IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY,

CASE NO: 3D20-0105
LT CASE NO: 19-CA-6602

Petitioner,

v.

ARMANDO CHIRINO,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

State Farm seeks review of the December 13, 2019 order holding that the parties or the umpire "shall be permitted to record, by video and/or audio, any and all appraisal inspections. . . ." (A. 196). State Farm argues that recording the inspection would violate the privacy rights of its appraiser. The Court should deny the petition because there is no clearly established law providing State Farm's appraiser with a reasonable expectation of privacy at Mr. Chirino's home.

Additionally, the harm State Farm argues will arise from videotaping is too speculative to warrant certiorari relief. Contrary to its argument, there is no "cat out of the bag" issue because the appraisal inspection itself is not secret, protected, or privileged. And State Farm does not argue that the mere act of recording the inspection will prejudice it in either appraisal proceedings or litigation. Instead, State Farm speculates that the recording could be further "subject to splicing,

editing, and/or alteration, as well as public dissemination." (Pet. 7). The Court should deny the petition because State Farm fails to show any concrete harm arising from the challenged order.

SUMMARY OF PROCEEDINGS BELOW

The petition's statement of the facts is adequate. Mr. Chirino will briefly summarize the arguments made below.

State Farm filed a "Petition for Appointment of Qualified, Disinterested Umpire and Other Appraisal-Related Relief" requesting that the court appoint an umpire and enter a scheduling order. Additionally, State Farm asked "that the Respondent's appraiser not be permitted to video/audio record the appraiser inspection." (App. 9-10, at ¶¶ 29-32). In his response Mr. Chirino requested a declaratory judgment that he was permitted to record the appraisal inspection. (App. 75-76). State Farm filed an answer to the declaratory count, arguing that the policy did not permit recording and that section 934.03, Florida Statutes, prohibited recording without consent. (App. 79-80 (citing *State v. Suco*, 503 So. 2d 446, 451-52 (Fla. 3d DCA 1987)). State Farm noted that it did not object to the appraisers conducting separate inspection instead, "which would facilitate Respondent's ability to record without infringing upon the rights of State Farm's appraiser. Neither the appraisal condition of the policy nor the applicable law prohibit separate inspections." (App. 80).

State Farm then filed a motion for protective order arguing that the "appraisal provision does not contemplate recording, recording can serve no proper purpose under the law because a court cannot consider evidence beyond the face of an appraisal award, and a protective order is appropriate to prohibit a violation of section 934.04, Florida Statutes." (App. 86). The court denied the motion, explaining at the hearing that "There is no public or plaintiff's interest in not having the appraisal video taped. . ." (App. 185). The court's written order makes it clear that State Farm can request a copy of the recordings. (App. 196).

LEGAL STANDARDS

Certiorari review does not "circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987). Mere legal error is not correctable. To prevail, the petitioner must demonstrate a "departure from the essential requirements of law." This standard "means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in gross miscarriage of justice." *Blamey v. Menadier*, 283 So. 3d 938 (Fla. 3d DCA 2019) (quoting *Chessler v. All Am. Semiconductor*, 225 So. 3d 849, 852 (Fla. 3d DCA 2016)).

"A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). Therefore, "'[w]ithout such controlling precedent, [a district court] cannot conclude that [a circuit court] violated a 'clearly established principle of law.'" *Alger v. United States*, 44 Fla. L. Weekly D3001 (Fla. 3d DCA December 18, 2019) (quoting *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)); *see also Nieves v. Viera*, 150 So. 3d 1236, 1239-40 (Fla. 3d DCA 2014) (denying petition because "case law falls far short of the establishment of an unremitting principle" on which the petitioner could rely).

And violation of a clearly established principle of law is not enough. "The error must be sufficiently egregious or fundamental, resulting in a miscarriage of justice." *In re Asbestos Litig. v. Mallia*, 933 So. 2d 613, 616 (Fla. 3d DCA 2006). There must be some "material injury to the petitioner that would be irreparable by way of appeal at the conclusion of the case." *Riano v. Heritage Corp.*, 665 So. 2d 1142, 1143-44 (Fla. 3d DCA 1996).

ARGUMENT

I. State Farm identifies no "clearly established principle of law" that affords its appraiser a reasonable expectation of privacy in an investigation conducted pursuant to the insurance policy.

