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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FOURTH DISTRICT

Case No.: 4D2024-0286

L.T. Case No.: 502020CA005240

COLLEEN SCHOCH
and TIMOTHY MORELL,

Appellants,

vs.

LM GENERAL INSURANCE
COMPANY

Appellee.
_____/

# APPELLEE'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Citations to the record on appeal will be designated as "R. __," citations to the supplemental record on appeal designated by Appellants will be designated as "SR. __," citations to the second supplemental record on appeal designated and filed by Appellee on June 27, 2024 will be designated as "S.R.2 __," all followed by the appropriate page number(s). Appellants Colleen Schoch and Timothy Morell, the Plaintiffs below, are referred to herein as "Ms. Schoch" and "Mr. Morell." Appellee LM General Insurance Company, the Defendant below, are referred to herein as "LM General."

## STATEMENT OF THE CASE AND OF THE FACTS

### A. STATEMENT OF THE CASE

LM General authenticated and produced records in this case reflecting that Ms. Schoch, *on three separate occasions* before the subject accident, electronically executed forms, undisputedly approved by the Office of Insurance Regulation, reflecting her selection of non-stacked uninsured motorist coverage under the auto policy issued by LM General. Ms. Schoch testified she does not recall whether she read or electronically signed the forms, and there is no record evidence she did not sign them. Under these facts, LM General, pursuant to section 627.727(9) Florida Statutes (2015), is entitled to a conclusive presumption that Ms. Schoch made a knowing, informed selection of non-stacked uninsured motorist coverage.

Ms. Schoch and Mr. Morell raise two main arguments on appeal. First, they contend that because each of the three uninsured motorist ("UM") selection forms bearing Ms. Schoch's electronic signature was prepopulated with an "x" selecting non-stacked coverage based on Ms. Schoch's oral communications with the insurance agent, the forms were invalid under section 627.727, Florida Statutes. But neither the text of section 627.727, nor any binding case law, supports their position that placing the "x" on the form based on the insured's oral communications with the insurance agent renders the selection invalid under Florida law. Second, they argue LM General failed to present legally sufficient evidence that Ms. Schoch electronically signed the three forms. Because LM General presented and authenticated three UM selection forms bearing Ms. Schoch's electronic signature, as well as time-stamped business records and other evidence corroborating her execution of the forms, and because Ms. Schoch in her testimony did not dispute but merely could not remember whether she electronically signed the forms, she failed to create an issue of material fact to defeat summary judgment. The affidavit of Ms. Schoch's and Mr. Morell's expert, which merely attacks the sufficiency of LM General's proof by contending additional electronic evidence should have been presented, likewise fails to create an issue of fact.

Ms. Schoch and Mr. Morell do not dispute that if Ms. Schoch validly elected non-stacked coverage, then an exclusion in LM General's policy applies to bar coverage for the subject accident in which Mr. Morell was injured because he was driving a vehicle he owned that was not listed under LM General's policy, and was in fact insured by another insurer. The trial court's summary judgment should be affirmed.

## B. STATEMENT OF FACTS

Ms. Schoch, who was fifty-five at the time of her July 13, 2022 deposition, has lived in Florida her entire life and owned cars continuously since she was nineteen years old. (R. 1371-74.) She first purchased auto insurance policy A05-258-282591-40 5 3 (the "Policy") with LM General in June 2015, to insure a Subaru Legacy driven by her son, and a Toyota Prius she drove; the Policy did not insure the car that belonged to her husband, Mr. Morell. (R. 1381, 1404-06, 1491-93, 1749-52.)

Ms. Schoch spoke to an LM General agent on June 22, 2015, and remembers telling him that she wanted "250/500" in coverage. (R. 1397-98.) Ms. Schoch testified she wanted "maximum coverage," but did not testify that she communicated this intent to the agent, and does not recall whether the topic of uninsured or underinsured motorist coverage came up during the call. (R. 1382-83, 1396-97.) Ms. Schoch authenticated and acknowledged

receipt of an email from LM General dated June 22, 2015, at 10:19 a.m. inviting her to log in to an Eservice account, testified she created an online account with LM General in connection with procuring coverage under the Policy, and authenticated and confirmed an email from LM General dated June 22, 2015, at 10:24 a.m., confirming she had registered for LM General's Eservice. (R. 1397-98, 1406-08, 1411, 1494.)

