may".

Neat makes her claim regarding the policy's requirements by quoting only a portion of a provision. When the portion of the provision partially quoted by Neat in her Amended Complaint is compared with the entire provision found in Neat's insurance policy, it is clear that material facts do not exist to support Neat's claim.

Partial Portion of Policy quoted in Amended Complaint

> **That the policy of homeowners' insurance**, a copy of which is attached hereto and made a part hereof as Exhibit A, pursuant to Rule 1.130, Fla.R.Civ.P., **specifically states as requirement of making a claim that the insured "b. Demand an appraisal of the loss.** In this event, each party will choose a competent appraiser within twenty (20) days after receiving a written request from the other. The two appraisers will choose an umpire.....the appraisers will separately set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision

[59] Order Granting Fees in 2009-CA-001675
[60] Am. Compl. at p.4 ¶ 11.

agreed to by any two will set the amount of the loss." **Rather than participating in the above appraisal process as required by the policy, the Defendant, MICHAEL B. BREHNE, ESQ., filed a lawsuit against Royal Palm Insurance Company**. "[61] (emphasis added)

Entire Provision in Insurance Policy

6. Mediation of (sic) Appraisal. If you or we fail to agree on the amount of loss, either **may**:

a. Demand a mediation of the loss in accordance with the rules established by the Florida Department of Financial Services. The results of the mediation are binding only when both parties agree, in writing, on a settlement and, you have not rescinded the settlement within 3 business days after reaching settlement You may not rescind the settlement after cashing or depositing the settlement check or draft we provided you.

We will pay the cost of conducting any mediation conference except when you fail to appear at a conference. That conference will then be rescheduled upon your payment of the costs of that rescheduled conference.

b. **Demand an appraisal of the loss**. In this event, each party wilt choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of the loss. . . ..[62] (emphasis added)

When asked about the discrepancy between her allegations in the Amended Complaint and the language in her policy, Neat had this to say in her deposition.

---

[61] Am. Compl. at p.3 ¶ 9. See also p. 410(b) and 12.
[62] Policy at Form entitled, Special Provisions for Florida, RPI HO 09 SP 05 06 at p. 6.

> Question: Take a look at Paragraph 9 of that amended complaint before we take a look at the policy, please.
>
> Answer: Okay.
>
> Question: All right. And you see there in Paragraph 9 [of the Amended Complaint] where it says that the policy "states as requirement of making a claim that the insured, b, demand an appraisal of the loss." Do you see that?
>
> Answer: Yes.

J. Neat Deposition at p. 133, ll. 9-16.

> Question: Okay. Well, do you know where in the policy it says that a party must demand an appraisal?
>
> Answer: I don't know where anything says the word "must". I can't tell you.

J. Neat Deposition at p. 133, ll. 22-25.

> Question: Okay. It doesn't say "must" demand or "shall" demand, does it? It says "may" demand; right?
>
> Answer: Yes.
>
> Question: Do you understand it says "may" demand? That's not mandatory, but permissible?
>
> Answer: Yes.

J. Neat Deposition at p. 134, ll. 15-20.

Based upon the plain reading of Neat's policy, an insured is not prohibited from filing suit if the insurer has not demanded appraisal. Therefore, the theory that as a direct and proximate result of Defendant's negligence, Neat suffered "attorney's fees awarded to Royal Palm Insurance Company due to Defendant's failure to abide by the terms of the policy of insurance, filing a lawsuit rather than submitting the claim to the appraisal process. . ." is wrong.

In addition to the plain reading of the policy, district courts in Florida have found that "[n]othing in the insurance policy or the law mandates presuit appraisal." *Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 817 (Fla. 3d DCA 2000) *approved and remanded_sub nom. Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002). Rather appraisal may be invoked by either party. Neat does not and cannot claim that Royal Palm Insurance Company demanded appraisal before the lawsuit was filed. Accordingly, Neat could proceed with litigation until Royal Palm Insurance Company made a timely demand for appraisal.

(ii) THE DECISION TO FILE SUIT AGAINST ROYAL PALM WAS MADE SOLELY BY NEAT, NOT DEFENDANTS

Second, Neat must prove that Defendants, not Neat, decided to file suit. There is no evidence in the record from which a finder of fact could infer that Defendants, as opposed to Neat decided to file the insurance lawsuit against Royal Palm. The only evidence in the record proves the opposite.

On January 21, 2009, Defendants e-mailed Neat and stated that Royal Palm had requested a third opportunity to inspect the damage to her home. Defendants went on to state that, "it is **your** decision whether you would like to give them this third opportunity to inspect your home or to file a lawsuit to compel the payments based on the inspections that have already occurred. Please advise in writing how you would like to proceed."[63] (emphasis added). In response, Neat e-mailed, "Please proceed with filing the lawsuit, as I think this is the appropriate next step in this process."[64] When questioned about this e-mail exchange during her deposition, Neat admitted that it was her decision, not Defendants, to file the lawsuit against Royal Palm.

> Question: Do you agree it was your decision whether you would like to give them a third opportunity to inspect your home or to file

[63] J. Neat Deposition, Exhibit 4 to Deposition (Emails)
[64] J. Neat Deposition, Exhibit 4 to Deposition (Emails)

a lawsuit to compel the payments based on the inspections that have already occurred?

Answer: Yes. That's what my e-mail says.

Question: And, you told Mr. Brehne in writing to please proceed with filing the lawsuit; is that correct?

Answer: Yes.

Question: And based upon your instructions, Mr. Brehne then filed the lawsuit; is that correct?

Answer: Yes.

J. Neat Deposition at p. 93, ll. 3-13.

As made clear by Neat's e-mail, and her admission during her deposition, Neat, and not Defendants, decided to file suit, instead of allowing another inspection. Defendants acted upon Neat's instruction in filing suit. Defendants cannot now be held liable for acting in accordance with the wishes of Neat. *Boyd v. Brett-Major*, 449 So. 2d 952, 954 (Fla. 3d DCA 1984) (holding that an attorney cannot be liable for following a client's directions, when the directions are within the bounds of the law.)

