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.
_____/

APPELLEE'S ANSWER BRIEF

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

LARS O. BODNIEKS, ESQ.
Fla. Bar No.: 888265
GEORGE FERNANDEZ, ESQ.
Fla. Bar No.: 0002097
MANUAL FERNANDEZ, ESQ.
Fla. Bar No.: 0937290
QUINTAIROS PRIETO WOOD & BOYER, P.A.
9300 S. Dadeland Blvd., 4th Floor
Miami, Florida 33156
Tel: (305) 670-1101
Fax: (305) 670-1161
lbodnieks@qpwblaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITY iv

INTRODUCTION AND QUESTIONS PRESENTED 1

STATEMENT OF THE CASE AND FACTS 3

No Issue of Fact 3

Underlying Events 4

Lawsuit 6

UICNA's Motion for Summary Judgment 7

Hearing on Motion for Summary Judgment 10

Order Granting UICNA's Summary Judgment 12

Order Denying Rehearing 13

SUMMARY OF THE ARGUMENT 14

ARGUMENT 16

I. The standard of review in this case is de novo. 16

II. The county court correctly granted summary judgment on UICNA's statutory § 673.3111, Fla. Stat. "Accord and satisfaction by use of instrument" defense. 18

Section 673.3111, Florida Statutes. 20

No issue of fact; summary judgment was proper under Florida law. 22

A. Universal established that its $3,000 payment addressed a claim that was "unliquidated or subject to a bona fide dispute." 24

B. Universal established that the $3,000 check was tendered "in good faith" as "full satisfaction of the claim." 25

C. The writing accompanying the check contained "a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim" in accordance with § 673.3111, Fla. Stat. 26

CONCLUSION 28

CERTIFICATE OF SERVICE 30

CERTIFICATE OF TYPEFACE COMPLIANCE 30

TABLE OF AUTHORITY

Cases

Allen v. Coates, 661 So. 2d 879, 882 (Fla. 1st DCA 1995)..... 18

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) 3

Birwelco-Montenay, Inc. v. Infilco Degremont, Inc., 827 So. 2d 255, 258 (Fla. 3d DCA 2001) 17

Brucato v. Ezenia! Inc., 351 F. Supp. 2d 464 (E.D. Va. 2004)..... 22, 26, 29

Crichlow v. Equitable Life Assur. Society of United States, 142 So. 219 (Fla. 1932) . 2

De La Rosa v. Tropical Sandwiches, Inc., 298 So. 2d 471, 473 (Fla. 3d DCA 1974) 18, 19

Duprey v. United Services Auto. Ass'n, 254 So. 2d 57, 58 (Fla. 1st DCA 1971)..... 16

Exim Brickell, LLC v. Bariven, S.A., No. 09-cv-20915-GOLD, 2011 WL 13131263, *17 (S.D. Fla. Aug. 16, 2011) 17

Fitzgerald v. South Broward Hosp. Dist., 840 So. 2d 460 (Fla. 4th DCA 2003) 17

Futch v. Wal-Mart Stores, Inc., 988 So. 2d 687, 690 (Fla. 1st DCA 2008)..... 16

Garcia v. Garcia, 958 So. 2d 947 (Fla. 3d DCA 2007) 3

Gelles & Sons General Contracting, Inc., v. Jeffrey Stack, Inc., 569 S.E. 2d 406 (Va. 2002)..... 21, 26, 29

Great Horizons Development, Inc. v. Minkin, 572 So. 2d 926, 927 (Fla. 3d DCA 1991)..... 19

Hardy v. Chemetron Corp., 870 F.2d 1007, 1012 (5th Cir. 1989)..... 19

Hartford Accident & Indemnity Co. v. Travelers Indemnity Co., 531 So. 2d 1049 (Fla. 1st DCA 1988..... 2

Henry v. Dugger, 574 So. 2d 1103 n. 1 (Fla. 1st DCA 1990)..... 19

Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)..... 17

Morroni v. Peeples, 872 So. 2d 366, 367 (Fla. 2d DCA 2004)..... 19

MRL Development I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 203 (3d Cir. 2016) 17, 18

National Luggage Services, Inc. v. Reedy Forwarding Co., Inc., 339 So. 2d 305 (Fla. 1976)..... 17

Ringelman v. Citizens Property Ins. Corp., 228 So. 3d 602 n. 2 (Fla. 5th DCA 2017) 4

Shahar v. Green Tree Servicing, LLC, 125 So. 3d 251, 254 (Fla. 4th DCA 2013) 3

Smart Dry, LLC v. Universal Insurance Company of North America, No. 5620117SC1612 (Fla. 19th Cir. Ct. Aug. 16, 2018) 11, 15, 23, 27, 29

St. Mary's Hospital, Inc. v. Schocoff, 725 So. 2d 454 (Fla. 4th DCA 1999) 8, 11-13, 15, 26

Town of Enterprise v. State, 4 So. 535 (Fla. 1888) 2, 3

United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc., 51 So. 3d 506, 507 (Fla. 4th DCA 2010..... 27, 28

Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) 16

Y*ost v. Miami Transit Co.*, 66 So. 2d 214 (Fla. 1953) 17

Zarate v. Deutsche Bank Nat'l Trust Co., 81 So. 3d 556, 557-58 (Fla. 3d DCA 2012) 3

Statutes

§ 673.1031(1)(d), Fla. Stat. 24, 25

§ 673.3111, Fla. Stat 1-3, 7-12, 14-16, 18-19, 21-23, 25-29

Ch. 92-82, § 2, Laws of Fla. (1992) 18

UCC Code § 8.3A-311 ..... 21, 26

Other Authorities

"Editors' Notes UNIFORM COMMERCIAL CODE COMMENT" https://1.next.westlaw.com/Document/N17F1A3D07E4B11DA8F1DA64F3D0F013D/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) 24

