IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA THIRD DISTRICT

Appellate Case No: 3D2024-0074

L.T. Case No: 19-37239

U.S. ALLIANCE MANAGEMENT CORP.
A Florida Corporation
d/b/a U.S. Security,

Appellant

vs.

APEIRON MIAMI, LLC, a Florida
Limited Liability Company

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY

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PRELIMINARY STATEMENT

Appellant, U.S. Alliance Management Corp., is the plaintiff below and will be referred to as "Appellant". The defendant below, Apeiron Miami, LLC, will be referred to as "Appellee".

Citations to the original one volume Record on Appeal will be noted as "(R. ___)" denoting the appropriate page number.

Statement of Facts and Procedural History

I. Statement of Facts

Appellant, a security management company, sued its customer, Appellee, a commercial real estate development company at the Jockey Club in North Miami for passing a worthless check in the amount of $129,744.16 and for breach of contract and related claims arising for Appellee's breach of the written service agreement ("Agreement"). See Appellant's five-count Complaint against Appellee for (I) Worthless Check (Fla. Stat. § 68.065) seeking, inter alia, the amount of the worthless check and "triple the amount owed" pursuant to Section 68.065(3)(a), and all allowable fees, charges, and attorney fees and collection costs pursuant to the statute; (II) Account Stated; (III) Open Account; (IV) Breach of Contract and (V) Unjust Enrichment. (R. 21 – 68).

Relevant to this Appeal, the terms of the one (1) year Agreement provided Appellee would compensate Appellant for services rendered according to its invoice within 30 days, a late fee of 1.5% per month on overdue accounts, automatic annual renewal absent cancelation, as well as lost profits for early cancelation, liquidated damages for

poaching employees, and prevailing party collection and attorney fees. (R. 33-35)

Between 2018 through 2019, an unpaid balance in the amount of $131,409.48 developed for the security services provided by Appellant.(R. 40 – 66) Appellee never objected to Appellant's invoices, they were simply unpaid. (R. 23)(R. 459)

On or about May 8, 2019, Appellee issued a check numbered 0230 in the amount of $129,744.16 drawn upon TD Bank, and payable to Appellant, leaving a balance of $1,665.52. Complaint, Ex. E.(R. 37) Appellee delivered the check to Appellant in June 2019. (R.115 -117) Appellant presented the check to the drawee bank, however, the instrument was refused for lack of funds. (Id. and R. 37) Thereafter, on June 18, 2019, Appellant sent a Section 68.065(4), Florida Statute demand to Appellee at the address on the check in accordance with the statute. (R. 39 and R. 115 -117))

Notably, on June 17, 2019, just days after the check was dishonored, a deposit for $225,000.00, more than sufficient to honor the check was made into Appellee's bank account. (R.395)

Additionally, Appellee deposited $354,744.16 into the same account the same month as the Worthless Check. (R. 395). Nevertheless, Appellee unilaterally failed to satisfy the Worthless Check within the thirty (30) day safe haven provision of contained in Section 68.065(4), Florida Statutes triggering Appellee's liability to Appellant for "triple the amount owed" pursuant to Section 68.065(3)(a), Florida Statutes.

Efforts were made to collect the worthless check and the balance of the invoices, but it remained unpaid and the relationship between the parties deteriorated. Resulting from repeated payment defaults on multiple invoices Appellant sought payment in advance for its services. In December 2019, Appellee terminated the Agreement which was set to renew in May 2020 having automatically renewed annually according to its terms. Appellee replaced Appellant's security services by hiring Appellant's employees that Appellant posted at the location.

As this case proceeded the worthless check and the balance of the invoices remained unpaid until May 19, 2019 when Appellee wired its pretrial disposition "tender" for $138,166.22. This figure represented Appellee's calculation of the amount of the worthless

check, the service charge, court costs and incurred bank fees. (R. 414)

In general, the underlying facts of this case are undisputed. As succinctly stated by Appellee in its August 23, 2021, on page 4 of its Motion for Summary Judgment on Counts II-V of Plaintiff's Complaint, "Plaintiff provided security services for which it was indisputably unpaid". (R. 459) Appellee's Answer generally denied Appellant's claims. (R. 98 -102) Appellee asserted the following bare-bone conclusions as its Affirmative Defenses (1) "Plaintiff claims are barred for failure to satisfy conditions precedent"; (2) it is entitled to a setoff for monies paid towards the balance of the invoices attached to the Complaint; (3) failure to mitigate (4) unclean hands, (5) restraint of trade; (6) failure to attach agreement; (7) payment has been made; and (8) the worthless check action was "barred in full or in part by economic hardship". (R. 102 – 103).

Ultimately, Appellee amended or unsuccessfully attempted to amended its Answer and Affirmative Defenses. (R. 447 – 455) Appellee's conclusory Affirmative Defenses asserted (1) Appellant failed to satisfy conditions precedent with its Section 68.065(4)

because another "payment" satisfying other outstanding invoices should have been applied to the worthless check; (2) Appellee demanded a set-off for a claim that never materialized for the "payment" satisfying other outstanding invoices; (3) Appellant failed to mitigate damages because Appellant should have applied the "payment", an amount less than the amount of the worthless check, the permissible service charges and fees of the worthless check, to the worthless check instead of the other outstanding invoices; (4) Appellant's claims at law are barred by the equitable doctrine of unclean hands; (5) The Agreement's restrictive hiring clause is an illegal restraint on trade; (6) Appellant failed to state a cause of action for breach of contract because it did not attach the operative document as an exhibit to the Complaint; (7) Appellant was made whole though Appellee's other payments for other outstanding that that Appellant should have used to satisfy the Worthless Check; (8) the Worthless Check action is barred by economic hardship; (9) liquidated damage provision of its contract is unenforceable; (10) Appellee is not liable for the acts of its agents/employees if they were acting outside the scope of their employment. (R.452 – 455)

On April 1, 2021, sixteen (16) months after the filing of the complaint and almost two (2) years from the dishonor of the worthless check for insufficient funds, Appellee made a pretrial disposition "tender" offer pursuant to Section 68.065(6) presenting a $138,166.22 check to satisfy the amount of worthless check, with statutory permitted fees and costs. (R. 414 – 416). See Defendant's Motion for Summary Judgment on Count 1 of Complaint, paragraph 5 and Exhibit C to that motion at 4- 10,

Appellee's offer of the "tender" was an admission for the pretrial disposition of Appellant's Worth Check claim (Count I) for the amount of the check, statutory treble damages and Appellant's attorney fees. (R. 414-416) Appellee's tender was an admission that there is no dispute to the elements of the worthless check claim: delivery of the check, presentation of the check to the drawee bank, dishonor due to insufficient funds, failure to pay the amount of the worthless check within the thirty (30) day safe-haven period after notice, and that the amount of the check remained unpaid. Appellee also paid $1,665.52 to Appellant on November 4, 2021, Appellee representing the outstanding invoice balance after the payment of the tender.