(iii) THERE IS NO RECORD EVIDENCE TO SUPPORT NEAT'S CLAIM THAT SHE SUFFERED ATTORNEY'S FEES AWARDED TO ROYAL PALM BECAUSE SHE FAILED TO ABIDE BY THE TERMS OF HER POLICY

Neat alleges that as a direct and proximate result of Defendant's negligence, Neat suffered "attorney's fees awarded to Royal Palm Insurance Company due to Defendant's failure to abide by the terms of the policy of insurance, filing a lawsuit rather than submitting the claim to the appraisal process. . ."[65] However, as admitted by Neat in her deposition there is no evidence to support the inference she alleges in her Amended Complaint. In her deposition Neat admitted the following:

[65] Am. Compl. ¶ 12

> Question: Did anybody ever tell you that you had to pay attorney's fees to Royal Palm Insurance Company because you filed a lawsuit against them to recover property damage to your home?
>
> Answer: I don't know.
>
> Question: Do you remember that?
>
> Answer: I don't recall.
>
> Question: You don't recall anybody ever saying that's why you had to pay Royal Palm Insurance Company attorney's fees; is that correct?
>
> Answer: Correct. I do not recall.

J. Neat Deposition at p. 152, ll. 1-11.

Nowhere in the Court's order granting fees to Royal Palm, does the Court say that Neat failed to abide by the terms of the policy of insurance when she filed a lawsuit instead of demanding appraisal.[66] Moreover, Neat's assumption that the award was based upon her decision to file suit is contradicted by the permissive policy language. As previously discussed, an insured is not required to demand an appraisal before filing suit.

Neat's assumption is also contradicted by the amount of the award. The Court only ordered Neat to pay fees and costs incurred **after** payment of the appraisal award on April 19, 2010. If the basis for the Court's order was Neat's alleged failure to abide by the terms of the policy of insurance when she filed a lawsuit instead of demanding appraisal, then the Court could have ordered Neat to pay fees from the date the lawsuit was filed.

Finally, even assuming that Neat is correct -- which she is not -- Neat is the only party to this lawsuit that could have cured the alleged error and prevented an award of fees and costs. Neat received the safe harbor letter from Royal Palm by certified and regular mail. She did

[66] Order Granting Fees in 2009-CA-001675, attached as Exhibit "E".

nothing with it. She never sought Defendants' advice or the advice of another attorney within the 21-day safe harbor period.

V. CONCLUSION

Defendants are entitled to judgment as a matter of law. In this malpractice lawsuit, Neat claims that Defendants breached their duty of care in the earlier insurance lawsuit in two ways. First, Neat alleges that Defendants failed to make a claim on behalf of Neat for the living expenses she incurred as a result of having to live in her parents' home. Neat, however, never actually incurred living expenses. Neat never paid rent. Neat never owed rent. Thus, Defendants are entitled to judgment as a matter of law on Neat's claim for her alleged loss of Additional Living Expenses.

Second, Neat alleges that "Defendant filed a first party lawsuit against Royal Palm Insurance Company, when the language of the insurance policy required disputes to be submitted to an appraisal process. . .." In fact, Neat's policy does **not** require an insured to demand appraisal. Moreover, the record evidence proves that it was Neat who decided to file a first party lawsuit against Royal Palm and that it was Neat who decided not to tell Defendants about the safe harbor letter. Thus, Defendants are also entitled to judgment as a matter of law on Neat's second claim.

WHEREFORE, Defendants Michael B. Brehne and Law Offices of Michael B. Brehne, P.A. respectfully request this Court to grant this Motion for Final Summary Judgment and enter judgment in its favor as a matter of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to James P. Kelaher, Esquire at jim@kelaherlaw.com and Lynda@kelaherlaw.com (Counsel for Plaintiff), this 24th day of December, 2014.

s/ Mary A. Nardella

FRANCIS H. SHEPPARD, ESQUIRE
Florida Bar No. 0442290
E-Mail: fsheppard@rumberger.com
docketingorlando@rumberger.com
fsheppardsecy@rumberger.com
MARY A. NARDELLA, ESQUIRE
Florida Bar No. 0058896
E-Mail: mnardella@rumberger.com
docketingorlando@rumberger.com
mnardellasecy@rumberger.com
RUMBERGER, KIRK & CALDWELL
A Professional Association
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Telecopier: (407) 841-2133

Attorneys for Defendants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

MRI ASSOCIATES OF ST PETE, INC., d/b/a SAINT PETE MRI., as assignee, individually and on behalf of those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant.

_____ /

CASE NO. 8:10-cv-815-T-30TGW

DISPOSITIVE MOTION

DEFENDANT ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY'S MOTION TO DISMISS AND/OR TO STRIKE CLASS ALLEGATIONS AND SUPPORTING MEMORANDUM OF LAW

Defendant ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY ("Allstate"), moves this Court pursuant to F.R.Civ.P. 12(b)(6) and 23(d)(1)(D) for the entry of an order (a) dismissing Plaintiff's Class Action Complaint ("Complaint"); and (b) striking Plaintiff's class allegations. In support thereof, Allstate states as follows:

Introduction

Plaintiff claims Allstate could not apply statutory fee schedule limitations for PIP benefits because Allstate's policy did not include them. Plaintiff is utterly incorrect. The language in Allstate's policy actually does apply the statutory PIP fee schedule limitations. Moreover, the Florida PIP statute expressly permits their use. Accordingly, this action should be dismissed.

Additionally, this action should be dismissed because Plaintiff has not complied with the statutory presuit demand requirements which are a condition precedent to a suit for unpaid PIP benefits. Furthermore, Plaintiff's claims for declaratory and injunctive relief are also subject to dismissal because those claims are predominantly for monetary relief and would require individualized factual determinations. Plaintiff's Complaint also fails to state a claim for equitable relief. Finally, Plaintiff's class claims should be stricken because Plaintiff's claims lack the required typicality and individual factual issues would predominate over issues common to the putative class.

Factual Background

On October 1, 2007, the Florida law which previously required mandatory PIP coverage for all motor vehicle insureds subject to the Florida Motor Vehicle No-Fault Law was allowed to lapse. The new law mandating PIP coverage, Fla.Stat. § 627.7407, became effective October 11, 2007, required PIP coverage be added to policies effective January 1, 2008, and specified several terms for such PIP coverage. Under its provisions, Florida Statutes, §627.736(5)(a)(2) now provides:

> The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
> c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 935 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.

> d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
> e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the inpatient services.
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

See Complaint, ¶ 17.

