**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT**
**APPELLATE DIVISION**
**STATE OF FLORIDA**

TOQUON SERVICES d/b/a WET OUT RESTORATION, a/a/o Donna Crosby,

Appellant,

NO: 312018AP000019
L.T. No.: 312018SC001070

v.

UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA,

Appellee.
_____/

# INITIAL BRIEF OF APPELLANT

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ON APPEAL FROM THE COUNTY COURT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

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## INTRODUCTION AND QUESTIONS PRESENTED

This is a breach of contract case, filed pursuant to an assignment of benefits ("AOB") payable under a homeowners insurance policy. The underlying coverage issue arises from an exclusionary clause, which requires insureds to request permission before exceeding the $3,000 cap on benefits for temporary repairs. This appeal, however, is about the Uniform Commercial Code's defense of "accord and satisfaction by instrument," as codified in Florida's law of negotiable instruments. § 673.3111, Fla. Stat.

In return for emergency remediation services, Appellant Wet Out Restoration ("Wet Out") accepted an AOB from Donna Crosby, whose homeowners policy was issued by Appellee Universal Insurance Company ("Universal"). Wet Out billed Universal $5,788.31, but Universal would only pay $3,000 because Wet Out allegedly did not request permission to exceed the policy's cap on emergency repairs. Universal sent Wet Out a check for $3,000 and correspondence indicating that the policy did not require the company to pay more. Wet Out has produced evidence that it asked for permission to exceed the cap.

The question in this appeal is whether Universal has shown, for summary judgment purposes, that it reached an accord and satisfaction with Wet Out Restoration by tendering a check for the undisputed $3,000 and taking the position that an exclusion applied to the remainder of Wet Out's claim.

## STATEMENT OF THE CASE AND FACTS

On June 6, 2018, Toquon Services, under the name Wet Out Restoration, filed a breach of contract suit against Universal Insurance Company of North America, as the holder of an assignment of homeowner insurance benefits (an "AOB") from Donna Crosby. (R. 1). The amended complaint alleges that Ms. Crosby's home suffered a water loss and retained Wet Out Restoration to perform services and repairs. (R. 70).

Ms. Crosby's insurance policy contains a $3,000 cap on emergency temporary repairs completed without prior notice to Universal:

> a. We will pay up to the greater of $3,000 or 1% of your Coverage A limit of liability for the reasonable costs incurred by you for necessary measures taken solely to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against.
>
> b. We will not pay more than the amount of **a.** above, unless we provide you approval within 48 hours of your request to us to exceed the limit in a. above. IN such circumstance, we will pay only up to the additional amount for the measures we authorize.
>
> If we fail to respond to you within 48 hours of your request to us and the damage or loss is caused by a Peril Insured Against, you may exceed the amount in **a.** above only up to the cost incurred by you for the reasonable emergency measures necessary to protect the covered property from further damage.

(R. 151). Accordingly, Universal argued on summary judgment that its liability was limited to the $3,000 it had already paid because it "never received a timely or

proper request to exceed the limits for emergency measures pursuant to the [policy] from the plaintiff prior to making its coverage determination." (R. 94). Emails show that Wet Out argued to Universal that it had made a proper request on the date it provided services. (R. 209).

Universal argued further that Wet Out had agreed to an accord and satisfaction of the entire debt. In a letter dated May 4, 2018, Universal wrote that "We have reviewed your invoice and in accordance with the applicable policy provision(s) are issuing payment in the amount of $3,000. Payment has been limited to the amount of $3,000 as we were not notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000 policy limit or 1 % of coverage A, limit of $1,740.00 until the mitigation work was completed." (R. 211). The letter quoted the relevant policy language, and invited Wet Out to contact the representative with "any questions concerning this mitigation claim or [the endorsement]." (R. 211).[1]

The letter was accompanied by a check for $3,000. (R. 221). The check includes the policy and claim numbers and the name of the insured, and, in the "REMARKS" field, the notations "Dwelling, LO, NO INV# R1J." (R. 221). The check itself includes no qualifying language. It does not indicate that it is intended

[1] The letter is reproduced in its entirety at pages 9-10 of this brief.

as payment in full for Wet Out's invoice, or as payment to settle any claims over $3,000.[2]

Universal characterized the correspondence accompanying the check as setting "the limits of the monies that UICNA would pay towards the disputed claim." (R. 93 (See R. 218 for letter)). Universal also pointed to the deposition testimony of corporate representative Kevin Gaudineer, indicating that the check was "for a full and final payment of services rendered." (R. 94). Universal argued that the additional $2,788.31 was not recoverable because tender and acceptance of the $3000 policy limits discharged the debt pursuant to Section 673.3111, Florida Statutes. (R. 95).