In total, Appellee's tender and the November 4, 2021 payments to Appellant are Appellee's admissions that there was no dispute regarding the different elements for the separate breach of contract and related claims: the parties entered into the an agreement for services in exchange for an agreed compensation and other terms; that services were provided, that Appellee received invoices, the invoices and the amounts were accurate and not objectionable, and that Appellee did not pay the invoices in accordance with the Agreement.

Nevertheless Appellant rejected the offer of tender because the amount of the offer did not include Appellee's liability for "triple the amount owed" or $389,232.48. (R. 414). Additionally, Appellant rejected Appellee's proposition that its 2021 post-suit, pretrial disposition tender offer was not a timely submission within the 2019 pre-suit 30 day safe-harbor provision of Section 68.065(3)(a). (R. 414)

II. Procedural History

A. Cross Motions for Summary Judgment as to Count I – Worthless Check

After the commencement of the case the parties engaged in discovery. Subsequently, on May 27, 2020, Appellant filed its Motion for Summary Judgment on Action for Worthless Check (Count I). (R. 106 – 121) The Motion was supported by the Affidavit of the Financial Controller of Appellant (R. 115 – 117), noted that "[T]o date, Apeiron has not paid U.S. Security the face amount of the dishonored Check and …. [the] service charge of 5% of the face amount of the Check." The Motion argued that there was not a genuine issue of material fact on the worthless check claim, and that there are no disputed issues of material fact with respect to Appellee's conclusory affirmative defenses unsupported by any facts. (R. 109 – 111)) For various reasons, the hearings on this motion were continued. (R. 139 – 140)

On September 29, 2020, without leave of court, Appellee filed an purported Amended Answer which included, inter alia, First Affirmative Defense, failure to satisfy conditions precedent; Second Affirmative Defense, alleging entitlement to a set off; Third Affirmative Defense, failure to mitigate damages; Fourth Affirmative Defense, unclean hands; Seventh Affirmative Defense, payment; and the

Eighth Affirmative Defense, economic hardship. All of the fore-mentioned Affirmative Defenses, but for the Eighth Affirmative Defense, arose out of an allegation of a $100,000 payment for other unpaid invoices separate from the unpaid invoices underlying Appellant's pleading. The Eighth Affirmative Defense alleged that the dishonored check was to be held as a security deposit until funds were received from a closed loan transaction. (R. 204 -213)

On October 13, 2020, the trial court entered an Order Granting Motion to Amend Affirmative Defenses which stated that "Defendant shall file an Amended Answer and Affirmative Defenses as a separate docket entry." (R. 214 – 215) Despite this Order, ***Appellee never subsequently filed a Amended Answer and Affirmative Defenses, its original pleading Appellee's Answer, filed May 13, 2020 with its conclusory Affirmative Defenses absent any allegation of fact are still the controlling pleading***. (See Record Generally)

On April 8, 2021, Appellee filed its Motion for Summary Final Judgment as to Count I (Worthless Check). (R. 223 – 375) This Motion argued that April 1, payment was compliant with attorney fee

mitigation provision Fla. Stat. § 68.065(6), timely provided the tender before the "hearing" which satisfied the totality of Appellant's worthless check claim (Count I) and waived the treble statutory damages. Appellee's Motion was silent regarding its economic hardship affirmative defense. (Id.)

On April 21, 2020, Appellant filed Plaintiff's Amended Motion for Final Summary Judgment on Action for Worthless Check (Count I) presented evidence that Appellee failed to pay the full amount of the worthless check during the 30 day safe-haven period after the statutory F.S. 68.065(4) notice was delivered demonstrating that Appellee's F.S. 68.065(6) pretrial disposition "tender" was not timely. (R. 376 - 395). Appellant also presented evidence of Appellee's June 17, 2019 $225,000 deposit and deposits totaling $354,744.16 that same month to refute Appellee's conclusory economic hardship affirmative defense unsupported by any facts. (Appellee's Answer, filed May 13, 2020, Eighth Affirmative Defense). (R 98 – 105). See Plaintiff's Amended Motion for Final Summary Judgment, paragraphs 3 – 9, and Exhibit A. (R. 395)

On May 13, 2021, the Court conducted a hearing on the motion for summary judgment. Confusingly, the trial court's decision reflected in its May 14, 2021 order ignored Appellant's Motions for Summary Judgment. (R. 1,1075 -1,077) The Court failed to make a finding as to the prevailing party entitled to judgment as to Count I. Instead the trial court granted Appellee's Motion for Summary Judgment with respect to Count I (Worthless Check) concluding that the Appellee's "tender" made prior to the "hearing" was in "satisfaction" of Count I" and that Appellee was is not entitled to an award of treble damages on the amount of the worthless check, based upon the Court's findings regarding "***the timeliness of the tender***." (Emphasis supplied). The trial court reserved the issues of Appellant's "reasonable attorneys' fees and costs, and pre-judgment interest "on any sums awarded herein".

On May 19, 2021, Appellee resubmitted the previously rejected $138,166.22 tender, however, the balance on the outstanding Invoices remained unpaid. As noted previously in the Statement of Facts, Appellee satisfied the balance of the unpaid invoices November 4, 2021.

B. Trial court proceedings on the remaining Counts II – V.

On August 23, 2021, Defendant filed a Motion for Summary Judgment on the remaining Counts II-V arguing (1) that Appellee's May 2021 "tender" of $138,166.22 to Appellant, exceeded the unpaid "outstanding balance" $131,409.48 as alleged in Counts II, III, and V of Appellant's Complaint and (2) Appellant was not entitled to liquidated damages of $15,000 per each subject employee or former employee; or for "lost profits" as contained in the parties' Agreement. (R. 456 – 549).

On January 6, 2022, the trial court granted Appellee's Motion as to just one (1) aspect of the Breach of Contract claim (Count IV): the Agreement's restrictive covenant against hiring Appellant's employees. The trial court found that the covenant was unenforceable because it was written as a liquidated damages provision. (R. 1,078 -1,081)

On June 28, 2022, Appellant filed its Motion for Summary Judgment for the balance of its Count IV - Breach of Contract claims: (1) lost profits damages from the date of Appellee's termination of the Agreement until May 2020 when the Agreement was set to renew; (2) pre-judgment interest for the period of time of (i) the underlying

invoices for the amount of the worthless check were unpaid through May 2021 when the tender was received and (ii) for the amount of the balance of the invoices through November 4, 2021 when that amount was satisfied, (3) as well as its reasonable attorneys' fees and collection costs as the prevailing party pursuant to the Agreement. (R. 798 – 844)

On December 7, 2023 the trial court entered its Final Summary Judgment on Appellee's Motion for Final Judgment on Counts II – V of Plaintiff's Complaint and Plaintiff's Motion for Summary Judgment as to Count IV of the Complaint. (R. 1,078 – 1,081). The Court made the following findings and conclusions of law:

> In its Complaint, Plaintiff alleged an outstanding balance for unpaid invoices of $131,409.48 (the "Outstanding Balance"), for security services rendered to Defendant. (citation to record omitted). The Court finds that it is undisputed that Defendant fully satisfied the sued upon outstanding balance for unpaid invoices through Defendant's tender, on March 1, 2021, under Count I of the Complaint.
>
> Under Counts II (Account Stated), III (Open Account), and V (Unjust Enrichment), the Plaintiff seeks recovery for the same Outstanding Balance that Defendant satisfied under Count I. Accordingly, these Counts are barred under Florida law, as any further award under these Counts would constitute an improper double recovery.