Plaintiff is a Florida health care provider that provides magnetic resonance imaging ("MRI"), x-rays and other diagnostic services. (Complaint, ¶ 4.) Plaintiff alleges a putative class that consists of:

> [A]ll persons and/or entities who are: (a) health care providers as described in Section 627.736(1)(a), Florida Statutes (2007-2009); (b) who any time on or after January 1, 2008 provided medical services to a PIP insured with a PIP insurance policy that was in effect on or after January 1, 2008; (c) who own an assignment of benefits from said PIP insured; (d) who submitted bills to [Allstate] for payment of such medical services; (e) where the amounts charged exceeded the rates described in Section 627.736(5)(a)2a through f, Florida Statutes (2007-2009); and (f) received payment from [Allstate] based on its application of the rates allegedly authorized by Section 627.736(5)(a)2, 3 and/or 4, Florida Statutes (2007-2009).

(Complaint, ¶ 33.) Plaintiff provided MRI services to Karmene Lusis, and pursuant to an assignment of benefits, sought reimbursement for those services under PIP coverage issued by Allstate and applicable to Karmene Lusis. (Complaint, ¶¶ 8-10.)[1] Plaintiff alleges that Allstate improperly paid the PIP claim for such services by applying the fee schedule limitations specified in Florida Statutes, §627.736(5)(a)(2). (Complaint, ¶¶ 22-23.)[2]

With regard to the services rendered to Karmene Luis, Plaintiff served a demand letter on Allstate. (Complaint, Exh. D.) It referenced Plaintiff's bills totaling $4900, and sought payment of a purported amount in dispute of $2,597.93. (*Id.*)

ARGUMENT

I. PLAINTIFF INCORRECTLY ASSERTS THAT ALLSTATE'S POLICY DID NOT PERMIT USE OF STATUTORY FEE SCHEDULES.

Plaintiff is blatantly incorrect in claiming that Allstate did not issue policies and endorsements "identifying an intent to pay PIP claims for medical benefits according to [Section 627.736(5)(a)2a through f] rates. (Complaint, ¶ 23.) Allstate's policy expressly authorizes use of those fee schedule limitations. Moreover, the Florida PIP statute expressly authorizes their use.

A. The Complaint Should Be Dismissed Because Allstate's Policy Expressly Permits Application Of The Rate Limitations Specified In The Florida PIP Statute.

---

[1] Attached as Exhibit "A" hereto is a copy of the Allstate policy applicable with regard to Karmene Lusis, which contains the same provisions as the "exemplar" policy attached as Exhibit B to the Complaint.

[2] Plaintiff also alleges that in paying the bills for services rendered by Plaintiff to Karmene Lusis, Allstate improperly applied the Medicare Hospital Outpatient Prospective Payment System ("OPPS") limitation. (Complaint, ¶¶ 24-25.) However, as reflected on Exhibit "B" hereto, it is the claims practice of Allstate not to apply the OPPS limitation with regard to payments pursuant to Fla. Stat. §627.736(5)(a)(2)(f), and Allstate has corrected the inadvertent application of the OPPS limitation with regard to Karmene Lusis, and has fully reimbursed Plaintiff for the MRI services in question at "200 percent of the applicable Medicare Part B fee schedule" pursuant to Fla. Stat. §627.736(5)(a)(2)(f). Accordingly, unless Plaintiff will agree to dismiss its OPPS claims voluntarily, Allstate will move for summary judgment on Counts IV, V and VI and all other claims pertaining to application of the OPPS limitation on mootness, standing and lack of controversy grounds.

Allstate's policy expressly permits use of fee schedule limitations listed in Florida's No-Fault Law:

> Any amounts payable under this [PIP] coverage shall be subject to any and all limitations, authorized by section 627.737, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including but not limited to, all fee schedules.

(*See* Complaint Exh. B, Endorsement AU14230, p. 7.)

Plaintiff's Complaint does not and cannot allege any breach of contract from Allstate's application of the fee schedule limitations authorized by statute. Allstate's policy expressly states that the amounts payable under PIP coverage are subject to "any and all limitations, authorized by section 627.737, or any other provisions of the Florida Motor Vehicle No-Fault Law, ... including but not limited to, all fee schedules." (Emphasis added.) Payment of PIP benefits based on contractually agreed rates is entirely proper. *Allstate Ins. Co. v. Holy Cross Hosp.*, 961 So. 2d 328, 335 (Fla. 2007). These fee schedule limitations are expressly authorized by statute and are contractually included in Allstate's policy. Allstate's payments to Plaintiff based on such fee schedule limitations were in conformity with its contractual obligations. Accordingly, Plaintiff's Complaint fails to allege any breach of contract claim against Allstate.

B. The Complaint Should Be Dismissed Because Florida Statutes, §627.736(5)(a)(2) Expressly Permits Use of the Fee Schedule Limitations.

Florida Statutes, §627.736(5)(a)(2) expressly permits insurers to apply a schedule of "maximum charges" for services to be paid with PIP benefits. This statute plainly states that an insurer "may" limit reimbursement in this manner. It does not prohibit or restrict use of

such limitations in any way, and there is no other statutory language that limits their use. "Absent some clear warrant for doing so in the statutory context, such permissive provisions should not be read to impose an implied prohibition." *Nationwide Mut. Ins. Co. v. Jewell*, 862 So.2d 79, 85 (Fla. 2d DCA 2003) ("may" is permissive). Therefore, simply on its face, Florida Statutes, §627.736(5)(a)(2) authorizes the use of the fee schedule limitations listed.

Use of the statutorily listed fee limitations is wholly consistent with the Florida No-Fault Law. "[P]ayment [of PIP benefits] at a reduced rate does not violate [Florida Statutes, §627.736(1)(a)] so long as the insurer pays 'eighty percent of all *reasonable expenses*.'" *Allstate v. Holy Cross*, 961 So. 2d at 335 (emphasis added) (holding that contractual agreements to accept PIP benefit payments at reduced rates did not violate the PIP statute). Florida Statutes, §627.736(5)(a)(2) is an express statement of the Florida legislature's intent to permit insurers to apply the statutorily listed fee limitations to PIP benefit payments. Such legislative intent, clearly derived from the plain language of the No-Fault statute, is unquestionably amenable to and directs the rational and logical interpretation that insurers "may" apply the statutorily listed fee limitations to PIP benefit payments. *Allstate v. Holy Cross*, 961 So. 2d at 334.