Florida law prohibits unauthorized recording of oral communications if a person has an actual expectation of privacy and there is "a societal recognition that the expectation is reasonable." *State v. Caraballo*, 198 So. 3d 819, 820-21 (citing *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994); § 934.02(2), Fla. Stat.). A fact-intensive balancing test determines whether a reasonable expectation of privacy exists. Relevant factors include "the location of the conversation, the type of communication at issue, and the manner in which the communication was made." *Stevenson v. State*, 667 So. 2d 410, 412 (Fla. 1st DCA 1996).

The undefinable nature of societal expectations makes State Farm's position on certiorari precarious indeed. "Reasonable expectation of privacy" is not a bright-line test that leads every court to reach the same decision. There is no general agreement on which privacy expectations society recognizes as reasonable, or on how to decide the question except through balancing competing factors. It is "notoriously unhelpful" in predicting judicial behavior and generating uniform results. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (observing that the societal expectations prong generates results that "bear an uncanny resemblance to those expectations of privacy that this Court considers

reasonable") (emphasis added). As Justice Thomas lamented, no unifying principle reliably explains which expectations are reasonable:

> Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," "'notoriously unhelpful,'" "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions.

Carpenter v. United States, 138 S. Ct. 2206, 2244 (2018).

These concerns about the unworkability of the legal standard may be hyperbole, but they serve well to illustrate State Farm's heavy burden here. This is not a case about clear statutory mandates or bright-line requirements. No "clearly established principle of law" can exist unless State Farm produces mandatory authority that addresses an issue on all fours with this one. Mr. Chirino does not believe there is one.

Mr. Chirino does not, however, rest on the unsettled state of the law. State Farm would deserve to lose even if this case were before the Court on *de novo* review.

A. The context from which this appraisal arises cannot support a reasonable expectation of privacy.

Appraisal is adversarial in nature: when invoked by the insurer in response to an invoice submitted, it "only comes about when an insurance company is trying to terminate or at the very least is questioning" the amount due. *United States Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 700 (Fla. 2000). The appraiser is not a guest or a friend, and he is not asserting his rights against a police officer or third-party eavesdropper. The appraiser is an instrument of the underlying dispute, one who now tries to control Mr. Chirino's behavior in his own home.

Admittedly, appraisal inspections usually signal the end of a dispute rather than "a potential step in the direction of litigation" like a PIP examination, *id.* at 701, but that is only because appraisal proceedings usually can substitute for the judicial process. Therefore, each party has an interest in verifying the accuracy of the inspection and appraisal reports for the umpire's consideration.

State Farm argues that when the appraisal occurs, its appraiser will have "a reasonable expectation of privacy concerning the appraisal inspection because he is a business invitee (as opposed to a trespasser) present at the insured property for a specific contractual purpose – appraisal." In fact, there is no Florida opinion holding that a business invitee has any reasonable expectation of privacy in statements made while an invitee carries out his purpose. State Farm's authority is miles away from the instance case. (Pet. for Writ of Cert., at 19 (citing *State v.*

Suco, 502 So. 2d 446, 453 (Fla. 3d DCA 1986))). In *Suco*, the "business invitee" was a landlord whose tenants permitted him to use his key to enter to collect rent and make repairs. The night of his arrest, there was no answer when he knocked on the door, so he let himself in. Finding the tenant unavailable, he sat on the couch to watch television with the children while he waited. Under the circumstances, this Court concluded that Mr. Suco had a reasonable expectation of privacy in the leased premises both because he retained limited possessory rights and because he was "tantamount to an invited guest on the premises." *Suco*, 502 So. 2d at 451-52. Therefore, Mr. Suco had standing to move to suppress the fruits of the ensuing search based on his own Fourth Amendment rights, independently of the rights of the tenants residing on the premises.

Suco does not create any right for a prospective invitee to demand that the invitor refrain from recording him. If anything, *Suco* supports the proposition that social guests and landlords with right of entry can claim a right of privacy against government intrusion in criminal proceedings. *But see State v. Suco*, 521 So. 2d 1100, 1102 (Fla. 1988) (affirming, but disapproving "the district court's dual analyses which appear to make either the respondent's status as lessor or his status as an invitee determinative"). Nevertheless, it remains clear that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like" do not control the totality-of-the-circumstance approach Florida law

requires. *Suco*, 521 So. 2d at 1102. Invitee status does render the other factors irrelevant, especially when it is the host who records.

