IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

NIKKI ANN CHILDRESS,

Appellant,

CASE NO.: CVA1 07 - 52
Consolidated with Case No.: CVA1 07 - 79

v.

MAZDA MOTOR OF AMERICA, INC. and TT LONGWOOD, INC., d/b/a/ CORY FAIRBANKS MAZDA,

Appellees.
_____/

On Appeal from the County Court
for Orange County,
Antoinette Plogstedt, Judge.

Aldo Bolliger, Esquire,
for Appellant.

Kimberly Ashby, Esquire
for Appellees.

Before Komanski, Latimore and Roche, JJ.

PER CURIAM.

This is a breach of automobile warranty case. Upon the motion of the Defendants/Appellees, Mazda Motor of America, Inc. ("Mazda") and TT Longwood, Inc., d/b/a/ Cory Fairbanks Mazda ("TT Longwood") (collectively "Appellees"), the claims of Plaintiff/Appellant, Nikki Ann Childress ("Appellant" or "Childress"), were dismissed, with prejudice, on account of Appellant's perpetration of a fraud upon the court. In a separate order, the trial court granted Appellees' application for counsel fees against both Childress and her

attorney. Childress now appeals both orders. The court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.[1]

FACTS

Childress purchased a vehicle from TT Longwood, a Mazda dealership and, after experiencing engine trouble, brought the car to the dealer for repairs. The dealer advised that the engine needed to be replaced but refused to replace it or make repairs under the existing warranty because, it claimed, the problems were cause by Appellant's failure to properly maintain the vehicle. Specifically, TT Longwood asserted that when Childress brought in the car for repairs, the engine was extremely low on oil and had a sludge buildup which in turn caused the "variable timing to go out of time." (Second Am. Compl. Ex. C.)

In her operative pleading, a seven count Second Amended Complaint, Childress set forth claims against Appellees for breach of warranty under the federal Magnuson-Moss Warranty Act ("MMWA") as well as state common law and statutory claims against Mazda.

During discovery, Childress was asked to produce evidence of maintenance and oil changes performed on her Mazda. She submitted to Appellees' counsel three documents which appeared to be invoices for oil changes from Bell's Auto Body & Collision ("Bell's") in Kissimmee. Kevin Bell, the proprietor of Bell's, testified at deposition, and reiterated in an affidavit, that the three Bell's invoices produced by Childress were bogus. He was certain they were fake because his business does not do oil changes; the receipt was not Bell's style; they were missing information required for receipts for oil changes; and the handwriting, which was the same on all three invoices, was unfamiliar to Mr. Bell. (Bell dep. Tr. 19:13 - 30:21; 38:4-22;

[1] Childress appealed these orders separately. The appeals were consolidated under Case

39:19-22; 74:8-12, May 3, 2007). A witness retained by Childress took an oil sample of the subject car and testified at deposition that there was no sludge in it.[2]

Mazda and TT Longwood moved to dismiss the complaint based upon Childress having committed a fraud on the court by submitting the phony invoices in discovery.[3] After reciting findings of fact, the trial court granted the motion concluding that Appellee's had demonstrated "by clear and convincing evidence that [Appellant] submitted phony oil change invoices on at least three (3) occasions: first, in order to obtain warranty service upon the subject vehicle; secondly, by her affirmative listing of the oil changes purportedly referenced in the three receipts in her verified Answers to Defendant [Mazda's] Interrogatories; and thirdly, in response to Defendant [Mazda's] Request to Produce." (Order of Dismissal 5, June 15, 2007.) The Court determined that Appellant's submission of false invoices "goes to the core issue of her lawsuit, thereby irreversibly tainting these proceedings. Pursuant to Florida law, this Court finds that final prejudicial dismissal of this lawsuit is the only sufficient remedy to [Appellant's] submission of fabricated, phony, otherwise non-existent documents." (Order of Dismissal 6.)