On June 22, 2015, Ms. Schoch e-signed a terms and conditions agreement, produced and authenticated by LM General, consenting to electronically execute documents related to the Policy. (R. 1763, 1843-45.) The terms and conditions agreement is offered up first during the e-signing session, and if it is not executed, the user is unable to continue with the signatory session. (R. 1739.)

On June 22, 2015, Ms. Schoch electronically signed a form electing non-stacked uninsured motorist coverage for the Policy, which form was produced and authenticated by LM General, approved by Florida's department of insurance – Florida's Office of Insurance Regulation ("OIR"), and contains the language mandated by section 627.727, Florida Statutes. (R. 1521-22, 1583-85, 1763-64, 1846-47, 2654.)[1] An applicant such as

[1] Ms. Schoch's and Mr. Morell's counsel conceded at the August 11, 2023 summary judgment hearing that "The parties [are] in agreement the form was approved." (R. 2654.)

Ms. Schoch cannot complete an e-signing session without clicking to sign statutorily-required forms. (R. 1732.) LM General produced and authenticated its time-stamped records reflecting that its system-generated forms, including the UM forms, were sent to Ms. Schoch for e-signature on June 22, 2015, at 10:19:29 a.m., and that Ms. Schoch completed the e-signing session on June 22, 2015, at 10:30:18 a.m. (R. 1583-85, 1785-87; S.R.2 017.)

The Policy was only issued and finalized after the electronic signing session was complete, and has an effective date of June 23, 2015, the day after the electronic signing session. (R. 1491-93, 1550.)

Ms. Schoch then contacted LM General by email on February 13, 2016, and requested the insurance coverage on the Subaru Legacy be dropped. (R. 1424.) LM General dropped the Subaru Legacy from coverage under the Policy. (R. 1425-26, 1495-97.)

On February 15, 2016, Ms. Schoch once again electronically signed an election of non-stacked UM coverage for the Policy on a form approved by Florida's OIR, which form contains the language mandated by section 627.727, Florida Statutes, as reflected on the form LM General produced and authenticated. (R. 1771-72, 1848-49, 1521-22.) Email correspondence from LM General to Ms. Schoch dated February 15, 2016, produced by

Ms. Schoch in discovery, directs her to her eservice account to e-sign "a form required by the state to complete the changes and restate your coverages when removing a second vehicle on the policy." (R. 2190.) LM General produced and authenticated its time-stamped records reflecting that its system generated forms, including UM forms, that were sent to Ms. Schoch for e-signature on February 15, 2016, at 09:23:47 a.m., and that Ms. Schoch completed the e-signing session on February 15, 2016, at 05:49:13 p.m. (R. 1583-85, 1785-87; S.R.2 014-15.)

Ms. Schoch added a Subaru Crosstrek to the Policy in August 2016, which car was being driven by her son. (R. 1429-30, 1498-1500.)

On August 9, 2016, Ms. Schoch, for the third time, electronically signed an election of non-stacked UM coverage for the Policy on a form approved by Florida's OIR, which election form contains the language mandated by section 627.727, Florida Statutes. (R. 1771-72, 1850-51, 1521-22.) Ms. Schoch testified that on August 9, 2016, while sitting in the dealership, she accessed her e-service account through a Liberty Mutual app. (R. 1435-36.) LM General produced and authenticated time-stamped records reflecting that its system-generated forms, including UM forms, were sent to Ms. Schoch for e-signature on August 9, 2016, at 04:36:54 p.m. (R. 1583-85, 1785-87; S.R.2 013.)

Under LM General's processes and procedures, an insured cannot electronically sign a UM coverage selection form without accessing and viewing the form itself.[2] (R. 1692-93, 1716-17, 1732, 1758-59.) A "click to sign" button appears on the form itself, which allows the insured to electronically execute it while the form is on screen. (R. 1759-60, 1764.)