Rules

Fla. R. App. P. 9.200(e) 2

Fla. R. App. P. 9.210(b)(3) 2

Fla. R. App. P. 9.900(h) 2

Fla. Sm. Cl. R. 7.135 ..... 3, 22

INTRODUCTION AND QUESTIONS PRESENTED

This action stems from a statutory, § 673.3111, Fla. Stat., and knowing accord and satisfaction of a disputed claim for damages arising out of an emergency water discharge loss, where: (1) the assignee received statutorily compliant written correspondence from the insurer that "conspicuously state[d] to the effect" that the check was being tendered as full satisfaction of the claim ("[p]ayment has been limited to the amount of $3,000.00 as we were notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000.00 policy limit") (R. 92-94 (2) the assignee's corporate representative in deposition testified that it knew it had received "full payment" (R. 307: 15-308: 7), (3) the assignee admitted that it "knew that that was [the insurer's] position that they're not going to pay anything more" (R. 310: 17-19), and (4) the assignee confirmed that it is in the business (and thus knows the custom and practice). (R. 322: 3-12).

The question in this appeal is whether the trial court properly entered summary judgment on the § 673.3111, Fla. Stat. defense of a statutory accord and satisfaction, where the assignee (1) agreed, and did not object, to proceeding on the dispositive October 1, 2018 hearing on the Motion for Summary Judgment (R. 278: 1-2; 281: 14-20), (2) did not disagree with the insurer's argument that no genuine issue of material fact exists as to its affirmative defense of a statutory accord and satisfaction under § 673.3111, Fla. Stat. (R. 281), (3) did not dispute

the insurer's response to the court's question that payment under § 673.3111, Fla. Stat. does not require language of "full satisfaction" as the statute does not require "mutual assent" (R. 314: 19-22); and (4) argued (and conceded) that under the statute,

> maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly express that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any language you can get across to the homeowner." (R. 318: 4-17

The Appellee in this Answer Brief submits that summary judgment, (R. 258-259), in the insurer's favor was legally proper and should be affirmed.

References to the Record on Appeal are noted as (R. [page number]). References to the transcript of the October 1, 2018 hearing are also noted as (R. [page number]).[1] References to the Initial Brief are noted as (IB [page number]).

[1] The Appellant apparently did **not** (a) file any Fla. R. App. P. 9.900(h) designation to the court reporter, (b) ensure that the transcript of the October 1, 2018 hearing be prepared and transmitted to in this appeal, Fla. R. App. P. 9.200(e), or (c) disclose such transcript in its Initial Brief. Appellee, however, did, in accordance with the March 26, 2019 Order granting the Appellee's motion to supplement the record, and has referenced the transcript of the hearing in this Answer Brief. (R. 266-326). The Initial Brief should therefore be stricken. *See Hartford Accident & Indemnity Co. v. Travelers Indemnity Co.*, 531 So. 2d 1049 (Fla. 1st DCA 1988 (striking briefs under Fla. R. App. P. 9.210(b)(3) where statements of the case and facts failed to contain appropriate references to the record or transcript). Alternatively, this appeal should be dismissed for non-compliance with the rules. *Crichlow v. Equitable Life Assur. Society of United States*, 142 So. 219 (Fla. 1932); *Town of Enterprise v. State*, 4 So.

STATEMENT OF THE CASE AND FACTS

No Issue of Fact

Defendant (Appellee herein), Universal Insurance Company of North America ("UICNA"), in its Motion for Summary Judgment, (R. 92-97), stated that "no triable issues" exist and that summary disposition is therefore required in accordance with Fla. Sm. Cl. R. 7.135

Plaintiff (Appellant herein), TOQUON SERVICES d/b/a WET OUT RESTORATION ("TOQUON" or "WET OUT"), as assignee of Donna Crosby ("Crosby"), in its Response and "Cross Motion for Summary Judgment" did **not** state or argue that any question or genuine issue of material fact exists in either of the Motions for Summary Judgment. (R. 98-110). **Nor** did TOQUON's counsel at the October 1, 2018 hearing disagree with defense counsel's argument that no genuine issue of material fact exists as to its affirmative defense of a statutory accord and satisfaction under § 673.3111, Fla. Stat. (R. 281).[2] Instead, TOQUON

---

535 (Fla. 1888). Or the appeal should be affirmed for Appellant's failure to provide a transcript of the hearing below. *See Garcia v. Garcia*, 958 So. 2d 947 (Fla. 3d DCA 2007) (affirming order and citing *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Zarate v. Deutsche Bank Nat'l Trust Co.*, 81 So. 3d 556, 557-58 (Fla. 3d DCA 2012) (stating that in the absence of a record of the summary judgment hearing, the court must assume that the trial court's order was correctly decided). *But see Shahar v. Green Tree Servicing, LLC*, 125 So. 3d 251, 254 (Fla. 4th DCA 2013) (stating that while "hearing transcripts ordinarily are not necessary for appellate review of a summary judgment," they are nonetheless "often helpful[.]").

[2] Counsel's representations during the hearing are binding on the party counsel

agreed, and did not object, to proceeding with the hearing on the Motion for Summary Judgment. (R. 278, 281).

