

**FLORIDA DISTRICT COURT OF APPEAL
THIRD DISTRICT
CASE NUMBER: 3D23-953**

Lower Tribunal Number: 2021-CA-3280-01
The Honorable Thomas J. Rebull

MARTH SUAREZ IZQUIERDO,

Appellant

v.

PRESIDENTE SUPERMARKET No. 27, INC., *et.als.*

Appellee.

**ON FINAL APPEAL FROM
THE FLORIDA CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT**

**ANSWER BRIEF OF APPELLEE
PRESIDENTE SUPERMARKET No. 27, INC.**

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
ISSUE ON APPEAL	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	
I. TRIAL COURT DID NOT ERR IN FINDING THAT PRESIDENTE SUPERMARKET COULD NOT BE HELD VICARIOUSLY LIABLE FOR MR. MARTINEZ' NEGLIGENCE IN RESPONDEAT SUPERIOR.	6
A. Standard of Review	6
B. Summary Judgment Generally.	5
C. Summary Judgment is Proper Because Ms. Izquierdo Failed to Provide the Court Facts From Which a Jury Could Reasonably Find that Presidente Supermarket Had the Right and Ability to Direct and Control the Pertinent Acts of Julio Martinez	7
D. Shopping Cart Sharing is a Red Herring.	13
E. The Record Does Not Support Ms. Izquierdo's Shared Employee Argument	14
F. Tropical Supermarket and Presidente Supermarket Are Separate, Distinct Corporate Entities	17

TABLE OF CONTENTS
(continued)

	Page
G. The Burden of Proof Lies with Ms. Izquierdo	17
CONCLUSION.....	18
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF SERVICE	19

TABLE OF CITATIONS

Cases	Page(s)
<i>Frantin v. MVS Media Grp., LLC</i> , 48 Fla. L. Weekly D2186 (Fla. 3d DCA November 15, 2023)	12,14,16
<i>Harper ex rel. Daley v. Toler</i> , 884 So. 2d 1124 (Fla. 2d DCA 2004)	18
<i>Leon Shaffer Golnick Adver. v. Cedar</i> , 423 So. 2d 1015 (Fla. 4th DCA 1982).....	12,16
<i>Patient Depo, LLC v. Acadia Enterprises</i> , 360 So. 3d 399 (Fla. 4th DCA 2023).....	7,9,17,18
<i>Postal Tel. & Cable Co. v. Doyle</i> , 167 So. 358 (Fla. 1936).....	14
<i>Riverwood Condo. Ass'n v. Litecrete, Inc.</i> , 69 So. 3d 983 (Fla. 3d DCA 2011).....	6
<i>Vasquez v. United Enters. of Sw. Fla.</i> , 811 So. 2d 759 (Fla. 3d DCA 2002).....	<i>passim</i>
<i>Wilson-Greene v. City of Miami</i> , 208 So. 3d 1271 (Fla. 3d DCA 2017)	16
Rules	
Fla. R. Civ. P. 1.510 (c)(1)(B)	6,17

PRELIMINARY STATEMENT

Appellant, Martha Suarez Izquierdo, will be referred to as Ms. Izquierdo. Appellee, Presidente Supermarket No. 27, Inc., will be referred as Presidente Supermarket. Citations to the record on appeal are designated [R. #]. Except where noted, all *emphasis* is ours.

STATEMENT OF THE CASE AND FACTS

Statement of the Case.

Ms. Izquierdo was injured in an auto accident with a van. [R. 503, ¶ 10]. She sued the van's owners, Cuba Tropical, Inc. and Pedro Osamy Rodriguez, [R. 503, ¶ 1; 504, ¶ 16; 506, ¶ 23], the van's driver, Julio Martinez, [R. 503, ¶ 11], and the driver's employer Tropical Supermarket, No. 12, d/b/a Presidente Supermarket No. 14 ("Tropical Supermarket"). [R. 503, ¶ 1; 504, ¶ 14; 506, L. 32]. Ms. Izquierdo later dismissed Julio Martinez. [R. 578].