Application of these fee schedule limitations furthers the purposes of Florida's PIP statute. The Florida Supreme Court has mandated that courts should construe the PIP statute in such a way as to give effect to the legislative purpose of providing broad PIP coverage. *Blish v. Atlanta Cas. Co.*, 736 So. 2d 1151, 1155 (Fla. 1999); *Charter Oak Fire Ins. Co. v. Regalado*, 339 So. 2d 277, 279 (Fla. 3d DCA 1976). The fee schedule limitations enhance, and do not limit, the medical care available to insureds and do not restrict their choice of

providers in any way. Instead, they extend the insureds' benefits by slowing the rate at which their PIP benefits are exhausted. Furthermore, they allow each insured to pay reduced co-payments based on the statutorily limited rates. Rather than an insurer paying 80% of a provider's higher, standard rate, under the statutory fee schedule limitations, an insurer will pay 80% of a lower rate. Likewise, the insured will pay only 20% of the lower rate, thus paying less for his or her 20% co-payment. The insured can then use the extra policy benefits saved for additional medical care.

The fee schedule limitations also promote the goal of ensuring "swift and virtually automatic payment" of no-fault claims. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 9, 16 (Fla. 1974). The use of these fee schedule limitations reduces potential conflicts and litigation concerning the "reasonableness" of a medical provider's charges. It also promotes the intertwined goal of prompt and efficient payment of insurance claims. In the absence of those limitations, individual determinations of reasonableness in each case are required for every provider's bill, thus increasing the likelihood of disputes, disagreements and delays over whether a provider's charges are in fact "reasonable."

Section 627.736(5)(a)(2) plainly authorizes the use of the fee schedule limitations listed. There is no prohibition of any type. Application of the fee schedule limitations benefits insureds and is wholly consistent with and furthers the purposes of the PIP statute.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE PRESUIT DEMAND LETTER REQUIREMENTS OF SECTION 627.736 (10).

Under Fla. Stat. § 627.736 (10), a PIP insured (or assignee) is required "to provide a presuit notice of intent to initiate litigation" about an overdue claim. *Menendez v.*

Progressive Express Ins. Co., Inc., ___ So.3d ___, 2010 WL 375080 (Fla., Feb. 4, 2010). This statutory notice is an express "condition precedent" to suit. Fla. Stat. § 627.736 (10). The provision identifies specific requirements that must be met in a pre-suit demand letter, including "an itemized statement specifying each exact amount, the date of treatment, service or accommodation and the type of benefit claimed to be due." "[T]his very specific notice requirement does not simply specify a time period in which suit may be filed, but rather clearly establishes a condition precedent to filing suit, and the failure to comply with this condition precedent eliminates the availability of a remedy." *Shenandoah Chiropractic, P.A. v. Nat'l Spec. Ins. Co.*, 526 F. Supp. 2d 1283, 1288 (S.D. Fla. 2007) (emphasis added); *see also Lucente v. State Farm Mut. Auto Ins. Co.*, 591 So. 2d 1126, 1128 (Fla. 4th DCA 1992) (plaintiff lacked standing to sue where he failed to comply with statutory notice requirement that is a condition precedent to filing suit).

The pre-suit demand requirements in the PIP statute are intended to reduce litigation costs, promote settlement of PIP claims and prevent fraud. *Shenandoah Chiropractic,* 526 F. Supp. 2d at 1287; s*ee also Mobile Diagnostic Imaging, LLC v. Allstate Indemnity Co.*, 11 Fla. L. Weekly Supp. 361a (17th Cir. Ct. 2004) ("[Section 627.736(11)'s] pre-suit notice requirement promotes the legislative goal of reducing unnecessary litigation and curtails ever increasing legal fees")(Attached as Exhibit "C").

While Plaintiff did file a pre-suit demand letter in this case stating that the amount at issue was $2,597.93, that demand letter does not fulfill the requirements for the instant suit because it does not correspond to the claim at issue in the instant lawsuit. Moreover, this

demand letter fails to satisfy this condition precedent to bringing this action on behalf of a putative class.

A. Plaintiff's Pre-Suit Demand for $2,597.93 Does Not Satisfy the Requirement for a Pre-Suit Demand for the Claim Plaintiff is Pursuing in this Lawsuit.

Plaintiff's demand letter (Complaint, Exh. D) asserts that $4,900 was billed by Plaintiff for services to Karmene Lusis. It states that Allstate made payments of $522.07 with application of a $1,000 deductible. The letter then asserts that based on the 80% payment rate under PIP, $2,597.93 is due. However, Plaintiff's demand letter does not explain the basis for this $2,597.93 demand.

The $2,597.93 demanded in Plaintiff's letter bears no correlation to the amount alleged for Plaintiff's individual claim in the instant lawsuit. Plaintiff's claim is that the full $4,900 billed amount should be the basis of its PIP claim. If paid at 80%, the amount payable would be $3,920. After deducting the $1,000 deductible and the $522.07 paid by Allstate, the net remainder would be $2,397.93. But Plaintiff never made a pre-suit demand for $2,397.93 as the "exact amount . . . claimed to be due" as a result of the claims advanced in this lawsuit. Instead, Plaintiff's demand letter states that $2,597.93 is due, and it is not discernable how this amount was determined.

The purpose of the condition precedent pre-suit demand letter requirement is to afford an insurer the opportunity to avoid suit by paying the demand. Accordingly, the Florida circuit court case law that has evolved to address important legal issues in the PIP insurance area has determined that a demand for payment in the wrong amount fails to comply with the statute. *See, e.g.*, *Muransky v. State Farm Mut. Insur. Co.*, 15 Fla. L. Weekly Supp. 99a (Fla.

17th Cir. Ct. 2007) (holding that demand letter must state the exact amount claimed due)(Attached as Exhibit "D"); *Gordon v. Progressive Am. Insur.*, 15 Fla. L. Weekly Supp 61b (Fla. 4th Cir. Ct. 2007) (holding that demand letter that fails to state exact amount owed and is inconsistent with the amount listed on the claimant's payment ledger fails to comply with the statute)(Attached as Exhibit "E"); *Robinson v. Mercury Insur. Co.*, 15 Fla. L. Weekly Supp. 156b (Fla. 13th Cir. Ct. 2007) (holding that demand letter which required insurer to calculate amount claimed to be due was insufficient)(Attached as Exhibit "F"); *Chambers Med. Group, Inc. v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. Ct. 2006) (holding that demand letters must strictly comply with the PIP statute and must set forth an itemized statement of the final amount due) (Attached as Exhibit "G"); *Chiro-Med. Rehab. of Orlando, Inc., v. Progressive Express Ins. Co.*, 12 Fla. L. Weekly Supp. 162b (Fla. 17th Cir. Ct. 2004) ("[a]s a matter of public policy, it is of paramount importance that the Demand Letter requirements of Section 627.736(11)(a) are strictly adhered to")(Attached as Exhibit "H".)