Underlying Events

This case started on or about February 24, 2018, when the property of UICNA's insured, Crosby, sustained water damage arising from damaged pipes in the garage of the insured residence. (R. 92). TOQUON provided emergency mitigation services for the insured's property pursuant to post-loss assignment of benefits written agreement with Crosby. (R. 93). TOQUON submitted a claim under a policy of insurance issued by UICNA. (R. 92). A dispute arose between the parties regarding the amount of payment that TOQUON was entitled to recover under the applicable policy of insurance. (R. 93). TOQUON contended that it was owed $5,788.31 for services rendered in the provision of emergency water mitigation services for the insured property. (R. 93). UICNA contended that pursuant to the applicable policy of insurance it owed no more than the $3,000.00 limit for the payment of reasonable emergency measures furnished by TOQUON. (R. 93).

Specifically, UICNA cited and relied on the applicable provisions of form **HO 00 06 10 00** referenced in the subject policy of insurance, (R. 93), which states:

---

represents. *See Ringelman v. Citizens Property Ins. Corp.*, 228 So. 3d 602 n. 2 (Fla. 5th DCA 2017).

SPECIAL PROVISIONS – FLORIDA, form **HOMEOWNERS UI 100 08 16:**

2. Reasonable Emergency Measures

Paragraph **2. Reasonable Repairs** in **HO 00 03 (C.2.** in form **HO 00 04. D.2.** in for [*sic*] **HO 00 06**) is deleted and replaced by the following:

a. We will pay up to the greater of $3,000.00 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 of a. above**. In such circumstance we will only pay 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. 93

UICNA contended it never received a timely or proper request to exceed the limits for emergency measures pursuant to the Florida Special Provision from the plaintiff prior to making its coverage determination. (R. 94). TOQUON's corporate representative in deposition claimed that he called UICNA prior to completing the water mitigation to verbally request that the limits of the emergency measures benefits be exceeded and that UICNA failed to respond to this request. (R. 94) UICNA in deposition denied that such a request ever occurred. (R. 94). No evidence

exists, and none was cited below, that UICNA gave any approval.

On or about May 4, 2018, UICNA sent a letter to TOQUON enclosing a check for the available policy limits of $3,000.00 pursuant to the applicable provisions of form **HO 00 06 10 00** referenced in the subject policy of insurance. (R. 94). The May 4 letter placed TOQUON on notice that the enclosed payment of $3,000.00 represented the limits of the monies that UICNA would pay towards the disputed claim. (R. 94; IB 9-10). Nowhere did the May 4 letter state that UICNA's payment was a partial payment or anything less than full payment of the disputed debt. (R. 94; IB 9-10). UICNA made it clear to TOQUON that this payment was limited to the amount of $3,000 as UICNA was not notified of the estimated mitigation costs and did not receive TOQUON's request to exceed the policy limit, a limit of $1,740.00, until after the mitigation work was already done. (R. 94; 211). On May 22, 2018, TOQUON cashed the $3,000.00 check tendered by UICNA. (R. 94).

TOQUON's corporate representative in deposition testified that following the receipt of the letter and prior to the cashing of the check, TOQUON was aware of UICNA's position that it was not going to pay any more than the $3,000.00 check that it tendered in this claim. (R. 95).

Lawsuit

On June 6, 2018, TOQUON filed the instant lawsuit in small claims court seeking an additional $2,788.31 for what it claimed to be the remaining balance on

its invoice notwithstanding the limitations for reasonable emergency measures contained in the applicable policy of insurance. (R. 1; 69; 95).

UICNA's Motion for Summary Judgment

UICNA in its memorandum of law for its Motion for Summary Judgment advised that, on these undisputed facts, the claim is barred by the § 673.3111, Fla. Stat., which provides for a *statutory* accord and satisfaction where a claim is discharged when the claimant negotiates a check that is tendered in full satisfaction of the debt. (R. 95-97).

Section 673.3111, Florida Statutes "Accord and satisfaction by use of instrument.—" states,

> (1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument . . . 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.
>
> * * *
>
> (4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim. (R. 95-96).

Unlike common law accord and satisfaction, the statutory accord and satisfaction defense under this statute bars a claim under two circumstances:

> [1] Where a check tendered in settlement of a disputed claim is accompanied by a letter or written communication that is sufficiently conspicuous to place the claimant on notice that the check is being tendered in full satisfaction of the claim;
> or,
> [2] The claimant cashes the check being tendered in full satisfaction of the claim with the actual knowledge that the check was being tendered in full satisfaction of the claim. (R. 96).

UICNA argued it had established ***both*** of the criteria for dismissing this action, even though only is legally sufficient to apply the statutory defense. (R. 96).

In particular, first, the UICNA letter enclosing the settlement check to TOQUON expressly stated that the payment being made was limited to $3,000.00 and that the payment represented the limits of the available benefits for emergency measures under the special endorsement in the policy. The language stated in section b. of the endorsement, which is contained in the actual letter, provides that: "[w]e will not pay more than the amount of a. above [$3,000.00]." Hence, the recitation that no further benefits are payable together with an explanation of the available benefits constituted sufficient notice to meet the conspicuousness requirements of section 673.3111(1) as a matter of law. *St. Mary's Hospital, Inc. v. Schocoff,* 725 So. 2d 454 (Fla. 4th DCA 1999) (addressing common law accord and satisfaction, not § 673.3111, Fla. Stat.).

Schocoff held that:

> the phrase in the letter-- "no further benefits will be payable"-- together with the explanation of benefits attached to the check which stated "the

> maximum for this type of service has been reached," makes explicit, without question, the insurer's position there are no further benefits due under the policy and it does not intend to make any further payments." *Id.* at 456.[3]

Wherefore, TOQUON's cashing of the $3,000.00 check that accompanied the letter barred the subject claim. (R. 96-97).[4]

Second, the claim was also barred by section 673.3111(4) which merely requires a showing that the plaintiff cashed the check with the knowledge that it was being tendered in full satisfaction in this claim. Given this undisputed material fact,

---

[3] TOQUON's counsel did not dispute—or even mention—*Schocoff* at the hearing. (R. 266-326), and did not address *Schocoff* until its Motion for Rehearing (R. 222-223) after Summary Judgment (R. 237) was entered.