Appellees then moved for an award of counsel fees and costs. The court below granted this motion and concluded that both Appellant and her counsel were liable for the fees and costs of Appellees' attorneys. This fee award was based upon section 57.105, Florida Statutes and, alternatively, Childress's rejection of Appellees' Offers of Judgment. In addition, the lower court relied upon its inherent authority to award fees and costs as a sanction. The trial court

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[2] Although the witness, James C. Walton, examined the engine and made written findings concerning his inspection, Appellant did not retain him to render an opinion.

[3] Prior to the commencement of suit, Childress also submitted these invoices to TT Longwood in her effort to obtain coverage for engine repairs under the warranty.

found Appellees' reasonable fees and costs to be $69,950.20 of which Appellant's counsel was responsible for $13,914.50.

THE MOTION FOR INVOLUNTARY DISMISSAL

Childress contends that "Appellees failed miserably in meeting their extremely heavy burden" of demonstrating a fraud upon the court by clear and convincing evidence and that the court below abused its discretion in finding otherwise. (Appellant's Initial Br. 14-15.) She further argues that "the trial court impermissibly shifted the burden [of proof] from Appellees to Appellant by requiring the Appellant come forth with evidence to refute the Appellees' allegations." (Appellant's Initial Br. 15.)

Appellees counter that the factual findings and assessment of the weight of the evidence by the lower court were within the bounds of its discretion, as was its exercise of its inherent authority to dismiss a case where a plaintiff has committed a fraud upon the court.

"[A] trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud upon the court." *Bologna v. Schlanger*, 995 So. 2d 526, 528 (Fla. 5th DCA 2008).

> The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."

Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (*quoting Aoude v. Mobil Oil Corp.*, 892 F. 2d 1115, 1118 (1st Cir.1989)).

"A trial court's decision concerning whether to dismiss a case for fraud on the court is subject to review under the abuse of discretion standard." *Ramey v. Haverty Furniture Cos.*,

Inc., 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008). Because a fraud upon the court must be shown clearly and convincingly, this standard is somewhat more narrow and less deferential than is normally the case in abuse of discretion review. *Id*. *See also Howard v. Risch*, 959 So. 2d 308, 312 (Fla. 2d DCA 2007); *Cherubino v. Fenstersheib and Fox, P.A.*, 925 So. 2d 1066, 1068 (Fla. 4th DCA 2006). Still, where application of this standard results in a close question or where reasonable minds could differ on the imposition of the dismissal sanction, the trial court should be affirmed. *Bass v. City of Pembroke Pines*, 991 So. 2d 1008, 1111-12 (Fla. 4th DCA 2008). *See also Saenz v. Patco Transp., Inc.*, 969 So. 2d 1145 (Fla. 5th DCA 2007); *Cox v. Burke*, 706 So. 2d at 47.

We appreciate that a prejudicial dismissal is the ultimate sanction, an "extraordinary remedy found only in cases where a deliberate scheme to subvert the judicial process has been clearly and convincingly proved." *Bologna v. Schlanger*, 995 So. 2d at 528. At the same time, a court's inherent power to dismiss a case when a fraud has been foisted upon it "is indispensable to the proper administration of justice because no litigant has a right to trifle with the courts." *Ramey v. Haverty Furniture Cos*., 993 So. 2d at 1018. A reviewing court must "carefully balance a policy favoring an adjudication on the merits with competing policies to maintain the integrity of the judicial system." *Cox v. Burke*, 706 So. 2d at 46.

Childress first challenges the trial court's finding that Appellees had demonstrated a fraud upon the court by clear and convincing evidence. Primarily, she argues that the deposition testimony of Mr. Bell was "tenuous and suspect" and that "the record evidence is susceptible to more than one interpretation." (Appellant's Initial Br. 18.) The County Court reviewed all of the evidence and reached a contrary conclusion which we see no reason to disturb. The evidence