Ms. Izquierdo also sued Presidente Supermarket No. 27, seeking to hold it vicariously liable for the negligence of Julio Martinez in respondeat superior. [R. 509]. Ms. Izquierdo did not allege that Presidente Supermarket was actively negligent or directly liable for her injuries. [R. 509].

The trial court entered final summary judgment finding “there is no genuine issue of material fact that that Julio Martinez was not an employee or agent of PRESIDENTE SUPERMARKET NO. 27, INC., and that there is no evidence that PRESIDENTE SUPERMARKET NO. 27, INC., exercised, or even had the right to exercise, control over Julio Martinez, which is the primary essential element in determining whether a person is an employee or agent of another.” [R. 940, ¶ 2].

From that judgment, Ms. Izquierdo timely appealed, [R. 898].

Statement of the Facts.

There are 30 or more sequentially numbered companies doing business as Presidente Supermarket, No. __. [R. 962, L. 21-24]. Each is a separate, distinct corporation, [R. 964, L. 2], that functions on its own, [R. 965, L. 10-15], with its own payroll and employees. [R. 965, L. 10-15]. Presidente Supermarket No. 27 is a defendant in this lawsuit. [R. 509].

Tropical Supermarket No. 12 (“Tropical Supermarket”) is a Florida corporation operating a grocery store under the fictitious name of Presidente Supermarket No. 14. [R. 1021, L. 2-10]. Tropical Supermarket No. 12, d/b/a Presidente Supermarket No. 14, is a defendant in this lawsuit. [R. 508].

The van driver, Julio Martinez, was employed by Tropical Supermarket. [R. 104; 1040, L. 8-9; 1037, L. 9-12]. His job was to retrieve shopping carts from the surrounding neighborhood and return them to the store. [R. 1038, L. 21-24].

Cuba Tropical, Inc., a separate, distinct corporate entity, [R. 1020, L. 7-9], is a wholesale grocery distributor. [R. 964, L. 3-15; 965, L. 12-15; 1019, L. 22-24].

Defendants Cuba Tropical and Pedro Osamy Rodriguez (collectively “Cuba Tropical”) owned the van Julio Martinez was driving at the time of the accident. [R. 1033, L. 14-18]. Cuba Tropical owns several vans which it lends to customers, [R. 1043, L. 3-7], and it was not unusual for Cuba Tropical’s vans to be transferred between grocery stores. [R. 1043, L. 22-24; 1055, L. 4-6]. The van Julio Martinez was driving at the time of the accident was transferred from Presidente Supermarket to Tropical Supermarket on the morning of the accident. [R. 1044, L. 22-25, 1045, L. 1-7].

The Shopping Carts.

Cuba Tropical’s corporate representative testified that shopping carts owned by its customers “. . . could be -- those shopping carts could be transferred to other stores . . . [i]t depends on the necessity

that the store has.” [R. 1039, L. 15-18]. Cuba Tropical did not say who owned what shopping carts or when, where, or how the carts were transferred between its customers. [R.].

The Motion for Summary Judgment.

Ms. Izquierdo sued Presidente Supermarket No. 27 alleging that it was vicariously liable for the negligence of Julio Martinez under a theory of respondeat superior. [R. 507]. Presidente Supermarket denied all relevant allegations. [R. 527-28]. Presidente Supermarket moved to for final summary judgment arguing that Ms. Izquierdo could not prevail because there was no evidence that Julio Martinez was its employee or agent. [R. 717, 723, ¶ 1].

The trial court entered final summary judgment against Ms. Izquierdo, finding that “there is no genuine issue of material fact that that Julio Martinez was not an employee or agent of PRESIDENTE SUPERMARKET NO. 27, INC., and that there is no evidence that PRESIDENTE SUPERMARKET NO. 27, INC., exercised, or even had the right to exercise, control over Julio Martinez, which is the primary essential element in determining whether a person is an employee or agent of another.” [R. 940, ¶ 2].

From that judgment, Ms. Izquierdo timely appealed. [R. 898].