State Farm's other authority, which it describes as "specifically holding that certiorari review is appropriate under similar circumstances," are too dissimilar to guide the Court here. (Pet. 10). The first case establishes that a nonparty in a criminal case can assert privacy rights when the State attempts to use an unauthorized recording as evidence. *Abdo v. State*, 144 So. 3d 594 (Fla. 2d DCA 2014). The *Abdo* court reversed because the recording itself was insufficient to show that Mr. Abdo had no reasonable expectation of privacy while riding as a passenger in his vehicle. The case was remanded for a full evidentiary hearing.

The second case, arising out of a civil suit, addressed a nonparty plaintiff's attorney who had made an unauthorized recording of conversations with the defendant and his counsel. *Briggs v. Salcines*, 392 So. 2d 263 (Fla. 2d DCA 1980). In *Briggs* the nonparty attorney had turned the tapes over to his own attorney, Mr. Briggs, who was then ordered to release the recordings to the defendant. Because the tapes were probably made illegally, the creator could assert Fifth Amendment protection and Mr. Briggs could assert attorney-client privilege. There is no relevant analogy to be made to Mr. Chirino's case.

Moreover, the appraiser's expectations of privacy will depend on the actual circumstances at Mr. Chirino's residence. If a video recorder is running when State

Farm arrives, any reasonable expectation of privacy will be destroyed. *E.g.*, *State v. Caraballo*, 198 So. 2d 819 (Fla. 2d DCA 2016) (no reasonable expectation where store's security cameras "operate twenty-four hours a day" and "are located in obvious places, are not hidden in any manner, and have a light that flashes" when operating). It is also difficult to see how State Farm's appraiser could have any subjective expectation of privacy in front of a running video camera. *Smiley v. State*, 279 So. 3d 262, 264-65 (Fla. 1st DCA 2019). There is nothing about the nature of appraisal or the conditions under which the inspection will occur that would create a reasonable expectation of privacy against Mr. Chirino in his home.

B. The appraisal clause does not create any reasonable expectation of privacy.

From its failure to draft any language addressing the issue, State Farm asks the Court to infer and enforce a clear, unequivocal purpose to prevent video and audio recording in the appraisal clause. (Pet. at 4 (arguing that policy "purposefully omits any reference to video or audio recording")). But Florida law does not permit an insurer to benefit from concealing or omitting terms. As trial counsel explained below, insurance policies are contracts of adhesion interpreted against the drafter. Whether an anti-recording provision would be enforceable is irrelevant unless and until State Farm, "with the stroke of a pen," adds it to the homeowners insurance policies sold in Florida. (App. 165). Here, the Court should decline State Farm's invitation to redraft the policy to conform to its unexpressed wishes.

Moreover, even if the rule on interpreting insurance contracts did not apply, State Farm fails to show that the policy prohibits recording of an appraisal because it is silent on the issue. According to State Farm, it is obvious that recording appraisal inspections will "drastically limit[] the pool of qualified, disinterested appraisers and umpires by removing those unwilling to be recorded (a significant number)." (Pet. 4-5). But nothing other than State Farm's speculation shows any "chilling effect on those willing to serve" as appraisers, (Pet. 22-23), an argument that has failed to persuade in similar cases. *Cimino*, 754 So. 2d at 701-02

(rejecting argument that permitting a recording of PIP examinations would "make it impossible for insurance companies to find doctors;" noting further that potential difficulties were outweighed by interests of justice). Indeed, during the evidentiary hearing, the judge inquired whether the umpire, "as an individual subject to videotaping," had any objections to recording. He did not. (App. 175-76).

State Farm also complains that recording "will frustrate the alternative dispute resolution purpose of appraisal by making the appraisal inspection more burdensome on everybody involved." (Pet. 4). It is unclear how permitting a recording will inherently "mak[e] the appraisal inspection more contentious and burdensome on all," and State Farm offers nothing in support of its premise.

Indeed, recording inspections contributes to an accurate appraisal process. Recordings document the appraiser's methods, which helps the umpire decide what weight the appraiser's conclusions should receive. Whether they are admissible in a court of law is beside the point, (Pet. 14), because they serve the same evidentiary function in the mini-trial context of appraisal. *See Cimino*, 754 So. 2d at 701-02 (explaining that "by allowing the examination to be observed by a third party or videotaped, the potential for harm to either party is reduced, not increased."). As State Farm points out, there is no effective appeal from an appraisal award absent extraordinary factors. Due to the lack of any appellate remedy, it is even more

important for the appraisal to be recorded because it contributes to an accurate appraisal award. *Compare State Farm Fla. Ins. Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019) (certiorari appropriate to cure appointment of biased appraiser who was not disinterested).

