

IN THE DISTRICT COURT OF APPEALS  
SECOND DISTRICT, STATE OF FLORIDA

KAC 2021-1, LLC,

APPELLANT,

v.

CASE NO.: 2D23-1513

L.T. 23-CC-002458; 23-CC-018688

JAMES VOGEL, et. al.,

APPELLEES.

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**APPELLEES' ANSWER BRIEF**

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## **INTRODUCTION**

This appeal stems from the entry of an Order Granting the Appellees' Amended Motion to Dismiss Appellant's Complaint With Prejudice. (R: 88-94). The lower court granted the Appellees' Amended Motion to Dismiss With Prejudice, correctly finding that (1) Appellant is not a debtor with standing to sue under the FCCPA; (2) the 3-Day Notice and posting thereof, as required by Florida Statutes Chapter 83 before commencing a residential eviction action, creates a litigation privilege; (3) Fla. Stat. §83.56 is a special statute governing the subject matter and controls over the general purpose statute and general prohibitions set forth in Fla. Stat. §559.72(5), and otherwise the lower court's statutory construction was in accordance with Florida law; and (4), there was no "fundamental error" by granting the Amended Motion to Dismiss pursuant to Rule 1.140, Florida Rules of Civil Procedure. Appellees submit that the lower court's rulings should not be disturbed as its holdings were correct as a matter of law.

Appellees, JAMES VOGEL and JUDITH VOGEL, will be referred to collectively as Appellees. Appellant, KAC 2021-1, as assignee for

April E. Fann and Spencer D. Woods, will be referred to as the Appellant.

Citations to the Record on appeal will be designated as (R:\_\_).

Citations to the Initial Brief will be designated as (IB:\_\_).

Citations to the Answer Brief will be designated as (AB:\_\_).

## ISSUES ON APPEAL

**I.** APPELLANT DOES NOT HAVE STANDING: THE FCCPA CAUSE OF ACTION ASSIGNED TO APPELLANT WAS NOT ASSIGNABLE AND THEREFORE INVALID

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**II.** THE LOWER COURT CORRECTLY FOUND THE 3-DAY NOTICE WAS SUBJECT TO A LITIGATION PRIVILEGE

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## **STANDARD OF REVIEW**

Appellees agree with Appellant that this Court's review standard of the trial court's grant of a motion to dismiss is de novo. *Fullerton v. Fla. Med. Ass'n*, 938 So. 2d 587 (Fla. 1st DCA 2006).

## **STATEMENT OF THE CASE AND FACTS**

Appellees commenced an eviction action against April E. Fann and Spencer D. Woods on January 10, 2023, in *Case No. 23-CC-002458*, which included a claim for damages. (R: 6-18). On January 31, 2023, the Appellees filed their Motions for Immediate Default against April E. Fann and Spencer D. Woods. (R: 22-25), which has not been ruled upon by the lower court.

In response to the eviction proceeding commenced against them by the Appellees, April E. Fann and Spencer D. Woods filed a Counterclaim (R: 38-43) alleging violation of Fla. Stat. Section 83.67(2) by preventing April E. Fann and Spencer D. Woods from gaining reasonable access to the dwelling unit (Count I); damages for violating Fla. Stat. Section 83.67(5) (Count II) and seeking Replevin of a MacBook allegedly left behind in the leased premises (Count III).

On March 5, 2023, the Appellant (KAC 2021-1 LLC, AS ASSIGNEE FOR APRIL E. FANN AND SPENCER D. WOODS) commenced a new action against the Appellees in lower court *Case No. 23-CC-018668* (R: 148-151), therein alleging a violation of Fla. Stat. Section 559.72 and seeking damages associated with the Appellees' statutory posting of the 3-Day Notice.

On April 1, 2023 the Appellees filed their Motion to Consolidate and thereafter their Amended Motion for Consolidation (R: 28-29, 30-31) to consolidate the Appellant's Section 559.72 action (*Case No. 23-CC-018668*) with Appellees' eviction action (*Case No. 23-CC-002458*). On June 1, 2023, the Appellees' Amended Motion for Consolidation was granted. (R: 44-45), and as a result *Case No. 23-CC-018668* was administratively closed.

After the Order of Consolidation, on June 21, 2023 the Appellees filed their Motion and Amended Motion to Dismiss Appellant's Section 559.72 action (R: 51-53, 59-72). In response, Appellant filed its Opposition (R: 80-83). On June 30, 2023, the Appellees filed their Reply to Appellant's Opposition to Amended Motion to Dismiss (R: 73-79) and on July 5, 2023, the Appellant filed its Sur-Reply in Opposition to Amended Motion to Dismiss. (R: 84-87).