In the response to the motion for summary judgment, Wet Out disputed whether it had requested to exceed the $3,000 cap. On February 24, 2018, the day it performed water mitigation services for Ms. Crosby, it "telephoned defendant with request to exceed the cap and subsequently transmitted the Defendant with a copy of the assignment as well as Plaintiff's invoice for $5,788.31." (R. 103; see R. 209 (Wet Out's email response to letter invoking $3,000 cap)). It argued that Universal's failure to respond within 48 hours constituted permission to exceed the cap, pursuant to the policy. (R. 108). Wet Out further explained that it had only

[2] The check is reproduced at page 11 of this brief.

learned on May 4, 2018 that Universal believed it had received no request to exceed the cap. (R. 104).

As to accord and satisfaction, Wet-Out argued that the law required mutual intent to settle the dispute, which could not be determined on summary judgment. (R. 101).

The county court granted Universal's motion for summary judgment. (R. 258). The court found that Universal's letter accompanying the check "clearly indicates an intention on the part of the Defendant to transmit a payment in full satisfaction of the claim, since it is in response to the Wet Out Restoration's request for a higher amount and not an unsolicited payment." (R. 259). The court stated that Florida's statutory accord and satisfaction does not require a showing of mutual intent; instead, accord and satisfaction occurs when the instrument is negotiated, so long as there was "a 'conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.'" (R. 260). The Court found that Universal had made a conspicuous statement in the correspondence accompanying the check, and Wet Out had unquestionably deposited the check knowing that Universal contended that no further payment was owed under the policy.

On October 4, 2018, Wet Out filed a motion for rehearing. (R. 222). Wet Out explained that, subjective intent aside, Florida law also requires a reasonably

expressed "that the check was being tendered in satisfaction of the claim as opposed to an undisputed payment." (R. 223). Universal's check and correspondence "was not clear that cashing of the check served as an accord and satisfaction," and therefore no objectively clear offer of accord had been extended. (R. 224).

Moreover, accord and satisfaction did not apply where, as here, no "settlement" occurred because there was no dispute over Universal's legal obligation to pay the $3,000. (R. 225). Only the remaining $2,788.31 was disputed, and Universal had not paid a single cent towards it. (R. 225-26). Taken to its logical extreme, the court's decision would discourage acceptance of partial payment by eradicating the distinction between disputed and undisputed claims, allowing insurers to impose settlements as a condition of paying what they unquestionably owed. (R. 226).

Finally, Wet Out asserted that Universal had failed to show on summary judgment that the payment was tendered "in good faith" as a settlement of the entire claim. (R. 226). "Because Florida law requires that the insurance carrier pay the undisputed portion of Plaintiff's claim, payment of a legal obligation cannot constitute an offer to settle in good faith." (R. 227).

In its response, Universal reiterated that it relied only upon Florida's "accord and satisfaction by instrument" statute, which did "not require that the party

against whom the accord and satisfaction is asserted has to agree with the insurer's position that the payment constituted full resolution of the debt." (R. 231). Universal argued that all it had to prove was that Wet Out "received a conspicuous written communication along with the check indicating that the insurer's payment was intended to serve as full satisfaction of the claim." (R. 231).

Universal also argued that it did not agree that Wet Out was entitled to payment to the $3,000 policy limits; it had recently hired an expert to testify that a reasonable payment would have been less than the policy limits. (R. 240; see R. 254 (noting that expert was hired by counsel, not Universal, on July 13, 2018)).

In its reply, Wet Out reminded the court that Section 673.3111 required good faith and a bona fide dispute, and that questions of fact remained on these issues. (R. 253-54).