The lack of a valid pre-suit demand corresponding to the claim at issue in the instant lawsuit mandates the dismissal of the instant lawsuit.

B. Plaintiff's Declaratory Judgment Claims Do Not Avoid the Condition Precedent Requiring a Proper Pre-Suit Demand Letter.

Plaintiff asserts that no presuit demand letter is required because its declaratory judgment action is not an "action for benefits." There is no support for this argument.

There is no question that Plaintiff has filed "an action for benefits." Plaintiff is clearly asserting that Allstate has failed to pay PIP benefits it alleges are due and owing. Allstate's alleged conduct, however, is the same claim that Allstate improperly paid PIP claims based

on the fee limitations under Section 627.736(5)(a)(2), alleged on behalf of the Plaintiff in Count III and on behalf of a purported class in Count VI. (Complaint, ¶¶39, 102-104.) Indeed, Plaintiff seeks a "judgment for damages" under Counts III and VI for "full payment for medical services and treatments in the amount required by Section 627.736(5)(a)2.f, 3 and/or 4", with prejudgment interest and interest on benefits not timely paid. (Complaint, p. 34, "Prayer for Relief", ¶ d.)

Plaintiff cannot be permitted to avoid the expressly applicable statutory condition precedent to suit by any artful pleading. Plaintiff's claim for PIP benefits in this action is clear. This is an action for PIP benefits subject to the requirements of Fla. Stat. § 627.736 (10).

C. Plaintiff's Pre-Suit Demand for $2,597.93 Does Not Satisfy the Requirement for a Pre-Suit Demand for the Class Action Claims Plaintiff is Pursuing in this Lawsuit.

Plaintiff's demand letter does not meet the requirements of Fla. Stat. § 627.736 (10) with regard to the class Plaintiff seeks to allege. It does not make any demand with regard to any PIP benefits due other than for services to Karmene Lusis. It did not provide "an itemized statement specifying each exact amount, the date of treatment, service or accommodation and the type of benefit claimed to be due" for any of the putative class members Plaintiff seeks to represent. The lack of a valid pre-suit demand corresponding to the claims Plaintiff seeks to assert on behalf of the putative class mandates the dismissal of the instant lawsuit. *Shenandoah Chiropractic, P.A. v. Nat'l Spec. Ins. Co.*, 526 F. Supp. 2d 1283, 1290 (S.D. Fla. 2007) (the lack of a presuit demand letter satisfying the condition precedent to suit on behalf of a putative class requires that class allegations be stricken);

Integra Health Serv., Inc. v. Progressive Amer. Ins. Co., 2008 WL 6914623 (17th Jud.Cir., Broward Cty, Fla., Feb, 1, 2008)(Attached as Exhibit "I".)[3]

III. NEITHER DECLARATORY JUDGMENT NOR INJUNCTIVE RELIEF IS APPROPRIATE BECAUSE PLAINTIFF'S CLAIMS ARE FOR MONETARY RELIEF.

A. Declaratory Judgment Is Not Appropriate For Resolution Of This Dispute.

The gravamen of Plaintiff's complaints is clearly that Allstate owes additional monetary payments for PIP claims. Plaintiff seeks a "judgment for damages" under Counts III and VI for "full payment for medical services and treatments in the amount required by Section 627.736(5)(a)2.f, 3 and/or 4", with prejudgment interest and interest on benefits not timely paid. (Complaint, p. 34, "Prayer for Relief", ¶ d.), because of Allstate's alleged improper application of the fee limitations. This is the same relief sought in Plaintiff's request for a declaration that Allstate could not properly apply the fee limitations established under Section 627.736(5)(a)2. A trial court should not entertain an action for declaratory judgment on issues which are properly raised in other counts of the pleadings through which a plaintiff will be able to secure full, adequate and complete relief. *See Kies v. Florida Insurance Guaranty Association,* 435 So. 2d 410, 411 (Fla. 5th DCA 1983).

Moreover, Plaintiff's claim that Allstate underpaid health care providers involves individualized factual determinations related to the reasonableness of each invoice for each medical service that render such claims inappropriate for declaratory judgment. "Declaratory

[3] Plaintiff's alternative allegation of a "subclass" of members who have submitted pre-suit demand letters is likewise insufficient since: (a) it is impossible from the face of the Complaint to determine that there is even a single member to such a "subclass"; and (b) as noted *supra*, it is impossible to determine from Plaintiff's demand letter what the basis of Plaintiff's claim is, and therefore would be impossible to determine which, if any other purported class members' demand letters presented statutorily compliant demands that would satisfy the required condition precedent.

judgment actions are unique proceedings that will not lie when judicial determinations hinge on factual issues not involving contract interpretations or construction of rights or other relations." *Dimuccio v. D'Ambra*, 779 F. Supp. 1318, 1322 (M.D. Fla. 1991); *accord "X" Corporation v. "Y" Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993) ("[A] declaratory action is not available where the object of the action is to try disputed questions of fact as the determinative issue rather than to seek a construction of definite stated rights, status, or other relations.").

This action is simply not suitable for across-the-board declaratory relief. In order to determine whether Plaintiff and each putative class member is entitled to relief for Allstate's alleged breach of contract by applying the fee limitations under Fla. Stat 627.736(5)(a)2, a fact-finder will have to evaluate each medical bill at issue and determine, *inter alia,* (i) whether the invoice for each medical service was reasonable in light of reimbursement levels in the community and various relevant federal and state medical fee schedules; and, (ii) if not, what a reasonable charge would be for each medical service.

