

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D2024-0937
L.T. CASE NO. 23-1317-CA-01

LAZARO RODRIGUEZ, et al.,

Appellants,

v.

MARCIANO JAIMES, et al.,

Appellees.

APPELLANTS' INITIAL BRIEF

On appeal from the Eleventh Judicial Circuit in and for Miami-Dade County.

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

A final Court Order granting the lower tribunal Defendants and Appellees, Fonticiella Construction Corporation's, Fonticiella Construction Management, LLC's, Fonticiella Development LLC's, Fonticiella GP, LLC's, and Fonticiella LLLP's, Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint was entered by the lower tribunal on April 27, 2024 (R1290-1295). The aforementioned dismissal was with prejudice. Plaintiffs' Motion for Rehearing and Motion for Reconsideration was denied by the Trial Court on May 21, 2024 (R1296-1297). Appellants appealed (R936-1269). The following designation will be used: ® - Record on Appeal.

I. Material Facts.

Appellees, FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA DEVELOPMENT LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP, hereinafter will collectively be referred to as "FONTICIELLA CONSTRUCTION".

This is a premises liability action arising out of a dog attack occurring on January 28, 2019, at a certain residential property located at 14240 Henderson Street, Homestead, Miami-Dade County, Florida, owned by

Defendants, MARCIANO JAIMES, and his wife, ENEDINA JAIMES, and controlled by Defendant and Appellee, FONTICIELLA CONSTRUCTION, a contractor performing work at or around the subject property at the time of the attack.

Appellants filed suit, in part, against Appellees, FONTICIELLA CONSTRUCTION, a construction contractor performing construction related activities on the residential property who controlled access to the property at the time of the attack for failing to maintain the premises in a reasonably safe condition and failing to warn Appellant LAZARO RODRIGUEZ that a dangerous and aggressive pit-bull-dog mix was roaming unsecured in and around the subject property, creating a dangerous condition.

On or about June 2, 2023, Appellees, FONTICIELLA CONSTRUCTION, filed a Motion to Dismiss, alleging that Appellants failed to state a cause of action for which relief could be granted because FONTICIELLA CONSTRUCTION did not owe a duty to Appellants. Specifically, Appellees argued that because the construction company did not own the premises and/or the dog at issue, the entity did not owe a duty to Appellants and thus, the Complaint should be dismissed. On August 23, 2023, the trial court agreed and granted the Motion to Dismiss, permitting Appellants to amend

their Complaint to allege a duty owed by the construction Appellees (R98-99).

On October 5, 2023, Appellants filed an Amended Complaint, (R100-150), alleging that Appellees, FONTICIELLA CONSTRUCTION, performed work at the subject property prior to the dog attack and knew or should have known of the dangerous pit-bull-mix-dog roaming unsecured around the property. Additionally, Appellants' Amended Complaint attached and incorporated a Work Order as an exhibit (R150), demonstrating that Appellee, FONTICIELLA CONSTRUCTION, was performing work at the subject premises at the time of the dog attack and entered into a rental agreement with Waste Management Inc. of Florida¹ to drop-off and pick-up a 10-yard roll-on commercial dumpster at the subject property to dispose of construction materials. *A photograph of a sample Waste Management Inc. of Florida commercial 10-yard dumpster is as a matter of reference for the Court's review found at (R199, R656).*

The attached Work Order (R150) named Appellee, FONTICIELLA CONSTRUCTION, as the entity who ordered and paid for the 10-yard commercial roll-on dumpster to be picked up from the subject premises where

¹Waste Management Inc. of Florida employed Appellant, Lazaro Rodriguez, at the time of the subject dog attack.

the dog attack occurred.

Pursuant to the aforementioned Work Order (R150), Appellee, FONTICIELLA CONSTRUCTION, ordered the commercial roll-on dumpster and named the “point of contact” as Hermie FONTICIELLA and Armando FONTICIELLA, owners and/or contacts of the construction company.

Pursuant to the aforementioned Work Order (R150), Appellee, FONTICIELLA CONSTRUCTION, ordered the 10-yard commercial dumpster to be picked up at 14240 Henderson Street, Homestead, Miami-Dade County, Florida, the subject premises where the dog attack occurred.

At all times material hereto, the commercial dumpster was dropped off and to be picked up from the fenced-in backyard of the subject premises.

Pursuant to the aforementioned Work Order (R150), Appellee, FONTICIELLA CONSTRUCTION, ordered the roll-on dumpster for construction “demolition.”

The aforementioned Work Order (R150) directs Waste Management Inc. of Florida, and specifically, Appellant, LAZARO RODRIGUEZ, as the employee assigned to this job, to dump the contents of the construction roll-on dumpster at “Delta Homestead C&D” a dump specifically reserved for “construction and demolition debris.” *A copy of the assigned dump and its*

accepted contents is found at (R203-205, R660-662).

There is also ***newly discovered evidence*** in the case at bar which arose ***after*** the March 7, 2024 hearing on *Defendants'*, FONTICIELLA CONSTRUCTION, *Motion to Dismiss Plaintiffs' Amended Complaint*, ***and just six (6) days after this Court's April 27, 2024 Order Granting Fonticiella Defendants' Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint (R1290-1295).***

In particular, on April 22, 2024, five (5) days prior to the trial court's April 27, 2024 Order (R1290-1295), Appellants generated their Subpoena Duces Tecum Without Deposition to Waste Management Inc. of Florida. Found at (R356-361, R671-676) is a copy of the respective Subpoena Duces Tecum Without Deposition. Furthermore, five (5) days prior to the trial court's April 27, 2024 Order (R1290-1295), FONTICIELLA CONSTRUCTION ***did not object to the aforementioned Subpoena Duces Tecum Without Deposition.*** Found at (R362-363, R678-679) is a copy of the Certificate of Non-Objection regarding the Subpoena Duces Tecum Without Deposition to Waste Management Inc. of Florida which was filed on April 22, 2024.

Thereafter, on May 3, 2024, just six (6) days after the trial court entered its Order Granting Fonticiella Defendants' Motion to Dismiss as

to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint, Waste Management Inc. of Florida responded to the aforesaid Subpoena.

Specifically, Waste Management Inc. of Florida furnished the following responsive documents found at (R364-384, R681-701):

- a. May 3, 2024 cover letter;
- b. October 1, 2018 Invoice No. 0271601-2194-6 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two pages;
- c. November 1, 2018 Invoice No. 0294420-2194-4 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two pages;
- d. December 1, 2018 Invoice No. 0318540-2194-1 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two pages;
- e. January 1, 2019 Invoice No. 0357152-2194-7 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two pages;
- f. February 1, 2019 Invoice No. 0386171-2194-2 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two pages;
- g. October 24, 2018 Check No. 16820 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- h. November 28, 2018 Check No. 16898 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- i. December 11, 2018 Check No. 16915 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- j. January 10, 2019 Check No. 16989 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;

- k. February 20, 2019 Check No. 17063 from Fonticiella Construction Corp payable to Waste Management Inc of Florida.

Of key importance, all of the aforementioned invoices furnished by Waste Management Inc. of Florida have the same "Customer ID" number: "20-84670-93002." Moreover, all of the respective invoices reference the same "Details for Service Location": "Fonticiella Construction Corp, 14240 Henderson St, Homestead FL 33032-6622." Indeed, the "Details for Service Location" concerning the disposal of construction materials establish a waste management service nexus between FONTICIELLA CONSTRUCTION and the subject property. The respective invoices do not reference the property owner's name regarding the waste management services. Furthermore, all of the abovementioned checks payable to Waste Management Inc of Florida were issued by Fonticiella Construction Corp and not the property owner. Meaning, having requested and paid for the waste management services performed at the subject property, FONTICIELLA CONSTRUCTION owed duties to the Appellant, LAZARO RODRIGUEZ.