A hearing held on July 5, 2023 entertained the Appellees' Amended Motion to Dismiss the Complaint of KAC 2021-1 LLC, AS ASSIGNEE FOR APRIL E. FANN AND SPENCER D. WOODS (R:59-72), as well as the Appellant's opposition filings. After the parties were heard, the lower court entered its Order Granting Appellees' Amended Motion to Dismiss the Complaint of KAC 2021-1 LLC, AS ASSIGNEE FOR APRIL E. FANN AND SPENCER D. WOODS With Prejudice. (R: 88-94).

On July 14, 2023, the Appellant (KAC 2021-1 LLC, AS ASSIGNEE FOR APRIL E. FANN AND SPENCER D. WOODS) filed its Notice of Appeal of the order dismissing Appellant's Section 559.72 complaint with prejudice.

The claim of Appellant arises from April E. Fann's and Spencer D. Woods' assignment to Appellant of their purported FCCPA claim against Appellees. Affirming the lower court's dismissal of KAC 2021-1 LLC'S action, as assignee of April E. Fann and Spencer D. Woods, will be consistent with federal interpretations that FDCPA claims cannot be assigned, in consonance with Fla. Stat. Section 559.77(5) requiring the courts of this state to give due consideration and great weight to the federal courts' interpretations of the Federal Trade

Commission and the Fair Debt Collection Practices Act. Such federal interpretations have held assignments of FDCPA claims are invalid. *Tisdale v. Enhanced Recovery Co. LLC*, 2023 U.S. Dist. Lexis 20973, 2023 WL 1810413 (M.D. Tex., January 17, 2023).

There is also no dispute between the parties that the alleged violation, associated with Appellant's purported FCCPA claim, was the posting of a 3-Day Notice. There is also no dispute that the 3-Day Notice is a statutory prerequisite to commence a residential eviction action.

Appellees advance that the 3-Day Notice is statutory condition precedent to commencing a residential eviction and is subject to the litigation privilege. However, the statute requiring service of a 3-Day Notice does not instruct the manner of "leaving a copy thereof at the residence," i.e., posting. See, Fla. Stat. Section 83.56(3).

Appellees also advance Fla. Stat. Section 83.56 is a more specific statute governing the Appellees posting of a 3-Day Notice, than Fla. Stat. Section 559.72, which is a general statute proscribing general activities associated with the collection of debts.

While Appellant asserts no 3-Day Notice should be affixed "facing outward" and should be put in an envelope and taped to the

door (IB: 5), what Appellant asked of the lower court, now this Court, is to legislate the manner of posting 3-Day Notices, which this Court should decline to do.

### **SUMMARY OF ARGUMENT**

In the Initial Brief, the Appellant asserts the lower court overlooked Florida's Rule of Assignability. (IB: 41-46). However, it is the Appellant that has overlooked or disregarded Fla. Stat. Section 559.77(5) which provides:

In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act.

Applying the federal court's interpretations, regarding the assignability of a debtor's claim under the federal Fair Debt Collections Act, the federal courts have a "resounding consensus" that assignments of FDCPA claims are invalid and therefore cannot confer standing for the assignee. *Tisdale v. Enhanced Recovery Co. LLC*, 2023 U.S. Dist. Lexis 20973, 2023 WL 1810413 (M.D. Tex., January 17, 2023). Appellant obviously did not win on this issue and for good reason. The finding that the debtors' purported FDCPA claim was not assignable to the Appellant was correctly recognized, and that

decision of the lower court should be affirmed by this Court, including Appellant's resulting lack of standing.

In the Initial Brief, the Appellant also states the lower court erred by finding the posting of a 3-Day Notice, pursuant to Fla. Stat. Section 83.56(3) is subject to the litigation privilege. (IB: 24-35). Although the Appellant's lack of standing makes this issue moot, the lower court correctly found the posting of the 3-Day Notice was subject to a litigation privilege and not actionable. This Court's decision in *Driscoll v. Knellinger*, 380 So. 3d 1237 (Fla. 2d DCA 2024) from earlier this year not only applies to the instant case but is dispositive of this issue. As acknowledged by this Court in *Driscoll*, conduct preliminary to judicial proceedings is covered by the litigation privilege. Because the 3-Day Notice is a statutory prerequisite to commencing a residential eviction action, the lower court's finding that the litigation privilege applied to the 3-Day Notice is consistent with *Driscoll*. Consequently, the manner of posting, as suggested by Appellant (IB: 12), is irrelevant since the litigation privilege applies.

In the Initial Brief, the Appellant also states the lower court erred in its statutory construction, purportedly rendering Fla. Stat. Section 559.72 meaningless. However, the lower court's finding that Fla. Stat.

Section 83.56 is a more specific statute governing the posting of a 3-Day Notice, than the general nature of Fla. Stat. Section 559.72, was correct and did not render Fla. Stat. Section 559.72 meaningless. (IB: 23). The lower court's decision merely determined that Fla. Stat. Section 559.72 does not apply to the posting of a 3-Day Notice pursuant to Fla. Stat. Section 83.56(3).

