IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D22–1530

RAVNEET CHOWDHURY, Individually and as Personal Representative of the Estate of Anand Chowdhury,

Appellant,

v.

MIDLAND NATIONAL LIFE INSURANCE COMPANY, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

ON APPEAL FROM A FINAL SUMMARY JUDGMENT ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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SUMMARY OF REPLY

Midland National Life Insurance Company ("Midland") spends most of its time in its Answer Brief discussing and proving elements of its defenses that went unchallenged by Mrs. Chowdhury on appeal. *See* Answer Brief of Appellee ("AB") at 30–33. By comparison, Midland spends very little time addressing Mrs. Chowdhury's principal argument: namely, that Midland waived and should be estopped from invalidating Mr. Chowdhury's insurance benefits by conveniently abandoning its "clean-sheeting" practice after those benefits vested. There's a reason Midland prefers not to talk about it.

Midland offers just two reasons to discount Mrs. Chowdhury's primary argument, both are belied by the record and summary judgment standard.

First, Midland asserts that there's only "conclusory" evidence of its clean-sheeting practice. AB at 42. Not so. Mrs. Chowdhury provided expert testimony from a witness who reviewed the documents and opined — without any opposition from a *Midland* witness — that the "clean-sheeting" occurred. More to that point, the record itself shows that Midland allowed Mr. Chowdhury to mark his forms "clean" (that is, represent he was in good health) in favor of obtaining and conducting a review of his medical records. Midland continued with the application process anyway, despite the variance between Mr. Chowdhury's representations and his medical records. And on

summary judgment, that's sufficient evidence to trigger the factual issue of waiver and the legal application of estoppel.

Second, Midland claims that the theory "simply makes no sense" because it would have required Midland to request medical records from "every doctor, clinic, and hospital in the State of Florida" to uncover Mr. Chowdhury's March 20th health problems. AB at 45. If that's a problem for Midland, then it was a problem of its own making. That's the route that Midland — not Mr. Chowdhury — chose when it permitted an applicant to "clean-sheet" several forms during the application process. The underlying rationale estopping Midland from complaining otherwise is that the fault should not lie with the insured, Mr. Chowdhury, because it was Midland that permitted the practice in the first place.

Allowing Midland to get away with this type of practice builds rescission into every policy Midland issues. Midland allows its insureds to "clean-sheet" an application, knowing that sheet to be inaccurate. When the time comes, Midland will always have the ability to pull the "*gotcha*" card by claiming those applications to be inaccurate all the while knowing — and encouraging — that practice in the first place.

For this primary reason, reversal remains warranted.

STANDARD OF REVIEW.

The parties agree that the operative standard of review is de novo. Initial Brief of Appellant ("IB") at 24 *with* AB at 16–17.

With respect to the new summary judgment standard, Midland offers that the Florida Supreme Court's "admonition" in *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72 (Fla. 2021), that "incredible" and "trivial" evidence can no longer maintain an issue of fact, "applies with particular force here." AB at 17. Though Midland never explains why. Indeed, no view of the evidence presented by Mrs. Chowdhury can conclude that this is the type of evidentiary presentation diminished by the adoption of the federal summary judgment standard.

Mrs. Chowdhury presented testimony from two experts who reviewed all the necessary documents in this case, and then applied their expertise to those facts. CR:2741 (Dr. Paul Genecin); CR:2749 (Vera Dolan).[1] And Midland never challenged the credibility or reliability of these experts. Which is to say, the new standard was adopted to do away with paper issues that stood in the way of summary judgment; this is a case where expert testimony conflicts, and inappropriate for summary judgment under the new standard.

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[1] Record reference abbreviations used in this brief conform to those designated in the Initial Brief of Appellant. *See* IB at vii.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF MIDLAND BASED ON MR. CHOWDHURY'S REPRESENTATIONS ON THE STATEMENT OF HEALTH FORM.

A. The Record Evidence Demonstrates that Midland Did Not Rely on Any of Mr. Chowdhury's Representations During the Application Process.

Midland does not deny that an insurance company can waive its ability to invoke forfeiture of a policy where it expressly does not rely on the representations made by its insured. *See* AB 47–50. If Midland permitted Mr. Chowdhury to "clean-sheet"[2] applications, then it clearly did not rely on Mr. Chowdhury's representations. Midland asked Mr. Chowdhury to sign the Statement of Health From as part of the same application process wherein — as the expert evidence shows — Midland allowed Mr. Chowdhury to "clean-sheet." That means the issue of estoppel should go to a jury to determine whether Midland should be estopped from denying vested insurance benefits by selectively enforcing its application protocols.