The aforesaid documentation found in (R364-384, R681-701) further establishes FONTICIELLA CONSTRUCTION retained the services of Waste Management Inc. of Florida to drop-off and pick-up a 10-yard roll-on commercial dumpster at the subject property in order to dispose of

construction materials. In fact, the amount of construction waste was so large that the November 1, 2018 Invoice No. 0294420-2194-4 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages, (R367-368, R684-685), states under the “Description” heading: “**Excess of 3 tons.**”

Notably, the February 1, 2019 Invoice No. 0386171-2194-2 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages, (R373-374, R690-691), states: “**Driver bite by dog.**” **Indeed, FONTICIELLA CONSTRUCTION was made aware of the dangerous dog bite incident experienced by the Appellant, LAZARO RODRIGUEZ, as demonstrated by the mentioned invoice dated just four (4) days after the subject dog bite incident.** Yet, in their sworn answers to Plaintiffs’ First Set of Interrogatories FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP denied having any knowledge of the subject dog bite incident. Specifically, FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP, answered Interrogatory No. 7 as follows:

**FONTICIELLA CONSTRUCTION CORPORATION,
FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,**

FONTICIELLA GP, LLC, and FONTICIELLA LLLP

7. Describe in detail how the Plaintiff's subject dog bite incident described in the Amended Complaint happened, including all actions taken by you or anyone on your behalf or on behalf of your company or anyone in order to prevent the dog bite incident.

ANSWER: Defendant has never visited the property in question, has never seen, known about, or interacted with the dog alleged to have bitten the Plaintiff, and therefore has no knowledge or information regarding how the incident described in the Amended Complaint occurred.

(R386, R704, R483, R713, R513, R722, R529, R731).

Found at (R385-392, R703-710), (R482-489, R712-719), (R512-519, R721-728), and (R528-535, R730-737) are the sworn answers to Plaintiffs' First Set of Interrogatories furnished by FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP ***sixty-four (64) days after Plaintiffs' First Set of Interrogatories were propounded.*** And, FONTICIELLA DEVELOPMENT LLC did not provide the Affidavit previously requested by the Appellants prior to answering Plaintiffs' First Set of Interrogatories.

The abovementioned February 1, 2019 Invoice No. 0386171-2194-2 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages,

(R373-374, R690-691), also states under the “Description” heading: “**Excess of 3 tons.**” In point of fact, FONTICIELLA CONSTRUCTION was aware of the considerable amount of construction waste on the date the Appellant, LAZARO RODRIGUEZ, experienced the dog attack.

Furthermore, in their sworn answers to Plaintiffs’ First Set of Interrogatories FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP did not know who was responsible for paying the waste management services scheduled to be performed on the date of the subject dog bite incident. Set forth below are the sworn answers to Interrogatory No. 9 provided by FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP.

FONTICIELLA CONSTRUCTION CORPORATION

9. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which agreed to pay or be responsible for payment as a result of the Plaintiff Lazaro Rodriguez traveling to the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida on the date the of the subject dog bite incident in order to perform waste management services.

ANSWER: Unknown at this time as discovery is pending.

(R387, R705).

* * *

**FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

9. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which agreed to pay or be responsible for payment as a result of the Plaintiff Lazaro Rodriguez traveling to the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida on the date the of the subject dog bite incident in order to perform waste management services.

ANSWER: No knowledge.

(R484, R714, R514, R723, R530, R732).

* * *

Yet, the following invoices generated by Waste Management Inc. of Florida and concerning the subject property were directed to “Fonticiella Construction Corp.”, (R365-374, R682-691):

- October 1, 2018 Invoice No. 0271601-2194-6 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages;
- November 1, 2018 Invoice No. 0294420-2194-4 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages;
- December 1, 2018 Invoice No. 0318540-2194-1 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages;
- January 1, 2019 Invoice No. 0357152-2194-7 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages;
- February 1, 2019 Invoice No. 0386171-2194-2 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages.

In addition, “Fonticiella Construction Corp” issued the following checks

payable to Waste Management Inc of Florida with respect to the waste management services performed at the subject property, (R375-384, R692-701):

- October 24, 2018 Check No. 16820 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- November 28, 2018 Check No. 16898 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- December 11, 2018 Check No. 16915 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- January 10, 2019 Check No. 16989 from Fonticiella Construction Corp payable to Waste Management Inc of Florida;
- February 20, 2019 Check No. 17063 from Fonticiella Construction Corp payable to Waste Management Inc of Florida.

And, despite the fact that the invoices generated by Waste Management Inc. of Florida concerning the subject property were directed to “Fonticiella Construction Corp”; and “Fonticiella Construction Corp” issued the aforementioned checks payable to Waste Management Inc of Florida with respect to the waste management services performed at the subject property; in their sworn answers to Plaintiffs’ First Set of Interrogatories FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP failed to describe and disclose the “contracts and/or agreements and/or

arrangements” with Waste Management Inc. of Florida in effect on the date of the Appellant’s dog bite incident.

FONTICIELLA CONSTRUCTION CORPORATION

20. Please describe all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff’s dog bite incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name and address of the individual, company and/or entity with whom the contracts and/or agreements and/or arrangements were entered into, and please provide the complete name, position and address of the individual(s) who possess(es) the aforementioned contracts and/or agreements and/or arrangements.

ANSWER: Defendant has never performed services at, and has no right, title or interest in the subject property. To date, the only relationship was between Defendant and Marciano Jaimes, as Defendant hired Mr. Jaimes, to perform work at a real property located in Key Largo, Florida—and not the Homestead property.

(R389, R707).

* * *

21. During the three (3) year period prior to and up to and including the date of the Plaintiff’s dog bite incident giving rise to the subject lawsuit, with whom did you or anyone on your behalf or on behalf of your company enter into a contract and/or agreement and/or arrangement regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be

performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name of the individual, company and/or entity with whom you or anyone on your behalf or on behalf of your company entered into the contract and/or agreement and/or arrangement.

ANSWER: Defendant has never performed services at, and has no right, title or interest in the subject property. To date, the only relationship was between Defendant and Marciano Jaimes, as Defendant hired Mr. Jaimes, to perform work at a real property located in Key Largo, Florida—and not the Homestead property

(R389-390, R707-708).

* * *

**FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

20. Please describe all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff's dog bite incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name and address of the individual, company and/or entity with whom the contracts and/or agreements and/or arrangements were entered into, and please provide the complete name, position and address of the individual(s) who possess(es) the aforementioned contracts and/or agreements and/or arrangements.

ANSWER: None.

(R486, R716, R516, R725, R532, R734).

* * *

21. During the three (3) year period prior to and up to and including the date of the Plaintiff's dog bite incident giving rise to the subject lawsuit, with whom did you or anyone on your behalf or on behalf of your company enter into a contract and/or agreement and/or arrangement regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name of the individual, company and/or entity with whom you or anyone on your behalf or on behalf of your company entered into the contract and/or agreement and/or arrangement.

ANSWER: None.

(R486, R716, R516, R725, R532, R734).

* * *

In fact, in their responses to Plaintiffs' First Request for Production FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP failed to provide any contract and/or agreement and/or arrangement in effect on the date of the Appellant's dog bite incident and entered into with Waste Management Inc. of Florida. And, despite "Fonticiella Construction Corp" having issued the aforementioned checks payable to Waste Management Inc of Florida with respect to the waste management services performed at the subject property, FONTICIELLA

CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP failed to provide any receipts for payment for the waste management and/or waste pickup and/or waste disposal services performed at the subject property.

FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP

16. Defendant is requested to produce a complete copy of any and all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff's dog bite incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida.

RESPONSE: None in Defendant's possession, custody, or control.

(R396, R742, R493, R832, R523, R841, R539, R850).

* * *

35. Defendant is requested to produce complete copies of any and all receipts for payment for all waste management and/or waste pickup and/or waste disposal services concerning or performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida and pertaining to the three (3) year period of time prior to and including the date of the Plaintiff's dog bite incident giving rise to the case at bar, and the one (1) year period of time after Plaintiff's dog bite incident giving

rise to the case at bar.

RESPONSE: None in Defendant's possession, custody, or control.

(R400, R746, R497, R836, R527, R845, R543, R854).