Under Count IV, for breach of contract, Plaintiff sought, in part, recovery of the same Outstanding Balance (citation to record omitted) that was fully satisfied. There are no further awardable contract damages under this Count. Therefore, this portion of Count IV is also barred, as a matter of law, as any further award for the Outstanding Balance would be an impermissible double recovery. Under Count IV, Plaintiff also seeks prejudgment interest on the Outstanding Balance, and lost profits damages. (Citation to the record omitted) As there are no further awardable contract damages under Count IV, Plaintiff is not entitled to prejudgment interest. The Outstanding Balance was fully satisfied under Count I, pursuant to Defendant's tender under Fla. Stat. 68.065(6). The statute does not mention prejudgment interest. "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." Moonlit Waters Apartments Inc. v. Cauley, 666 So.2d 898, 900 (Fla.1996).

Next, Plaintiff is not entitled to lost profits damages under Count IV, as such theory is based on an unpled contract. Specifically, based on Plaintiff's deposition testimony and its responses to interrogatories, it is undisputed that the original contract materially changed, such that there was a new advanced payment requirement. See e.g., Pl. Resp. to Def. Second Set of Interrogatories, Resp. 4. ("US Security and Apeiron amended the existing payment terms of the Contract which required advanced payment for services."). Plaintiff's claim for lost profits directly relies on this unpled claim.

Since it undisputed that Plaintiff did not plead the new "advanced payment" contract in its Complaint, the Court grants summary judgment to Defendant on this claim. See D'Agostino v. CCP Ponce, LLC, 274 So. 3d 1141, 1147 (Fla. 3d DCA 2019) ("It is well settled that a defendant cannot be liable under a theory that was not specifically pled."); Fernandez v. Fla. Nat'l Coll., Inc., 925 So. 2d 1096,

1101 (Fla. 3d DCA 2006) ("issues that are not pled in a complaint cannot be considered by the trial court at a summary judgment hearing".); see also Kuehlman v. Bank of Am., N.A., 177 So. 3d 1282, 1283 (Fla. 5th DCA 2015) ("As argued by Borrower, because the parties entered a modification agreement following Borrower's alleged breach of the original mortgage, Lender could only foreclose by alleging and proving a breach of the modification agreement."). In opposition to Defendant's Motion, Plaintiff cited Bornstein v. Marcus, 275 So. 3d 636 (4th DCA 2019). The Court reviewed this case and does not believe it prevents entry of summary judgment for Defendant. Bornstein discusses the differences between a modification and novation of a contract. Here, the Court does not need to decide whether the original contract was modified, or whether there was a full novation. Plaintiff failed to plead this claim.

Further, the Court finds that the Parties subsequently agreed that Plaintiff would only provide services if it received payments from Defendant in advance. Under this agreement, there could be no reasonable expectation of lost profits.

Plaintiff's Motion to Strike was denied because the Court did not consider such evidence to be new.

Accordingly, the Court grants Final Summary Judgment to Defendant under Counts II – V. As the Court previously disposed of Count I of the Complaint in its May 14, 2021 Order, Plaintiff shall take nothing of all remaining Counts of the Complaint, and Defendant shall go hence without day.

The Court reserves jurisdiction to determine the Parties' entitlement to, and amount of, reasonable attorneys' fees and court costs; and to enter any other or additional orders that may be necessary or appropriate. (R. 1078 – 1,081)

On December 8, 2023 Appellee filed a motion for attorney fees based on its assertion that it was the prevailing party in the matter according to the trial court rulings in its favor despite Appellant's recovery from Appellee for the amount of the worthless check and the November 4, 2021 payment totaling the balance of the unpaid invoices. (R. 1,019 – 1,022). The trial court granted this motion on March 3, 2024. (See Docket)

On December 22, 2023, Appellant filed a Motion for Rehearing (R. 1023 – 1,035) regarding the trial court's adverse rulings against it which the trial court summarily denied.(1,087 – 1,088)

This appeal ensued.

STANDARD OF REVIEW

A trial court's ruling on a motion for summary judgment is subject to a de novo standard of review. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000)). This appeal involves questions of law, which are reviewed de novo. All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC, 274 So. 3d 438, 445 (Fla. 3d DCA 2019).

To prevail on a motion for summary judgment, the movant must show that (1) "there is no genuine dispute as to any material fact" and (2) "the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). When determining if there is a genuine dispute of material fact, "[t]he court views the evidence in a light most favorable to the nonmoving party, and a genuine dispute occurs when the evidence would allow a reasonable jury to return a verdict for that party." Baum v. Becker & Poliakoff, P.A., 351 So. 3d 185, 189 (Fla. 5th DCA 2022)).

In amending Florida Rule of Civil Procedure 1.510, the Florida Supreme Court sought to align Florida's summary judgment rule with the federal summary judgment standard. In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d 72, 74 (Fla. 2021). According to the Florida Supreme Court, "those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard." Id. at 75. Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986)). And under both

standards, "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Id. (citations omitted). Those applying the new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (quoting Anderson, 477 U.S. at 248). Thus, in Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Id. (citation omitted).

One of the principal purposes of the summary judgment rule is to "isolate and dispose of factually unsupported claims or defenses." In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 309 So. 3d 192, 194 (Fla. 2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986)). However, the Florida Supreme Court, in adopting this amendment, reaffirmed "the bedrock principle that summary judgment is not a substitute for the trial of disputed fact issues." Id.

As the United States Supreme Court itself has emphasized, the summary judgment rule must be implemented "with due regard for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." Id. (quoting Celotex, 477 U.S. at 327).

Here, the trial court made erroneous conclusions of law and erred in its decisions granting summary judgment in favor of Appellee. Accordingly, the Court of Appeals should reverse the trial court's orders and remand for further proceedings.

SUMMARY OF ARGUMENT

Appellee's presentation of a worthless check for over $129,000 and other bad acts were detrimental to Appellant placing it into the position of a financier instead of service provider after its payment for labor and expenses without compensation for over 2 years. Every relevant trial court decision at issue in this appeal is in contravention of principles of statutory and contract construction, established law and Florida public policy intended to provide litigants like Appellant powerful remedies to deter the evil of passing bad checks and to prevent mischief in trade and commerce. Appellee's admitted that it failed to pay the worthless check, satisfy the invoices for the services supplied, and for some of the invoices, for over 2 years. In defiance of logic, the law, and justice, the trial court identified Appellee the virtuous actor and the prevailing party due to its "timely" Section 68.065(6) tender and denied Appellant its mandatory remedies and barred its other independent claims and separate damages. Upon review, the Court of Appeals should reverse all the trial court summary judgment ruling, remand for further proceedings, with instructions to enter summary judgment on Count I – Worthless Check in favor of Appellant for the amount of the worthless check,

"triple the amount owed" statutory damages, Appellant's attorney fees and collection costs up to the date of the tender, as well as, interest from the date of dishonor to the date of the tender.