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[2] Midland makes some fuss about how the term "clean-sheeting" is colloquially used in other cases. *See* AB at 44–45. While the term may be used in situations where an insured attempts to defraud its insurer, here the term is clearly used to imply that Midland *knew* about the practice and *requested* the practice be employed. Which is to say, how the term is used in other cases is inconsequential to the situation here.

Midland offers only two reasons why that should not be the case. First, Midland asserts that there's only "conclusory" evidence of its clean-sheeting practice. AB at 42. Second, Midland claims that it "simply makes no sense" because it would have required Midland to request medical records from "every doctor, clinic, and hospital in the State of Florida" to uncover Mr. Chowdhury's March 20th health problems. AB at 45. Neither reason stands in the way of reversing the trial court's Final Summary Judgment.

MRS. CHOWDHURY'S EVIDENCE WAS NOT CONCLUSORY

Mrs. Chowdhury provided expert testimony from a witness who reviewed the documents and opined — by providing the underlying data she reviewed and without any opposition from a *Midland* witness — that the "clean-sheeting" occurred. That is the opposite of conclusory evidence.

Recall, Mrs. Chowdhury provided the affidavit of Vera Dolan, "an epidemiologist with four decades of experience in the life insurance industry, with specific expertise in policies and procedures relating to the underwriting process." CR:2749. She "evaluate[d] the underwriting process employed by Midland and its reinsurer, Swiss Re, for the three life insurance policies insuring the life of [Mr. Chowdhury]." *Id*. She testified extensively about what she, in her expert capacity, identified as intentional and permissible "clean-sheeting" of the application documents:

> 8. At the outset, it is apparent that the Insurer did not rely on the information provided in Mr. Chowdhury's applications submitted on September 24 and November 8 application forms. At the time of Mr. Chowdhury's paramedical examination and questions about his health status, Mr. Chowdhury disclosed to the Insurer that he was only taking medications for high blood pressure and elevated cholesterol by choice, and answered "No" to all other questions about health conditions and treatment. **A term of art in the life insurance business is "clean-sheeting," where on the medical questionnaire section of the application the applicant's answers indicate no or minimal adverse health conditions.** It thus appears that the medical questionnaire part of the application for Mr. Chowdhury was clean-sheeted. **Instead of completely answering such questions on his application, Mr. Chowdhury authorized the Insurer to have full access to all of his medical and health records as part of their customary independent underwriting investigation of policies that comprise a total face amount of $30 million of coverage**.