[4] UICNA had put TOQUON and its counsel on notice of the section 673.3111 defense in writing in discovery responses just two months after the check was cashed, which afforded the Plaintiff twenty seven (27) days within which to return the funds to avoid the statutory accord and satisfaction defense provided for in section 673.3111. TOQUON'S motion for rehearing admitted that Plaintiff cashed the $3,000.00 check on May 24, 2018. Moreover, UICNA's July 24, 2018, response to TOQUON's initial request for production no. 16 specifically noted that it is UICNA's position that the payment made to TOQUON and attached to the responses to the request to produce is and was payment in full for the disputed claim of the plaintiff, and that TOQUON has been fully indemnified under the provisions of the policy. Notice was thereby given of the aforesaid fact and UICNA's position that UICNA is exercising its rights pursuant to § 673.3111, Fla. Stat. and that TOQUON has not re-tendered any payment of the monies cashed from the instrument it negotiated in this claim. (R. 233-234). UICNA's request for admissions nos. 11-12 directed to TOQUON made UICNA's position clear that the $3,000.00 payment was being tendered as a full and final payment for the disputed charges that are the subject of this lawsuit. (R. 233-234). Thus, TOQUON had almost 30 days – while represented by the same counsel in this matter – to return the funds once it was placed on further notice of UICNA's intent to enforce its statutory accord and satisfaction rights under section 673.3111. TOQUON instead opted to keep the funds.

which was based on the admission of TOQUON's own corporate representative in deposition, TOQUON's last email communication after receiving the check, and the deposition of the UICNA's adjuster who testified that the $3,000.00 check was a full and final payment, dismissal of the action with prejudice was proper as a matter of law by application of section 673.3111. (R. 97).

Of note, TOQUON did **not** state or argue that any question or genuine issue of material fact exists in either of the Motions for Summary Judgment, (R. 98-110).

Hearing on Motion for Summary Judgment

At the October 1, 2018 hearing on the Motion for Summary Judgment, UICNA argued in accordance with its filed Motion. (R. 267-326). Importantly, TOQUON: (1) agreed, and did not object, to proceeding on the dispositive hearing on the Motion for Summary Judgment (R. 278: 1-2; 281: 14-20); (2) did not disagree with the UICNA's argument that no genuine issue of material fact exists as to its affirmative defense of a statutory accord and satisfaction under § 673.3111, Fla. Stat. (R. 281) (thereby waiving, abandoning, and being judicially estopped from its contrary argument in the appeal (IB 5)); (3) did not dispute that TOQUON's corporate representative in deposition confirmed that TOQUON knew it had received "full payment" (R. 307: 15-308: 7); (4) did not dispute that the TOQUON's corporate representative in deposition admitted, "I knew that that

was their position that they're not going to pay anything more[,]" (R. 310: 17-19); (5) did not dispute UICNA's response, to the court's question, that payment under § 673.3111, Fla. Stat. does not require language of "full satisfaction" as the statute does not require "mutual assent" (R. 314: 19-22); (6) argued (and conceded) that under the statute,

> maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly express that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any language you can get across to the homeowner." (R. 318: 4-17);

(7) never argued that "mutual assent appears anywhere in the statute" (R. 321: 21-24); (8) confirmed TOQUON is not a homeowner, but someone who is in the business (R. 322: 3-12); and (9) did not dispute or even address UICNA's argument that the language, "no further benefits will be payable," sufficed for a statutory accord and satisfaction under § 673.3111, Fla. Stat. under controlling Fourth District law, viz. *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999). (R. 306).

UICNA added that another Florida Circuit-Appellate division decision, *Smart Dry, LLC v. Universal Insurance Company of North America*, No. 5620117SC1612 (Fla. 19th Cir. Ct. Aug. 16, 2018) (R. 237-240; 289-296) reached a similar conclusion on a section 673.3111 defense where the assignee cashed the insurer's

check for $3,000 after receiving the letter that stated payment was limited to the amount of $3,000 based, in part, on the plaintiff's failure to request defendant exceed the policy limits. (R. 239; 289-296). TOQUON did not address *Smart Dry* at the hearing or in its Initial Brief.

Not once in its filed papers or during the October 1, 2018 hearing did TOQUON ever utter, mention, say, or allude to any "Official Comments" to § 673.3111, Fla. Stat. **Nor** did TOQUON cite any case or statute (apart from *St. Mary's Hospital* (R. 101) and § 673.3111, Fla. Stat.) that later appeared for the first time in its Initial Brief.

Order Granting UICNA's Summary Judgment

The court entered its Order granting UICNA's motion for summary judgment (R. 258-260), stating, in part,

> Undisputed Facts
> On May 4, 2018, UICNA sent Wet Out a letter acknowledging that it had received Wet Out Restoration's invoice in the amount of $5,788.31. In that correspondence, UICNA enclosed a check in the amount of $3,000.00 as payment on the subject loss. UICNA's letter specifically set forth: "[p]ayment has been limited to the amount of $3,000.00 as we were notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000.00 policy limit." UICNA's correspondence went on to recite the specific provisions in the subject policy of insurance which limited the available coverage for reasonable emergency measures. Wet Out Restoration received the correspondence and the check. Wet Out Restoration proceeded to cash the $3,000.00 check with knowledge of UICNA's assertion that the payout for this claim would be "limited" to $3,000.00. Wet Out Restoration is in the business of emergency remedial measures for

homeowners and deals with insurance companies on a regular basis.