The last point on appeal, which was added within the Amended/Corrected Initial Brief, suggests that the Florida Small Claims Rules precluded the lower court from entertaining the Appellee's Amended Motion to Dismiss at the July 5, 2023 hearing. If not then, when? The Pre-Trial Conference, originally scheduled in the small claims case (Case No: 23-SC-18668) was cancelled upon the entry of the Order of Consolidation and Appellant's small claims case was administratively closed (R: 44-45).

The Appellant also alleges "fundamental error," seemingly because otherwise this newly raised issue on appeal would be deemed waived. Notwithstanding, there was no fundamental error because the Appellant was afforded notice and the opportunity to be heard, and Appellant even briefed the lower court on legal issues scheduled for the July 5, 2023 hearing. Further, the Order of Dismissal was based

upon the four corners of Appellant’s complaint, and a presentation of evidence was not required to rule on the issues of law presented to the lower court, i.e., is an FCCPA claim assignable, does the litigation privilege apply to posting a 3-Day Notice, and upon consolidation of a small claims case within a county civil court case do the Rules of Civil Procedure apply to all subsequent matters<sup>1</sup>.

The only relevant Florida Small Claims Rule associated with the Appellant’s “fundamental error” argument is Rule 7.020(c), which provides that “[i]n any particular action, the court may order that action to proceed under 1 or more additional Florida Rules of Civil Procedure on application of any party or the stipulation of all parties or on the court's own motion.” Notably, the Amended Motion to Dismiss identifies in the first paragraph that the motion is being “lodged pursuant to Rules 1.110 and 1.140, Florida Rules of Civil Procedure” (R: 59-72) and the hearing proceeded under Rule 1.140 without objection by Appellant.<sup>2</sup> The Appellees having

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<sup>1</sup> After the Order of Consolidation, the Appellant’s small claims action was administratively closed, and thereafter the Florida Rules of Civil Procedure, not the Florida Small Claims Rules, applied to all pending matters.

<sup>2</sup> The Appellant’s Amended Motion to Dismiss was filed after the Order of Consolidation, and is also allowed under Rule 7.090(c),

invoked Florida Rule of Civil Procedure 1.140, without objection, the Motion should be deemed an application to proceed under Rule 1.140, and the lower court's order of dismissal should be deemed a grant of the application to apply Rule 1.140 to the lower case proceeding. Further, the application of the Florida Small Claims Rules was rendered moot by the Order of Consolidation.

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Florida Small Claims Rules, albeit the Rules of Civil Procedure applied to all matters after the Order of Consolidation.

## LEGAL ARGUMENT

### **I. APPELLANT DOES NOT HAVE STANDING: THE FCCPA CAUSE OF ACTION ASSIGNED TO APPELLANT WAS NOT ASSIGNABLE AND THEREFORE INVALID**

This appeal is dispositive on this single issue. That is, Appellant's cause of action, alleging a violation of Fla. Stat. Section 559.72, was not assignable by APRIL E. FANN and SPENCER D. WOODS to KAC 2021-1 LLC (Appellant) as a matter of law.

Fla. Stat. Section 559.77(5) provides guidance as to how this court should construe the FCCPA:

In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act.

To this point, there are interpretations of federal courts on this very issue, and those interpretations are that a debtor's claim under the Federal Trade Commission (FTC) and the Federal Fair Debt Collection Practices Act (FDCPA) cannot be assigned.

The federal courts have a "resounding consensus" that assignments of FDCPA claims are invalid and therefore cannot confer standing for the assignee. *Tisdale v. Enhanced Recovery Co. LLC*, 2023 U.S. Dist. Lexis 20973, 2023 WL 1810413 (M.D. Tex., January 17,

2023) (“ . . . no court has found an **assignment** of **FDCPA** and FCRA claims valid under any theory applying any state’s laws. Put simply, there is resounding consensus among the federal courts that **assignments** of **FDCPA** claims are invalid and therefore cannot confer standing for the assignee”). Applying these federal decisions to the instant case, the assignment by APRIL E. FANN and SPENCER D. WOODS of their purported FCCPA claim to Appellant was invalid and did not confer standing to the Appellant. *Tisdale v. Enhanced Recovery Co. LLC*, at \*26 (“In sum, the Court finds the Assignment is invalid under Texas law because claims under the FDCPA and FCRA are personal and punitive in nature and permitting their assignment would frustrate their stated purpose to protect and encourage consumers to personally bring their claims. Because the Assignment is invalid, it cannot confer standing to Plaintiff to bring claims assigned....”).

Notwithstanding the federal decisions militate for invalidating the assignment of the FCCPA claim to Appellant, the Appellant addresses this dispositive issue by invoking “Florida’s Rule of Assignability.” (IB: 45-47). Therein, the Appellant cites decisions that found, generally, causes of action based upon a statute can be assigned. However,

Appellant cites no decision that authorizes a debtor to assign a cause of action under the FCCPA.