The court denied the motion for rehearing, reasoning that the key pertinent facts conclusively established accord and satisfaction:

> Plaintiff submitted an invoice for payment. The Defendant responded with a letter and a check. The letter indicated that the Defendant would not pay the invoiced amount, **but** would only pay the amount of the check submitted in payment of the claim. The language indicated that the payment submitted was the maximum limit that would be paid. The Plaintiff did not return the check within 90 days. Finally, the Plaintiff is not an unsophisticated consumer, but an entity in the business of dealing with insurance companies

(R. 257).

Wet Out appeals.

3120185C001070

UNIVERSAL

**Universal North America**
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T: (888) 877-0770 F: (866) 465-1759
www.universalnorthamerica.com

May 4, 2018

EXHIBIT "B"

Wet Out Restoration
1623 SW Crossing Cir
Palm City. FL 34990

| | | |
|---|---|---|
| Insured | : | DONNA CROSBY |
| Claim Number | : | 1802FL24000304 |
| Date of Loss | : | 2/24/2018 |
| Policy Number | : | UICH0000180626 |

Dear Wet Out Restoration

We are in receipt of the invoice in the amount of $5,788.31 you have submitted for water mitigation services performed at the subject insured property owned by DONNA CROSBY. We have also received a copy of your Assignment of Benefits, Direction to Pay and 2018 signed W-9.

We have reviewed your invoice and in accordance with the applicable policy provision(s) are issuing payment in the amount of $3,000. Payment has been limited to the amount of $3,000 as we were not notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000 policy limit or 1 % of coverage A, limit of $ 1,740.00 until the mitigation work was completed.
The $3,000 payment is greater than the 1% of the policy Coverage A limit of $1,740.00.

Please refer to the following as excerpted from the Florida Special Provisions UI-100 8-16 endorsement, which states in part:

**E. Additional Coverages**
****

**2. Reasonable Emergency Measures**
Paragraph 2. Reasonable Repairs in HO 00 03 (D.2. in form HO 00 06) is deleted and re-placed by the following:

a. We will pay up to the greater of $3,000 or 1% of your Coverage A limit of liability for the reasonable costs incurred by you for necessary

EXHIBIT 8 9/12/18

FILE IN OPEN COURT
Date 10-01-18
By EH EH

measures taken solely to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against.

b. We will not pay more than the amount of a. above, unless we provide you approval within 48 hours of your request to us to exceed the limit in a. above. In such circumstance, we will pay only up to the additional amount for the measures we authorize.

If you have any questions concerning this water mitigation claim or the Florida Special Provisions UI-100 8-16 endorsement, please feel free to call me at 888-877-0770 You may reach me between the hours of 8:30 AM and 5:30 PM.

Sincerely,

Kevin Gaudineer
Inside Claims Representative
(888) 877-0770; Ext. 6663
claims@uihna.com

312018SC001070

**Document type : Disbursement Check** 08/29/2018 9:10 AM

THIS CHECK IS VOID WITHOUT A COLORED BORDER AND BACKGROUND PLUS A KNIGHT & FINGERPRINT WATERMARK ON THE BACK - HOLD AT ANGLE TO VIEW

**Universal Insurance Co. of North America**
P.O. Box 50907
Sarasota, FL 34232

32-2/1110

**CHECK NO.** 340118626
**DATE** 05 /10 /2018

Bank of America
Tampa, FL

**POLICY NO.** UICH0000180626 **CLAIM NO.** 1802FL24000304
**REMARKS** Dwelling,LO,NO INV#: RJJ

Checks over $20,000 require two signatures.