Legal Analysis

UICNA moves for final summary disposition because it claims that the act of cashing the $3,000.00 check constituted an accord and satisfaction by statute pursuant to Section 673.3111. In opposition, Wet Out Restoration argues that there was no meeting of the minds with regard to acceptance of $3,000.00 as full and final settlement of its claim. Based on the record evidence before the Court, this Court finds that there is no genuine issue of material fact and that UICNA is entitled to final summary disposition as a matter of law.

The Court finds that Wet Out Restoration's claims are barred by Section 673.3111, Florida Statutes (accord and satisfaction by instrument). The letter sent by UICNA 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. Plaintiffs reliance on *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 1999) is misplaced. There, the district court addressed the issue of common law accord and satisfaction, not accord and satisfaction by use of instrument under Section 673.3111. 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. The statute merely requires that the written communication which accompanies the instrument contain a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." Section 673.3111(2). Therefore, UICNA has satisfied its burden of establishing the use of a conspicuous statement indicating that the instrument was tendered as full satisfaction of the claim, and it is undisputed that Wet Out Restoration cashed the check. In addition, Plaintiff had knowledge of UICNA's position that the payment was limited to $3,000.00. Accordingly, this Court finds that Wet Out Restoration's claim is barred pursuant to Section 673.3111. * * * (R. 258-259).

Order Denying Rehearing

The court denied TOQUON’s motion for rehearing, (R. 222; 257), stating,

the pertinent, agreed upon facts established that the 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).

TOQUON appealed. (R. 261).[5]

SUMMARY OF THE ARGUMENT

The court correctly applied the controlling "accord and satisfaction by instrument" statute, § 673.3111, Fla. Stat. to the undisputed summary judgment evidence of record. TOQUON in deposition established that it: (1) had received

[5] TOQUON's statement in its Statement of the Case and Facts that "emails show that Wet Out argued to Universal that it had made a proper request on the date it provided services[] (R. 209)," (IB 3) does **not** appear to be reflected in the Record on Appeal. The phrase "subjective intent" (IB 5) does **not**, based on a PDF OCR search, appear to be contained anywhere in the Record on Appeal. The phrase "objectively clear offer of accord" (IB 6) does **not**, based on a PDF OCR search, appear to be contained anywhere in the Record on Appeal. The argument in TOQUON's Statement of the Case and Facts that "[t]aken 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)" does **not** appear in the pin cite to, or anywhere in, the Record on Appeal. TOQUON's statement that, "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))[,]" (IB 7) appears to refer to a comment that appeared for the first time in TOQUON's post-summary judgment October 17, 2018 reply, (R. 253), **not** before the October 1, 2018 hearing, (R. 266-326), or entry of the October 4, 2018 summary judgment. (R. 258-260).

"full payment," (2) knew UICNA's position that it will not pay anything more, (3) it is in the business, and therefore familiar with the custom and practice. TOQUON in its pre-hearing filings and at the hearing on the Motion for Summary Judgment did not dispute (1) UICNA's argument that payment under §673.3111, Fla. Stat. does not require language of "full satisfaction" as the statute does not require "mutual assent," that (2) the language, "no further benefits will be payable," sufficed for a statutory accord and satisfaction under § 673.3111, Fla. Stat. under *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999), and that (3) *Smart Dry, LLC v. Universal Insurance Company of North America*, No. 5620117SC1612 (Fla. 19th Cir. Ct. Aug. 16, 2018) (R. 237-240; 289-296) reached a similar conclusion on a section 673.3111 defense where the assignee cashed the insurer's check for $3,000 after receiving the letter that stated payment was limited to the amount of $3,000 based, in part, on the plaintiff's failure to request defendant exceed the policy limits. TOQUON even argued (and conceded) that under the statute,

> "maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly express that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any language you can get across to the homeowner." (R. 318).

Hence, because (1) a statutorily sufficient dispute as to the amount had existed, (2) a check had been tendered and was accompanied by a written

communication containing a conspicuous statement to the effect that the check was tendered as full satisfaction of the claim, (3) the check had been deposited, (4) no repayment was tendered, (5) the assignee knew that it had received full payment, (6) the assignee admitted that it knew nothing more would be paid, (7) the assignee was experienced in the business, and (8) the assignee remained silent as to any question of fact, TOQUON's claim was discharged and summary judgment for UICNA was absolutely proper under§ 673.3111, Fla. Stat.

This Court should therefore affirm.

ARGUMENT

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

An order granting final summary judgment is reviewed *de novo* to determine whether any genuine issues of material fact exist and whether the trial court properly applied the correct rule of law. *Futch v. Wal-Mart Stores, Inc.*, 988 So. 2d 687, 690 (Fla. 1st DCA 2008) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper where the basic facts of a cause of action are clear and undisputed, there being only a question of law to be determined. *Duprey v. United Services Auto. Ass'n*, 254 So. 2d 57, 58 (Fla. 1st DCA 1971) (affirming summary judgment). Summary judgment should be granted where salient facts are not really in issue and the controversy has

resolved into one purely of law to be decided on undisputed basic facts. *Yost v. Miami Transit Co.*, 66 So. 2d 214 (Fla. 1953) (affirming summary judgment based on the undisputed basic facts in the affidavits). Where the determination of liability depends upon the written instruments of the parties and the legal effect to be drawn therefrom, the question at issue is one of law only and ordinarily is determinable by summary judgment. *National Luggage Services, Inc. v. Reedy Forwarding Co., Inc.*, 339 So. 2d 305 (Fla. 1976) (affirming summary judgment).