ISSUE ON APPEAL

- I. WHETHER TRIAL COURT ERRED IN FINDING THAT PRESIDENTE SUPERMARKET COULD NOT BE HELD VICARIOUSLY LIABLE FOR MR. MARTINEZ' NEGLIGENCE IN RESPONDEAT SUPERIOR?**

SUMMARY OF THE ARGUMENT

- I. TRIAL COURT DID NOT ERR IN FINDING THAT PRESIDENTE SUPERMARKET COULD NOT BE HELD VICARIOUSLY LIABLE FOR MR. MARTINEZ' NEGLIGENCE IN RESPONDEAT SUPERIOR.**

Ms. Izquierdo's seeks to hold Presidente Supermarket vicariously liable for the negligence of Julio Martinez in respondeat superior. To avoid summary judgment Ms. Izquierdo, the party with the burden of proof at trial, was called upon to provide the court with facts from which a jury could reasonably find that Presidente Supermarket had the right and ability to control the pertinent acts of Julio Martinez.

Final summary judgment is proper in this case because the moving party, Presidente Supermarket, has shown that there is an absence of evidence supporting Ms. Izquierdo's vicarious liability claim based on respondeat superior.

ARGUMENT

I. TRIAL COURT DID NOT ERR IN FINDING THAT PRESIDENTE SUPERMARKET COULD NOT BE HELD VICARIOUSLY LIABLE FOR MR. MARTINEZ' NEGLIGENCE IN RESPONDEAT SUPERIOR.

A. Standard of Review.

“Our standard in reviewing an order granting summary judgment is de novo.” *Riverwood Condo. Ass'n v. Litecrete, Inc.*, 69 So. 3d 983 (Fla. 3d DCA 2011).

B. Summary Judgment Generally.

To prevail on summary judgment, the moving party must show that the “adverse party cannot produce admissible evidence” satisfying their burden of proof at trial. Fla. R. Civ. P. 1.510 (c)(1)(B).

Florida’s summary judgment rule follows “federal summary judgment standard,” and “[u]nder the adopted federal standard, a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant’s case.” *Patient Depo, LLC v. Acadia Enterprises*, 360 So. 3d 399, 406 (Fla. 4th DCA 2023) (Warner, J.). (internal citation and quotation omitted). Moreover, “there is no express or implied requirement . . . that the moving party support its motion with affidavits or other similar

materials negating the opponent's claim.” *Id.* “Rather, the burden on the moving party may be discharged by ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

C. Summary Judgment is Proper Because Ms. Izquierdo Failed to Provide the Court Facts From Which a Jury Could Reasonably Find that Presidente Supermarket Had the Right and Ability to Direct and Control the Pertinent Acts of Julio Martinez.

In *Vasquez v. United Enters. of Sw. Fla.*, 811 So. 2d 759 (Fla. 3d DCA 2002), plaintiff was injured in an auto accident with a restaurant employee who was acting in the course and scope of his employment. *Id.*, at 760. The employee was formally employed by an employee leasing company, but the employee leasing company did not exercise any control over the employee in carrying out his duties. *Id.* The restaurant owner testified that he controlled all aspects of his business, including what his employees did. *Id.*, at 761. The employee leasing company’s motion for summary judgment was denied, the case went to trial and, after the jury found in favor of the leasing company, plaintiff appealed. *Id.*

On appeal, the *Vasquez* Court found that “[t]he liability of the master to answer for the conduct of his servant [in case of injury done

by the servant while in the exercise of his employment] * * * is founded on the superintendence and control which the master is supposed to exercise over his servant.” *Id.*, at 761 (internal citation and quotation omitted). The court also found that “[i]t is a fundamental rule that the respondeat superior doctrine applies only when the alleged master has the ability and authority to direct and control the pertinent acts of the employee.” *Vasquez*, 811 So. 2d at 760.

Applying its findings to the case at hand, the *Vasquez* Court affirmed, holding that “[a]bsent control, there is no vicarious liability for the act of another, even for an employee . . . Florida courts do not use the label ‘employer’ to impose strict liability under a theory of respondeat superior but instead look to the employer’s control or right of control over the employee at the time of the negligent act” in determining whether one should be held liable for the acts of another. *Vasquez*, 811 So. 2d at 761.