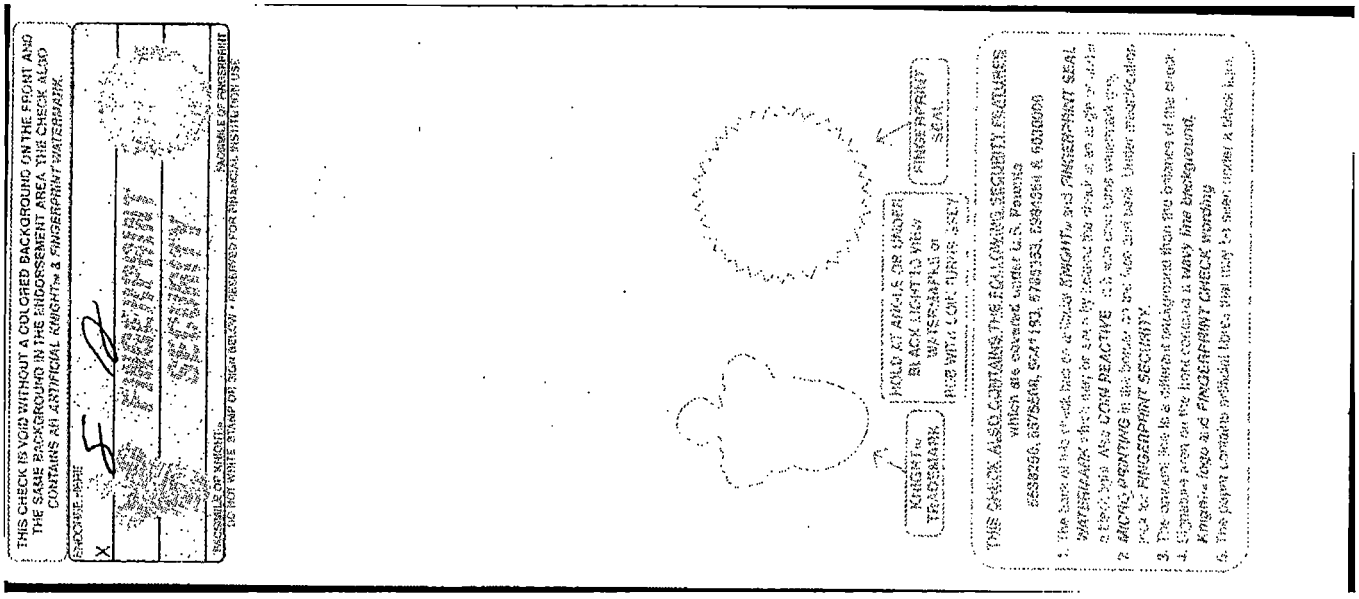
**INSURED** DONNA CROSBY

******$3,000.00

**Three Thousand And NO/100 Dollars**

PAY
TO THE
ORDER OF **Wet Out Restoration, Toquon Services, LLC**
**1623 SW Crossing Circle**
**Palm City FL 34990**

⑈ [redacted]




| Tag | Amount | Note | Serial Number | Volume ID / Customer Data | Item Date | ImgVolNo | Account Number / Issue Date |
|---|---|---|---|---|---|---|---|
| No | | No | | 18060540015301 | 05/22/2018 | | [redacted] |
| | 3000.00 | | 340118626 | Wet Out Restoration, Toquon Services, LLC | | 1 | |

FILE IN OPEN COURT
Date 10-01-18
By EH EH

## SUMMARY OF ARGUMENT

The county court improperly applied the Uniform Commercial Code's "accord and satisfaction by instrument" defense, as enacted in Section 673.311, Florida Statutes. A payment can only be an accord and satisfaction as an unliquidated or disputed claim, and it must be tendered in good faith and in full satisfaction of that claim. When these elements exist, the acceptance of instrument can serve as accord and satisfaction, if the instrument or correspondence accompanying it contain a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

Here, Universal merely admitted coverage and paid to the policy limits it argues apply. It did not contend that it owed less than the $3,000 it paid, nor did it pay even one dollar of the $2,788.31 actually in dispute. Moreover, Universal's good faith is not evident because it has not shown "observance of reasonable commercial standards of fair dealing." Finally, neither the letter nor the check contain clear, visible language of release of Wet Out's claim to payment of its full invoice. The Court should reverse and remand for further proceedings.