A declaratory judgment is simply not an appropriate form of relief when such a case-by-case factual inquiry is required. *See Shenandoah Chiropractic, P.A. v. Nat'l Spec. Ins. Co.*, 526 F. Supp. 2d 1283, 1285-86 (S.D. Fla. 2007) (dismissing plaintiff's request for declaratory judgment and stating "a declaratory judgment as to whether or not the insurer's method of determining reasonableness violates the language of the contract is . . . inappropriate for across-the-board declaratory relief, because the fact-finder must, on a case

by case basis, construe the term 'reasonable' and determine whether or not the insurer's evaluation of the bills submitted fits the definition of 'reasonable'").[4]

A similar effort was rejected in *State Farm Mutual Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002). In *Sestile*, the plaintiffs filed a declaratory action requesting the court to declare that the insurer's use of a computer database to determine the reasonableness of bills violated the PIP statute and the policy of insurance. *Id.* at 1245. The *Sestile* Court resoundingly rejected the plaintiffs' requested relief finding that both the PIP statute and the policy required payment for "reasonable" medical services, but that neither the PIP statute nor the policy declared how an insurer should make the determination of what constitutes a "reasonable" expense. *Id.* Accordingly, an insurer is permitted to consider a variety of sources to make this determination. *Id.* at 1246. While an insured is permitted to challenge the ultimate payment decision, he may not mandate the sources utilized by the insurer in arriving at the ultimate decision. *Id.* The *Sestile* Court concluded that reimbursement for "reasonable" medical services must be determined by the fact-finder on a case-by-case basis. *Id.* Given the problems of individualized facts and proof, the *Sestile* Court found the plaintiffs' action inappropriate for generalized relief. *Id.*

Plaintiff's declaratory judgment claims are subsumed in its breach of contract claim. Moreover, Plaintiff's request for a declaratory judgment would necessarily require the court to engage in a pure determination of fact that must be made on a case-by-case basis in order

[4] For these same reasons, Plaintiff's claims cannot be adjudicated on a class-wide basis. *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 685, 695 (S.D. Fla. 2008) ("Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individualized claims, such claims are not suitable for class certification.") (internal citations omitted).

to determine whether there has been a breach of contract by Allstate. Accordingly, a declaratory judgment is inappropriate, and Plaintiff's claims for such should be dismissed.

B. Counts II And V Of The Complaint Should Be Dismissed Because They Fail To State A Cause Of Action For Injunctive Relief.

Likewise, the fact that Plaintiff's claims are really concerned with the amounts it alleges Allstate should have paid for PIP benefits, for which it seeks a judgment for monetary damages, precludes its claims for injunctive relief. To state a cause of action for injunctive relief, a Plaintiff must allege ultimate facts which, if true, would establish, among others things, (1) irreparable injury and (2) lack of an adequate remedy at law. *Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317, 1321 (M.D. Fla. 1998).

An injury is "irreparable" only when it is conclusively demonstrated that the injured party cannot be adequately compensated in money damages. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (when an injury is compensable through money damages there is no irreparable harm); *Global Retail Enterprises, Inc., v. Personalized Products, LLC*, 2006 WL 4774797, *1 (M.D. Fla. 2006) (Slip Opinion) (holding that Plaintiff was not entitled to a preliminary injunction because damages sought could be readily calculated). Any injury resulting from alleged underpayment of healthcare providers can be cured by money damages. Accordingly, Plaintiff has not suffered irreparable harm and Counts II and V of the Complaint, which seek injunctive relief, should be dismissed.

Second, Plaintiff has an adequate remedy at law. It is axiomatic that equitable, injunctive relief is only available where there is no adequate remedy at law. *Bolin v. Story,* 225 F.3d 1234 (11th Cir. 2000). Absent exceptional circumstances, courts will not enforce contractual rights by injunctive relief, because a suit for damages for a breach of contract is

available. *Jets Services, Inc., v. Hoffman*, 420 F. Supp. 1300, 1306 (M.D. Fla. 1976) (extraordinary equitable relief is neither necessary nor justified if Plaintiff has an adequate available remedy at law for damages under the contract). Accordingly, Counts II and V of the Complaint, which seek injunctive relief, should be dismissed.

IV. COUNTS I, II, IV, V AND VI SHOULD BE DISMISSED BECAUSE THEY FAIL TO ADEQUATELY ALLEGE CLASS CLAIMS.

Because class action treatment can bind thousands of individuals who are not before the Court, a party filing a class representation complaint bears the burden of pleading in detail every element required by Rule 23. Allegations that do not meet the requirements of the rule must be dismissed. A court may strike class action allegations at the pleading stage if, as here, the complaint fails to plead the elements for a class action required under Rule 23. *See Strange v. Norfolk & Western Ry. Co.*, 809 F.2d 786, 1987 WL 36160 (4th Cir. 1987) (unpublished) (upholding dismissal of class allegations on motion by the defendant, and stating that, "[t]he court was not required to wait until [plaintiff] sought class certification").[5]

Class treatment of Plaintiff's claims that Allstate's PIP payments were inadequate would essentially require individualized proof of the reasonableness, relatedness and necessity for every medical service provided by every provider to persons covered by Allstate PIP coverage. Moreover, the individual determinations with regard to the individual claim alleged in the Complaint by Plaintiff are not necessarily common or typical of services and charges of other providers to other injured persons eligible for PIP coverage.

[5] This Motion addresses only the legal deficiency of Plaintiff's class action allegations on the face of her Complaint. By focusing on the allegations relating to these particular class action requirements in this Motion, Defendant in no way concedes the existence of any class action element. If this Motion is not granted, and Plaintiff is allowed to proceed with a full-scale motion for class certification, Defendant will formally challenge Plaintiff's showing as to all the class action prerequisites.

Accordingly, these issues are inappropriate for class action treatment as a matter of law. The determination of the reasonableness of charges for each medical treatment provided to different individuals does not present common questions. *See, e.g., Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525-26 (5th Cir. 2007) (the reasonableness of medical fees depends on multiple factors regarding the services rendered and the customary fee for similar services presents "fact-specific rather than class oriented" claims since different patients' care is not comparable); *Colomar v. Mercy Hosp., Inc.,* 242 F.R.D. 671, 676-77 (S.D. Fla. 2007) (commonality not present in putative class action where reasonableness of hospital's charges for treatment rendered to different patients requires review of specific bills and analyzing them against factors like the market rate for the same services at other hospitals); Therefore, this Court should dismiss or strike the class action claims with prejudice. S*ee, e.g., Ostrof v. State Farm Mutual Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) (denying class certification based on predominance of individualized issues in medical bill case); *Ross-Randolph v. Allstate Ins. Co.*, 2001 WL 36042162 (D. Md. May 11, 2001); *Premier Open MRI Center, LC v. Allstate Ins. Co.*, (Case No. 16-2003-CA-004498) (Fla. 4th Jud. Cir. 2005)(Attached as Exhibit "J"); *Gaetan v. GEICO Indemnity Co.*, 938 So. 2d 569 (affirming dismissal with prejudice of PIP class action, (Case No. 01-18636 CA 04) (Fla., 11th Jud'l Cir. June 20, 2002)(Attached as Exhibit "K"); *Dade County Police Benevolent Assn., Inc. v. Metro. Date County,* 452 So. 2d 6 (Fla. 3d DCA 1984)); *Padilla v. Liberty Mutual Ins. Co.*, 934 So. 2d 511 (Fla. 3d DCA 2005) (dismissing PIP class action allegations against insurer with prejudice); *Antoine v. Allstate Ins. Co.,* No. 214453 (Md. Cir. Ct. Mont.