Ms. Izquierdo does not seek to hold Presidente Supermarket liable under a theory of dangerous instrumentality, negligent entrustment, negligent hiring, negligent retention, or any other active negligence or direct liability theory. Nor does she allege that Tropical

Supermarket is the alter ego of President Supermarket, and that justice requires that the corporate veil be pierced. Ms. Izquierdo seeks to hold Presidente Supermarket vicariously liable for the negligence of Julio Martinez under the doctrine of respondeat superior. To avoid summary judgment, Ms. Izquierdo was called upon to show the court that there are facts from which a reasonable jury could find, *Patient Depo*, 360 So. 3d at 406, that President Supermarket had “the ability and authority to direct and control the pertinent acts of [Julio Martinez].” *Vasquez*, 811 So. 2d at 760.

There is nothing in the record showing, or tending to show, that President Supermarket had “the ability and authority to direct and control the pertinent acts of [Julio Martinez].” Nothing. In fact, the opposite is true; it is undisputed that at the time of the accident Julio Jimenez was employed by Tropical Supermarket and that Julio Jimenez was doing what he was hired and paid by Tropical Supermarket to do – retrieving shopping carts from the surrounding neighborhood and returning them to the store.

Final summary judgment is proper in this case because Presidente Supermarket, the moving party, has shown that “there is

an absence of evidence to support [Ms. Izquierdo's] case.” *Vasquez, supra*. Accordingly, the judgment on appeal must be affirmed.

Julio Martinez Was Not Presidente Supermarket's Agent.

While Ms. Izquierdo properly identifies the elements of a claim for agency, *i.e.*, acknowledgment by the principal that the agent will act for him, the agents, acceptance of the undertaking, and control by the principal over the actions of the agent; the record, created by Ms. Izquierdo in support of her claim, does not support a finding that at the time of the accident Julio Martinez was acting as Presidente Supermarket's agent.

Ms. Izquierdo did not depose Presidente Supermarket. Ms. Izquierdo did not depose Julio Martinez. Ms. Izquierdo did not depose Tropical Supermarket. Since she did not; there is nothing in the record showing or tending to show that Presidente Supermarket acknowledged that Julio Martinez was acting on its behalf, or that Julio Martinez agreed to act on behalf of Presidente Supermarket, or that President Supermarket controlled the means and methods by which Julio Martinez carried out his employment duties for Tropical Supermarket.

Final summary judgment is proper in this case because Presidente Supermarket, the moving party, has shown that “there is an absence of evidence to support [Ms. Izquierdo’s] case.” *Vasquez, supra*. Accordingly, the judgment on appeal must be affirmed.

No Right to Order Julio Martinez to Bring the Van Back.

To show control, Ms. Izquierdo argues that Presidente Supermarket “had control over the van Julio Martinez was driving . . . [because Presidente Supermarket] could contact him to say it needed the van back and he would have to do it.” *Initial Brief* at page 15, L. 1-3. The facts do not support this argument.

There is nothing in the record showing, or tending to show, that Presidente Supermarket had the right or authority to order Julio Martinez to do anything. And no one –not Presidente Supermarket, not Julio Martinez, not Tropical Supermarket, not the owner of the van– has ever said that Presidente Supermarket had the right or authority to order Julio Martinez to return the van. No one.¹

¹ Cuba Tropical, the owner of the van, said that it lends vans to its grocery store customers, [R. 1043, L. 3-7], that it was normal for the vans to be transferred from customer to customer as needed, [R. 1043, L. 22-24; 1055, L. 4-6], and if one store needed a van located at another store, the store manager in need would call the other store

Ms. Izquierdo's argument is just that, argument, and "[i]t is black letter law that argument of counsel does not constitute evidence." *Frantin v. MVS Media Grp., LLC*, 48 Fla. L. Weekly D2186 (Fla. 3d DCA November 15, 2023). It is also black letter law that argument of counsel may not be considered or relied upon by the trial court or the appeal court in reaching its decision. *Leon Shaffer Golnick Adver. v. Cedar*, 423 So. 2d 1015, 1016-1017 (Fla. 4th DCA 1982) ("[T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.").

manager and request that the van be transferred. [R. 1043, L. 10-16; 1045, L. 1-4].