* * *

Attached as (R393-481, R739-827), (R490-497, R829-836), (R520-527, R838-845), and (R536-543, R847-854) are the responses to Plaintiffs' First Request for Production furnished by FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP **sixty-four (64) days after Plaintiffs' First Request for Production were propounded.** And, FONTICIELLA DEVELOPMENT LLC did not provide the Affidavit previously requested by the Appellants prior to responding to Plaintiffs' First Request for Production.

On March 7, 2024 this Court conducted a hearing on *Defendants' FONTICIELLA CONSTRUCTION Motion to Dismiss Plaintiffs' Amended Complaint.* On April 27, 2024 this Court entered its *Order Granting Fonticiella Defendants' Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint,* (R1290-1295).

Appellees', FONTICIELLA CONSTRUCTION's, Motion to Dismiss Plaintiffs' Amended Complaint should have been denied because:

(a) Plaintiffs' Amended Complaint and incorporated exhibit demonstrates that FONTICIELLA CONSTRUCTION controlled access to the subject premises at the time of the dog attack and knew or should have known that a dangerous pit-bull-mix dog was roaming unsecured on the property;

(b) FONTICIELLA CONSTRUCTION's conduct created a broader zone of risk to the Appellant; and

(c) this issue was not ripe for adjudication on a Motion to Dismiss.

Moreover, as set forth above there is additional ***newly discovered evidence*** which further demonstrates Appellants' positions (a), (b), and (c) as detailed above.

SUMMARY OF THE ARGUMENT

This is a premises liability action arising out of a dog attack occurring on January 28, 2019, at a certain residential property located at 14240 Henderson Street, Homestead, Miami-Dade County, Florida, owned by Defendants, MARCIANO JAIMES, and his wife, ENEDINA JAIMES, and controlled by Defendant and Appellee, FONTICIELLA CONSTRUCTION, a contractor performing work at or around the subject property at the time of the attack. FONTICIELLA CONSTRUCTION's Motion to Dismiss Plaintiffs'

Amended Complaint should have been denied because:

- (a) Plaintiffs' Amended Complaint and incorporated exhibit demonstrates that FONTICIELLA CONSTRUCTION controlled access to the subject premises at the time of the dog attack and knew or should have known that a dangerous pit-bull-mix dog was roaming unsecured on the property;
- (b) FONTICIELLA CONSTRUCTION's conduct created a broader zone of risk to the Appellant; and
- (c) this issue was not ripe for adjudication on a Motion to Dismiss.

Moreover, as set forth above there is additional ***newly discovered evidence*** which further demonstrates Appellants' positions (a), (b), and (c) as detailed above. Also, the final Court Order granting FONTICIELLA CONSTRUCTION's Motion to Dismiss Plaintiffs' Amended Complaint unfairly deprived the Appellants of their right to trial by jury against all the named Defendants.

STANDARD OF REVIEW

The standard of review for orders granting motions to dismiss is *de novo*. *Cornfeld v. Plaza of the Americas Club, Inc.*, 273 So. 3d 1096, 1098 (Fla. 3d DCA 2019); *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLP*, 137

So. 3d 1081, 1089 (Fla. 3d DCA 2014). “The standard of review of orders granting motions to dismiss with prejudice is *de novo*.” *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408, 410 (Fla. 4th DCA 2007) (quoting *Kreizinger, P.A. v. Schlesinger, P.A.*, 925 So. 2d 431, 432 (Fla. 4th DCA 2006)).

ARGUMENT

I. Legal Standard on a Motion to Dismiss, and Newly Discovered Evidence.

“A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues....” *The Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006). “In considering a motion to dismiss, a trial court is required to accept all factual allegations contained in the complaint as true.” *See, e.g., Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1061 (Fla. 3d DCA 2018), *citing Falkinburg v. Village of El Portal*, 183 So. 3d 1189, 1191 (Fla. 3d DCA 2016). The trial court is bound to the allegations of the complaint, including its incorporated attachments. *Id.* Additionally, “any reasonable inferences drawn from the complaint must be construed in favor of the non-moving party.” *Minor v. Brunetti*, 43 So. 3d 178, 179 (Fla. 3d DCA 2010).

Finally, “in considering a motion to dismiss, a trial court is required to consider exhibits attached to and incorporated into the complaint.” *See, Harry*

Pepper & Assocs. v. Lassester, 247 So. 2d 736, 736 (Fla. 3d DCA 1971); see also, *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 894 (Fla. 3d DCA 2010); *Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008); *Merovich v. Huzenman*, 911 So. 2d 125, 128 n.5 (Fla. 3d DCA 2005). “Any exhibit attached to a pleading shall be considered a part thereof for all purposes.” Fla. R. Civ. P. 1.130(b) (2017). See also, *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994)(“When a party attaches exhibits to the complaint those exhibits become part of the pleading and the court will review those exhibits accordingly.”).

A complaint must contain “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” Fla. R. Civ. P. 1.110(b). “To maintain an action for negligence, a plaintiff must establish that the defendant owed a duty, that the defendant breached that duty, and that this breach caused the plaintiff damages.” *Fla. Dep’t of Corr. v. Abril*, 969 So. 2d 201, 204 (Fla. 2007). Such duty can arise from common law, the specific circumstances of the case, or “whenever a human endeavor creates a generalized and foreseeable risk of harming others.” *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992). “The cornerstone of the duty element

is foreseeability; ‘each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result.’” *Id.*

With respect to the liability of an owner or occupier of a property for injuries caused to invitees, Florida courts have long recognized a two-pronged standard of care: (1) the duty to use reasonable care in maintaining the property in a reasonably safe condition, and; (2) the duty to warn of latent or concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care. *Pozanco v. FJB 6501, Inc.*, 346 So. 3d 120, 123-24 (Fla. 3d DCA 2022), *citing*, *Grimes v. Family Dollar Stores of Fla.*, 194 So. 3d 424, 427 (Fla. 3d DCA 2016). “These two duties are distinct from one another, and compliance with one does not necessarily mean that the landowner has complied with the other. *Id.*, *citing*, *Rocamonde v. Marshalls of Ma, Inc.*, 56 So. 3d 863, 865 (Fla. 3d DCA 2011).

Here, Plaintiffs’ Amended Complaint alleges that Appellee, FONTICIELLA CONSTRUCTION, was performing construction work at the subject property and ordered a commercial dumpster to be delivered to and picked up at the subject property [Amend. Compl. 152, 153, R130]. The Amended Complaint alleges that Appellant, LAZARO RODRIGUEZ, was an

invitee on the subject property at the time of the dog attack. [Amend. Compl. 151, R129-130]. Therefore, Appellee, FONTICIELLA CONSTRUCTION, as the occupier of the property, owed the Appellant a duty to warn of latent or concealed dangers which it knew or should have known existed on the property. The Amended Complaint alleges that Appellee, FONTICIELLA CONSTRUCTION, knew or should have known that a pit-bull-mix dog roamed unsecured in and around the property, creating a dangerous condition [Amend. Compl. 153, R130]. Finally, the Amended Complaint alleges that Appellee, FONTICIELLA CONSTRUCTION, failed to warn the Appellant of the dog and as a result, the Appellant sustained serious and permanent injuries from the dog attack [Amend. Compl. 156, R131]. The Amended Complaint sufficiently pleads a claim for premises liability against Appellee, FONTICIELLA CONSTRUCTION, and thus, the Motion to Dismiss should have been be denied.

Also of key importance, the aforementioned ***newly discovered evidence*** fits within Fla. R. Civ. P. 1.540(b). In *Sledge v. Richards*, 592 So.2d 316, 316-17 (Fla. 3d DCA 1991), the Third District Court of Appeal held that the circuit court abused its discretion in not granting Fla. R. Civ. P. 1.540(b) relief.