Cnty, Dec. 5, 2001) (dismissing class allegations in case challenging medical bill reductions)(Attached as Exhibit "L").

A. No Allegation Of A Proper Rule 23(a)(1) Class.

The predominance of individual questions demonstrates that certification under Rule 23(b)(1) would not be proper. Rule 23(b)(1) is only appropriate where the litigation of individual members' claims would create a risk that such individual adjudications could establish incompatible standards of conduct for defendant; or would impair or be dispositive of other class members' claims. These requirements of Rule 23(b)(1) are not met. Rule 23(b)(1) requires commonality of questions of law and/or fact. The necessary, individualized determinations present here demonstrate the lack of commonality, as discussed *infra* in connection with Rule 23(b)(3) (which requires predominance of such common questions). As one treatise has stated:

> Under [rule 23(b)(1)(A)], it is not enough that separate litigation may result in inconsistent adjudications. Rather, the Rule explicitly requires that such adjudication impose incompatible standards of conduct on the party opposing the class. Accordingly, the mere possibility of varying or inconsistent adjudications in which a party may prevail against a putative class member in one case and lose in a second case to another such class member, does not, standing alone, impose incompatible standards of conduct on the party in satisfaction of Rule 23(b)(1)(A). Rather Rule 23(b)(1)(A) is satisfied only if inconsistent judgments in separate suits would place the party opposing the class *in the position of being unable to comply with one judgment without violating the terms of another judgment.*
>
> 5 James Wm. Moore et al., *Moore's Federal Practice,* § 23.41[2][a] (3d ed.1997) (internal footnotes omitted) (emphasis added).

Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 353-54 (Fla. 1st DCA 2003). The risk of inconsistent adjudications in these circumstances would arise in the context of the myriad of individual issues surrounding each class member's individual PIP claim. As in *Seven Hills*, where the Court held that the risks of inconsistent adjudications about separate easements would not have placed that defendant in the dilemma contemplated by Rule 23(b)(1), *id.* at 354, so too here, no ruling on any class member's PIP claim would place Allstate in the position of violating the terms of a judgment on another PIP claim.

B. No Allegation Of A Proper Rule 23(a)(2) Class.

Rule 23(a)(2) requires that "the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class." In the instant case, Plaintiff alleges that Allstate did not properly calculate the reimbursements paid for medical services rendered. Significantly, however, the charges for specific medical services paid to Plaintiff (and Allstate's payment thereof) are not necessarily representative of charges by other health care providers. If Plaintiff is correct that Allstate could not apply the fee limitations specified in Fla. Stat 627.736(5)(a)2, the calculations of reimbursements that Plaintiff contends are required under Fla. Stat 627.736(1)(a) to determine whether the "reasonable" medical expense to be paid will require a fact-finder to evaluate each medical bill at issue for each medical service provided to each insured by each to determine, *inter alia,* whether the invoice for the each emergency medical service was reasonable in light of reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and

other insurance coverages, and, if not, what a reasonable charge would be for each medical service provided.

Certification under Rule 23(b)(2) would not be proper. Rule 23(b)(2) certification is "appropriate only for the resolution of class claims that rest on the same grounds and apply equally to all members of the class." *Freedom Life Ins. Co. of Am. v. Wallant*, 891 So. 2d 1109, 1117 (Fla. 4th DCA 2004). Where there are significant differences among class members requiring individual determinations of liability and damages, Rule 23(b)(2) certification is not proper. *Hess Corp. v. Gillasca*, --- So.3d ----, 2009 WL 4931668 (Fla. 2d DCA, Dec. 23, 2009); *see also Chase Manhattan Mort. Corp. v. Porcher*, 898 So. 2d 153, 158 (Fla. 4th DCA 2005) (the required cohesiveness of class members' claims under Rule 1.220(b)(2) is lacking where individual characteristics of their claims have significant legal impact on their recovery).[6]

Although Plaintiff alleges that class treatment of its claims in Counts I, II, IV and V under Rule 23(b)(2)[7] is proper because Allstate has acted in a manner "generally applicable to all class members" (Complaint, ¶ 45), Allstate's alleged conduct is Plaintiff's same claim that Allstate improperly paid PIP claims based on the fee limitations under Section 627.736(5)(a)(2), which is alleged on behalf of the Plaintiff in Count III and on behalf of a purported class in Count VI. (*Id.*, ¶¶ 39, 102-104.) "Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998)

[6] Moreover, as discussed above, (b)(2) certification is not appropriate where the appropriate final relief relates exclusively or predominantly to money damages.

[7] Because Plaintiff's Complaint was initially filed in Florida state court, its class allegations refer to Fla.R.Civ.P. 1.220. However, now that this matter has been removed to federal court, those allegations are being treated as if made regarding F.R.Civ.P Rule 23.

(citation omitted). "[M]onetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief." *Id.* at 415 (emphasis added). The Eleventh Circuit has adopted the standard announced in *Allison* to determine whether monetary damages are incidental to equitable or declaratory relief:

> By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.... Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established.... Liability for incidental damages should not ... entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (quoting *Allison v. Citgo Petroleum*, 151 F.3d at 415).

A declaratory judgment about the use of those fee limitations in Plaintiff's favor would not automatically entitle the putative class members to any recovery. Plaintiff does not seek those damages as a "group remedy" on behalf of the putative class. *See Allison v. Citgo Petroleum*, 151 F.3d at 415. Rather, each putative class member's entitlement to such damages is individual, based on the specific medical services rendered, and would require further individual determinations of the reasonableness, relatedness and necessity of each of those services and the rates charged for them with regard to every insured for every provider.