LM General forms that require validation and signature by a customer, such as the UM selection forms at issue in this case, are serviced through LM General's vendor OneSpan. (R. 1544-45.) OneSpan creates the session that the customers sign into to review and electronically sign the forms. (R. 1545.) A small yellow circle with a question mark inside appears on the printed UM selection forms because the printed forms were generated through Adobe Reader software, while the forms were electronically signed

[2] Ms. Schoch and Mr. Morell assert the e-signature of Mr. Jervis in *Jervis v. Castaneda*, 243 So. 3d 996 (Fla. 4th DCA 2018), appeared "nearly identical in form" to Ms. Schoch's e-signature, but they omit critical differences between the facts of *Jervis* and this case. (Initial Br. 6 n1.) The *Jervis* trial court found GEICO's forms and processes did not comply with section 627.727 because Mr. Jervis was not shown and never electronically signed a form containing the required statutory language. Specifically, the *Jervis* trial court found: "[T]he form containing the twelve (12) point bold type was not actually signed by the insured. It incorporated the warning by reference. It was not electronically possible to actually sign on the M9 form. One must sign on a precursor screen. Therefore the M9 waiver of uninsured motorist coverage is void." (R. 2014-15.) In addition, Mr. Jervis testified unequivocally that he "absolutely… one hundred percent categorically… did not" see the form or go through any consents, and provided multiple reasons for his certainty. (R. 2384-85.)

through the OneSpan platform with a Silanis Signature, which signature cannot be validated by Adobe Reader without first installing a plug-in. (R. 1767, 2285, 2288, 2349.) The question mark would not have been visible to Ms. Schoch during the e-signing session. (R. 1767.)

Ms. Schoch and Mr. Morell contend LM General did not provide certain discovery, including a plug-in for OneSpan documents that would eliminate the question mark, but they did not seek to have LM General's objections to these discovery requests overruled, move to compel discovery, seek this discovery from OneSpan, or ask to continue the summary judgment hearing.[3] (R. 402-06, 1884-97, 1917-18.) Instead, they pursued their own summary judgment motion, which was heard at the same time as LM General's summary judgment motion. (R. 1940-24, 2682.) In support of their motion, Ms. Schoch and Mr. Morell attached an affidavit of a computer forensic expert, challenging the sufficiency of LM General's evidence, opining "the records presented in this matter fail to provide the kind of replay needed to resolve disputes of fact" and "do not demonstrate the presentation,

[3] Ms. Schoch and Mr. Morell contend "LM refused to provide [them] the plugin," but that contention is not supported by their citations to the record, which are: (1) a statement by their own counsel in a footnote from their summary judgment motion; (2) an email from OneSpan with a link for the plugin; and (3) a page with the text "Unable to Process Request; We couldn't access the content delivery; This content has been deleted, doesn't exist, or can't be previewed." (Initial Br. 19) (citing R. 1943 n.13, 2012, 2285.)

selection, and affirmation of an option on any form presented by Liberty to Ms. Schoch on or around June 22, 2015, February 15, 2016 or August 9, 2016." (R. 1963.) But he did *not* opine that Ms. Schoch *did not* execute the forms selecting non-stacked UM coverage. (R. 1962-69.)

Ms. Schoch testified she does not recall whether or not she read or electronically signed the June 22, 2015, February 15, 2016, or August 9, 2016 election of non-stacked UM coverage forms. (R. 1415-17, 1427-29, 1432-34.) Specifically, she testified:

> Testimony regarding June 22, 2015 UM Selection Form:
>
> Q. Let me have you turn now to Exhibit 7. And just confirm with you, if you will, that Exhibit 7 that you have in front of you contains the Bates label LM General 402 through 403?
>
> A. Yes.
>
> Q. Have you seen this document before?
>
> A. I don't recall.
>
> Q. Do you know whether you -- well, strike that. Just to be clear about that since you don't recall having seen it, you can't tell us whether this was something that you accessed and saw on your eService account around the time that you were buying insurance with LM General; is that right?
>
> A. I don't recall.
>
> Q If this was a document that had been presented to you, knowing your personal habit as an English teacher with a bachelor's degree or -- I'm sorry, as someone who has a bachelor's degree in English, do you think you would have read the document?