George L. Richards, M.D., appeals a non-final order denying his motion filed pursuant to Florida Rule of Civil Procedure 1.540(b). We reverse. “A party is not required to anticipate false testimony from an opposing party and a new trial is warranted on the ground of newly discovered evidence, where it is shown that the prevailing party gave or used false testimony.” *McFarlin v. Jack Eckerd Corp.*, 581 So.2d 181, 182 (Fla. 3d DCA 1991). The record establishes that in his testimony, plaintiff Allen Sledge misrepresented his employment status and his physical condition at the time of trial. In addition, Sledge’s expert testified in reliance on that inaccurate information. Thus, the trial court abused its discretion in failing to grant Dr. Richards’ Rule 1.540(b) motion founded on Sledge’s misrepresentation. See *Alston v. Shiver*, 105 So.2d 785 (Fla. 1958); *Kline v. Belco, Ltd.*, 480 So.2d 126 (Fla. 3d DCA 1985), review denied, 491 So.2d 278 (Fla. 1986); *Roberto v. Allstate Ins. Co.*, 457 So.2d 1148 (Fla. 3d DCA 1984); Fla.R.Civ.P. 1.540(b). For this reason, we reverse and remand for a new trial.

See also, Fla. R. Civ. P. 1.530 and 1.540.

II. Appellants’ Amended Complaint Alleges That Appellee, FONTICIELLA CONSTRUCTION, Owed a Duty to Appellants.

a. Appellee, FONTICIELLA CONSTRUCTION, controlled access to the subject property at the time of the dog attack.

“Premises liability is not predicated on ownership of the property;” instead, the “duty to protect others from injury resulting from a dangerous condition on the premises rests on the right to control access to the property.”

Welch v. Complete Care Corp., 818 So. 2d 645, 649 (Fla. 2d DCA 2002) (holding that the landlord who surrendered control of access to the property entirely to tenant was not liable for failing to protect invitee from a dangerous condition on the property). *See also, Haynes v. Lloyd*, 533 So. 2d 944, 946 (Fla. 5th DCA 1988) (“The crux of the cause of action for premises liability is not legal title or ownership, but the failure of a person who is in actual possession and control (be it the owner, an agent, a lessee, a construction contractor, or other possessor with authority and control), to use due care to warn or to exclude, licensees and invitees from areas known to the possessor to be dangerous because of operations or activities or conditions.”). *See also, Verges v. Pacheco & Sons, Inc.*, 822 So. 2d 542, 543 (Fla. 3d DCA 2002), quoting *Worth v. Eugene Gentile Builders*, 697 So. 2d 945, 947 (Fla. 4th DCA 1997). “For this reason, control of property for purposes of premises liability means control that rises to the level of the ability to control access or exclude others from the property.” *Brown v. Suncharm Ranch, Inc.*, 748 So. 2d 1077, 1078 (Fla. 5th DCA 1999). “The duty to protect others from injury resulting from a dangerous condition on a premises rests on the party who has the right to control access by third parties to the premises, be it the owner, an agent, or a lessee of the property.” *Id.*

“Contractors may also share responsibility for injuries caused on or around a construction site” even though the landowner retains some possession and control of the premises. *Worth*, 697 So. 2d at 947. In *Worth*, a construction company, Eugene Gentile Builders, was building condominium units on a property owned by Palm Beach National (“PNC”). *Id.* at 945. Due to frequent acts of vandalism on the construction site, PNC asked the Palm Beach County Police Department to send an officer to the site for surveillance. *Id.* While on the property, the officer was injured and brought a premises liability suit against PNC and Eugene Gentile Builders. *Id.* Eugene Gentile Builders moved for summary judgment arguing they did not invite the officer to the property; they had no knowledge of the officer on the property; and owed no duty to the officer. *Id.* The trial court agreed and granted summary judgment in favor of the construction contractor finding that premises liability applied only to landowners and not to entities in lawful possession of the premises. *Id.*

The district court reversed and held that contractors share responsibility for injuries caused on a premises if all or part of the premises is under the contractor’s control. *Id.*; see also, *Carter v. Livesay Window Co., Inc.*, 73 So. 2d 411 (Fla. 1954)(a sub-contractor was liable for the death of a child,

resulting from the contractor's failure to secure window frames because the applicable test was whether a reasonably prudent contractor in like circumstances should have anticipated other persons present on the property when there was an inherently dangerous condition); *Slavin v. Kay*, 108 So. 2d 462, 467 (Fla. 1958)(so long as the premises are under the contractor's control, he has a "duty to the whole world" to exercise due care); *Cockerham v. R.E. Vaughan, Inc.*, 82 So. 2d 890 (Fla. 1955)("so long as the work by the [contractor] was unfinished and remained in his charge, the [contractor] was subject to the same liability to others for harm resulting from that particular work entrusted to him as though he were the possessor of the land.").

The Court in *Worth* reasoned that because the construction work was not yet complete; and because the construction contractor knew about the frequent events of vandalism and thus knew that persons were visiting the site; a question of fact remained as to whether Eugene Gentile Builders "provided adequate warnings or safeguards under the circumstances to prevent injuries" on the premises. *Id.*

Likewise, here, Appellee, FONTICIELLA CONSTRUCTION, had control of the subject property and controlled access to the property at the time of the dog attack because Appellants' Amended Complaint alleges that the

construction contractor ordered to have a commercial roll-on dumpster delivered and picked up at the property to dump construction materials [Amend. Compl. 152, R130]. Further, the Work Order incorporated into the Amended Complaint clearly demonstrates that the construction company ordered and thus, paid for, Waste Management Inc. of Florida to enter the subject property to drop-off and pick-up a 10-yard commercial dumpster in order to dispose of construction and demolition debris.² The Work Order reasonably indicates that the homeowner surrendered control or partial control of the property to Appellee, FONTICIELLA CONSTRUCTION, and allowed the construction company to invite Waste Management Inc. of Florida to enter the property to drop-off and pick-up a commercial dumpster for construction materials. Further, the 10-yard commercial dumpster was

²Appellants recognize and understand that the Court's review on a Motion to Dismiss is confined to the four corners of the Complaint and its attachments, but in an effort to put this Work Order in context, Appellants proffer evidence that when an entity such as Appellee, FONTICIELLA CONSTRUCTION, orders a commercial dumpster from Waste Management Inc. of Florida, the company must properly prepare the property for the roll-on dumpster. Waste Management Inc. of Florida lists multiple requirements on its website, including, making sure there is open access to the area in question where the dumpster is to be dropped-off and picked-up. There are further requirements to check for low lying trees and other conditions on the property. The company responsible for renting the commercial dumpster must agree to these terms prior to the initial drop-off. A copy of these requirements of the contracting entity is found at (R207-211, R856-860).

ordered to be delivered and picked up in a fenced-in area of the backyard of the subject residence. Thus, Appellee, FONTICIELLA CONSTRUCTION, assumed control over the property with authority to allow third parties to access the fenced-in backyard area of the premises.

Additionally, Appellants' Amended Complaint alleges that Appellee, FONTICIELLA CONSTRUCTION, performed work at the subject property prior to the dog attack and thus, knew or should have known that a pit-bull-mix dog was roaming unsecured on the property [Amend. Compl. 153, R130]. ***In fact, the newly discovered evidence reveals four separate (4) invoices generated by Waste Management Inc. of Florida as well as four separate (4) checks payable to Waste Management Inc. of Florida all of which predate the date of the dog bite incident.*** While *Worth* involved a review of an order granting summary judgment, the reasoning is instructive for the case at bar. Because Appellee, FONTICIELLA CONSTRUCTION, controlled access to the subject premises at the time of the dog attack, the contractor owed a duty to provide "adequate warnings or safeguards under the circumstances to prevent injuries" on the premises. *Id.* The facts in the instant case are even more compelling because Appellee, FONTICIELLA CONSTRUCTION, directly ordered the commercial dumpster, and, thus, had

actual knowledge that Waste Management Inc. of Florida and its employees would be entering the fenced-in backyard area of the property. The contractor, therefore, owed a duty to warn of an unsecured pit-bull-mix dog on the premises.

Of importance, while duty is a question of the law for the Court, whether a Defendant exercises sufficient control over a premises is a question of fact to be resolved by the jury. *Regency Lake Apartments Associates, Ltd. v. French*, 590 So. 2d 970, 974 (Fla. 1st DCA 1991); *Cook v. Bay Area Renaissance Festival of Largo, Inc.*, 164 So. 3d 120 (Fla. 2d DCA 2015); *Florida Power & Light Co. v. Morris*, 944 So. 2d 407, 410 (Fla. 4th DCA 2006) (“Generally, control and responsibility are issues of fact to be resolved by the jury.”).