was overwhelming that the invoices submitted by Childress were not legitimate Bell's invoices. Kevin Bell testified at his deposition that the invoices were done on a form which his business did not utilize in 2005, when they were dated. He further testified that Bell's Auto Body, as its name indicates, is a body shop and while it sometimes *adds* oil to a car in conjunction with other work, it does not *change* oil. The invoices presented by Appellant, however, recite that the only work done was an "oil change on car." There was no pricing information on any of these receipts. The handwriting on all three appears similar but Mr. Bell testified at deposition that it is not his. Finally, one of the invoices is dated September 4, 2004, but Kevin Bell testified that his shop was not even open for business on that day as a result of hurricane damage. Finally, the lower court noted that the dates of the three invoices submitted by Childress are "smack in the middle" (Mot. Dismiss Hearing Tr. 65, June 7, 2007) of dates of service by Mazda dealers. But for these three invoices, there would have been "significant gaps in time between other, presumably bona fide, oil changes at other service facilities." (Order of Dismissal 5). The court below found that Kevin Bell was a disinterested witness having no financial or other interest in this case and that, if anything, he was sympathetic to Childress, his customer. Appellant did not submit any documentation of any kind to indicate that the alleged bills from Bell's had, in fact been paid. Indeed, Childress did not produce any evidence whatsoever in opposition to Appellees' motion to dismiss. (Order of Dismissal 6.)[4]

[4] Childress contends that the lower court's observation that she had submitted no evidence in opposition to the Appellees' motion to dismiss, is proof that it impermissibly shifted the burden of proof from Appellees to Appellant. The trial court judge correctly stated and applied the proper burden of proof and simply observed that the evidentiary hearing took place over the course of multiple days and that plaintiff had sufficient opportunity to adduce and submit evidence. That comment is especially innocuous here, where the court, and not a jury, was discharging the fact-finding responsibilities. The trial court's observation is similar to that

The record fully supports the finding of the lower court that the three oil change invoices submitted by Childress and purporting to be from Bell's Auto Body were "phony." (Order of Dismissal 5,6.)

The question next arises as to whether the court below abused its discretion in its selecting a remedy (i.e. prejudicial dismissal) for Appellant's fraudulent conduct. We conclude that it did not.

In his concurring opinion in *Bologna v. Schlanger*, Judge Griffin observed the "burgeoning case law" of "fraud on the court" dismissals. *Bologna v. Schlanger*, 995 So. 2d at 529. He noted that in personal injury cases, "the bulk of these decisions now concern the [plaintiff's] failure to disclose" information in discovery, something not so egregious as to warrant dismissal. *Id.* Likewise, a party should not be deprived of a jury trial because of inaccuracies or inconsistencies in responses to depositions or interrogatories. *Gehrmann v. City of Orlando*, 962 So. 2d 1059, 1062 (Fla. 5th DCA 2007).

The matter sub judice is not a case of mere testimonial discrepancies. Appellant did not simply give incomplete, evasive, or inaccurate answers during discovery. She cannot take refuge in a faulty memory or failure to understand a question posed to her. Here, Childress (or someone

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of the Fourth District Court of Appeal in *Bass v. City of Pembroke Pines*, where the district court noted that "[h]aving been given no plausible explanation [for a plaintiff's intentional omission of significant information in discovery responses], the trial court reasoned that the untruthfulness was wilful and for the purpose of thwarting discovery warranting dismissal of the complaint." *Bass v. City of Pembroke Pines*, 991 So. 2d 1008, 1012 (Fla. 4th DCA 2008). That observation of a lack of plausible explanation for false discovery answers was not a shift of the burden of proof to the offending party. Instead, the *Bass* court simply pointed out that once the moving party established a fraud on the court, there was no evidence refuting that fact. The same is true here.

on her behalf) manufactured three separate documents upon which she repeatedly relied in seeking to overcome one of Appellees' affirmative defenses. Appellant's conduct involved multiple acts of wilful wrongdoing made with an intent to deceive and in the utmost bad faith.