Appellant relies solely upon its statement, “[n]owhere does the FCCPA specifically forbid a debtor to assign its FCCPA statutory causes of action.” (IB: 47). To this point, that Fla. Stat. Section 599.715 specifically authorizes the assignment by a creditor of consumer debt<sup>3</sup>, but there is no corresponding statute authorizing a debtor to assign a claim under the FCCPA, is instructive. It is this absence of a statutory provision addressing an assignment by a debtor that precludes an assignment by a debtor under the principles of statutory construction. This conclusion is consistent with the general principle of statutory construction, *expressio unius est exclusio alterius*, which means that "express mention of one thing is the exclusion of another." *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1150 (Fla. 2d DCA 2006) (quoting *Inman v. State*, 916 So. 2d 59, 61 (Fla. 2d DCA 2005)). Further, because the FCCPA expressly describes the particular situation by which a creditor may assign its consumer debt, the inference must be drawn that not mentioning a debtor’s right to assign

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<sup>3</sup> Fla. Stat. Section 599.715 provides, “This Section does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt.”

its claim was intentionally omitted or excluded. Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997) (“when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.” See, *Subirats v. Fidelity National Property*, 106 So. 3d 997, 1000 (Fla. 3d DCA 2013) (“It is familiar interpretive principle that when a legislature use a particular language in one section of a statute and omits from another section, courts must presume the omission was intentional”, citing *Canon v. Crosby*, 666 So.2d 536 (Fla. 1<sup>st</sup> DCA 2005)). See also, *Capeletti Bros., Inc v. Dep't of Transp.*, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) (“The **omission** may be a legislative oversight; nevertheless, courts should not rewrite legislation to cure an **omission** by the legislature just because it seems to fit overall legislative policy.”). As such, application of the statutory construction *expressio unius est exclusio alterius* also precludes the assignment of the FCCPA to the Appellant.

Further, as to the standing argument, the Appellant must be a debtor, as defined in Fla. Stat. §559.77(1) (“A debtor may bring a civil action against a person violating the provisions of s. 559.72.”) A “debtor” is defined under Section 559.55(8) as “any natural person obligated or

allegedly obligated to pay any debt.” A “debt” is defined under §559.55(6) as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” Once again, we look to federal courts for guidance. Since the FCCPA is modeled after the FDCPA and in applying and construing Fla. Stat. § 559.77(5) due consideration and great weight should be given to the interpretations of the federal courts relating to the FDCPA. *Rivernider v. Brough*, 2013 WL 5353748, at \*7 (S.D. Fla. 2013). Because Plaintiff is not obligated to pay its assignors’ debt, Appellant is not a debtor as defined by the act. *Condon v. Glob. Credit & Collection Corp.*, 2010 WL 5071014, at \*5–6 (M.D. Fla. 2010) (dismissing complaint because plaintiff, as an attorney, was not obligated to pay any debt to defendant and therefore lacked standing to assert a claim under the FDCPA); See, *James v. Puget Sound Collections*, 2022 U.S. Dist. LEXIS 116054, \*13 (to state a claim under the FDCPA, a plaintiff must allege facts establishing the plaintiff has been the object of collection activity arising from a consumer debt);. The Appellant’s failure to allege it was a debtor and had its own independent injury, but instead alleging its Assignors (the Tenants) are the “debtors” under the

FCCPA, precludes the Appellant from having standing to bring the FCCPA claim lodged in its Statement of Claim (R: 148-151) as an assignee. See, *US Fax Law Ctr., Inc. v. Ihire, Inc.*, 476 F.3d 1112, 1120 (10<sup>th</sup> Cir. 2007) (“Because the underlying assignment of TCPA claims was invalid, the Plaintiff-Appellants lack standing.”).

## **II. THE LOWER COURT CORRECTLY FOUND THE 3-DAY NOTICE WAS SUBJECT TO A LITIGATION PRIVILEGE**

While the first point of appeal in this brief is dispositive, i.e., the claim assigned to the Appellant was invalid and the Appellant had no standing, almost half of the Appellee’s legal argument is dedicated to the lower court’s finding that the Appellees were protected by the litigation privilege. (IB: 28-40). The lower court found the Appellees’ posting of the 3-Day Notice created a litigation privilege, as the litigation privilege includes landlord-tenant actions where there is a notice requirement as a condition precedent to suit. (R:88-94). See, *Pledger v. Burnup & Sims, Inc.*, 432 So.2d 1323 (Fla. 4<sup>th</sup> DCA 1983); *Echevarria, Mcall, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007).