At this stage of the litigation, the Amended Complaint along with the attached Work Order exhibit alleges that Appellee, FONTICIELLA CONSTRUCTION, controlled access to the subject property at the time of the dog attack and, thus, owed a duty to Appellant to protect him from a dangerous condition on the property. ***And, the newly discovered evidence reveals four separate (4) invoices generated by Waste Management Inc. of Florida as well as four separate (4) checks payable to Waste***

Management Inc. of Florida all of which predate the date of the dog bite incident.

- b. Appellee, FONTICIELLA CONSTRUCTION, created a broader zone of risk for the Appellant, and, thus, the construction Appellee owed a duty to warn of a dangerous condition on the premises.**

“The general facts of a case may indicate a legal duty where a defendant’s conduct creates a foreseeable zone of risk.” *Gross v. Sand & Sea Homeowner’s Ass’n*, 756 So. 2d 1073 (Fla. 4th DCA 2000), citing, *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992). “In such cases, the defendant is obligated to act with reasonable care.” *Id.* “The law generally will recognize a duty upon the defendant to either lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk imposes.” *Id.*

In *Gross*, the district court reversed an order granting a motion to dismiss in favor of a homeowner’s association finding that the entity owed a legal duty to the plaintiff child to maintain the common areas of a mobile home park in a safe condition, and a duty to use ordinary care in adopting rules regulating the use of the playground on the property. *Id.* The homeowner’s association closed one of two playgrounds on the property, forcing children to cross a road to use the remaining playground. *Id.* Plaintiff child was

crossing the road in route to the playground and was hit by a car. *Id.* The district court in *Gross* determined that on a Motion to Dismiss, the court must accept the allegations in Plaintiff's complaint as true and the Plaintiff child alleged that Sand & Sea Homeowner's Association had the authority to make the rules and maintained the recreational facilities, thus they owed a duty to "maintain the premises in a reasonably safe condition" and "use ordinary care in adopting rules regulating use of the property." *Id.* These allegations were hotly contested by Defendants; however, the Court noted that discovery will reveal whether Defendants had control over the property and summary judgment may be appropriate. Nevertheless, the allegations plead a duty owed and dismissal was premature. *Id.*

Similarly, here, Appellants' Amended Complaint states that Appellee, FONTICIELLA CONSTRUCTION, performed work at the subject property prior to the dog attack and, thus, knew or should have known of the dangerous condition where a pit-bull-mix dog was roaming unsecured on the property. Next, the Work Order clearly shows that Appellee, FONTICIELLA CONSTRUCTION, ordered a commercial 10-yard dumpster to be delivered and picked up at the subject property demonstrating that the contractor had a right to control access to the property. It is reasonable to infer that when

Appellee, FONTICIELLA CONSTRUCTION, ordered the dumpster, the entity knew that persons from Waste Management Inc. of Florida would be entering the property to deliver and pick up the commercial dumpster. Therefore, Appellee's conduct of ordering the dumpster without warning the company of the pit-bull-mix dog roaming unsecured on the property created a foreseeable zone of risk. ***And, the newly discovered evidence reveals four separate (4) invoices generated by Waste Management Inc. of Florida as well as four separate (4) checks payable to Waste Management Inc. of Florida all of which predate the date of the dog bite incident.*** Under the holding in *Gross*, Appellee, FONTICIELLA CONSTRUCTION, was obligated to act with reasonable care to lessen the risk or see that sufficient precautions were taken to protect others from the harm that the risk imposed. *Id.* As such, Appellants' Amended Complaint sufficiently pled a duty owed and dismissal was premature. *See also, Sewell v. Racetrac Petroleum, Inc.*, 245 So. 3d 822, 825 (Fla. 3d DCA 2017); *Ramirez v. M.L. Mgmt. Co., Inc.*, 920 So. 2d 36, 38 (Fla. 4th DCA 2005); *Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 339-40 (Fla. 4th DCA 1998). *See also, Mitchell v. Bonnell*, 770 So. 2d 1292, 1294 (Fla. 3d DCA 2000)(given that the allegations of the operative complaint were broad enough, the trial court abused its discretion in limiting plaintiff's

theories of recovery).

III. Duty May Rest Upon More Than one Party.

Under a premises liability theory, “[t]wo or more persons or entities can have the ability to exercise possession or control and, if that is the case, either or both may be liable in a premises liability action: “A duty, and therefore liability for breach of that duty, may rest upon more than one party.” *Craig v. Gate Maritime Properties, Inc.*, 631 So. 2d 375, 378 (Fla. 1st DCA 1994). “Anyone who assumes control over the premises in question, no matter under what guise, assumes also the duty to keep them in repair...” *Id.* at 378. “Control over property sufficient to establish liability does not have to be complete or exclusive.” *Bechtel Corp. v. Batchelor*, 250 So. 3d 187 (Fla. 3d DCA 2018). “More than one party may share responsibility, possession, or control over property and each may therefore, be held liable for injuries that occur on the premises.” *Id.*

In the case at bar, Appellants allege that multiple parties assumed control over the subject property at the time of the dog attack. Defendants, MARCIANO JAIMES and his wife, ENEDINA JAIMES, as the owners of the subject premises and the owners of the pit-bull-mix dog exercised control over the premises, giving rise to a duty to warn Appellant of the pit-bull-mix dog

roaming unsecured in and around the property. Additionally, Appellee, FONTICIELLA CONSTRUCTION, assumed control and specifically, controlled access to the subject property during its construction activity in and around the property. The Work Order indicates that Appellee, FONTICIELLA CONSTRUCTION, had authority to invite third parties, in this case, Waste Management Inc. of Florida and its employees, to the subject property to deliver and pick-up a commercial dumpster for its construction materials. Therefore, both the owners of the property and the construction contractors performing work on the property are liable in a premises liability action.

IV. Appellees FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP provided incomplete and evasive discovery answers and responses sixty-four (64) days after Appellants' discovery was propounded.

On January 30, 2024, three hundred one (301) days ago, Appellants, LAZARO RODRIGUEZ and ELIZABETH RODIL, his wife, propounded discovery on Appellees FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP. ***Sixty-four (64) days after the aforesaid Appellees received Appellants' discovery, they provided incomplete and evasive answers and responses --despite having ample opportunity to***

fully answer and respond to the requested discovery--, and which the Appellants are entitled to receive and review.

Referenced below are the answers and responses to Appellants' discovery from FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA DEVELOPMENT LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP.

- FONTICIELLA CONSTRUCTION CORPORATION's Answers to First Set of Interrogatories propounded on January 30, 2024 and jurat page,(R385-392, R703-710);
- FONTICIELLA CONSTRUCTION CORPORATION's Response to First Request for Production propounded on January 30, 2024, including insurance policy, (Bates labeled FCC00001 - 000080), (R393-481, R739-827);
- FONTICIELLA CONSTRUCTION MANAGEMENT, LLC's Answers to First Set of Interrogatories propounded on January 30, 2024 and jurat page,(R482-489, R712-719);
- FONTICIELLA CONSTRUCTION MANAGEMENT, LLC's Response to First Request for Production propounded on January 30, 2024,(R490-497, R829-836);
- FONTICIELLA DEVELOPMENT LLC's Answers First Set of Interrogatories propounded on January 30, 2024 and jurat page, (R498-504, R862-868);
- FONTICIELLA DEVELOPMENT LLC's Response to First Request for Production propounded on January 30, 2024,(R505-511, R870-876);
- FONTICIELLA GP, LLC's Answers to First Set of Interrogatories

propounded on January 30, 2024 and jurat page, (R512-519, R721-728);

- FONTICIELLA GP, LLC's Response to First Request for Production propounded on January 30, 2024, (R520-527, R838-845);
- FONTICIELLA LLLP's Answers to First Set of Interrogatories propounded on January 30, 2024 and jurat page,(R528-535, R730-737) ;
- FONTICIELLA LLLP's Response to First Request for Production propounded on January 30, 2024,(R536-543, R847-854).