## ARGUMENT

### I. The standard of review in this case is *de novo*.

A trial court's order granting a motion for summary judgment is reviewed *de novo*. *Volusia County v. Aberdeen at Ormond Beach L. P.*, 760 So.2d 126 (Fla. 2000). Summary judgment is appropriate only when the submissions "as would be admissible in 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." *Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC*, 209 So. 3d 622, 624 (Fla. 5th DCA 2017) (citations omitted). At summary judgment, all evidence "must be considered in the light most favorable to the non-moving party, and if the record raises the possibility of any genuine issue of material fact or even the slightest doubt that an issue might exist, summary judgment is improper." *Penton Bus. Media Holdings, LLC v. Orange Cty.*, 236 So. 3d 495, 497 (Fla. 5th DCA 2018) (citations omitted).

### II. The county court erred by granting summary judgment on Universal's "Accord and satisfaction by use of instrument" defense.

Florida has adopted the Uniform Commercial Code's provisions regarding negotiable instruments, along with the Official Comments thereto. Chapter 673, Florida Statutes. Section 673.3111, Florida Statutes, permits "Accord and satisfaction by use of instrument." Subsection one contains three elements: (1) an

unliquidated claim or a claim subject to a bona fide dispute; (2) a good-faith tender of an instrument as full satisfaction of that dispute; and, (3) negotiation of the instrument by the claimant. Only if subsection one is satisfied can "the following subsections apply" to discharge the claimant's liability.

Subsection 2 then provides that, with an exception not relevant here, that the claim is discharged "if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." § 673.3111(2), Fla. Stat.

As Official Comment 4 summarizes, "The person seeking the accord and satisfaction must prove that the requirements of subsection [1] are met. If that person also proves that the statement required by subsection [2] was given, the claim is discharged . . . ." §673.3111, Official Comment 4.

A. Universal has failed to show that its $3,000 payment addressed a claim that was "unliquidated or subject to a bona fide dispute."

Accord and satisfaction by instrument permits parties in arms-length transactions to settle disputes with minimal cost. *E.g.*, *Burke Co. v. Hilton Dev. Co.*, 802 F. Supp. 434, 439 (N.D. Fla. 1992) (describing "the full payment check by parties bargaining at arm's length" as "a convenient and valuable way of resolution of dispute through agreement of the parties"). Official Comment 4 makes it clear that the defense "does not apply to cases in which the debt is a

liquidated amount and not subject to a bona fide dispute." It further observes that "Other law applies to cases in which a debtor is seeking discharge of such a debt by paying less than the amount owed." *See, e.g., Berman v. United States Fin. Acceptance Corp*., 669 So. 2d 1116, 1117 (Fla. 4th DCA 1996) (discussing discharge of liquidated debt).

One particularly scholarly opinion in a U.C.C. case gives us a useful footnote regarding the "critical distinction between 1) the adequacy of certain offers to settle unliquidated claims and 2) the inadequacy of those very same offers to settle liquidated claims." *Weston Builders & Developers, Inc. v. McBerry, LLC*, 167 Md. App. 24, 72 n.9, 891 A.2d 430, 457 (Md. App. 2006). Another opinion observes that the essence of accord and satisfaction is "the payment by one part of a sum greater than that which he admits he owes and the acceptance by the other party of a sum less than that which he claims is due." *Wickman v. Kane*, 136 Md. App. 554, 56, 766 A.2d 241, 245 (Md. App. 2001) (discussing controversy requirement in common-law accord and satisfaction case).

Universal did not protest payment to the policy limits. Instead, it indicated by letter that coverage existed and that at least $3,000 was reasonably expended to provide emergency repairs for Ms. Crosby. (R. 211 ("We have reviewed your invoice and in accordance with the applicable policy provision(s) are issuing payment in the amount of $3,000. Payment has been limited . . . as we were not

notified by you . . . nor did we receive your request to exceed the $3,000 policy limit."). As far as can be discerned from the letter, Universal was simply making prompt partial payment of money it knew it owed, in compliance with the policy's ninety-day requirement. (R. 34; see R. 221 (check dated May 10, 2018)); Fla. Stat. § 627.70131(5)(a). Such a tender is not in settlement of a "dispute" for the purposes of the accord and satisfaction statute. *See R4 Props. v. Riffice*, No. 3:09-cv-00400(DJS), 2014 WL 4724860, 2014 U.S. Dist. LEXIS 133260, at *18 (D. Conn. Sep. 23, 2014) (applying Florida law in diversity case; concluding that payment did not address any dispute where $22,000 payment represented "accurate balance of capital call amounts that the defendants owed the partnership and both parties agreed that this exact amount was owed").