The interpretation of a statute central to a summary judgment is a matter of law subject to de novo review. *Fitzgerald v. South Broward Hosp. Dist.*, 840 So. 2d 460 (Fla. 4th DCA 2003). A clear and unambiguous statute that conveys a clear and definite meaning must be given its plain and obvious meaning without resorting to the rules of statutory interpretation and construction. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

The plain words in the Uniform Commercial Code ("UCC") determine the meaning of the UCC. *See Birwelco-Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So. 2d 255, 258 (Fla. 3d DCA 2001). Statutory analysis of a UCC statute begins with consideration of the plain meaning of the statutory text. *Exim Brickell, LLC v. Bariven, S.A.*, No. 09-cv-20915-GOLD, 2011 WL 13131263, *17 (S.D. Fla. Aug. 16, 2011). Courts analyze the application of the UCC by applying a plain meaning interpretation. *MRL Development I, LLC v. Whitecap Inv. Corp.*, 823 F.3d 195, 203

(3d Cir. 2016).[6]

II. The county court correctly granted summary judgment on UICNA's statutory § 673.3111, Fla. Stat. "Accord and satisfaction by use of instrument" defense.

Contrary to TOQUON's argument (which cited no legal authority and included none in its Table of Authorities) that "Florida has adopted the Uniform Commercial Code's provisions regarding negotiable instruments, along with the Official Comments thereto[] Chapter 673, Florida Statutes[]" [IB at 13], Florida has **not**. *See* Ch. 92-82, § 2, Laws of Fla. (1992). Indeed, **neither** § 673.3111, Fla. Stat. **nor** Ch. 92-82, § 2, Laws of Fla. (1992) that enacted section 673.3111 mentions the words or phrase, "official comments." Instead, the official comments of the Uniform Commercial Code are only a guide in Florida, *Allen v. Coates*, 661 So. 2d 879, 882 (Fla. 1st DCA 1995); they are **not** controlling. *De La Rosa v. Tropical Sandwiches*,

[6] TOQUON's remark that "[a] trial court's order granting a motion for summary judgment is reviewed *de novo*[,] *Volusia*[]" (IB at 13), **omits** that summary judgment may be affirmed where no genuine issue of material fact existed and the moving party was entitled to a judgment as a matter of law. TOQUON's remark that "[s]ummary 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*[]" (IB at 3), adds a phrase "only when" that does **not** exist in the *Genuinely Loving* decision. TOQUON's remark that "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*.[]" (IB at 13), is **incorrect**, as it is "summary judgment evidence," **not** "all evidence" that must be considered in favor of the non-movant.

Inc., 298 So. 2d 471, 473 (Fla. 3d DCA 1974).

While now nothing more than a *l'esprit de l'escalier*,[7] **not** once in its filed papers or during the October 1, 2018 hearing did TOQUON ever utter, mention, say, or allude to any "Official Comments" to § 673.3111, Fla. Stat. **Nor** did TOQUON cite or argue any case or statute (apart from *St. Mary's Hospital* and § 673.3111, Fla. Stat.) in proceedings below that now appears for the first time in its Initial Brief. New arguments that are advanced on appeal but which were not presented to the trial court below cannot be considered in appeal. *Great Horizons Development, Inc. v. Minkin*, 572 So. 2d 926, 927 (Fla. 3d DCA 1991). Interpretations of a statute not argued below, but rather raised for the first time on appeal, may not be considered in reaching a decision in this case. *Henry v. Dugger*, 574 So. 2d 1103 n. 1 (Fla. 1st DCA 1990). Consideration of the applicability of a statute [or outside case or official comment] that was never presented to the trial court is improper when raised for the first time in the appeal. *See Morroni v. Peeples*, 872 So. 2d 366, 367 (Fla. 2d DCA 2004). TOQUON's references to the "official comments" should, therefore, be disregarded.

[7] Arguments conceived for the first time after both actual trial and appellate briefing are but l'esprit de l'escalier. *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1012 (5th Cir. 1989) (stating "We cannot and do not overturn district court judgments on the basis of arguments that counsel might have, but did not, make.").

Section 673.3111, Florida Statutes.

Starting—and ending—with the controlling statute, section 673.3111 Florida Statutes ("Accord and satisfaction by use of instrument.—") states,

> (1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was *unliquidated or subject to a bona fide dispute*, and that the claimant obtained payment of the instrument, the following subsections apply.
> (2) Unless subsection (3) applies, 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*.
> (3) Subject to subsection (4), a claim is not discharged under subsection (2) if either paragraph (a) or paragraph (b) applies:
>
> (a) The claimant, if an organization, proves that:
>
> 1. Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and
>
> 2. The instrument or accompanying communication was not received by that designated person, office, or place.
>
> (b) The claimant, whether or not an organization, proves that, within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (a)1.
>
> (4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the

> claim.
> History.—s. 2, ch. 92-82. (emphasis added)

See, e.g., Gelles & Sons General Contracting, Inc., v. Jeffrey Stack, Inc., 569 S.E. 2d 406 (Va. 2002) (affirming judgment finding statutory accord and satisfaction under state's UCC Code § 8.3A-311). *Gelles* barred a claim for additional monies allegedly due under a contract, where the letter stated the payer stands by its final amounts as stated on the latest correspondence and enclosed a check representing final payment on the contract. *Gelles* explained that the statute itself, "by describing the required statement as one 'to the effect' that the tender will satisfy the debt, necessarily contemplates that no specific language is required and that each case must be considered on its own merits." *Id.* at 408.