The following incomplete and evasive discovery answers and responses were supplied by Appellees FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP to Appellants' discovery.

**FONTICIELLA CONSTRUCTION CORPORATION,
FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

7. Describe in detail how the Plaintiff's subject dog bite incident described in the Amended Complaint happened, including all actions taken by you or anyone on your behalf or on behalf of your company or anyone in order to prevent the dog bite incident.

ANSWER: Defendant has never visited the property in question, has never seen, known about, or interacted with the dog alleged to have bitten the Plaintiff, and therefore has no knowledge or information regarding how the incident described in the Amended Complaint occurred.

(R386, R704, R483, R713, R513, R722, R529, R731).

* * *

FONTICIELLA CONSTRUCTION CORPORATION

9. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which agreed to pay or be responsible for payment as a result of the Plaintiff Lazaro Rodriguez traveling to the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida on the date the of the subject dog bite incident in order to perform waste management services.

ANSWER: Unknown at this time as discovery is pending.

(R387, R705).

* * *

**FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

9. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which agreed to pay or be responsible for payment as a result of the Plaintiff Lazaro Rodriguez traveling to the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida on the date the of the subject dog bite incident in order to perform waste management services.

ANSWER: No knowledge.

(R484, R714, R514, R723, R530, R732).

* * *

FONTICIELLA CONSTRUCTION CORPORATION

11. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which on the date the of the subject dog bite incident communicated in writing and/or verbally with the Plaintiff Lazaro Rodriguez, prior to and/or after the mentioned dog bite, concerning the waste management services to be performed at the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida and/or concerning the mentioned dog bite incident.

ANSWER: Unknown at this time as discovery is pending.

(R387, R705).

* * *

**FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

11. Describe in detail the full name and address of the individual(s) and/or entity(ies) who or which on the date the of the subject dog bite incident communicated in writing and/or verbally with the Plaintiff Lazaro Rodriguez, prior to and/or after the mentioned dog bite, concerning the waste management services to be performed at the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida and/or concerning the mentioned dog bite incident.

ANSWER: No knowledge.

(R484, R714, R514, R723, R530, R732).

* * *

FONTICIELLA CONSTRUCTION CORPORATION

20. Please describe all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff's dog bite incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name and address of the individual, company and/or entity with whom the contracts and/or agreements and/or arrangements were entered into, and please provide the complete name, position and address of the individual(s) who possess(es) the aforementioned contracts and/or agreements and/or arrangements.

ANSWER: Defendant has never performed services at, and has no right, title or interest in the subject property. To date, the only relationship was between Defendant and Marciano Jaimes, as Defendant hired Mr. Jaimes, to perform work at a real property located in Key Largo, Florida—and not the Homestead property.

(R389, R707).

* * *

21. During the three (3) year period prior to and up to and including the date of the Plaintiff's dog bite incident giving rise to the subject lawsuit, with whom did you or anyone on your behalf or on behalf of your company enter into a contract and/or agreement and/or arrangement regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name of the individual, company and/or entity with whom you or anyone on your behalf or on behalf of your company entered into the contract and/or agreement and/or arrangement.

ANSWER: Defendant has never performed services at, and has no right, title or interest in the subject property. To date, the only relationship was between Defendant and Marciano Jaimes, as Defendant hired Mr. Jaimes, to perform work at a real property located in Key Largo, Florida—and not the Homestead property.

(R389-390, R707-708).

* * *

**FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,
FONTICIELLA GP, LLC, and FONTICIELLA LLLP**

20. Please describe all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff's dog bite

incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name and address of the individual, company and/or entity with whom the contracts and/or agreements and/or arrangements were entered into, and please provide the complete name, position and address of the individual(s) who possess(es) the aforementioned contracts and/or agreements and/or arrangements.

ANSWER: None.

(R486, R716, R516, R725, R532, R734).

* * *

21. During the three (3) year period prior to and up to and including the date of the Plaintiff's dog bite incident giving rise to the subject lawsuit, with whom did you or anyone on your behalf or on behalf of your company enter into a contract and/or agreement and/or arrangement regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida. In responding to this interrogatory, please specify the full name of the individual, company and/or entity with whom you or anyone on your behalf or on behalf of your company entered into the contract and/or agreement and/or arrangement.

ANSWER: None.

(R486, R716, R516, R725, R532, R734).

* * *

**FONTICIELLA CONSTRUCTION CORPORATION,
FONTICIELLA CONSTRUCTION MANAGEMENT, LLC,**

FONTICIELLA GP, LLC, and FONTICIELLA LLLP

16. Defendant is requested to produce a complete copy of any and all contracts and/or agreements and/or arrangements in effect on the date of the Plaintiff's dog bite incident giving rise to this lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida.

RESPONSE: None in Defendant's possession, custody, or control.

(R396, R742, R493, R832, R523, R841, R539, R850).

* * *

27. Defendant is requested to produce complete copies of any and all documentation, records and materials demonstrating or revealing all the agreements that you or someone on your behalf or on behalf of your company have entered into with any individual or any entity regarding the present case.

RESPONSE: None.

(R398, R744, R495, R834, R525, R843, R541, R852).

* * *

28. Defendant is requested to produce complete copies of any and all communications, including e-mails, text messages, faxes and correspondence, you or anyone on your behalf or on behalf of your company or anyone had with the Plaintiff Lazaro Rodriguez on the date of the subject dog bite incident but prior to the mentioned dog bite incident, discussing or referencing construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal services concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade

County, Florida.

RESPONSE: None in Defendant's possession, custody, or control. Defendant reserves the right to amend and/or supplement this response as discovery is ongoing.

(R398-399, R744-745, R495-496, R834-835, R525-526, R843-844, R541, R852).

* * *

29. Defendant is requested to produce complete copies of any and all communications, including e-mails, text messages, faxes and correspondence, you or anyone on your behalf or on behalf of your company or anyone had with the Plaintiff Lazaro Rodriguez on the date of the subject dog bite incident but after the mentioned dog bite incident, discussing or referencing construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal services concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida.

RESPONSE: None in Defendant's possession, custody, or control. Defendant reserves the right to amend and/or supplement this response as discovery is ongoing.

(R399, R745, R496, R835, R526, R844, R541-542, R852-853).

* * *

30. Defendant is requested to produce complete copies of any and all communications, including e-mails, text messages, faxes and correspondence, you or anyone on your behalf or on behalf of your company or anyone had with the Plaintiff Lazaro Rodriguez on the date of the subject dog bite incident or afterwards, discussing or referencing the Plaintiff's dog bite incident giving rise to the case at bar.

RESPONSE: None in Defendant's possession, custody, or control. Defendant reserves the right to amend and/or supplement this response as discovery is ongoing.

(R399, R745, R496, R835, R526, R844, R542, R853).

* * *

31. Defendant is requested to produce complete copies of any and all communications you or anyone on your behalf or on behalf of your company have had with anyone and/or any entity (excluding your attorney), including e-mails, text messages, faxes and correspondence, discussing or referencing the Plaintiff's dog bite incident giving rise to the case at bar

RESPONSE: None in Defendant's possession, custody, or control. Defendant reserves the right to amend and/or supplement this response as discovery is ongoing.

(R399, R745, R496, R835, R526, R844, R542, R853).

* * *

35. Defendant is requested to produce complete copies of any and all receipts for payment for all waste management and/or waste pickup and/or waste disposal services concerning or performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida and pertaining to the three (3) year period of time prior to and including the date of the Plaintiff's dog bite incident giving rise to the case at bar, and the one (1) year period of time after Plaintiff's dog bite incident giving rise to the case at bar.

RESPONSE: None in Defendant's possession, custody, or control.

(R400, R746, R497, R836, R527, R845, R543, R854).