Indeed, there is no evidence that Universal disputed any portion of Wet Out's invoices before Universal's counsel requested a comparative estimate on July 13, 2018. (R. 254 (discussing $2,559.99 estimate by Raul Paredes)). Additionally, the law would not permit Universal to "mend the hold" by changing its reason for denying Wet Out's full claim. (R. 255 (citing, *inter alia*, *Baquero v. Lancet Indem. Risk Retention Grp., Inc.*, No. 12-24105-CIV-MORE, 2013 U.S. Dist. LEXIS 132661, at *15 (S.D. Fla. Sep. 17, 2013))). Therefore, Universal failed to carry to its burden to produce evidence that the check was directed to a

bona fide dispute instead of to an acknowledged debt. The Court should reverse and remand for further proceedings.

B. Universal did not show that the $3,000 check was tendered "in good faith" as "full satisfaction of the claim."

Universal has also failed to show good faith in the tender of its check as full satisfaction of the claim.

The Official Comment explains that a tender in good faith requires "not only honesty in fact, but the observance of reasonable commercial standards of fair dealing." The term "good faith" is also defined in Section 673.1031(1)(d), Florida Statutes to require subjective honesty and objectively reasonable commercial standards of fair dealing. *See Any Kind Checks Cashed v. Talcott*, 830 So. 2d 160, 164-65 (Fla. 4th DCA 2002) (discussing objective nature of requirement in identically-worded requirement for holder in due course). Official Comment 4 to that section explains that "although fair dealing is a broad term that must be defined in context," it refers to "the fairness of conduct" and not "the care with which an act is performed."

Fair dealing is determined on a case-by-base basis. However, the Official Comment itself discourages sending notice only by correspondence, explaining that "the notice required [of tender as full satisfaction of claim]" is "normally . . . written on the check." Section 673.3111, Official Comment 4. Official Comment 1 similarly contemplates a clear statement "to the effect that the check is offered

as full payment or full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered."

Here, neither the check nor the accompanying letter indicated that Universal was paying Wet Out $3,000 as a final payment, in return for releasing any claim to full payment of its invoice. Perhaps Universal can eventually produce evidence that objectively reasonable standards of fair dealing would condone such an oversight in an offer of accord and satisfaction. However, the record here would not support such a finding. *Any Kind Checks Cashed*, 830 So. 2d at 166 (reversing where party produced no evidence of industry standards and court held procedures were not reasonable to ensure fair dealing); *see also Regions Bank v. Kaplan*, No. 8:12-CV-1837-T-17MAP, 89 U.C.C. Rep. Serv. 2d (Callaghan) 528 2016 U.S. Dist. LEXIS 52774, at *69 (M.D. Fla. Apr. 18, 2016) (observing that reasonable standards of fair dealing are ordinarily a question for the finder of fact).

The county court therefore erred by finding on summary judgment that Universal tendered the $3000 check in good faith. The Court should reverse and remand.

C. The check, or an accompanying writing, must contain "a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

The lower court also erred in determining that there occurred "a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

Official Comment 4 explains that "Conspicuous" is defined in Section 1-201(10), which is codified at Section 671.201(10), Florida Statutes. A term is "conspicuous" when it is "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." Headings in all capitals or increased typeface size and language set off by symbols or other attention-getting marks are listed as examples of conspicuous terms. Ultimately, "Whether a term is 'conspicuous' is a decision for the court." *Id.*

When accord and satisfaction occurs via delivery and acceptance of a negotiable instrument, the law favors notice made conspicuous by placement on the check. For example, Official Comment 4 explains the inherently conspicuous nature of any language printed on the check itself:

> The statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it. If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally indorse it. Since the statement concerning tender in full

> satisfaction normally will appear above the space provided for the claimant's indorsement of the check, the claimant "ought to have noticed" the statement."

§ 673.3111, Official Comment 4.