So too here. TOQUON's counsel at the hearing on the Motion for Summary Judgment acknowledged that,

> maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly expresses that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any language you can get across to the homeowner. (R. 318: 4-17).

Even more so, TOQUON did not dispute UICNA's response to the court's question that payment under § 673.3111, Fla. Stat does not require language of "full satisfaction" as the statute does not require "mutual assent." (R. 314: 19-22). In fact, TOQUON's counsel did not disagree. (R. 321: 21-24).

In another example, *Brucato v. Ezenia! Inc.*, 351 F. Supp. 2d 464 (E.D. Va. 2004) (finding a statutory accord and satisfaction), where the same "statute [Va. Code § 8.3A–311] require[d] that a reasonable person would have understood that the "instrument was tendered as full satisfaction of the claim[,]" the district court ruled that "'conspicuousness' requires only a "term or clause that a reasonable person 'ought to have noticed[,]'", and does not [] contemplate any specific required language."

No issue of fact; summary judgment was proper under Florida law.

UICNA's Motion for Summary Judgment, (R. 92-97) stated that "no triable issues" exist and that summary disposition is therefore required in accordance with Fla. Sm. Cl. R. 7.135. TOQUON's Response and "Cross Motion for Summary Judgment" did **not** state or argue that any question or genuine issue of material fact exists in either of the Motions for Summary Judgment. (R. 98-110). **Nor** did TOQUON's counsel at the October 1, 2018 hearing disagree with defense counsel's argument that no genuine issue of material fact exists as to its affirmative defense of a statutory accord and satisfaction under § 673.3111, Fla. Stat. (R. 281). Instead, TOQUON agreed, and did not object, to the hearing on the dispositive Motion for Summary Judgment. (R. 278, 281).

Moreover, TOQUON at the hearing on the Motion for Summary Judgment did not dispute that: (1) TOQUON's corporate representative in deposition

confirmed that TOQUON knew it had received "full payment", (R. 307: 15-308: 7); (2) TOQUON's corporate representative in deposition admitted, "[he] knew that that was their [UICNA] position that they're not going to pay anything more." (R. 310: 17-19); (3) TOQUON is not a homeowner, but someone who is in the business (R. 322: 3-12); and (4) UICNA's argument that the language, "no further benefits will be payable" sufficed for a statutory accord and satisfaction under § 673.3111, Fla. Stat. under controlling Fourth District Court of Appeal law. (R. 306).

As such, because: (1) a statutorily sufficient dispute as to the amount had existed, (2)(a) a check had been tendered and (b) accompanied by a written communication containing a conspicuous statement to the effect that the check was tendered as full satisfaction of the claim, (3) the check had been deposited, (4) no repayment was tendered, (5) the assignee knew that it had received full payment, (6) the assignee admitted that it knew nothing more would be paid, (7) the assignee was experienced in the business, and (8) the assignee remained silent as to any question of fact, TOQUON's claim was discharged and summary judgment for UICNA was absolutely proper under§ 673.3111, Fla. Stat., *Smart Dry, LLC v. Universal Insurance Company of North America*, No. 5620117SC1612 (Fla. 19th Cir. Ct. Aug. 16, 2018) (R. 237-240), and even

TOQUON's "official comment 4"[8], (IB 13-14).

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

Without contradiction, the evidence of record established that TOQUON's alleged claim for payment of an amount that exceeded the amount permitted under the policy of insurance, which UICNA therefore disputed based on language quoted from the policy, (R. 92-94), created a bona fide dispute which TOQUON fully recognized and acknowledged in deposition. (R. 307; 310).

Late mention of an "unliquidated" or "bona fide dispute"[9] appeared for the first time in TOQUON's Motion for Rehearing, (R. 222, 226), **not** at the hearing on the Motion for Summary Judgment, (R. 267-326), or in any papers filed before the hearing.[10]

---

[8] Viewable at Westlaw "Editors' Notes UNIFORM COMMERCIAL CODE COMMENT" https://1.next.westlaw.com/Document/N17F1A3D07E4B11DA8F1DA64F3D0F013D/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) (last visited May 1, 2019

[9] The words and phrases, "unliquidated" and "bona fide dispute" do not appear to be defined by any Florida case law on the UCC, chapters 671 or 673, Florida Statutes, §§ 671.201 and 673.1031, Fla. Stat., or even TOQUON's "official comments."

[10] **None** of the cases that TOQUON mentions in sub-heading "A" are apposite, instructive, or controlling. *Burke* (IB 14) noted that UCC §3-111, which Florida had **not** yet adopted at the time of the decision, would have resolved the case. *Berman* (discussing discharge of liquidated debt) (IB 14-15) arose from a memorandum of agreement which constituted the release that was not a negotiable instrument within the meaning of section 673.1041(2), for which reason 673.3111 did **not** by its terms apply. *Weston Builders* (IB 15) was **not** an accord and satisfaction case. *Wickman*

B. Universal established that the $3,000 check was tendered "in good faith" as "full satisfaction of the claim."

The court heard, without objection, that TOQUON's corporate representative in deposition had testified that TOQUON: (1) knew it had received "full payment" (R. 307: 15-308: 7), (2) "knew that that was [the insurer's] position that they're not going to pay anything more" (R. 310: 17-19), and (3) it is in the business (and thus knows the custom and practice). (R. 322: 3-12).

Only later, after the hearing on the Motion for Summary Judgment (R. 267-326), did TOQUON for the first time utter anything about "good faith", (R. 222, 226).[11] While apparently not defined by any Florida case law, § 673.1031(1)(d), Fla. Stat. states "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing." On this record and TOQUON's belated argument, "good faith" was manifest under section 673.3111.