* * *

Of significance, on the one hand Appellees FONTICIELLA CONSTRUCTION CORPORATION, FONTICIELLA CONSTRUCTION MANAGEMENT, LLC, FONTICIELLA GP, LLC, and FONTICIELLA LLLP: **(1)** denied having any knowledge of the subject dog bite incident; **(2)** were

incomplete and evasive when asked who paid for or was responsible to pay for the waste management services to be performed at the address located 14240 Henderson Street, Homestead in Miami-Dade County, Florida; **(3)** were incomplete and evasive when asked to describe all contracts and/or agreements and/or arrangements in effect on the date of the Appellant's dog bite incident giving rise to the lawsuit and entered into between you or anyone on your behalf or on behalf of your company and any individual, company and/or entity regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida; **(4)** were incomplete and evasive when asked "[d]uring the three (3) year period prior to and up to and including the date of the Plaintiff's dog bite incident giving rise to the subject lawsuit, with whom did you or anyone on your behalf or on behalf of your company enter into a contract and/or agreement and/or arrangement regarding construction services, dumping construction waste, dumping waste, waste management and/or waste pickup and/or waste disposal concerning or to be performed at the address located at 14240 Henderson Street, Homestead in Miami-Dade County, Florida."

On the other hand, the aforesaid invoices **--newly discovered evidence--** supplied by Waste Management Inc. of Florida all refer to the same "Customer ID" number "20-84670-93002"; all refer to the same "Customer Name" "Fonticiella Construction Corp"; all have the same "Details for Service Location" "Fonticiella Construction Corp, 14240 Henderson St, Homestead FL 33032-6622"; and the February 1, 2019 Invoice No. 0386171-2194-2 to Fonticiella Construction Corp, Customer ID 20-84670-93002, two (2) pages, states "**Driver bite by dog.**" Furthermore, the abovementioned checks **--newly discovered evidence--** furnished by Waste Management Inc. of Florida were all issued by Fonticiella Construction Corp, and were all payable to Waste Management Inc of Florida. Simply stated the aforesaid Appellees cannot have it both ways.

"It is inherent in the present rules of discovery that lawyers, out of respect for the adversary system, should make good faith efforts to comply with one another's reasonable discovery requests." *Summit Chase Condominium Ass'n, Inc. v. Protean Investors, Inc.*, 421 So. 2d 562, 564 (Fla. 3d DCA 1982). To that end, parties "have a duty to provide true, explicit, responsive, complete and candid answers" to discovery requests. *Chubb Integrated Syst. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 61 (D.D.C.

1984) (citing *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977)); *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D.Pa. 1996). The Fourth District Court of Appeal has made clear that “evasive or incomplete” discovery responses do not fulfill that duty. *Herold v. Computer Components Int'l, Inc.*, 252 So.2d 576, 580 (Fla. 4th DCA 1971).

Our judicial system has spoken firmly against evasive and incomplete discovery responses. In *Turner v. Marks*, 612 So.2d 610 (Fla. 4th DCA 1992) an appeal was taken from “an order striking pleadings and entering a default based on **discovery abuses**.” (Emphasis supplied). Regarding the Appellant’s position, Judge Warner, who concurred specially with opinion, stated the following:

However, his compliance amounts to the continual furnishing of **evasive and incomplete answers to discovery requests** (which according to Rule 1.380(a)(3), Florida Rule of Civil Procedure, is the equivalent of a failure to answer). At some point “**mere foot dragging**” becomes **conduct which evinces deliberate callousness and willful disregard of the court’s authority**. See *Commonwealth Federal Sav. and Loan Ass’n v. Tubero*, 569 So.2d 1271 (Fla. 1990). **And while I can find on this record a violation of the letter of the law by the filing of patently evasive and incomplete answers to interrogatories after being ordered to answer them**, I also note a willful violation of the “spirit” of the law as evidenced by the two year effort, mostly unsuccessful, to extract

information from this defendant. The trial court did not abuse its discretion.

Id. at 610. (Emphasis supplied).

Pursuant to Fla. R. Civ. P. 1.280, Appellants' discovery propounded on the Appellees is "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Yet, the Appellees have provided incomplete and evasive discovery answers and responses to the aforementioned discovery propounded by the Appellants.

In *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) the Florida Supreme Court underscored the importance of allowing a party to conduct discovery.

As stated in the seminal case of *Surf Drugs, Inc. v. Vermouth*, 236 So.2d 108, 111 (Fla.1970), "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics." See also *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (rules of discovery should be afforded "'broad and liberal treatment' to effectuate their purpose that" trials should not be "carried on in the dark") (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Our rules of civil procedure broadly allow parties to obtain discovery of "any matter, not privileged, that is relevant to the subject matter of the pending action," whether the discovery would be admissible at trial, or is merely "reasonably calculated to lead to the discovery of admissible evidence." Fla.

R. Civ. P. 1.280(b)(1).

Id. at 995.

The Florida Supreme Court further explained that “[o]nly when **all relevant facts are before the judge and jury can the ‘search for truth and justice’ be accomplished.** *Dodson v. Persell*, 390 So.2d 704, 707 (Fla.1980).” *Id.* at 995. (Emphasis supplied). See also, *Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995) “[t]he concept of relevancy is broader in the discovery context than in the trial context.”

V. The jury should be afforded the opportunity to draw adverse inferences against Appellee FONTICIELLA CONSTRUCTION based on the record evidence.

In light of the record evidence in the case at bar including the ***newly discovered evidence***, the jury should be afforded the opportunity to draw adverse inferences against Appellee FONTICIELLA CONSTRUCTION.

Nothing in Florida’s Evidence Code prevents “the drawing of an inference that is appropriate.” § 90.301(3), Fla. Stat. (2004). An inference, unlike a presumption, is “[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.” Black’s Law Dictionary 778 (6th ed. 1990); see Charles W. Ehrhardt, Florida Evidence § 301.1 (2002 ed.).

Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 780-81 (Fla. 4th DCA 2006).

Unlike an adverse presumption instruction, where the court must find the spoliator was duty-bound to preserve the evidence, “an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.” *Martino*, 835 So. 2d at 1257.

Golden Yachts, Inc. v. Hall, 920 So. 2d at 781.

In *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391

(Fla. 2015) the Florida Supreme Court set forth the following:

Even in the absence of a legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. As this Court explained in *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346 (Fla. 2005), Florida courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. If the evidence was negligently destroyed, a rebuttable presumption of liability may arise. *Id.* at 347. In other words, as recognized by the Fourth District Court of Appeal, “an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.” *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006) (quoting *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003), approved, 908 So. 2d 342); see also *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (stating that “[c]ases in which evidence has been destroyed, either inadvertently or

intentionally, are discovery violations” that may be subject to sanctions).

In *Am. Hosp. Mgmt. Co. v. Hettiger*, 904 So. 2d 547, 550-51 (Fla. 4th DCA 2005) the appellate court set forth the following:

In circumstances where the lost evidence was under the sole control of the party against whom the evidence might have been used to effect, and where the lost evidence is in fact critical to prove the other party’s claim, an adverse inference instruction may be necessary to achieve justice in the jury’s determination of the case. This would be true where the party failing to preserve the evidence argues that the thing lost was not as represented by the injured party, or that the injured party should not prevail because of the failure to present the evidence foreclosed by the loss of the item.

VI. Appellants are entitled to their right to trial by jury against all the Defendants, including FONTICIELLA CONSTRUCTION, in the instant case.

The Appellants should be afforded their right to a trial by jury against all the Defendants, including Appellee FONTICIELLA CONSTRUCTION. To do so, would allow the jury to hear and weigh the record evidence including the opportunity to draw adverse inferences from the record evidence against all the Defendants, including Appellee FONTICIELLA CONSTRUCTION. In their *Amended Complaint for Damages and Demand for Jury Trial*, Appellants demanded on all counts trial by jury. See, (R100-150).

In *Hollywood, Inc. v. Hollywood*, 321 So. 2d 65 (Fla. 1975), the case arose from an action by the tax assessor seeking declaratory decree and equitable relief because the parties claimed title to the land. Petitioner corporation, that claimed title by deed, appealed the Fourth District Court of Appeal's reversal of the trial court's judgment against respondent city which claimed title by dedication. The Florida Supreme Court concluded that "that portion of the District Court's opinion denying Respondent a jury trial is quashed with directions to remand for proceedings consistent herewith." *Id.* at 73.