The general rule concerning the litigation privilege is that

litigants are absolutely exempt from liability for conduct in the course of judicial proceedings so long as the conduct has some relation to or connection with the subject of inquiry. *Driscoll v. Knellinger*, 380 So. 3d 1237, 1241 (Fla. 2d DCA 2024) (citing and quoting *DelMonico v. Traynor*, 116 So. 3d 1205, 1211 (Fla. 2013)). Florida courts have applied the litigation privilege to conduct that is "necessarily preliminary" to judicial proceedings. *Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992) (quoting *Ange v. State*, 98 Fla. 538, 123 So. 916, 917 (Fla. 1929), for the proposition that the absolute privilege "arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto."). In consonance with the foregoing authority, there can be no question that the posting of a 3-Day Notice, pursuant to Fla. Sta. section 83.56(3), is an "act required or permitted by law in the due course of the judicial proceedings" and therefore subject to the litigation privilege and is absolutely exempt from liability for the posting. *Fridovich v. Fridovich*, 598 So. 2d at 66.

Notwithstanding the above well settled law, the Appellant seeks to reverse the lower court's decision on the issue of "litigation

privilege” by asserting the litigation privilege is an affirmative defense that cannot be considered at a motion to dismiss hearing, citing *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*, 810 So. 2d 996 (Fla. DCA 2002). This proposition is not novel and the courts have made it abundantly clear that any affirmative defense, including the litigation privilege, may be considered in resolving a motion to dismiss when "the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action." *Jackson v. BellSouth Telecomms*, 372 F.3d 1250, 1277 (11<sup>th</sup> Cir. 2004). See, *Reisman v. Gen. Motors Corp.*, 845 F.2d 289, 291 (11th Cir. 1988) (quoting *Evans v. Parker*, 440 So. 2d 640, 641 (Fla. 1st DCA 1983)). Here, the Appellant’s lower court Statement of Claim (R:148-151) "affirmatively and clearly" establishes that the challenged conduct relates to the Appellees’ posting of a 3-Day Notice<sup>4</sup>, which is a prerequisite to commencing an eviction action per Fla. Stat. Section 83.56(5); and therefore, the litigation privilege bars the action.

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<sup>4</sup> Appellant alleges at paragraphs 11, 12 and 13 of its statement of claim that: (1) On October 18, 2022, Defendant posted a 3 Day Notice to the Tenant’s door and, (2) the posted the 3 Day Notice was in violation of the Florida Consumer Collection Practice Act.

The Appellant also presents a strained argument that there can be no litigation privilege because the Statement of Claim is silent on whether the manner of posting the 3-Day Notice comported to Florida Law. (IB:30). However, the silence on the issue becomes less relevant because the Statement of Claim, at paragraph 11, admits Appellees “posted a 3 Day Notice to the Tenant’s door as is required by statute when commencing an eviction action.” This admission militates for the conclusion that the litigation privilege was properly considered by the lower court in resolving Appellees’ Amended Motion to Dismiss.

Appellant claims the manner of posting, by “publishing the 3-Day Notice’s contents face-out for the world to see” was a violation of the FCCPA (IB: 35). However, privilege exists, or it does not, regardless of the manner of posting. Further, the Appellant’s attempt to describe how 3-Day Notices should be posted is merely an ask for this Court to legislate the manner 3-Day Notices are to be posted, as the statute is silent. This Court should avoid Appellant's invitation to legislate. See, *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991) (“Florida's strong adherence to a strict separation of powers doctrine, art. II, § 3, Fla. Const., has led this Court to repeatedly

warn against **judicial legislation**.... Because of Florida's nondelegation doctrine, we believe the court below erred in reading an additional element into a statute. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1137 (Fla. 1990)).

As for the *Hollander* and *Moise* decisions cited by Appellant (IB:35-37), the facts of these case are clearly distinguishable from the instant appeal. In both decisions, the Third District Court of Appeals denied a litigation privilege because the Plaintiffs did not have a cause of action. In *Hollander* the appellate court found the Plaintiff/Association's Declaration had expired and there was no right to collect dues. *Rhonda Hollander, P.A. v. Fortunato*, 305 So. 3d 344, 345 (Fla. 3<sup>rd</sup> DCA 2020) (sending threatening collection letters demanding payment of maintenance assessments, interest, late charges, and attorney's fees (collectively "dues") pursuant to the subject Declaration, despite having actual knowledge that the Declaration was expired and unenforceable.... Thus, petitioners had no basis to proceed with the collection of these dues."). Likewise, in *MOISE*, the Plaintiff/Association had assigned its rights to collection to another entity, although the Association had no right to collect dues. *Moise v. Ola Condo. Ass'n*, 314 So. 3d 708, 709 (Fla. 3<sup>rd</sup> DCA

2021) (“violations of the Florida Consumer Collection Practices Act, against the Association, Essig, and LAS, based on communications with Moise for debt collection purposes and by filing the underlying lawsuit, despite having knowledge that the Association had no entitlement to collect any debt from Moise....”). Unlike the *Hollander* and *Moise* cases, Appellant has not alleged the Appellees did not have a right to collect the debt from their tenants<sup>5</sup>. In fact, Appellant has acknowledged the right to collect the debt and that Appellees’ 3-Day Notice was a statutory requirement before commencing an eviction action, by alleging:

11. On October 18, 2022, Defendant posted a 3 Day Notice to the Tenant’s door as is required by statute when commencing an eviction action.