(IB 15) involved a different legal issue, viz. whether the court erred in ruling that acceptance of a partial payment of the total amount due on the promissory note constituted a common law accord and satisfaction. *R4 Props.* (IB 15) was **not** an accord and satisfaction because defendant could not prove the debt paid was unliquidated and disputed. *Baquero* (IB 16; but not cited in its Table of Authorities) is **not** a § 673.3111 case.

[11] None of the cases that TOQUON mentions in subheading "B" are apposite or instructive; *Any Kind* (IB 16, 17) and *Regions Bank* (R. 17, 18) are not UCC § 673.3111 cases.

C. <u>The writing accompanying the check contained "a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim" in accordance with § 673.3111, Fla. Stat.</u>

"To the effect" conspicuity of a statement for purposes of § 673.3111(2), Fla. Stat. is satisfied when "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*." (emphasis added).

A letter stating that the payer stands by its final amounts as stated on the latest correspondence and enclosing a check representing final payment on the contract, meets the "to the effect" conspicuity requirement of UCC 3-311. *See Gelles & Sons General Contracting, Inc., v. Jeffrey Stack, Inc.*, 569 S.E. 2d 406, 408 (Va. 2002) (affirming judgment finding statutory accord and satisfaction under state's UCC Code § 8.3A-311).

Further, an understanding by a reasonable person that the check was tendered as full satisfaction of the claim, meets the "to the effect" conspicuity requirement of UCC 3-311. *Brucato v. Ezenia! Inc.*, 351 F. Supp. 2d 464 (E.D. Va. 2004) (finding a statutory accord and satisfaction).

St. Mary's Hospital, Inc. v. Schocoff, 725 So. 2d 454, 456 (Fla. 4th DCA 1999) (addressing common law accord and satisfaction, not § 673.3111, Fla. Stat.), held that the phrase in the letter-- "no further benefits will be payable"-- together with the explanation of benefits attached to the check which stated "the maximum for this

type of service has been reached," makes explicit, without question, the insurer's position there are no further benefits due under the policy and it does not intend to make any further payments.

And *Smart Dry, LLC v. Universal Insurance Company of North America*, No. 5620117SC1612 (Fla. 19th Cir. Ct. Aug. 16, 2018) (R. 237-240) reached a similar conclusion on a section 673.3111 defense where the assignee cashed the insurer's check for $3,000 after receiving the letter that stated payment was limited to the amount of $3,000 based, in part, on the plaintiff's failure to request defendant exceed the policy limits. (R. 239; 289-296).

Same here, especially where TOQUON's counsel at the hearing on the Motion for Summary Judgment observed that,

> maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly expresses that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any language you can get across to the homeowner. (R. 318: 4-17).

TOQUON's counsel did not dispute, and did not disagree, with UICNA's response to the court's question that payment under § 673.3111, Fla. Stat. does not require language of "full satisfaction" as the statute does not require "mutual assent." (R. 314: 19-22; R. 321: 21-24).[12]

[12] Neither *United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc.*, 51 So. 3d 506, 507

CONCLUSION

This Court should affirm the summary judgment entered in favor of UICNA on its affirmative defense of "accord and satisfaction by instrument" statute, § 673.3111, Fla. Stat. as the undisputed evidence established: (1) a statutorily sufficient dispute as to the amount had existed, (2)(a) a check had been tendered which was (b) accompanied by a written communication containing a conspicuous statement to the effect that the check was tendered as full satisfaction of the claim, (3) the check had been deposited, (4) no repayment was tendered, (5) the assignee knew that it had received full payment, (6) the assignee admitted that it knew nothing more would be paid, and (7) the assignee was experienced in the business. TOQUON did not dispute (1) UICNA's argument that payment under § 673.3111, Fla. Stat. does not require language of "full satisfaction" as the statute does not require "mutual assent", that (2) the language, "no further benefits will be payable," sufficed for a statutory accord and satisfaction under § 673.3111, Fla. Stat., (3) conceded that under the statute,

> maybe it's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean we can come back to the well. You can use any language that clearly express that. And the statute gives an example. * * * As long as you're saying that, Hey, this is for full – any

---

(Fla. 4th DCA 2010) [IB 20], which was not a section 673.3111 case, nor TOQUON's uncited "official comment 4", which is not the law in Florida, are of any legal import.

language you can get across to the homeowner[,]

and, (4) the assignee remained silent as to any question of fact.

As a matter of law, the composite of § 673.3111, Fla. Stat., *Schocoff*, *Smart Dry*, *Gelles* and *Brucato*, warrant that the final summary judgment be affirmed.

Respectfully Submitted,

QUINTAIROS PRIETO WOOD & BOYER, P.A.
9300 S. Dadeland Blvd., 4th Floor
Miami, Florida 33156
Tel: (305) 670-1101
Fax: (305) 670-1161
By: */s/ Lars O Bodnieks*
LARS O. BODNIEKS, ESQ.
Fla. Bar No.: 888265
lbodnieks@qpwblaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Answer Brief has been furnished via through the Florida courts e-portal to: L. Dick Ducheine, Esq., THE DIENER FIRM, P.A., 8751 W. Broward Boulevard, Suite 404, Plantation, Florida 33324, at service@dienerfinn.com, lducheine@dienerfirm.com and Gray R. Proctor, LAW OFFICE OF GRAY PROCTOR, 1108 E. Main Street, Suite 803, Richmond, VA 23219, gray@appealsandhabeas.com on this 2nd day of May, 2019.

/s/ Lars O Bodnieks

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/ Lars O Bodnieks