Argument on Appeal

I. The trial court erred when it granted Appellee's Motion for Summary Judgment regarding Appellee's Worthless Check claim compelling Appellant's acceptance of Appellee's pretrial disposition tender as satisfaction of Count I and unconstitutionally construed Section 68.065(6) to deny Appellant's entitlement to Section 68.065(3)(a) treble statutory damages and withheld the award of Appellant's attorneys' fees and collection costs.

A. The Legislative Intent behind Florida's worthless payment statutes is to remedy the evil of bad checks causing mischief in trade and commerce.

Florida's approach to worthless payment instruments is comprehensive and multi-dimensional.

> "The right to bring an action to collect on a worthless check existed prior to the 1979 enactment of section 68.065. Indeed, in 1968, the Florida Supreme Court approved a form complaint for an action to collect on a worthless check. (Citation omitted) Section 68.065 does not create an exclusive means to bring an action on a worthless check; rather it authorizes an award of treble damages and reasonable attorney's fees in worthless check actions where certain additional elements have been proved." Sarras v. Mill-Sarras, 161 So. 3d 509 (Fla. 5th DCA 2014).

In Florida, an award of treble damages in the business context is unique to civil theft (Fla. Stat. § 772.11) and writing a worthless check (Fla. Stat. § 68.065) where both claims involve behavior that is otherwise criminalized. These statutes are narrowly constructed and

provide 30-day "safe harbor" provisions allowing a defendant a clear opportunity to right a wrong prior to facing suit. "The intention of [Section 68.065, Florida Statutes] is to preclude the necessity of a civil suit by giving the maker or drawer a powerful financial incentive to make payment within the thirty (30) days [initial notice period]. See Krontz v. Feiler, 553 So. 2d 1302, 1303 (Fla. 3d DCA 1989). The Legislature takes worthless payments very seriously. Pursuant to Fla. Stat. § 832.05, even a worthless check as low as $150 is a felony punishable by incarceration. Under this statutory framework, it is public policy of this State and the intent of the Legislature "to ***remedy the evil of giving checks***, drafts, bills of exchange, debit card orders, and other orders ***on banks without first providing funds in or credit with the depositories*** on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange, debit card orders, and other orders on banks, bad banking, check kiting, and ***a mischief to trade and commerce***. Section 832.05(1), Florida Statutes (emphasis supplied).

Section 68.065, Florida Statutes states:

* * *

(2) …, the payee of a payment instrument, ***the payment of which is refused by the drawee because of lack of funds***, lack of credit, or lack of an account, or where the maker or drawer stops payment on the instrument with intent to defraud, may lawfully collect bank fees actually incurred by the payee in the course of tendering the payment, plus a service charge of $25 if the face value does not exceed $50; $30 if the face value exceeds $50 but does not exceed $300; $40 if the face value exceeds $300; or 5 percent of the face value of the payment instrument, whichever is greater. The right to damages under this subsection may be claimed without the filing of a civil action.

3(a) In any civil action brought for the purpose of collecting a payment instrument, the payment of which is refused by the drawee because of lack of funds, lack of credit, or lack of an account, or where the maker or drawer stops payment on the instrument with intent to defraud, and ***where the maker or drawer fails to pay the amount owing, in cash, to the payee within 30 days after a written demand therefor, as provided in subsection (4), the maker or drawer is liable to the payee, in addition to the amount owing upon such payment instrument, for damages of triple the amount so owing***. However, in no case shall the liability for damages be less than $50. The maker or drawer is also liable for any court costs and reasonable attorney fees incurred by the payee in taking the action. ***Criminal sanctions, as provided in s. 832.07, may be applicable***. (emphasis supplied).

See F&A Dairy Prods., Inc. v. Imperial Food Distribs., Inc., 798 So. 2d 803 (Fla. 4th DCA 2001)("[I]f payment of a check is refused by a drawee-bank for insufficient funds, a payee may bring a cause of action against the drawer for recovery of the amount of the check plus treble the amount of the check."). The civil route offers an alternative, complementary, and interconnected avenue for redress from the criminal justice system, ensuring that victims of financial deception have robust mechanisms to prevent them from becoming long-term creditors. These Legislative sanctions are a stern reminder to all participants to uphold the integrity of their financial obligation transactions.

B. The trial court failed to properly apply well-established statutory construction rules.

The triple damage sanction contained in section 68.065(3)(a) of the Worthless Payment Statue was enacted in derogation of common law. See Sarras v. Mill-Sarras, 161 So. 3d 509 (Fla. 5th DCA 2014) cited above. Predecessor versions of the Worthless Payment statute limited triple damages to $2,500. However, in 1988, the Legislature eliminated any limitation to an award of statutory damages. See Session Law 88-381

(https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1832&context=staff-analysis, page 70, (last accessed June 15, 2024)("This bill also amends s. 68.065(4) F.S. eliminating language in the prescribed notice form that limits damages to $2500.").

Despite subsequent amendments to section 68.065, this change has remained to the present day. "[A] statute enacted in derogation of the common law must be strictly construed . . . . The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." Major League Baseball v. Morsani, 790 So. 2d 1071, 1078-79 (Fla. 2001). See, e.g. TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 615 (Fla. 1995) (Wells, J., concurring in part and dissenting in part) (Courts are to strictly construe statutory damages "[b]ecause attorney fees awarded under the offer of judgment statute are sanctions against the party whom the sanction is levied.")(citation omitted) In Florida the "legislature is presumed to know the existing law when it enacts a statute." M. Joshua v. City of Gainesville, 768 So.2d 432, 438 (Fla. 2000). The Florida legislature is presumed to know existing "judicial decisions on the subject" as well. Id. Where the legislature has provided a

plain and unambiguous statutory procedure … courts are not free to deviate from that process absent express authority." Pineda v. Wells Fargo Bank, N .A., 143 So.3d 1008, 1011 (Fla. 3d DCA 2014). Orr v. Trask, 464 So. 2d 131, 135 (Fla. 1985)("Courts of equity have no power to overrule established law."). "It is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides this Court's interpretation." Borden v. East–European Ins. Co., 921 So.2d 587, 595 (Fla.2006). The best method to determine the intent of the legislature is to "look to the actual language used in the statute." Daniels v. Fla. Dep't of Health, 898 So.2d 61, 64 (Fla.2005). When construing different parts of a statute, "[i]t is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another." Knowles v. Beverly Enterprises–Florida, Inc., 898 So.2d 1, 6 (Fla.2004) (citation omitted).

It is presumed that the Florida legislature had knowledge of the 1997 Fourth District Court of Appeals in Kehle v. Modansky, 696 So.