Final summary judgment is proper in this case because Presidente Supermarket, the moving party, has shown that “there is an absence of evidence to support [Ms. Izquierdo’s] case.” *Vasquez, supra*. Accordingly, the judgment on appeal must be affirmed.

E. Shopping Cart Sharing is a Red Herring.

At deposition, Cuba Tropical’s corporate representative said, in passing, that “[t]he shopping carts wouldn’t be specifically for that store . . . shopping carts could be transferred to other stores . . . [i]t depends on the necessity that the store has.” [R. 1039, L. 15-18].

Cuba Tropical’s statement does not establish that on the day of the accident Presidente Supermarket acknowledged that Julio Martinez was acting for it in collecting shopping carts; or that Julio Martinez, in collecting shopping carts, agreed to act for Presidente Supermarket; or that Presidente Supermarket controlled the means and methods by which Julio Martinez carried out his employment duties with Tropical Supermarket. It merely shows, without more, that the companies were transferring shopping carts amongst themselves.

Final summary judgment is proper in this case because Presidente Supermarket, the moving party, has shown that “there is

an absence of evidence to support [Ms. Izquierdo's] case.” *Vasquez, supra*. Accordingly, the judgment on appeal must be affirmed.

E. The Record Does Not Support Ms. Izquierdo's Shared Employee Argument.

Citing *Postal Tel. & Cable Co. v. Doyle*, 167 So. 358, 360 (Fla. 1936), Ms. Izquierdo argues that whether Presidente Supermarket and Tropical Supermarket shared control over Julio Martinez at the time of the accident is a question for the jury. In support of this, Ms. Izquierdo baldly states that “the shopping carts [Julio Martinez] collected were used by all area Presidente stores, not just Presidente 14.” *Initial Brief* at page 6, ¶ 2; that “the shopping carts which littered the Hialeah neighborhood where both Presidente 14 and Presidente No. 27 were located needed to be collected,” and that “Julio Martinez [sic] had no van . . . Presidente No. 27, on the other hand, had a van but no employee to drive it because the usual driver had the day off . . . [and, thus,] [i]t was a classic instance of two related companies sharing employees and resources to accomplish a common goal.” *Initial Brief* at page 14, ¶ 1. As we will show, the facts do not support Ms. argument.

There is nothing in the record showing that Presidente Supermarket needed its shopping carts collected on the day of the accident, nor is there evidence that Tropical Supermarket and Presidente Supermarket are in the same neighborhood.² In fact, the record shows that Presidente Supermarket did not need the van on the day of the accident, and that it transferred the van to Tropical Supermarket so that Julio Martinez could do his work. [R. 1041, L. 5-12]. Further, no one –not Tropical Supermarket, not Julio Martinez, not Presidente Supermarket– said that the “shopping carts [Julio Martinez] collected [on the day of the accident] were used by all area Presidente Stores.” Truth is, there is no evidence showing who owned what carts or when, where or how the shopping carts were transferred amongst the various companies; much less that the transfer of grocery carts between the various companies is tied to the collection of the shopping carts – Ms. Izquierdo merely speculates that it is. Finally, even if Ms. Izquierdo’s arguments are true, which

² At hearing, Ms. Izquierdo argued that Tropical Supermarket and Presidente Supermarket were located on West 29 Street, 8/10ths of a mile apart, [R. 918, L. 2-4], and the trial properly ignore that argument. *Frantin, supra.* (“[I]t is black letter law that argument of counsel does not constitute evidence.”).

they are not, a jury would have to rely upon an improper stacking of inferences to arrive at the conclusion that on the day of the accident Presidente Supermarket had the ability and authority to direct and control the pertinent acts of Julio Martinez. *See and compare Wilson-Greene v. City of Miami*, 208 So. 3d 1271, 1275 (Fla. 3d DCA 2017) (“Although it is true that a non-moving party to a summary judgment motion may set forth a genuine issue of material fact through justifiable inferences from facts presented to the trial court the [improper] stacking of inferences is not permitted.”) (internal citation and quotation omitted).