MR. STAHL: Objection, form.

A. I honestly don't, I don't know.

BY MR. LAPIN:
Q. Do you remember seeing documents on your eService account that you didn't take the time to read?

A. I don't recall.

Q. Do you know whether there were any documents on your eService account in June of 2015, and let's make it specific, June 22, 2015, that were only accessible to you by clicking a link?

MR. STAHL: Objection, form.

A. I do not recall.

BY MR. LAPIN:
Q. Do you know whether there were any documents on your eService account on June 22nd, 2015, that you can only physically see if you used a drop-down menu or clicked on some box to call the document up?

A. I don't recall.

(R. 1415-16.)

Testimony regarding February 15, 2016 UM Selection Form:

Q. Do you see in the bottom on this form above the signature of the named insured, there is an eSignature that appears there by you of February 15, 2016, around the same time or at the same time that you would have made the change to your policy to eliminate the Subaru Legacy? My question is do you recall having done anything to e-sign this document at that time?

MR. STAHL: Objection, form. You can answer.

A. No.

BY MR. LAPIN:
Q Do you have any reason to doubt that you were given the opportunity to review these documents and e-sign them on February 15th, 2016?

MR. STAHL: Objection to form.

A. Yes.

BY MR. LAPIN:
Q. And what is that?

A. I don't know that I was served these specific pages to physically mark anything because this is a stamp, it's not my signature. It's not like I placed my signature there.

Q. Now, in any aspect of your business or your life outside of the LM General insurance program, have you signed any documents by use of an eSignature?

MR. STAHL: Object to form.

A. In Acrobat I digitally sign documents, but I am physically placing my signature like, you know, the one that comes from my hand that is a digital replica of it where I am physically placing it in each place, you know, in each line where it's asking for my signature.

BY MR. LAPIN:
Q. Have you ever used a software program where your eSignature appeared on a document in a printed form after you clicked a button to assent to that eSignature being there?

MR. STAHL: Object to form.

A. No. I'm having to physically place my signature at each place. So it's a digital signature, but it's different than this.

BY MR. LAPIN:
Q. Hearing you say that, do you know whether what appeared on the documents we've been looking at including at the bottom of Exhibit 13, the second page,

> appeared there as a result of you clicking anything on your computer screen or your phone screen?
>
> A. No.
>
> Q. No, you don't know, or no, you're certain that didn't happen?
>
> A. No, I don't know.[4]

(R. 1427-29.)

> Testimony regarding August 9, 2016 UM Selection Form:
>
> Q. All right. Let me have you flip now to Exhibit 15. And you'll see this is one-page document LM General 273, and once again has of the top, "eSignature Terms and Conditions" and has the same eSignature markings dated August 9, 2016 with your name. Do you have any recollection of doing anything to have that eSignature line appear on this document?
>
> A. No.
>
> Q. Do you know, as you sit here today, one way or the other whether there was something presented to you that you clicked on your computer screen to have that signature appear there?
>
> A. No.
>
> Q. Let me flip to Exhibit 16, please. I mean, flip to Exhibit 16. This is Bates labeled 274 and 275 of course you notice it's the same type form involving Florida uninsured motorist coverage, but if you look at in the election of stacked or nonstacked, but if you look at the bottom, this one corresponds to the change of your policy in which you

[4] Ms. Schoch's and Mr. Morell's contention in their brief that Ms. Schoch "denied clicking any button that would have caused [her electronic signature] to be affixed" is inaccurate, and cannot be reconciled with her testimony above. (Initial Br. 5.)

added a vehicle that we were talking about it because it has an eSignature date of August 9, 2016 by Colleen Schoch. Again the question is do you have any recollection of having done anything to have the eSignature appear on this document on August 9, 2016?