2d 493 (Fla. 4th DCA 1997) which addressed treble damages for large checks. The Court of Appeals stated***"We are not unsympathetic to the apparent harshness of a treble damages remedy when applied to a $120,000 deposit check. Nevertheless, the wisdom of such relief is a matter for the legislature to consider. "*** Id. at 494 (Emphasis supplied). See also State Street v. Lord, 851 So. 2d 790, 796 (Fla. 4th DCA 2003)(holding that no further foreclosure action could be instituted against the homeowner where the bank failed to meet the evidentiary requirements of Fla. Stat. §673.3091), the Court of Appeals held "***We recognize that applying the statute as we do will result in a windfall*** to the mortgagor and a likely injustice to the mortgagee, …. ***Any remedy must, therefore, be left to the legislature.***"). Ultimately, the Courts of the State of Florida are not "permitted to add to a statute words that were not placed there by the Legislature." B.C. v. Fla. Dep't of Children & Families, 887 So.2d 1046, 1052 (Fla.2004). See Avatar Dev. Corp. v. State, 723 So. 2d 199, 201 (Fla. 1998) ("Article II, section 3 declares a strict separation of the three branches of government . . . ."). The Supreme Court instructs:

> If a Legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. ***If it has been passed improvidently the responsibility is with the Legislature and not the courts***.

Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992)(citation omitted)(emphasis supplied).

The Third DCA's decision in Krontz v. Feiler, 553 So. 2d 1302, 1303 (Fla. 3rd DCA 1989) affirms that "A unilateral failure to respond [in thirty days] to the [now Section 68.065(4) notice] does, however, trigger the statutory liability" of Section 68.065(3)(a). The Legislature authorizes "the court or jury" "the discretion to waive all or part of the statutory damages" only if the fact-finder "determines that the failure of the maker or drawer to satisfy the dishonored payment instrument was due to economic hardship." Section 68.065(7), Florida Statutes. See also Alvarez v. Alvarez, 800 So. 2d 280, footnote 8 (Fla. 3rd DCA 2001)("*Section 68.065 provides* ***an*** *exception [singular] to awarding treble damages*, but that exception is not applicable in the instant case.")(citation omitted)(emphasis supplied). On the other hand, Section 68.065(6) permits pretrial

disposition[1] to mitigate the maker's liability for the mandatory attorney fees incurred as a result of the claim:

> "[a]fter commencement of the action but before the hearing, the maker or drawer may tender to the payee, as satisfaction of the claim, an amount of money equal to the sum of the payment instrument, the service charge, court costs, and incurred bank fees. Other provisions notwithstanding, ***the maker or drawer is liable to the payee for all attorney fees and collection costs incurred by payee as a result of the payee's claim***." (emphasis supplied).

Florida Statute § 68.065(6) does not include the term "damages", "statutory damages", or waive attorney fees or authorize a waiver of any kind. Section 68.065(6) uses none of the language found in the affirmative defense provided in Section 68.065(7). See C S Computers, Inc. v. Bodensiek, 662 So.2d 1383, 1384 (Fla. 4th DCA 1995) ("[W]hen section 68.065(6)[equivalent to the 2019 version of section 68.065(7)] . . . speaks of the court's authority to waive all or part of the statutory damages due to economic hardship, the term statutory damages refers to those damages which were created by statute, i.e., the treble damages."). A pretrial disposition tender

[1] In Saad Remodeling Custom Home Builders Inc. et al v. Reyes FC Services Corp, Docket no. 4D2023-1006 (Fla. 4th DCA December 20, 2023) (Gross, J., concurring specially) the justice writes "Similarly, section 68.065(6), in describing a ***pretrial disposition*** of a case, …." clarifying the use of the word "hearing" as used by the statute in § 68.065(6).

pursuant to Section 68.065(6) is not equivalent to the 30 day "tendering" of interpleaded funds referenced in the Court of Appeals decision Krontz v. Feiler, 553 So. 2d 1302, 1303 (Fla. 3rd DCA 1989) where the plaintiff prematurely initiated the litigation before the passage of 30 days as referenced in now Section 68.065(3)(a). Krontz distinguishes that section 68.065 has a provision "which allows the trier of fact to waive all or part of the statutory damages in case of economic hardship". Id.

Simply stated Appellee's pretrial disposition "tender" was not timely according to the pre-suit thirty (30) day safe haven provision of Section 68.065(3)(a). Ignoring the ***evil*** it perpetuated for almost two years through non-payment of its worthless check to avoid the harsh sanction of F.S. 68.065(3)(a), Appellee argued to the trial court its pretrial disposition F.S. 68.065(6) tender *almost 2 years* ***after*** *the 30 day safe-haven provision* was equivalent to the "tendering" of interpleaded funds within the 30 day safe haven period discussed in Kronz. Appellee has argued that an award of treble damages $389,232.48 would be a windfall to Appellant. Convinced, the May 14, 2021 trial court ruling ignored Appellant's Motion for Summary

Judgment on Court I, granted Appellee's Motion for Summary Judgment which simply sought to compel Appellant's acceptance of its $138,166.22 pretrial disposition tender for the amount of the worthless check and the other fees and charges permitted by the statute, and denied Appellee's statutory damage claim crafting a waiver affirmative defense through the insertion of words "due to the timeliness of the tender" which do not exist in Section 68.065(6) or the Worthless Payment Statute generally.

The trial court erred in its May 21, 2021 order by failing to award of treble statutory damages to Appellant. Strictly construed according to its plain reading, the worthless payment instrument statute does not grant a trial court authority to waive the maker's liability "due to the timeliness of the tender". The trial court's waiver of Appellant's statutory damages is an unconstitutional construction of Section 68.065(6) and overreach of its authority abrogating the clear Legislative intent to deter the criminal behavior of actors like Appellee.

C. The trial court's May 14, 2021 Order should be reversed because it waives Appellant's entitlement to statutory

damages without authority and fails to award mandatory attorney fees and collection costs and interest.

The trial court's ruling on the parties' cross-Motions for Summary Judgment regarding Count I – Worthless check left unspoken the underlying core of the Section 68.065 tender was that the disposition of the claim was in Appellant's favor due to its recovery for the amount of the worthless check $129,744.16 even as the trial court denied Appellant its entitlement to triple statutory damages. The trial court ignored Appellant's Motions and instead, solely and inversely, granted Appellee's Motion for Summary Judgment compelling Appellant to accept Appellee's tender in satisfaction of Count I.

The trial court should have granted Appellant's Motion for Summary Judgment. Appellant sought summary judgment for the amount of the worthless check and for triple statutory damages. Appellant presented unrebutted evidence of the dishonor of the check, proof of its Sec. 68.065(4) notice to Appellee and Appellee's unilateral failure to resolve the worthless check within the 30 day safe-haven period, and that the amount of the check and the triple statutory damages as provided in the Sec. 68.065(4) notice remained

unpaid. The Motion also addressed Appellee's economic hardship affirmative defense. Appellant presented Appellee bank records from drawee bank which showed that Appellee deposited funds within days and throughout the month hundreds of thousands more than sufficient to honor the $129,744.16 worthless check during the 30 day safe haven period in 2019. Appellant's Motion was undisputed. Appellee's Motion and Reply did not produce any facts rebutting Appellant's production of facts and remained mute regarding the economic hardship affirmative defense. Appellee solely focused on its April 2021 tender and how its tender was presented before the "hearing" and likening it to the unrelated "tendering" in Krontz. It was undisputed that Appellee's unilateral failure to pay during the 30 day safe haven period was not due to economic hardship. The trial court should have granted summary judgment in Appellant's favor and entered judgment for the amount of the check and "triple the amount owed" statutory damages.