Florida opinions also illustrate the importance of language on the instrument in imparting notice as a practical matter in the course of business. The Court's review in *St. Mary's Hospital, Inc. v. Schocoff*, 725 So.2d 454 (Fla. 4th DCA 1999) is instructive. In *Schocoff*, the Court reversed an order granting summary judgment on the accord and satisfaction defense. St. Mary's hospital had cashed a check from an insurer, which was accompanied by a letter stating "No further benefits will be payable." *Id*. at 455. The *Schocoff* Court explained that the communication accompanying the check lacked any language "which reasonably implies, much less expresses, that St. Mary's, by its acceptance of the check, would be deemed to have *agreed* with the insurer's position." *Id.* at 456.[3] A trier of fact might ultimately agree with the court, but "mutual intent for the tender and

[3] The county court discussed this requirement in terms suggesting it believed *Schocoff* referred to a subjective intent that did not extend beyond common law accord and satisfaction. (R. 266 ("Unlike common law accord and satisfaction, Section 673.3111 does not require that the party against whom the accord and satisfaction is asserted has to agree with the insurer's position.")). Wet Out would note that the *Schocoff* court actually discusses the reasonable implications of a communication, an objective issue, and not whether a subjective intent to be bound existed in that case.

acceptance of the check to be in full settlement" could not be decided on summary judgment. *Id.* at 456.

The *Schocoff* Court reviewed some of the cases in which the language on an instrument demonstrated sufficient intent to reach an accord. The common thread is that the offer to settle a dispute was either apparent on the face of the instrument or expressed with absolute clarity in the correspondence accompanying it:

> In *Ennia* the draft stated: "By endorsing the draft the payees accept same in full settlement and release of all claims …."; in *Mortell* the check was marked "paid in full," accompanied by a letter clearly demonstrating the debtor's position that the check was in complete payment of the amount due in the dispute between the two; in *Yelen*, the check was sent with a letter that stated: "The enclosed check is being tendered to you in full satisfaction of the current controversy existing between you and [us]….Your acceptance and depositing of this check shall constitute your … acceptance of the terms of the release. If this is not acceptable, you should return the check to me"; in *Eder*, consistent with evidence that the parties had reached agreement on a settlement of the amount due for certain work, the debtor paid the stated amount in a series of checks, the last of which contained the notation "balance in full for all work done"; in *Pino* the check noted "Full and final payment for all goods, services and claims to date".

725 So. 2d at 456 Fn2; *cf. United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc.*, 51 So. 3d 506, 507 (Fla. 4th DCA 2010) (explaining that accord and satisfaction should have applied where check itself was "FOR FULL AND FINAL PAYMENT OF PIP BENEFITS F/A/O JOYCE THOMAS", but error could not be corrected on certiorari review).

In this case, the check itself does not indicate that Universal's payment was conditioned on anything. As for the correspondence, Universal did not purport to be compromising with Wet Out or asking Wet Out to relinquish any legal claims in return. Assuming *arguendo* that some language in the letter could indicate an accord and satisfaction, Universal did not make that language conspicuous by adopting a layout to increase its visibility. The county court therefore erred in finding that Universal's check came with any conspicuous statement proposing an accord and satisfaction with Wet Out.

## CONCLUSION

At least for the purposes of summary judgment, Universal's purported "accord and satisfaction" is missing key elements. Universal did not show that its payment was directed to a bona fide dispute, that its actions were reasonably fair, or that it included a conspicuous statement of accord and satisfaction. The Court should reverse and remand for further proceedings.

Respectfully Submitted,

*s/Gray Proctor*

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of Initial Brief has been furnished via through the Florida courts eportal to:

George L. Fernandez, Esq. And Manuel A. Fernandez, Esq., of the law firm of Quintairos, Prieto, Wood & Boyer, P.A., 9300 South Dadeland Boulevard, 4th Floor Miami, Florida 33156 at gfernandez@OPWBLAW.com; manuel.fernandez@OPWBLAW.com; and bfetokakis-fernandez@OPWBLAW.com

on this 18th day of March, 2019.

/s/ Gray Proctor

## CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ Gray Proctor