Finally, State Farm itself has argued that where the policy does not prohibit an appraisal-related act, it is permissible. (App. 80 (arguing that separate inspections are permissible because the policy does not explicitly prohibit it)). The Court should not find that the policy's silence on recording appraisal inspections is the equivalent of a prohibition.

C. The nature of communications during appraisal does not create any reasonable expectation of privacy.

The appraiser will not be at Mr. Chirino's house to discuss sensitive personal matters, or to exchange trade secrets, or to undertake confidential attorney-client discussions. His purpose is to conduct an inspection and generate an appraisal report for submission to the umpire. The parties expect that Mr. Chirino's appraiser will be present. (App. 80). No reason exists for State Farm's appraiser to expect that his methods, observations, and conclusions would remain secret.

Neither the circumstances, the policy, nor the prospective utterances support any expectation of privacy. The Court should deny the petition.

II. State Farm has not shown any "irreparable harm for the remainder of the case."

It is true that other courts have described an invasion of privacy as an irreparable harm for certiorari purposes. But this case is different. Here, State Farm does not assert its appraiser's right to conduct the appraisal in secrecy, out of view of Mr. Chirino or his own appraiser. (*See* App. 80 (discussing for the first time the possibility of separate inspections)). There is no analogy to "cat out of the bag" discovery, (Pet. 8), because there are no legitimate secrets or personal details. Instead, State Farm focuses on the possibility that "splicing, editing, and/or alteration" or other misconduct will occur. (Pet. 7-8).

State Farm attempts to elevate these claims from the realm of mere speculation by producing email correspondence between the two appraisers. (App. 154, 156, 161). "Contentious" might be too mild a word to describe their relationship, with Mr. Chirino's appraiser warning that State Farm's appraiser to "mind your P's and Q's when we inspect and lose the tuff guy attitude" because "the entire appraisal inspection is being recorded for transparency." (App. 154). But there is no evidence that improper or unlawful use of the recording is a realistic fear, much less a reasonably certain one. Certiorari review is not appropriate to address the bare possibility of harm. *Fratangelo v. Olsen*, 271 So. 3d 1051, 1055 (Fla. 3d DCA 2018) (explaining that possible reputational damage was "too prospective and speculative in nature to invoke the certiorari jurisdiction

of this Court."); *see also Holden Cove, Inc. v. 4 Mac Holdings, Inc*., 948 So. 2d 1041, 1042 (Fla. 5th DCA 2007) (finding harm that could arise from exposure to future discovery requests too "premature and speculative" for certiorari purposes).

CONCLUSION

The lower court was correct when it ruled that "there are no interests that are being offended by videotaping the process." (App., at 185). And even if the Court disagrees, certiorari review would not be the appropriate vehicle to announce a new principle of law. Moreover, State Farm identifies no concrete irreparable harm. Its arguments are somewhere between speculation and unsupported accusation. Because the lower court did not depart from the essential requirements of law, and because there is no irreparable harm, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

/s/ Gray Proctor

Gray Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Florida Bar No. 48192
1108 East Main Street, Suite 803
Richmond, VA 23225
Ph: (888) 788-4280
Email: gray@allappeals.com

Daniel Cruz, Esq.
DIENER LAW FIRM
Florida Bar No. 31023
8751 W. Broward Blvd, Suite 404
Plantation, FL 33324
Ph: (954) 541-2117
Email: service@dienerfirm.com
daniel@dienerfirm.com
christine@dienerfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via email through the efiling portal, this 3d day of February, 2020 to

Kara Rockenbach Link, Esq., and David A. Noel, Esq., Link & Rockenbach, PA, 1555 Palm Beach Lakes Blvd., Suite 930, West Palm Beach, FL 33401, at:
kara@linkrocklaw.com;
david@linkrocklaw.com; and,

Kristi Bergemann Rothell, Esq., Methe & Rothell, 1555 Palm Beach Lakes, West Palm Beach, FL 33401
krothell@flacivillaw.com
ckrause@flacivillaw.com
lreppel@flacivillaw.com

/s/Gray R. Proctor
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this Response is typed in Times New Roman 14-point font.

/s/ Gray R. Proctor
Attorney