A federal court has recognized that "dismissal is the appropriate sanction where a party manufactures evidence which purports to corroborate its substantive claims." *Vargas v. Peltz*, 901 F. Supp. 1572, 1580-81 (S.D. Fla. 1995)(court dismissed sexual harassment suit as sanction for plaintiff's fabrication of evidence to support her harassment claims.) Dismissal is particularly appropriate where a plaintiff, as here, seeks to enhance the merits of her case with fabricated evidence and fictionalized testimony. *Id.* at 1581

Appellant also suggests that her wrongdoing should be excused because the evidence she manufactured was immaterial. Her submission of phony "proof" of oil changes should not result in a dismissal, Childress contends, because her expert testified at deposition and indicated in writing that he inspected the engine of Appellant's car and found no evidence of the sludge which TT Longwood had stated was evidence of improper maintenance. Thus, Childress asserts that "the case changed after evidence showed that there was no sludge in the engine and the engine had been maintained properly." (Appellant's Reply Brief 18.)

We reject this argument. One reason courts are empowered to dismiss a complaint as a sanction for a plaintiff's fraudulent conduct is to protect the integrity of the court and the litigation process. As Appellant would have it, a litigant's knowing, intentional submission of fraudulent documents should be excused so long as she can later hire a witness who can minimize the importance of the issue which occasioned the fraudulent conduct in the first place. "The integrity of the civil litigation process depends on the truthful disclosure of facts. A system

that depends on an adversary's ability to uncover falsehoods is doomed to failure which is why this kind of conduct must be discouraged in the strongest possible way." *Cox v. Burke*, 706 So. 2d at 47. The phony invoices submitted by Childress were directly related to one of Appellees' affirmative defenses and not collateral to this case.

Therefore, we hold that the trial court judge did not abuse her discretion by dismissing Appellant's claim, with prejudice, on account of Appellant's fraud upon the court.

MOTION FOR FEES AND COSTS

The lower court awarded Appellees their fee fees and costs pursuant to sections 57.105 and 768.79, Florida Statutes as well as its inherent authority to do so.[5] "Typically, the appellate court applies an abuse of discretion standard in reviewing a trial court's award of attorney's fees, usually with regard to the amount of an award rather than the actual entitlement to an award." However, when entitlement to attorney's fees is based on the interpretation of contractual provisions, or a statute, as a pure matter of law, the appellate court undertakes a de novo review. *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner*, P.A., 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (citations omitted).

Section 57.105, Florida Statutes

One basis for the lower court's fee award was Section 57.105, Florida Statutes. Section 57.105 authorizes a trial court to award fees when

[5] It appears that while the trial court judge awarded fees pursuant to section 57.105, Florida Statutes, she, correctly, did not award costs pursuant to that statute.

> the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.

§57.105(1), Fla. Stat. (2006).

This enactment contains a "safe harbor" provision which provides that:

> A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

§57.105(4), Fla. Stat. (2006).

Childress contends that Appellees failed to comply with this provision. Even if true, however, Appellant fails to take account of the fact that, in addition to granting the fee motion brought by Appellees, the trial court judge also awarded fees on her own motion. The twenty - one day notice requirement imposed by section 57.105(4) on motions filed by "a party," does not apply where the court acts on its own initiative as expressly authorized under section 57.105(1). *Morton v. Heathcock*, 913 So. 2d 662, 669 (Fla. 3d DCA 2005).

Childress maintains that section 57.105 cannot be a basis for any fee award - whether on the motion of a party or the court's own initiative - because there has been no finding that the action is frivolous. Appellant is correct that when a court awards counsel fees under section 57.105, it must make an express finding that the claim is frivolous. *Ferdie v. Isaacson*, 8 So. 3d 1246, 1250 (Fla. 4th DCA 2009). Frivolous, in this context means "not supported by the material facts necessary to establish her claim or would not have been supported by the

application of then-existing law to those material facts." *Mullins v. Kennelly*, 847 So. 2d 1151,1155 (Fla. 5th DCA 2003). In fact, the trial court judge made precisely such a finding.