Ms. Izquierdo’s store location / shopping cart argument is just that, argument, and “[i]t is black letter law that argument of counsel does not constitute evidence.” *Frantin, supra*. It is also black letter law that argument of counsel may not be relied upon by the trial court or the appellate in reaching its decision. *Cedar*, 423 So. 2d at 1016-1017 (“[T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts . . . [t]rial judges cannot rely upon these unsworn statements as the basis for making factual

determinations; and this court cannot so consider them on review of the record.”).

E. Tropical Supermarket and Presidente Supermarket Are Separate, Distinct Corporate Entities.

Tropical Supermarket No. 12 d/b/a Presidente Supermarket No. 14 and Presidente Supermarket No. 27 are separate, distinct corporate entities. Referring to Tropical Supermarket by its fictitious name, *i.e.*, Presidente Supermarket No. 14, and referring to Tropical Supermarket and Presidente Supermarket indiscriminately as Presidente Supermarket, or as The Presidente Supermarket Group, or as plain ol’ Presidente, does not make these companies one-in-the-same – it just confuses things.

F. The Burden of Proof Lies with Ms. Izquierdo.

Citing *Harper ex rel. Daley v. Toler*, 884 So. 2d 1124 (Fla. 2d DCA 2004), which was decided 20 years ago under the old summary judgment rule, Ms. Izquierdo argues that “[i]n the motion filed by Presidente No. 27, there was no attempt to prove Presidente No. 27 had no right to control the actions of Julio Martinez.” *Initial Brief* at page 12, ¶ 1. Presidente Supermarket respectfully disagrees with Ms. Izquierdo’s burden of proof analysis.

To prevail on summary judgment, the moving party must show that the “adverse party cannot produce admissible evidence” satisfying their burden of proof at trial. Fla. R. Civ. P. 1.510 (c)(1)(B).

Florida’s summary judgment rule follows “federal summary judgment standard,” and “[u]nder the adopted federal standard, a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant’s case,” and “there is no express or implied requirement . . . that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.” *Patient Depo*, 360 So. 3d at 406 (internal citation and quotation omitted). “Rather, the burden on the moving party may be discharged by ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

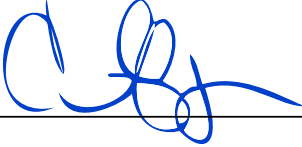
Contrary to Ms. Izquierdo’s argument, it was not Presidente Supermarket’s obligation to prove that it “had no right to control the actions of Julio Martinez,” *Initial Brief* at page 12, ¶ 1; Presidente Supermarket had the burden of showing “that there is an absence of evidence to support [Ms. Izquierdo’s] case.” *Patient Depo*, 360 So. 3d at 406. Which it did.

CONCLUSION

For the forgoing reasons the judgment on review must be affirmed.

CERTIFICATE OF COMPLIANCE


I hereby certify that the font utilized in this brief is Bookman Old Style, the type size is 14-point, and the word count is 3,536.

By:  _____

CERTIFICATE OF SERVICE

WE CERTIFY that in accordance with Rule 2.516 of the Florida Rules of Judicial Administration, a true and correct copy of the foregoing was filed with the Clerk of Court and served via email through the Florida Courts e-Filing Portal on all counsel of record to wit: **Bard D. Rockenbach, Esq.**, Burlington & Rockenbach, P.A., *Counsel for Appellant*, 1601 Forum Place, Suite 600 , West Palm Beach, FL 33401, bdr@FLAppellateLaw.com, fa@FLAppellateLaw.com, **Carlos Santisteban Jr., Esq.**, Carlos Santisteban, P.A., *Counsel for Appellant*, 6080 Bird Road, Suite 9, Miami, FL 33155, carlos@csjrlaw.com, eservice@csjrlaw.com: on **January 3, 2023**.

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