12. Defendant posted the 3 Day Notice in violation of the Florida Consumer Collection Practice Act by posting the notice face out, disclosing to the world that the Tenant owed money.

18. The rent the Defendant [Appellees] claims Tenants owed qualifies as a “debt” or “consumer debt” under FCCPA § 559.55(6)....

(R: 149, 150).

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<sup>5</sup> The Tenants/Assignees did not file an answer to the Complaint for Eviction. The Counterclaim (R:38-46), filed on behalf of the Tenants by the same counsel as for Appellant, did not allege the Appellees had no right to collect the alleged past due rent.

Contrary to the Appellant's assertion that Appellees had no right to post the 3-Day Notice (IB: 37), by Appellant's own admissions the Appellees had every right to posting the 3-Day Notice required by Fla. Stat. Section 83.56(3).

Appellant's argument that applying the litigation privilege in the instant case would eviscerate the FCCPA is absurd, if only because the Appellees/Landlords were required to send/post the 3-Day Notice, which Appellant admits this was required before commencing a residential eviction action.

If we compare the facts in *Scott v. Albertelli Law Partners, LLC*, 2018 U.S. Dist. LEXIS 108350, cited by Appellant, with the instant this case, the Scott decision is not based upon a violation of the FCCPA. All that can be gleaned from the *Scott* decision, and the cited *Battle v. Gladstone Law Group, P.A.*, 951 F. Supp. 2d 1310, 1315-16 (S.D. Fla. 2013) decision, is that the Florida's litigation privilege does not apply to alleged violations of federal law. i.e., FDCPA, and nothing more. These decisions have no application to the instant case because the claim brough by Appellant is a claim under a Florida statute, the FCCPA and not a claim for violating federal law.

The Appellant also asserts that the litigation privilege does not apply to FCCPA case. However, that is decidedly wrong. In *Dyer v. Choice Legal Grp. P.A.*, 2015 U.S. Dist. LEXIS 75783, the District court held the filing and maintenance of a FCCPA action, such as an action in foreclosure, is precisely the kind of activity protected by Florida's **litigation privilege**. See, *Davidson v. Capital One, N.A.*, No. 14-20478-CIV, 2014 U.S. Dist. LEXIS 104639, 2014 WL 3767677, at \*5 (S.D. Fla. July 31, 2014) (dismissing a FCCPA count as barred by the Florida's litigation privilege); *Mikesell v. FIA Card Servs., N.A.*, No. 2:12-cv-606-FTM-29DNF, 2013 U.S. Dist. LEXIS 153494, 2013 WL 5781241, at \*2 (M.D. Fla. Oct. 25, 2013) (FCCPA claim barred by the litigation privilege). Consequently, Appellees are entitled to immunity under Florida's litigation privilege and the lower court's ruling should be sustained.

### **III. THE LOWER COURT'S STATUTORY CONSTRUCTION WAS CORRECT.**

The lower court's finding that Fla. Stat. Section 83.56 is a more specific statute governing the posting of a 3-Day Notice, than Fla. Stat. Section 559.72; Fla. Stat. Section 83.56 permits posting upon

the premises in the manner alleged in the Complaint; and Fla. Stat. Section 83.56 does not dictate the manner of posting required by a landlord, were all correct. And these findings did not render Fla. Stat. Section 559.72 meaningless, if only because the claim asserted by Appellant is invalid. To the contrary, Fla. Stat. Section 83.56 would be rendered meaningless if Fla. Stat. Section 559.72 trumped the pre-litigation requirements to commence an eviction action. The Appellant tries to make sense of its argument by adding requirements upon Landlords for posting that are not in the statute, e.g. use an envelope or tape face down. (IB:45). However, the Appellant cites *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So.2d 503 (Fla. 2008), that held holding “[c]ourts are not at liberty to add words to the statute that were not placed there by the legislature.” *Id.* at 512 (IB: 40). This *Lawnwood Med. Ctr.* decision denounces exactly what Appellant asks this Court to do, i.e., adding a statutory requirement to Fla. Stat. Section 83.56(5) that all postings must be placed in an envelope and taped to the door face down. (IB: 45). It was not the role of the lower court, nor this Court, to judicially legislate the manner which a 3-Day Notice should be posted, as promoted by Appellant.

Appellant also cites *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452 (Fla. 1992) for the principal, “[w]here **possible** [emphasis added], courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.” *Id.* at 455. (IB:40). Unlike the instant case, the *Forsythe* Court evaluated two (2) different sections in the same statute. In the instant case, we are looking at two different statutes addressing two (2) different matters, i.e., residential eviction (Chapter 83) and consumer collection practices (Fla. Stat. Sections 559.55 – 559.785). Further, and unlike the Appellant’s proposition, the *Forsythe* Court found the two (2) sections it was asked to review were plain and unambiguous, not in conflict and without a scintilla evidence of a contrary legislative. *Id.* at 456. Thus, the “where possible” provision omitted from Appellant’s quote (IB: 40) is relevant to the statutory construction of two (2) different statutes, one a special statute and the other a general statute, regarding a specific claimed of event. For purposes of this appeal, the litigation privilege is in harmony with statutory construction that a specific statutory provision trumps a general statutory provision.