> Upon [Appellees'] motion and this Court's own initiative pursuant to Fla. Stat. §57.105, this Court found that [Appellant] knew at the inception of this lawsuit, and that her attorneys knew or should have known as of at least a date specified below, that [Appellant's] claim was a) not supported by the material facts necessary to establish it; and b) would not be supported by the application of then-existing case law to those material facts.

(Order Granting Appellees' Counsel Fee Mot. 2, Oct. 15, 2007.)

Therefore, we hold that the findings and conclusions of the County Court were adequate to support an award of counsel fees under section 57.105 made upon the court's own initiative.

Inherent Authority

Childress contends in her brief on the fee issue that "the Court repeatedly attempts to make an award of fees and costs pursuant to some inherent authority that it cannot cite. Such an award is not based on Rule or Statute [and] is clearly outside of the Court's authority." (Appellant's Initial Br. Regarding Fee Award 16.)

In fact, "since 1920, [the Florida Supreme] Court has recognized the inherent authority of trial courts to assess attorneys' fees for the misconduct of an attorney in the course of litigation." *Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002). "The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith." *Hoegh v. Estate of Johnson*, 985 So. 2d 1185, 1186 (Fla. 5th DCA 2008). This inherent authority to tax fees and costs as a sanction applies not only to attorneys but to litigants as well. *Moakley v. Smallwood*, 826 So. 2d at 224. Appellant's argument concerning

the court's inherent authority to assesses fees and costs rests entirely on the proposition that the court has no such authority - an argument plainly at odds with *Moakley*. No alternative argument is advanced.

The Court's inherent authority to award fees and costs in properly exercised in cases of bad faith, vexatious or wanton conduct or where a party acts for oppressive reasons. *Moakley v. Smallwood*, 826 So. 2d at 224. We agree with the trial court judge that there is no more appropriate case for a court to award fees and costs pursuant to its inherent authority than when, as here, a party and her counsel have committed a fraud upon the court. Therefore, we affirm the lower court's exercise of its inherent authority to award counsel fees and costs against Childress and her attorneys.

Offer of Judgment Statute and Court Rule

We have already affirmed the order of the lower court awarding fees against Childress pursuant to section 57.105 and assessing fees and costs pursuant to its inherent authority. Therefore, we do not address the County Court's award of fees and costs against Childress pursuant to the Offer of Judgment Statute, section 768.79, Florida Statute (2006).

APPELLATE COUNSEL FEES

Childress moves for appellate counsel fees pursuant to the MMWA. Inasmuch as she is not a prevailing party, that motion is denied. *See* 15 U.S.C. § 2310(d)(2) (2008) (Fees may be awarded under MMWA when a "consumer finally prevails.").

Section 57.105

Appellees, too, seek to recover their fees and costs on appeal "based upon Section 57.105, Florida Statues and based upon the offers of judgment." (Appellees' Mot. Appellate Attorney's Fees 2.) Although Appellant has not opposed this motion, the Fifth District Court of Appeal has held that a motion for appellate counsel fees "may" but need not be opposed.[6] *Mercury Cas. Co. v. Rural Metro Ambulance Inc.*, 909 So. 2d 408, 409-10 (Fla. 5th DCA 2005). Inasmuch as Appellees' fee motion relies upon the same grounds as asserted in the trial court, we look for guidance to Childress's opposition to the counsel fee motion below.

With respect to section 57.105, we noted in considering the lower court's fee award that this statute contains a safe harbor clause. This provision requires a party who wishes to seek fees under section 57.105 to first serve a copy of its motion prior to filing it in order to give the adverse party an opportunity to withdraw the papers which the movant contends are frivolous. It is undisputed that Appellees never complied with this provision. They contend that a letter they sent to Appellant's counsel satisfies the notice requirement of section 57.105.

We disagree. The requirement of the safe harbor provision that a "motion" be served before filing requires just that - a motion and "not a letter and . . . notice by letter does not meet the restrictive terms of the statute." *Kenniasty v. Bionetics Corp.*, 10 So. 3d 1183, 1186 (Fla. 5th DCA 2009).