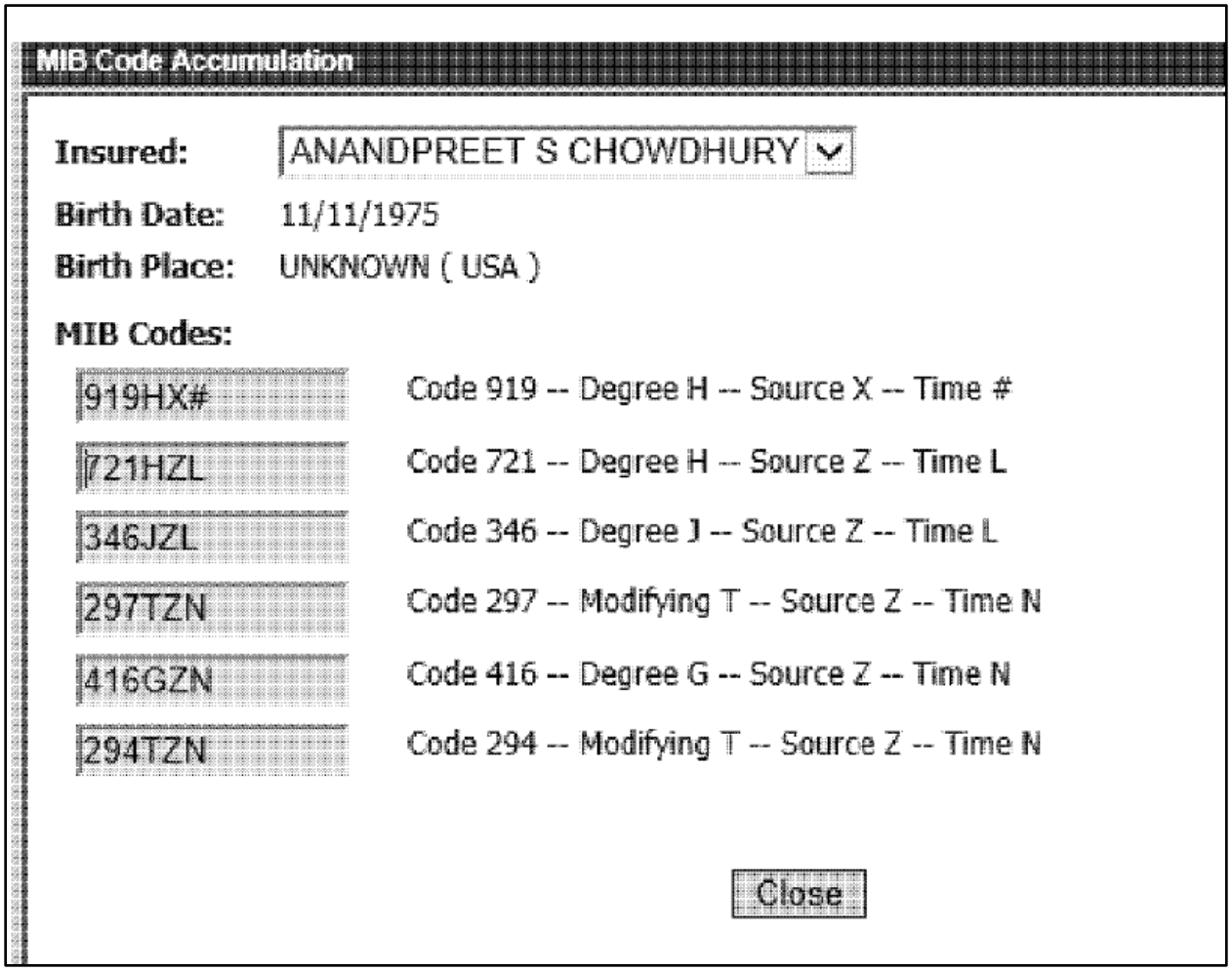
CR:2750 (emphasis added).

Midland claims that her testimony is conclusive and should be discounted. AB at 42. It is anything but. To render a conclusive opinion, Ms. Dolan would have had to *omit* the underlying facts on which her opinion is based on. *See* Black's Law Dictionary 11th ed. 2019 (defining "conclusory" as "expressing a factual inference without stating the underlying facts on which the inference is based.") *And see* *Stolzenberg v. Forte Towers S., Inc.*, 430 So. 2d 558, 559 (Fla. 3d DCA 1983) (holding that an affidavit was insufficient as containing "mere conclusions" because the affidavit did not indicate the source of the affiant's knowledge); *Heitmeyer v. Sasser*, 664 So.

2d 358 (Fla. 4th DCA 1995) (holding that an expert's affidavit was conclusory because it did not provide any reasoning to support the expert's conclusions). But Ms. Dolan, instead, described with detail how she arrived at her opinion based on the documents she reviewed and her familiarity with Midland's underwriting process.

Ms. Dolan reviewed Mr. Chowdhury's application which, she noted, Midland allowed to Mr. Chowdhury to authorize it "to have full access to all of his medical and health records as part of their customary independent underwriting investigation of policies" instead of "answering such questions on his application." CR:2750. She then described the process of submitting that information to the Medical Information Bureau, a "clearing house for the life insurance industry by which different medical conditions and other conditions affecting the insurability of the applicant to whom they relate are coded in reports sent by the underwriter to MIB." CR:2751–2752. She reviewed the medical conditions for Mr. Chowdhury "reported by Midland to MIB" which revealed that it included "codes for elevated hemoglobin A1c, currently treated diabetes mellitus, currently treated hypertension, mental disorders, sleep apnea and anxiety." CR:2752.