The trial court additionally erred on its reservation on the issue of entitlement to attorney fees. In the special concurrence in Saad Remodeling Custom Home Builders Inc. et al v. Reyes FC Services

Corp, Docket no. 4D2023-1006 (Fla. 4th DCA December 20, 2023) Judge Gross addressed the entitlement to attorney fees:

> [S]ection 68.065 does not authorize an award of fees to defendant makers or drawers of dishonored checks who ultimately prevail on a statutory claim. Section 68.065(3)(a) provides, among other things, that "[t]he maker or drawer [of a bad check] is also liable for any court costs and reasonable attorney fees incurred by the payee in taking the action." § 68.065(3)(a), Fla. Stat. (2018). Similarly, section 68.065(6), in describing a pretrial disposition of a case, says that "the maker or drawer is liable to the payee for all attorney fees and collection costs incurred by payee as a result of the payee's claim." § 68.065(6), Fla. Stat. (2018).

Clearly, as the maker or drawer of the worthless check, ***Appellee is not entitled to any attorney fees and collection costs***. Rather, ***Appellee is liable*** for Appellant's attorney fees and collection costs mitigated to the date of Appellee's Section 68.065(6) tender. Applying the principles of statutory construction, attorneys' fees statutes are "strictly construed" because there was no common law right to attorneys' fees. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So.2d 276, 278 (Fla. 2003). Section 68.065(6) mandates an attorneys' fee and collection cost award to Appellant, there is no need to determine entitlement to attorneys' fees, a prevailing party or employ the "significant issues" test. By

virtue of the tender, Appellant prevailed on its worthless check claim under Fla. Stat. § 68.065(6). In Sumner Group, Inc. v. M.C. Distributec, Inc., 949 So. 2d 1205, 1206 (Fla. 4th DCA 2007) the trial court denied attorney fees where the plaintiff prevailed on its worthless check claim and breach of contract claim for the same amount. The Court of Appeals reversed, "[the plaintiff] prevailed on its worthless check claim under Fla. Stat. § 68.065 … ***an award of attorney's fees was mandatory***. Alvarez v. Alvarez, 800 So. 2d 280, 283-84 (Fla. 3rd DCA 2001)." See, e.g. Alvarez v. Alvarez, Id. The trial court lacked any discretion to rule otherwise.

Moreover, Section 68.065(3)(b) states "***In the event that a*** judgment or ***decree is rendered***, interest at the rate and in the manner described in s. 55.03 may be added toward the total amount due." See e.g. Alvarez v. Alvarez, 800 So. 2d 280, 283-84(Fla. 3rd DCA 2001) where the Court of Appeals affirmed the trial court's award of the amount of a worthless check, treble damages, prejudgment interest and attorney fees in action pursuant to F.S. 68.065).

Appellant prevailed on the worthless check claim recovering the amount of the worthless check. However, according to the trial court's curious order granting Summary Judgment in Appellee's favor and compelling Appellant's acceptance of the "timely" tender identified Appellee as the victim and the prevailing party. This absurd decision rendered Appellant's successful litigation effort to collect bad check favor pyrrhic. The trial court further erred when it denied Appellant other tools provided by the Legislature in section 68.065 to combat Appellee's criminal behavior, interest, mandatory treble damages, mandatory attorney fees and collection costs. The Court of Appeals should reverse the trial court's May 14, 2021 decision in total and remand with instructions to enter summary judgment on Count I – Worthless Check in favor of Appellant for the amount of the worthless check, "triple the amount owed" statutory damages, Appellant's attorney fees and collection costs up to the date of Appellee's pretrial disposition tender, as well as, interest from the date of dishonor to the date of the tender.

II. The trial court erred in its ruling on the issue of liquidated damages.

The Florida Supreme Court has stated that a liquidated damages clause may stand if "damages are not readily ascertainable at the time the contract is drawn, but [equity may] relieve against the forfeiture if it appears unconscionable in light of the circumstances existing at the time of breach." Hutchison v. Tompkins, 259 So.2d 129, 132 (Fla.1972). Generally, contracts are voluntary undertakings, and contracting parties are free to bargain for – and specify – the terms and conditions of their agreement. That freedom is indeed a constitutionally protected right. Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 252-53 (1906). Contracting parties are at liberty to address any issue they see fit, including the question of whether their agreement may be modified at all, and, if so, how. See, e.g., Atl. Beach Mgmt., Inc. v. Breakers of Fort Walton Beach Condos., Inc., 589 So. 2d 315, 316 (Fla. 1st DCA 1991). When contracting parties elect to adopt a term or condition, including one addressing the question of modification, it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document. See Pol v. Pol, 705 So. 2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract."); Int'l Expositions,

Inc. v. City of Miami Beach, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973) ("[C]ourts may not rewrite, alter, or add to the terms of a written agreement between the parties and may not substitute their judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain.").

A liquidated damages clause is generally enforceable in Florida when the damages that would result from a breach are uncertain at the time the contract is drawn; the amount stated as liquidated damages represents a reasonable forecast of just compensation for the harm caused should a breach occur and the language is clear that ***the parties intended*** to provide for liquidated damages and not a penalty. Hyman v Cohen, 73 So.2d 393 (Fla. 1954). There are no concrete rules as to whether a stipulated sum is a penalty or a valid liquidated damage provision and the courts will always determine the issue on a case-by-case basis, considering the particular facts involved. Multitech Corp. v. St. Johns Bluff Investment Corp., 518 So. 2d 427 (Fla.1st DCA 1988). A significant factor in the unconscionability equation "is the amount of money

being retained vis a vis the total contract price." Hooper v. Breneman, 417 So.2d 315, 317 (Fla. 5th DCA 1982).

Here, the trial court dismissed Appellant's liquidated damages provision as a matter of law without performing any factual inquiry as to the total amount of the liquidated damages as a percentage of the total contract price over the three (3) year span of the parties' Agreement to determine if this figure is within the range of liquidated damages approved by Florida courts. See Bloom v. Chandler, 530 So.2d 341 (Fla. 4th DCA 1988) (upholding a liquidated damages clause wherein the sellers retained a $49,500 deposit as liquidated damages on a contract for $225,000 or 22% of the purchase price); Beatty v. Flannery, 49 So.2d at 81-82 (holding that forfeiture of 10% of purchase price for buyer's breach of real estate sales contract was not unconscionable); Dade Nat'l Dev. Corp v. S.E. Investments, 471 So.2d 113, 116-17 (Fla. 4th DCA 1985) (upholding forfeiture of cancellation fees totaling 11.82% under two contracts); Johnson v. Wortzel, 517 So.2d 42, 43 (Fla. 3d DCA 1987) (approving forfeiture of 18.2% of contract price); compare McNorton v. Pan Am. Bank of Orlando, 387 So.2d 393, 397 (Fla. 5th DCA 1980) (holding that

"retention of 50% of the purchase price paid as a deposit by a vendee in default" was "sufficiently shocking" to state a cause of action). Compare Berndt v. Bieberstein, 465 So.2d 1264, 1266 (Fla. 2d DCA 1985) (disallowing as unconscionable liquidated damages of over 55% of the purchase price); Coleman v. Chamberlain Sons Inc, No. 5D99-3307 (Fla. 5th DCA 2000)(liquidated damages provision of two hundred (200%) percent of one year's gross revenue generated by a former employee is an unenforceable penalty). In Coleman, contrary to this case, the president of the former employer admitted that the purpose of the payment provision was to discourage former employees from taking customers and to penalize them if they did. Here, two commercial entities, with no suggestion of an imbalance of bargaining power between them, were free to fashion a transaction to include liquidated damages provision to address the possibility (that became reality) that a service contract is terminated and Defendant retains Plaintiff's employees with all of their training, knowledge and experience provided through Plaintiff's employment. The liquidated damages are intended to cover the cost or value of such provisions is uncertain and unascertainable, yet not excessive and not as a penalty.