We also note that under section 57.105(1), the court may award fees on its own motion and in such cases the safe harbor provision does not apply. Unlike the trial court, however, we decline to award further fees on our own initiative.

Offers of Judgment

[6] Appellants filed separate appellate fee applications with respect to each of the

Appellees also seek appellate fees under section 768.79 and Florida Rule of Civil Procedure 1.442. This is the offer of judgment mechanism.

During the course of the proceeding below, Appellees served several offers of judgment, covering all of Childress's claims. Each offer of judgment served by Appellees contained, among other things, the provision that "Terms of this settlement are to be kept confidential by Plaintiff." (Appellees' Mot. to Tax Attorney's Fees and Costs, Exs. A, B, C and D.)[7] Childress did not accept any of them.

> The [offer of judgment] rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So.2d 1067, 1079 (Fla. 2006).

"[A] summary of the proposed release can be sufficient to satisfy rule 1.442, as long as it eliminates any reasonable ambiguity about its scope." *Id.* Thus, the touchstone of a valid offer of judgment is that it "be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more." *Id.* Appellees' proposals for a confidentiality agreement as part of the settlement of this case all provide, in their entirety, that "[t]erms of this settlement are

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consolidated cases. They both seek fees on the same bases.

[7] This reference to the exhibits of Appellees' fee motion pertains to the motion made in the trial court as copies of the offers of judgment were not included with their motion for appellate fees.

to be kept confidential by Plaintiff." This proposal fails to provide Childress with an inkling of what the terms of the proposed confidentiality agreement might require of her.

Here, the proposals for a confidentiality agreement provide neither specific terms nor even a summary. We hold that Appellees' general proposal that "[t]erms of this settlement are to kept confidential by [Childress]" lacks the particularity required by Rule 1.442(c)(2)(D) and the Offer of Judgment Statute and therefore Appellees' offers of judgment cannot serve as a basis for a fee award.

CONCLUSION

The lower court did not abuse its discretion in dismissing the Second Amended Complaint with prejudice, as a sanction for Appellant's commission of a fraud upon the court. In addition, the trial court judge correctly taxed costs and fees against Childress and her counsel and did not abuse her discretion in fixing the amount. We deny all motions for counsel fees and costs associated with this appeal.

WHEREFORE based upon the foregoing, it is hereby **ORDERED and ADJUDGED** that:

1) The trial court's "Final Order of Dismissal With Prejudice for Plaintiff's Fraud Committed Upon Defendants and the Court," dated June 15, 2007, which is appealed in CVA1 07-52, be and hereby is **AFFIRMED**; and

2) The trial court's "Final Attorney Fee and Cost Judgment against Plaintiff, Nikki Ann Childress and Her Counsel, Consumer Legal Services, P.C., In Favor of Defendant, Mazda North American Operations and Defendant, TT Longwood, Inc," dated October 15, 2007, which is appealed in CVA1 07-79, be and hereby is **AFFIRMED**; and

3) Appellant's motion for counsel fees on appeal be and hereby is **DENIED;** and

4) Appellees' motions for counsel fees on appeal be and hereby are **DENIED.**

DONE and ORDERED in Chambers in Orlando, Orange County, Florida on this _____ day of **January**, 2010.

/s/
WALTER KOMANSKI
Circuit Judge

/s/
ALICIA L. LATIMORE
Circuit Judge

/s/
RENEE A. ROCHE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to:

1) Aldo Bolliger, Esq., MITCHELL & BOLLIGER, PLLC, 106 South Armenia Avenue, Tampa, Florida 33609; and

2) Kimberly A. Ashby, Esq., AKERMAN SENTERFITT, P.O. Box 231, CNL Tower II, Suite 1200, 450 South Orange Avenue, Orlando, Florida 32802-0231; and

3) W. Scott Powell, Esq., POWELL & PEARSON, LLP, 399 Carolina Avenue, Suite 200, Winter Park, Florida 32789.

/s/
Judicial Assistant

Dated: January 4, 2010