And she provided the actual "underlying facts" supporting her testimony:


MIB Code Accumulation

Insured: ANANDPREET S CHOWDHURY

Birth Date: 11/11/1975

Birth Place: UNKNOWN (USA)

MIB Codes:

919HX#	Code 919 -- Degree H -- Source X -- Time #
721HZL	Code 721 -- Degree H -- Source Z -- Time L
346JZL	Code 346 -- Degree J -- Source Z -- Time L
297TZN	Code 297 -- Modifying T -- Source Z -- Time N
416GZN	Code 416 -- Degree G -- Source Z -- Time N
294TZN	Code 294 -- Modifying T -- Source Z -- Time N

Close

CR:2790.

Midland also "obtained … an extensive list of all prescription medications" that Mr. Chowdhury had been taking — which far exceeded what he reported in his application. CR:2752. *And see* CR:2791–2887 (more of Ms. Dolan's underlying data).

Ms. Dolan's supported, *non*conclusory testimony shows that despite Mr. Chowdhury not reporting those conditions and medications in his application (because he was told to "clean-sheet"), "Midland knew and reported these health and medical conditions of Mr. Chowdhury to MIB at the time of application." CR:2752.

For that reason, Midland's reinsurer, Swiss Re, "determined that the Mr. Chowdhury presented significant risks with a mortality risk that was higher than standard." CR:2753. And also for that reason, "Mr. Chowdhury's application information was sent to several other reinsurers for consideration of Mr. Chowdhury's risk, **but they declined to make an offer on his risk after conducting their own underwriting investigations**. These reinsurers include SCOR, Hannover Re and Canada Life Re. These reinsurers determined that **Mr. Chowdhury's mortality risk was so adverse that they would not accept his risk at any price**." CR:2753 (emphasis added). *And see* CR:2889.

Midland refuses to "call it like it is": There is evidence of its decision to allow Mr. Chowdhury to "clean-sheet." Mrs. Chowdhury submitted sufficient, expert evidence which showed that Midland told Mr. Chowdhury to "clean-sheet" his application in favor of Midland conducting its own investigation and review of medical records. CR:2750–2753. Midland knew the

insurability risk was high but proceeded with the application process anyway, asking Mr. Chowdhury to once again fill out an identical form that Midland had told him to "clean-sheet" previously. He did that, consistent with Midland's modus operandi. Midland knew the medical conditions; Midland knew the risk. It proceeded forward regardless.

MRS. CHOWDHURY'S THEORY "MAKES SENSE" AND IT IS SUPPORTED BY LAW

Midland claims that Mrs. Chowdhury's argument "is contrary to the undisputed facts and Florida Law" and belied by the fact that Midland could not request medical records that "it did not know existed." AB at 46. The law supports the Mrs. Chowdhury's defense. And if Midland was unable to request updated medical records from Mr. Chowdhury, then that's the route that Midland — not Mr. Chowdhury — chose when it permitted an applicant to "clean-sheet" the forms during the application process. This is a criticism attributable only to Midland's own practices.

Section 627.409 conditions an insurer's ability to "prevent recovery under the contract or policy" on the insurer's *lack* of knowledge regarding the alleged misrepresentation in an application. Subsection (1)'s "standards", which Midland makes much ado about on appeal, both premise Midland's ability to forestall insurance benefits on an actual misrepresentation or fraud:

> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

§ 627.409, Fla. Stat. (2023). Where there is an intentional request by the insurer to "misrepresent" something in an application (in favor of the insurance company taking matters into its own hands), these standards — the objective or the subjective — simply do not apply.[3]

The law supports the theory that estoppel can be invoked "against an insurer when its conduct has been such as to induce action in reliance upon it." *Mut. of Omaha Ins. Co. v. Eakins*, 337 So. 2d 418, 419 (Fla. 2d DCA 1976); *Reliance Mut. Life Ins. Co. of Ill. v. Booher*, 166 So. 2d 222, 226 (Fla. 2d DCA 1964). That applies in the application process. If Midland's agent "negligently misled [Mr. Chowdhury] in the application process, the insurance company is 'estopped' from relying on resulting errors in the application to

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[3] For this reason, much of Midland's brief discussing the standards is off the mark. *See, e.g.,* AB at 24–25, 31–32, 34–40.

deny or revoke coverage." *Casamassina v. U.S. Life Ins. Co. in City of New York*, 958 So. 2d 1093, 1102 (Fla. 4th DCA 2007).