A. No.

Q. Is it possible, Ms. Schoch, again, we looked at a lot of documents that had that eSignature text on them. Is it possible that you were clicking something on your eService account and didn't recall that you had done that on these occasions?

MR. STAHL: Objection, form.

A. Not -- not that I recall. I think I need you to rephrase the question.

BY MR. LAPIN:
Q. I guess the question is, I know that the process of making changes to policies and securing policies and the paperwork associated with that may or may not be something that people find particularly significant. And I'm trying to find out from you based on your personality and your habits whether you think this is something that you would have a specific recollection of or not necessarily because you wouldn't have paid too much attention to whether you clicked a button to sign those?

MR. STAHL: Objection to form. What's the specific question?

BY MR. LAPIN:
Q. Is clicking a button on a computer screen to sign the forms that we've shown you throughout this deposition something that you think you would specifically remember doing or something that you could have done without remembering doing it?

MR. STAHL: Object to form.

> A. I don't mean to seem dense, but I need you to ask me the question one more time because it's like it's -- can you simplify the question for me a little bit? Do I remember clicking something or -- yeah, I'm still not clear on the question.
>
> BY MR. LAPIN:
> Q. I understand, let me try to be more clear. You testified today when presented with documents that appear to have an eSignature with your name on it that you don't recall doing anything that would have caused that to appear on these documents, and I'm trying to understand whether Ms. Schoch is the type of person that if she had clicked something that would have caused that signature to be on there, she would distinctly remember it or whether it's something that she wouldn't necessarily remember because it wouldn't have registered to her as being a particularly important event?
>
> MR. STAHL: Objection, form.
>
> A. I still don't know how to answer this one.

(R. 1431-34.)

Ms. Schoch has lived in Florida her entire life and owned cars continuously for more than 35 years but testified that, before she purchased auto insurance with LM General, she had no recollection of ever having signed a form that had anything at all to do with UM coverage in connection with her purchase of auto insurance. (R. 1371-74, 1385.)

The Initial Brief misleadingly cites an excerpt of Ms. Schoch's testimony to contend she denied ever "us[ing] software where her e-signature appeared on a document after she clicked a button to assent,"

but that testimony was in response to a line of questions about her experience "*outside of the LM General insurance program*." (Initial Br. 8; R. 444; 1429.) Specifically, Ms. Schoch testified:

> Q. Now, in any aspect of your business or your life outside of the LM General insurance program, have you signed any documents by use of an eSignature?
>
> MR. STAHL: Object to form.
>
> A. In Acrobat I digitally sign documents, but I am physically placing my signature like, you know, the one that comes from my hand that is a digital replica of it where I am physically placing it in each place, you know, in each line where it's asking for my signature.
>
> BY MR. LAPIN:
> Q. Have you ever used a software program where your eSignature appeared on a document in a printed form after you clicked a button to assent to that eSignature being there?
>
> MR. STAHL: Object to form.
>
> A. No. I'm having to physically place my signature at each place. So it's a digital signature, but it's different than this.

(R. 1428-1429.)

The Policy was renewed for the period from June 23, 2018, through June 23, 2019. (R. 341-85, 1439.) The Policy provides that uninsured motorist coverage is non-stacked, and contains an exclusion that provides:

> A. We do not provide Uninsured Motorist Coverage for "bodily injury" sustained:
>
> 1. By any named insured or "family member" while "occupying" any motor vehicle owned by any named

> insured or "family member", for which this coverage was not purchased under this policy.

(R. at 374, 1751-52.)

Mr. Morell was a named insured under the Policy, including from June 23, 2018, through June 23, 2019. (R. 343, 1755.) Mr. Morell was in the subject accident on January 8, 2019, while driving a Chevy Camaro that he owned, which Camaro was separately insured by Allstate and not under the LM General Policy. (R. 341-85, 1439-41, 1857.)