Accordingly, the Court of Appeals should reverse the trial court order on the issue of liquidated damages and remand for further proceedings to determine if the amount of the liquidated damages is within the acceptable range.

III. The trial court erred when it granted Appellee's Motion for Summary Judgment dismissing Appellant's remaining Counts II- V determining that they were barred as double recovery.

The trial court erred in its December 7, 2023 Order on the parties competing Motions for Summary Motion for Final Summary Judgment on the remaining counts of Appellant's complaint. The trial court wrongfully assumed that judgment in favor of the Appellant is barred to prevent double recovery. The court's entire decision flows from its earlier decision on March 21, 2021 that "Defendant fully satisfied the sued upon outstanding balance for unpaid invoices through Defendant's tender, on March 1, 2021, under Count I of the Complaint" and that any "recovery" for Counts II (Account Stated), III (Open Account), and V (Unjust Enrichment) is the same as "recovery for the same Outstanding Balance that Defendant satisfied under Count I" and accordingly "barred under

Florida law, as any further award under these Counts would constitute an improper double recovery." The specter of "double recovery" does not prevent the Court from entering summary judgment on the independent counts and awarding the requested relief on multiple independent bases, but only ordering the recovery of a single liquidated figure.

Compensatory damages are designed to "make the injured party whole to the extent that it is possible to measure such injury in monetary terms." MCI Worldcom Network Servs., Inc. v. Mastec*, Inc.*, 995 So.2d 221, 223 (Fla. 2008). A plaintiff "is not entitled to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of the defendant." *Id.* Although a double recovery based on the same measure of damages is prohibited, here, Appellant's breach of contract elements and category for damages are separate and distinct from the elements and category of damages provided for in the worthless check statute.

By eliminating Appellant's entitlement to pursue viable damage claims at the summary judgment stage, the Court put the cart before the horse. There is no risk of windfall via double recovery

here because the breach of contract claim and the worthless check claim are not the same. See Sumner Group, Inc. v. M.C. Distributec, Inc., 949 So. 2d 1205, 1206 (Fla. 4th DCA 2007) where the appellate court reversed the denial of an award for plaintiff's attorney fees where the plaintiff prevailed on both its worthless check count and its breach of contract count. "Reversal for ***an award*** of attorney's fees ***is thus required of two independent bases***." The trial court confused the election of *remedies* doctrine and erred when it granted Appellee's Motion for Summary Judgment and dismissed Appellant's *cause of action* for breach of contract. See also Am. Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942, 944 (1908) ("Where the law affords several distinct, but not inconsistent, remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies.") Rodriguez ex rel. Rodriguez v. Yount, 623 So.2d 618, 619 (Fla. 4th DCA 1993)("a party may get more than one judgment, so long as there is only one recovery); Liddle v. A.F. Dozer, Inc., 777 So.2d 421, 422 (Fla. 4th DCA 2000)(The election of remedies doctrine is intended "to prevent double recoveries for a

single wrong." (citation omitted). Here, the claims rely on the same facts and the plaintiff seeks further relief consistent with the relief already given, the remedies are not inconsistent. See Klondike, Inc. v. Blair, 211 So.2d 41, 42–43 (Fla. 4th DCA 1968) (holding that unsatisfied judgment on note was not inconsistent with claim for foreclosure of mortgage securing it and was not an election).

IV. Appellant was entitled to compensation for (1) lost profits for the remainder of the contract term; (2) prejudgment interest on each invoice as of the date it became due; (3) payment or thirty days of services (whether furnished or not) following cancellation of the agreement; and (4) one-point-five percent (1.5%) in late charges levied by U.S. Security as of the date the Complaint in this action was filed.

A. Appellant is entitled to Prejudgment interest.

Prejudgment interest recognizes the time value of money and fairness - that a service provider should not be penalized for the delay in payment and the loss of its earned compensation placed into the un-agreed and uncompensated position of a creditor. Appellant's entitlement pursuant to the Agreement of an award prejudgment interest should have not been negated by Appellee's March 2021 Section 68.065(6) "tender".

The trial court justified its ruling on the grounds that Appellee met the prerequisites to satisfy Appellant's Count I Worthless Check with the submission of its pretrial disposition section 68.065(6) tender. As the Court reasoned incorrectly, prejudgment interest was not a form of compensation due to the payee under Sec. 68.065, Florida Statutes, Appellant was not entitled to recover prejudgment

interest on its breach of contract count. As discussed previously in Section I of this Brief, Section 68.065(3)(b) allows an award of interest. See e.g. Alvarez v. Alvarez, 800 So. 2d 280 (Fla. 3rd DCA 2001)(affirming trial court's award of the amount of a worthless check, treble damages, prejudgment interest and attorney fees pursuant to F.S. 68.065). Prevailing on a worthless check claim does not prevent a litigant from prevailing on an independent breach of contract claim for similar damages. In Sumner Group, Inc. v. M.C. Distributec, Inc., 949 So.2d 1205 (Fla. 4th DCA 2007) the plaintiff sued its customer for passing a worthless check and for breach of the written sales contract containing an attorney fee provision for the same amount. While the plaintiff prevailed on both counts the trial court denied an attorney fee award. The Court of Appeals stated "[the plaintiff] prevailed on its worthless check claim under Fla. Stat. § 68.065 … an award of attorney's fees was mandatory. The written contract provided for an award of attorney's fees incurred in collection of the debt. The trial court thus had no discretion to deny the award of contractual attorney's fees. ***Reversal for an award*** of attorney's fees is thus ***required on two independent bases***." Id. at 1206 (citations omitted).

Prejudgment interest is meant to compensate the prevailing party for the loss of use of money from the date the plaintiff's loss is determined that he is entitled to a sum of money to the time when final judgment is entered. See Kissimmee Util. Auth. v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988). "[P]rejudgment interest is allowed in Florida for actions based on contract from the date the debt is due." Lumbermens Mut. Cas. Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995)(citation omitted). When losses occur on separate dates prejudgment interest should be calculated from the date each is due. Metro. Dade County v. Bouterse, Perez & Fabregas Architects Planners, Inc., 463 So.2d 526, 527 (Fla. 3d DCA 1985) (court should have awarded prejudgment interest from the date of each invoice). These questions of timing and amount of prejudgment interest are questions of fact for trial, not summary judgment. Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985) ("[T]he finder of fact, whether judge or jury, has to decide both entitlement to and amount of prejudgment interest."); Wood v. Unknown, 56 So. 3d 74 (Fla. 2d DCA 2011) (remanding further proceedings because the resolution of the appeal requires factual determinations as to exact date payment was due on invoice for services rendered).