C. No Allegation Of A Proper Rule 23(a)(3) Class.

Likewise, Plaintiff cannot meet the requirement of Rule 23(a)(3) that "the claim or defense of the representative party is typical of the claim or defense of each member of the

class." For precisely the same reasons why the charges for its medical treatment are not common, they are not typical. Plaintiff's entire claim that Allstate underpaid would require a determination whether the charges actually billed are reasonable. The analysis of the Plaintiff's charges will not necessarily be typical of the analysis of charges by other providers. *See Colomar v. Mercy Hosp., Inc.,* 242 F.R.D. 671, 677 (S.D. Fla. 2007) (plaintiff's proof that her charges for medical services were not reasonable would not establish liability for any other class member's charges, so her claims are not typical of the class).

Additionally, to obtain class certification under Rule 23(b)(3), Plaintiffs must demonstrate not only that questions of law or fact common to each member of the class exist, but also that those issues "predominate over any question of law or fact affecting only individual members of the class." *Brooks v. Southern Bell Teleph. & Telegraph Co.*, 133 F.R.D. 54, 57 (S. D. Fla. 1990) (plaintiff's claims, which are dependent upon individualized facts, are not appropriate for class treatment). The predominance inquiry is "demanding." *Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (1997). It requires a court to analyze how a trial on the merits would proceed.

Here, even if we assume that Plaintiff's identification of one allegedly common legal question satisfies the commonality requirement, Plaintiffs' predominance allegations are grossly deficient. They are insufficient as a matter of law to sustain Plaintiff's burden of pleading the class allegations with particularity. Even if Plaintiff was given the opportunity to amend its class allegations, as a matter of law, the individual PIP claims of each class member in the putative class are not suitable for class treatment. Plaintiff's Complaint

ignores the fundamental aspect of PIP - each claim must be decided on its own individual merits. *E.g. Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 526 (5th Cir. 2007) (common issues do not predominate because the question of determining a reasonable charge for medical services requires individual review of each patient's medical care and consideration of the amounts charged for similar services); *Donovan v. State Farm Mut. Auto. Ins. Co.*, 560 So. 2d 330, 331 (Fla. 4th DCA 1990). Certifying any class in this case, and deciding the substantive questions raised by Plaintiff's Complaint, would not get the Court any closer to resolving each class member's individual claims. There are numerous individual factual questions that will not be resolved by a ruling on the alleged common issues identified in the Complaint. Even if the Court determines that Allstate could not properly apply the fee schedule limitations permitted under Fla. Stat. 627.736(5)(a)(2)(b), the determination of each individual class member's claim for PIP benefits remains potentially subject to numerous individual questions which must be resolved on a case-by-case basis, including whether the services related to the operation of a motor vehicle, whether the services provided were medically necessary, whether the amount charged by the provider was within the usual, customary, and reasonable charges for that particular geographic location, whether the provider obtained a valid, enforceable assignment of benefits giving it standing to pursue PIP benefits, and the amount of benefits available under the particular PIP policy in question and whether benefits have been exhausted.

Class members would only be entitled to recovery if such highly-individualized factual questions are determined. The only question in common with Plaintiff's claim (whether Fla. Stat. 627.736(5)(a)(2(b) permits an insurer to apply the fee schedule

limitations), will be swamped by the many individualized determinations the trier of fact would need to make. Each case will require a mini-trial on each individual PIP claim once the single common question is resolved, to examine the individual issues outlined above. *See, e.g., Charter Oak Fire Ins. Co. v. Regalado*, 339 So. 2d 277 (Fla. 3d DCA 1976); *see also Ward v. Luttrell*, 292 F. Supp 165 (E.D. La 1968) ("True the law would be common to the 'class,' but we cannot conceive what the questions of fact would be").

The existence of these necessary, individualized determinations conclusively demonstrates that common issues do not predominate in this case, and that the case as alleged does not warrant class action treatment. *Brooks v. Southern Bell Teleph. & Telegraph Co.*, 133 F.R.D. 54, 57 (S. D. Fla. 1990) (Plaintiffs' claims, which are dependent upon individualized facts are not appropriate for class treatment); *Mathieson v. General Motors Corp.*, 529 So. 2d 761, 762 (Fla. 3d DCA 1988); *Cohen v. Camino Sheridan*, 466 So. 2d 1212, 1214 (Fla. 4th DCA 1985); *K. D. Lewis Enterprises Corp. v. Smith*, 445 So. 2d 1032, 1034 (Fla. 5th DCA 1984). Thus class action treatment of these predominant individual claims is inappropriate as a matter of law. *See State Farm Mutual Auto. Ins. Company v. Kendrick*, 822 So. 2d 516 (Fla. 3d DCA 2002) (plaintiff sought reimbursement of certain insurance losses on a class action basis; the Third DCA rejected class certification, finding "[t]his case presents a multitude of varied claims under various insurance policies based on widely divergent individual facts. To allow class certification in this case would undermine the purpose for which this procedural vehicle was created.").

In light of the overwhelming weight of the case law, even if we assume that Plaintiffs could somehow plead in accordance with the detailed pleading requirements of Rule 23, the

case is inherently unsuitable for class treatment under Rule 23 (b)(1), (2) or (3). This Court should therefore strike the class allegations and dismiss the class action claims in the Complaint.

CONCLUSION

WHEREFORE, Defendant ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY prays that this Court enter an order dismissing Plaintiff's Complaint with prejudice and/or striking the class allegations of Plaintiff's Complaint, and awarding to Allstate such other and further relief as may be deemed just and proper.

Respectfully submitted,

s/ Lori J. Caldwell
LORI J. CALDWELL
Florida Bar No. 0268674
MARY ALICE COX
Florida Bar No. 0058896
RUMBERGER, KIRK & CALDWELL, P.A.
Lincoln Plaza, Suite 1400
300 South Orange Avenue
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Telecopier: (407) 841-2133
E-Mail: lcaldwel@rumberger.com
mcox@rumberger.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **David M. Caldevilla** at dcaldevilla@dgfirm.com; **Scott R. Jeeves** at sjeeves@jeeveslawgroup.com; and **Craig E. Rothburd** at crothburd@e-rlaw.com. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: **Lorca Divale**, 501 Goodlette Road, N., Suite D-100, Naples, Florida 34102

s/ Lori J. Caldwell
LORI J. CALDWELL
Florida Bar No. 0268674
MARY ALICE COX
Florida Bar No. 0058896
RUMBERGER, KIRK & CALDWELL, P.A.
Lincoln Plaza, Suite 1400
300 South Orange Avenue
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Telecopier: (407) 841-2133
E-Mail: lcaldwel@rumberger.com
mcox@rumberger.com

Attorneys for Defendant