The law is that an "insurer who accepts an application which is not fully completed accepts that application at its risk." *Leonardo v. State Farm Fire & Cas. Co.*, 675 So. 2d 176, 178 (Fla. 4th DCA 1996); *Indep. Fire Ins. Co. v. Horn*, 343 So. 2d 862 (Fla. 1st DCA 1976). That is, an insurer that knowingly accepts misinformation in its application has "accepted the risk of providing insurance despite [the] purported failure to provide information" required in the application. *Leonardo*, 675 So. 2d at 178. *And see LeMaster v. USAA Life Ins. Co.*, 922 F. Supp. 581, 586 (M.D. Fla. 1996) (reversing summary judgment where a reasonable jury could find that the insurer knew, or should have known, of insured's relevant medical history).

And so the law supports the argument that if Midland misled Mr. Chowdhury into "clean-sheeting" certain forms in the application, and that practice was continued by Mr. Chowdhury into the Statement of Health form (which Midland contends is just another step in the application process), Midland "accepted the risk of providing insurance despite the purported failure to provide information" requested in the Form. *Casamassina*, 958 So. 2d at 1102; *Leonardo*, 675 So. 2d at 178. If Midland was unable to procure the information it wanted from Mr. Chowdhury (*i.e.*, that he visited a

new hospital previously undisclosed by the medical records Midland pulled) then it should not have "accepted the risk" of allowing Mr. Chowdhury to clean-sheet. That's the *risk* it bore.

Again, the point is that Mr. Chowdhury followed *Midland's* requested practice. The consequences that flow from that action are to be borne by *Midland* given it was *Midland's* accepted practice.

B. The Record Evidence Demonstrates that Mr. Chowdhury's March 2019 Medical Episode Did Not Present a Change in Health from his Previously Disclosed Illnesses.

Midland claims that "[w]hether [Mr. Chowdhury's] new, life-threatening medical conditions can fairly be characterized as a 'progression' of his preexisting medical history is irrelevant" because "Midland's underwriting standards are applied to the treating physicians' reported diagnoses in the medical records, not the speculative, postmortem 'diagnosis' offered by a paid expert who never saw or treated the applicant." AB at 35, 37. That statement, however, is inconsistent with the applicable statutory language. What Mr. Chowdhury's *real state of health* was at the time of filling out the March 2019 form does matter to both standards under section 627.409.

Recall, section 627.409 conditions an insurer's ability to "prevent recovery under the contract or policy" on either a misrepresentation that is

"material to the acceptance of the risk" or "the true facts" that would have caused the insurer to not issue the policy. § 627.409, Fla. Stat. (2023). All of Midland's evidence is premised on the characterization of Mr. Chowdhury's medical episode provided by the Mercy Hospital doctors. If that characterization were proven false, that is, if a reasonable jury could believe Dr. Genecin's medical diagnosis as opposed to the Mercy Hospital doctors, then the characterization of Mr. Chowdhury's health relied on by Midland to prove the "subjective" and "objective" standard (*see* AB at 35–40) would no longer exist. And thus, Midland's assessment of its hypothetical actions (*i.e.,* to issue the policy or not) would no longer be relevant.

Mr. Chowdhury's medical diagnosis in March of 2019 is the so-called misrepresentation that Midland's entire case rests upon.[4] Both questions asked of Mr. Chowdhury by the Statement of Health Form — was there a change in his health and did he consult with any doctors — are materially affected by what his diagnosis, and thus answers, could be. Certainly if

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[4] Perhaps not realizing it, Midland even admits that the *accuracy* of the facts — which is to say, which version of the facts the trier of fact accepts — matters. *See* AB at 35, 37, 56 (citing *Carter v. United of Omaha Life Ins.*, 685 So. 2d 2, 6 (Fla. 1st DCA 1996) for the proposition that "Florida law provides that 'if the facts accurately stated might reasonably have influenced the insurer in deciding whether to accept the risk.'"

Mr. Chowdhury presented to his normal doctors for a routine checkup, Midland could not utilize the Question 1.B on its form to invalidate the Policy. *See, e.g.,* AB at 28. So, if Mr. Chowdhury merely experienced a "progression" of his already diagnosed and "disclosed"[5] illnesses, a negative response to Question 1.B would make no difference under section 627.409's standards.