Here, the first invoice that Appellee defaulted on was due November 18, 2018, establishing that date as the breach of the Service Agreement. The subsequent twenty-five (25) invoices went unpaid from late November 2018 through November 2019.

The trial court erred when it found as a matter of law that Appellant was not entitled to prejudgment interest in connection with Count IV (Breach of Contract). By ignoring the late fee provision and permitting Appellant to meet its obligations years after falling delinquent, the trial court has impermissibly rewritten the Agreement to Appellant's detriment. See Olsen v. Hirschberg, 145 So. 2d 303, 305 (Fla. 2d DCA 1962) ("we are restricted in our consideration to the parties' intention as expressed in the [contract].)

B. Plaintiff is entitled to lost profits under Count IV.

It is undisputed that Appellee stopped using Appellant's personnel for its security needs in November 2019. Nevertheless, pursuant to the terms of the Agreement, Appellant was entitled to lost profits for the remaining six (6) months until the expiration of the Agreement. A modification to a legally enforceable agreement, to

the extent it would constitute an avoidance of all or part of a defendant's liability under the agreement, is an affirmative defense that must be pled and proven by the defendant. BSP/Port Orange, LLC v. Water Mill Props., Inc., 969 So. 2d 1077, 1078 (Fla. 5th DCA 2007) (holding that an alleged modification to an agreement was an affirmative defense that had to be pled). F.M.W. Props., Inc. v. Peoples First Fin. Sav. & Loan Ass'n, 606 So. 2d 372, 378 (Fla. 1st DCA 1992) (Ervin, J., specially concurring) (collecting cases from other jurisdictions that modification is an affirmative defense).

Further, "[i]t is well established that the parties to a contract can discharge or modify the contract, however made or evidenced, through a subsequent agreement. **Whether the parties have validly modified a contract is usually a question of fact**. Under Florida law, the parties' subsequent conduct also can modify the terms in a contract. We note however, that a party cannot modify a contract unilaterally. All the parties whose rights or responsibilities the modification affects must consent." St. Joe Corporation v. McIver, 875 So.2d 375, 381-82 (Fla. 2004)(internal citations omitted). Parties can discharge or modify portions of a written contract between them, whether such a modification is valid is a question of fact. Id. at 382.

See also Rotemi Realty, Inc. v. Act Realty Co., Inc., 911 So. 2d 1181 (Fla. 2005). "A written contract can be modified by a subsequent oral agreement between the parties or by the parties' course of dealing" and that ***whether a contract has been modified is a question of fact for the jury.*** (emphasis supplied). Kiwanis Club of Little Havana, Inc. v. de Kalafe, 723 So. 2d 838, 841 (Fla. 3d DCA 1998), See S. Fla. Beverage Corp. v. Figueredo, 409 So. 2d 490, 495-96 (Fla. 3d DCA 1981)(several factors guide the analysis: (1) individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another; (2) any inconsistency should be resolved by determining how the parties performed; and (3) the purpose of the amendment evidences that the contract was changed from what the parties ***believed and intended*** was provided before); see also H.I. Resorts, Inc. v. Touchton, 337 So.2d 854, 856 (Fla. 2d DCA 1976)(The parol evidence rule does not bar the introduction of evidence of a subsequent oral contract modifying a written agreement). See e.g. Olsen v. First Team Ford, Ltd, 359 So. 3d 873 (Fla. 5th DCA 2023)(holding under new summary judgment standard ""intent is a question of fact that should not be decided on a summary judgment" and reversing granting summary judgment for remand to determine

if the plaintiff intended to enter into a subsequent car rental agreement.). The issue of the parties' intent to modify the Agreement or enter into a new agreement is a question of fact that should be determined at trial, not by summary judgment.

Appellee did allege as its fifth affirmative defense that the Agreement was modified, however, the allegation was conclusory and it did not allege any facts. It did not specify how the Agreement was modified or in what way and failed to put Appellant on notice that it was seeking to avoid. In its summary judgment motion, Appellee alleged that only one term changed – the requirement of advanced payment replaced its prior obligation to pay each invoice within thirty (30) days of receipt. Appellee did not present any other argument that any other term was altered. In response, Appellant submitted facts that Appellee accepted to the modification when it paid advanced fees. Pursuant to the summary judgment standard, Appellant as the non-moving party where the court is to make all reasonable inferences in favor of the non-moving party, a jury could reasonably find in favor of Appellant that the Agreement was modified, not discharged. Appellant was not required to plead a modification of the Agreement to recover its lost profit damages or anticipate Appellee's

modification theory. See Hammonds v. Buckeye Cellulose Corp., 285 So. 2d 7 (Fla. 1973) (complaint need not anticipate affirmative defenses). Appellant's attachment of the Agreement to its Complaint was sufficient to state both a cause of action for breach of contract and its claim for lost profits.

The trial court erred in granting Summary Judgment for the Appellee. The Court appeals should reverse the December 2023 order of summary judgment and remand for further proceedings.

V. The Court of Appeals should reverse the trial court's March 30, 2024 order granting Appellee's Motion for Attorney's Fees.

The Court of Appeals should reverse the order granting Appellee entitlement to attorney fees because it was not the prevailing party. See prior analysis above. Appellant recovered the amount of its worthless check and other fees and charges through Appellee's pretrial disposition tender. Section 68.065.

CONCLUSION

The trial court erred in every summary judgment ruling that it entered in this case. Appellee was the bad actor here, not paying its bills and passing a $129,000 bad check and not making good on any

of it for two years. Appellant should be the prevailing party as it recovered the amount of the $129,000 worthless check, the most significant issue in this matter.

The Court of Appeals should reverse and remand for further proceedings on all of the trial court summary judgment orders and the order granting Appellee's Motion for Entitlement to Attorney's Fees, and further provide special instruction to the trial court to grant summary judgment in favor of Appellant regarding its May 14, 2021 order award Appellant the amount of the worthless check, treble damages, prejudgment interest, and its attorney fees and collection costs up to the point of Appellee's tender.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by the Florida Courts E-Filing Portal via to: **David Rosenblatt, Esq.** **service@stoklaw.com**, drosenblatt@stoklaw.com and **Yosef Kudan, Esq.** ykudan@stoklaw.com One East Broward Blvd., Ste. 915 Fort Lauderdale, Florida 33180 on this 24th day of June, 2024.

By: /s/ Michael P. Reitzell

CERTIFICATE OF TYPEFACE COMPLIANCE

The typeface font used in the body of this document is Bookman Old Style 14 which complies with Florida Rule of Appellate Procedure 9.210(a)(2).

By: /s/ Michael P. Reitzell
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