**IV. THE LOWER COURT CORRECTLY APPLIED THE STATUTORY CONSTRUCTION RELATED TO SPECIAL STATUTORY PROVISIONS AND GENERAL STATUTORY PROVISION COVERING SIMILAR ISSUES.**

This issue on appeal is the result of the Appellant's attempt to re-write Fla. Stat. Section 83.56 in a manner to promote its "invalid" assignment of an FCCPA claim related to the posting of a 3-Day Notice. If we are to evaluate the juxtaposition of Fla. Stat. Section 83.56 and Fla. Stat. Section 559.72, proper statutory construction is required. Chapter 83 is a specific statute addressing eviction proceedings and Fla. Stat. Section 83.56(3) requires the service of a 3-Day Notice upon a tenant as a legislative requirement to commence an eviction proceeding. Fla. Stat. Section 83.56(4) provides the manner in which a 3-Day Notice may be served upon a tenant, and as for posting there is no specific legislative requirement on how to post, but traditionally the posting of a 3-Day Notice would be face-out. Appellant creates a conflict between Fla. Stat. Section 83.56 and Fla. Stat. Section 559.72 in that posting a 3-Day Notice can be a violation of Fla. Stat. Section 559.72, albeit Fla. Stat. Section 83.56 does not direct the manner of posting. This created conflict is resolved by statutory construction that provides a specific statute

will control over a provision in a general statute. See, *Read v. MFP, Inc.*, 85 So. 3d 1151, 1154 (Fla. 2d DCA 2012) (internal citations and quotations omitted) (“[I]t is a well settled rule of statutory construction . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms.”); *Nolden v. Summit Fin. Corp.*, 244 So. 3d 322, 326 (Fla. 4th DCA 2018) (finding that “under the rules of statutory construction, the more specific statute controls over the general usury statute”). There can be no dispute that Chapter 83, and Fla. Stat. Section 83.56(3), requiring the service of a 3-Day Notice upon a tenant as a legislative requirement to commence an eviction proceeding, are more specific statutes than Fla. Stat. Section 559.72, a general statute addressing consumer collection practices. Appellant does not dispute these characterizations of Chapter 83, Fla. Stat. Section 83.56(3) and Fla. Stat. Section 559.72, but merely states this analysis by the lower court should not have occurred because Appellant denies there is a conflict between Fla. Stat. Section 83.56 and Fla. Stat. Section 559.72. To accept Appellant’s view, Fla. Stat. Section 559.72, a general statute, would trump Fla.

Stat. Section 83.56(3), a specific statute, and that would indeed create an absurd result that Appellant states it wants to avoid.

**V. THERE WAS NO ERROR BY THE LOWER COURT ENTERTAINING THE APPELLEES' AMENDED MOTION TO DISMISS PURSUANT TO RULE 1.140, FLORIDA RULES OF CIVIL PROCEDURE**

This point on appeal was added after Appellant's Motion To File Amended/Corrected Initial Brief was granted. Furthermore, absent alleging "fundamental error," this point of appeal would have been deemed waived, as it was not raised before the lower court.

Mindful that the issues raised in the Appellees' Amended Motion to Dismiss were legal issues and not evidentiary matters, there was no fundamental error because the Appellant was in fact afforded the opportunity to be heard and was heard at the July 5, 2023 hearing. Appellant also took advantage of the Rules of Civil Procedure by briefing the lower court on legal issues scheduled to be heard on the Amended Motion to Dismiss<sup>6</sup>. This briefing by Appellant would not

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<sup>6</sup> The Appellant filed an Opposition to Amended Motion to Dismiss (R: 73-79) and Sur-Reply in Opposition to Amended Motion to Dismiss. (R: 84-87).

have been available to Appellant if the Small Claims Rules advanced by Appellant applied. Further, the Order of Dismissal was based upon the four corners of Appellant's complaint<sup>7</sup>, and a presentation of evidence was not required to rule on the issues of law presented to the lower court, i.e., (1) is an FCCPA claim assignable, (2) does the litigation privilege apply to posting a 3-Day Notice, and (3) upon the consolidation of a small claims case within a county civil court case, did the Rules of Civil Procedure thereafter apply to all subsequent matters<sup>8</sup>.

Appellant asserts the Florida Small Claims Rules precluded the lower court from entertaining the Appellees' Amended Motion to Dismiss at the July 5, 2023, hearing<sup>9</sup>. If not then, when? The Pre-Trial Conference, originally scheduled in the small claims case (Case No: 23-SC-18668), was cancelled upon the Order of Consolidation with the earlier filed county civil action (Case No: 23-2458), and with

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<sup>7</sup> See, fn. 4, at AB 24.