In formulating its opinion in *Hollywood, Inc.*, the Florida Supreme Court set forth the following:

We hold that the Respondent was entitled to a jury trial on the issues of dedication and actual possession of the property and that the right to that jury trial has not been waived. Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions. See U.S. Constitution, Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, § 22.

Hollywood, Inc., 321 So. 2d at 71.

Such is the case here. Appellants should be afforded the opportunity to present their entire case against all the Defendants, including Appellee

FONTICIELLA CONSTRUCTION, to the jury, including the record evidence from which a jury can reasonably draw inferences in arriving at a verdict.

With respect to *In re 1978 Chevrolet Van*, 493 So. 2d 433, 434-35 (Fla. 1986), the Florida Supreme Court asserted the following:

First, we note that the term “common law” does not appear in article I, section 22 or in any prior state constitutional provision on the subject, as it does in the provision’s federal counterpart. The seventh amendment to the United States Constitution provides in part:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

Although the seventh amendment guarantee to the right of trial by jury is only binding upon federal courts, this Court has recognized that federal decisions construing it are helpful and persuasive in construing this state’s constitutional provision of like import. *Dudley v. Harrison McCready & Co.*, 127 Fla. 687, 173 So. 820 (1937). Therefore, it is apparent to us that reference to the “common law” in regard to the right to a jury trial under our state constitution is the result of reliance on federal decisions construing that right under the seventh amendment to the United States Constitution. As used in the context of the right to a jury trial under the seventh amendment, the term “common law” is used in a jurisdictional sense “in contradistinction to equity, and admiralty, and maritime jurisprudence.” *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446, 7 L. Ed. 732 (1830). It includes not only the *lex non scripta* but also the written statutes enacted by both

Parliament and Congress. See, e.g., *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 231 P.2d 832, 835 (1951); *One 1976 Mercedes Benz*, 618 F.2d at 456-57.

The constitutional right to a trial by jury is not to be narrowly construed. See *Hollywood, Inc. v. City of Hollywood*, 321 So.2d 65 (Fla. 1975). This right is not limited strictly to those specific proceedings in which it existed before the adoption of our constitution, but should be extended to proceedings of like nature as they may arise. *Wiggins v. Williams*, 36 Fla. 637, 18 So. 859 (1896). Accord, *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 231 P.2d 832 (1951); *State v. 1920 Studebaker*, 120 Or. 254, 251 P. 701 (1926); *Colon v. Lisk*, 13 A.D. 195, 43 N.Y.S. 364, *affd*, 153 N.Y. 188, 47 N.E. 302 (1897).

In *Dep't of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994),

the Florida Supreme Court stated the following:

A right to a jury trial “shall be secure to all and remain inviolate.” Art. I, § 22, Fla. Const. These words guarantee Floridians the right to a jury trial “in those cases in which the right was enjoyed at the time this state’s first constitution became effective in 1845.” *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986). When we have been called upon to interpret article I, section 22 of the Florida Constitution, we have found guidance in the Seventh Amendment to the United States Constitution. In *Chevrolet Van*, we stated that “although the seventh amendment guarantee to the right of trial by jury is only binding upon federal courts, . . . federal decisions construing it are helpful and persuasive in construing this state’s constitutional provision of like import.” 493 So. 2d at 434; see also *Dudley v. Harrison, McCready*

& Co., 127 Fla. 687, 173 So. 820, 825 (1937). Now, as in prior times, we seek guidance from previous interpretations of the Seventh Amendment. The amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law

U.S. Const. amend. VII.

Fla. R. Civ. P. 1.430 Demand for Jury Trial; Waiver includes the following rule: “**(a) Right Preserved.** The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.” Appellants fully preserved their right of trial by jury against all the Defendants, including Appellee FONTICIELLA CONSTRUCTION, when they demanded it in all the counts set forth in their *Amended Complaint for Damages and Demand for Jury Trial* found at (R100-150).

Indeed, as to the right of a jury trial and due process, the State of Florida has certainly looked to the Seventh and Fourteenth Amendments of the United States Constitution. In so doing, a party should be afforded the opportunity to present his or her case to the jury, including record evidence from which reasonable inferences may be drawn by the jury, and allow the

jury to weigh the evidence. By entry of the *Order Granting Fonticiella Defendants' Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint*, (R1290-1295), the Appellants LAZARO RODRIGUEZ and ELIZABETH RODIL, his wife, were unfairly deprived to their right to a jury trial against the FONTICIELLA CONSTRUCTION Defendants and to their due process.

The U.S. Supreme Court has recognized the importance to the right of a jury trial. *Jacob v. New York City*, 315 U.S. 752, 62 S. Ct. 854 (1942) arises from the Petitioner employee appealing a decision from the Second Circuit Court of Appeals affirming the dismissal of a personal injury action under the Jones Act. In *Jacob*, the U.S. Supreme Court stated: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob*, 315 U.S. at 752-53, 62 S. Ct. at 854. The U.S. Supreme Court reversed and remanded to the District Court. *Id.* at 758.

The U.S. Supreme Court again underscored the importance to the right of a jury trial in *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 79 S. Ct.

948, 952 (1959): “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486.”

The crucial importance of preserving the right to a jury trial is not confined to the State of Florida, but, rather, it is important throughout the United States in order to allow parties who demand a jury trial to have their causes of action fully heard and addressed by a jury, including reviewing and weighing the record evidence. To do otherwise, would unfairly close the courthouse doors to our jury system.

VII. Having granted *Appellees’ Fonticiella Construction’s Motion to Dismiss Plaintiffs’ Amended Complaint* unfairly deprived the Appellants of their ability to try their case against the FONTICIELLA CONSTRUCTION Appellees before a jury, and, thus, violated Appellants’ due process.

The *Order Granting Fonticiella Defendants’ Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs’ Amended Complaint*, (R1290-1295), unfairly deprived the Appellants of their ability to try their case before a jury against the FONTICIELLA CONSTRUCTION Defendants. The basic due process guarantee of the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art.

I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same.

“To qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive (sic).” *Miami-Dade Cnty. v. Reyes*, 772 So. 2d 24, 29 (Fla. 3d DCA 2000) (quoting *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA 1996)). Thus, a court should “render[] judgment only after proper consideration of issues advanced by adversarial parties.” *Reyes*, 772 So. 2d at 29 (quoting *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990)). See, *Douglas v. Johnson*, 65 So.3d 605, 607 (Fla. 2d DCA 2011). See also, *Yue Yan v. Byers*, 88 So.3d 392, 394 (Fla. 4th DCA 2012).

Due process is “the most basic of all rights under our legal system.” *Holland v. State*, 503 So. 2d 1250, 1252 (Fla. 1987). It “serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue, ...” *Crosby v. Fla. Parole Comm’n*, 975 So. 2d 1222, 1223 (Fla. 1st DCA 2008).

CONCLUSION

Rooted in the aforesaid grounds, the Trial Court erred in granting the aforementioned Motion to Dismiss in favor of FONTICIELLA

CONSTRUCTION . Thus, Appellants respectfully request that this Honorable Court reverse the Trial Court Order granting the lower tribunal Defendants and Appellees, FONTICIELLA CONSTRUCTION's, Motion to Dismiss as to Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Amended Complaint, and remand the case for further proceedings.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was sent this 26th day of November, 2024 via electronic mail to: Giancarlo Cueto, Esquire and Alette D. Rodz, Esquire, Shutts & Bowen LLP, Counsel for Fonticiella Defendants, 200 S. Biscayne Boulevard, Suite 4100, Miami, FL 33131 (gcueto@shutts.com, arodz@shutts.com, lkelly@shutts.com, ialpg_service@shutts.com).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellants' Initial Brief was typed in Arial 14-point font, contains 12,784 words, and is therefore in compliance with the Florida Rules of Appellate Procedure 9.045(e).

By: /s/ Ramon M. Rodriguez
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