Dr. Genecin's expert opinion matters. For that reason, Midland spends a good deal of time attacking the *weight* and *credibility* of that opinion. *See* AB at 37 ("Dr. Genecin — who never saw or treated Anand in his life"). But that does not jive even with the new summary judgment standard. *See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) ("It is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence."); *In re Trasylol Products Liab. Litig.*, 08-MD-01928, 2010 WL 1489793, at *7 (S.D. Fla. Feb. 24, 2010) (courts "must be careful not to conflate questions of admissibility of expert testimony with the weight appropriately to be accorded to such testimony by

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[5] Remember, nothing was "disclosed" to Midland because Midland elected to have Mr. Chowdhury "clean-sheet" his application. This March 2019 Statement of Health Form would be the first time Mr. Chowdhury ever provided a specific medical diagnosis in response to a Midland inquiry. That takes us back to the first point.

the fact finder.") *Gov't Employees Ins. Co. v. Seco*, 21-24155-CIV, 2023 WL 2866383, at *7 (S.D. Fla. Feb. 17, 2023) ("A less-than-perfect expert opinion may still be admitted, even if it contains gaps").

II. THE TRIAL COURT IMPROPERLY DETERMINED THAT THE POLICIES' EFFECTIVE DATE WAS INCONSEQUENTIAL.

As to Mrs. Chowdhury's own request for summary judgment, Midland takes issue with the Policies' plain language and argues that Mrs. Chowdhury somehow waived an argument predicated on the very language interpreted and applied by the trial court. AB at 52–60. That is not the case. Mrs. Chowdhury rested her entire case — from affirmative defense to operative motion for summary judgment — on the plain language of the Policies. The argument made on appeal, expounding on and adding to that plain language analysis, was preserved below.

To be clear, Mrs. Chowdhury relied entirely on the Policies' plain language when alleging her primary affirmative defenses to Midland's crossclaims, as follows:

Affirmative Defense 1.

> Midland fails to state a claim for relief because its allegations are directly and expressly contradicted by the clear and unambiguous provisions of the Policies, which Midland made a plain language argument to the trial court at various stages of the litigation.

Affirmative Defense 2.

> Midland fails to state a claim for relief because its allegations related to the Statement of Health and Insurability Form, which are inconsistent with the stated terms of the Policies that their issued and effective date was March 15, 2019, result in an ambiguity, which must be construed against Midland as the drafter and in favor of coverage.

R:1241–1243. And Mrs. Chowdhury relied on the Policies' plain language at every stage of the litigation. *See* R:1133–1137; R:1383–1384.

To be clear, Mrs. Chowdhury's argument on appeal relies on that very same plain language. The tandem argument relying on the Policies' effective date which *predated* Mr. Chowdhury's March 2019 medical issues and Midland's *inability* to attach the Statement of the Health Form to its Policies are reciprocal in nature. Midland *could not* attach the Statement of Health Form to its Policies because the Policies were issued *prior to* Mr. Chowdhury signing the Form. *See* R:1397 (defining the Policy Date as "the date on which this Policy is issued and the insurance coverage becomes effective. The Policy Date is shown on the Schedule of Policy Benefits.") That must be the conclusion of any reasonable plain language analysis.

A plain reading of Section 3.1.1 and the Policies' effective date means that the Statement of Health form could never be considered an "application" and "attached" to the Policies; thus, it could not serve as the basis to "contest a claim under" the Policies. R:1399. There is no ambiguity in that provision nor in the facts relating to this argument.

All Midland could do on appeal is insinuate that the Statement of Health form *could* have been attached to the Policies — but at no point does Midland affirmatively demonstrate that to be the case. AB at 59. The best that Midland can offer is the affidavit of Michelle Hopley, who attaches the Policies and the Statement of Health form as exhibits. R:2203–2204. Critically, Ms. Hopley attaches the Policies *as separate exhibits* from the Statement of Health form. She attaches the Policies as Exhibits 1–3, the applications as Exhibits 4–5, and the Statement of Health form as Exhibits 6–8. R:2203–2204; R:2446–2454. The only reasonable inference from that evidence is that the Statement of Health form *was not attached to the Policies*. And at no point in the Record is there evidence otherwise.

That warrants summary judgment in Mrs. Chowdhury's favor.

CONCLUSION

Mrs. Chowdhury respectfully requests that the Court reverse the Final Summary Judgment for the reasons stated in Issue I and remand for directions to enter summary judgment in her favor for the reasons stated in Issue II.

Respectfully submitted,

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I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 4,000 words, in compliance with Rule 9.210(a)(2)(B).

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