<sup>8</sup> After the Order of Consolidation, the Appellant's small claims action was administratively closed, and thereafter the Florida Rules of Civil Procedure, not the Florida Small Claims Rules, applied to all pending matters.

<sup>9</sup> Application of the Florida Small Claims Rules was rendered moot by the Order of Consolidation, and the small claims action being administratively closed.

the consolidation of cases Appellant's small claims case was administratively closed (R: 44-45). Further, after the small claims action was administratively closed there was then only county civil jurisdiction, and the consolidated action was subject to the Rules of Civil Procedure. Respectfully, it would be absurd for two (2) consolidated cases to proceed under two (2) different rules of procedure.

As for Rule 7.020(c), Small Claims Rules, the Amended Motion to Dismiss identifies in the first paragraph that the motion is being "lodged pursuant to Rules 1.110 and 1.140, Florida Rules of Civil Procedure" (R: 59-72) and the hearing proceeded under Rule 1.140 without objection by Appellant.<sup>10</sup> Such action by the lower court is consistent with Rule 7.020(c) that provides the Rules of Civil Procedure will apply after the application of the Appellees without objection, and/or "on the court's own motion." *See, Mech v. Brazilian Waxing by Sisters, Inc.*, 2022 Fla App. LEXIS 5432, \*4, 5; 2022 WL 3221779 (Fla. 4<sup>th</sup> DCA 2022) ("Here, only one party (Appellant) invoked Florida Rule of Civil Procedure 1.510 and, to the extent that

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<sup>10</sup> The Appellees' Amended Motion to Dismiss was filed after the Order of Consolidation, albeit the Amended Motion to Dismiss was allowed under Rule 7.090(c), Florida Small claims Rules.

this can be deemed "an application to proceed under that rule," the small claims rule provides the trial court with discretion ("may order") whether to so proceed.") (This opinion was withdrawn and new opinion issued, on other grounds within *Mech v. Brazilian Waxing by Sisters, Inc.*, 349 So.3d 453 (Fla. 4<sup>th</sup> DCA 2022)). Therefore, if there is any merit to the Appellant's claim regarding the application of the Small Claims Rules, after consolidation, the Appellees' Amended Motion to Dismiss was *a fortiori* a request to apply Rule 1.140, and the lower court's ruling was *a fortiori* a grant of Appellees' request to proceed under the Rule 1.140, or otherwise a grant by the lower court to proceed under Rule 1.140 on its own motion.

There being no "fundamental error" by the lower court entertaining the Appellees' Amended Motion to Dismiss, this issue on appeal should be rejected.

### **CONCLUSION**

First and foremost, the assignment by April E. Fann and Spencer D. Woods of their purported FCCPA claim to Appellant was invalid and the Appellant, as an assignee, did not have standing to lodge a FCCPA claim against Appellees.

Second, Appellant is not debtor, as defined by the FCCPA, and therefore without standing to bring the FCCPA claim set forth in its complaint.

Third, the posting of the 3-Day Notice cannot be the subject of a FCCPA lawsuit, as such posting is protected by Florida's litigation privilege.

Fourth, there was no fundamental error, as after the Order of Consolidation only the Florida Rules of Civil Procedure applied to the consolidated case. But if the Florida Small Claims Rules were to apply, the Appellees properly applied for the application of the Florida Rules of Civil Procedure, without objection by Appellant, and the lower court properly granted such application and/or applied the Florida Rules of Civil Procedure.

Fifth, there was no fundamental error, as Appellant was provided an opportunity to be heard on the Amended Motion to Dismiss, and in fact briefed the issues in advance of the hearing.

Sixth, the lower court correctly applied statutory construction.

In consonance with the above specific points, and the entire argument set forth in this Answer Brief, Appellees, JAMES VOGEL and JUDITH VOGEL pray this Court enter an order affirming the

County Court's Order dismissing Appellant's Complaint with prejudice; denying the Appellant's Motion for Attorney's fees and Costs; and awarding Appellees their attorney fees and costs per Fla. Stat. Section 559.77(2), Fla. Stat. Section 83.48 and the Lease exhibited to the Eviction Complaint (R:10)<sup>11</sup>.

**CERTIFICATE OF COMPLIANCE**

WE HEREBY CERTIFY that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.045(b) by using 14-point Bookman Old Style font, and that this Answer Brief contains less than 13,000 words.

Respectfully submitted,

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<sup>11</sup> The Appellant's Statement of Claim arises under the provisions of Florida Statutes Chapter 83, Part II.

**CERTIFICATE OF SERVICE**

I do hereby that a copy of the foregoing Answer Brief for Appellees was served on the following counsel of record for Appellant this 3rd day of September, 2024 via Florida's e-portal filing system:

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