## STANDARD OF REVIEW

The summary judgment standard applicable to this case is the federal summary judgment standard, which was adopted by the Florida Supreme Court effective May 1, 2021. *In re Amendments to Fla. R. Civ. P. 1.510*, 309 So. 3d 192, 193 (Fla. 2020). The earlier, superseded, standard for summary judgment allowed for "the existence of *any* competent evidence creating an issue of fact" to defeat summary judgment. *Id.* at 193. In contrast, under the current standard applicable here, the test is "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* And "[i]f the [opposing] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*

## SUMMARY OF THE ARGUMENT

Neither the text of section 627.727, Florida Statutes (2015), nor any binding case law, supports Ms. Schoch's and Mr. Morell's argument that LM General placing an "x" on the form Ms. Schoch thereafter signed, to indicate her selection of non-stacked uninsured motorist ("UM") coverage based on her oral communications with the insurance agent, renders the selection invalid under Florida law. Section 627.727(9) governs the selection of non-stacked UM coverage, and requires only that the selection be made on a form approved by the Florida's OIR that informs the applicant of the limitations of coverage and that such coverage is an alternative to coverage without such limitations. It is undisputed that LM General's forms at issue in this case were approved by the OIR and contain the required statutory language. The validity of the insurer's forms or online processes for selecting non-stacked UM coverage were not issues decided on appeal in either the *Jervis* or *Brown-Peterkin* cases, and therefore neither case supports Ms. Schoch's and Mr. Morell's argument here. And even if the trial court ruling in *Jervis* that Geico's forms and processes were deficient were somehow binding authority, LM General's forms and process in this case differ materially and substantially from Geico's forms and processes in *Jervis*.

LM General presented substantial, competent evidence that Ms. Schoch, on three separate occasions, electronically signed statutorily compliant forms selecting non-stacked UM coverage, which under section 627.727(9) entitles LM General to a statutory conclusive presumption that Ms. Schoch made an informed, knowing selection of non-stacked coverage. LM General authenticated and produced the electronically signed forms, email correspondence to Ms. Schoch directing her to sign the forms on the day they were signed, and time-stamped records reflecting when Ms. Schoch began and ended the e-signing sessions in which the forms were signed. LM General's corporate designee testified that Ms. Schoch's signature could only have appeared on the forms by Ms. Schoch clicking a button assenting to her electronic signature being placed on the forms. The execution of the forms was further corroborated by Ms. Schoch's own testimony that she created an e-service account with LM General, and accessed that account on the same day the forms reflect she electronically signed them. Ms. Schoch's and Mr. Morell's argument that LM General was required to also produce metadata, audit trails, and screenshots lacks both merit and support. And Ms. Schoch and Mr. Morell failed to present any competent, substantial evidence disputing that Ms. Schoch signed the forms. Ms. Schoch repeatedly testified she could not remember, one way or

another, whether she electronically signed them. And Ms. Schoch's and Mr. Morell's expert witness merely challenged the sufficiency of LM General's evidence, but did not opine that Ms. Schoch *did not* sign the forms. The recognition of electronic signatures is statutorily mandated under Florida's Uniform Electronic Transaction Act, section 668.50, Florida Statutes. Ms. Schoch's and Mr. Morell's argument that Ms. Schoch's electronic signature is somehow invalid because it was placed on the form by a "non-human software program called 'docengine,'" has no more merit than would a challenge to a manual signature as being affixed with a "non-human" pen. Substantial competent evidence supports that Ms. Schoch, on three separate occasions, caused her electronic signature to be affixed to OIR approved forms selecting non-stacked UM coverage, even if the mechanics of that process included "non-human" software.

The final summary judgment in LM General's favor should be affirmed.

## ARGUMENT

### A. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT BASED ON LM GENERAL'S UNREFUTED, COMPETENT, SUBSTANTIAL EVIDENCE THAT MS. SCHOCH, ON THREE SEPARATE OCCASIONS, ELECTRONICALLY SIGNED STATUTORILY COMPLIANT FORMS, APPROVED BY THE OIR, SELECTING NON-STACKED UM COVERAGE, ENTITLING LM GENERAL TO A STATUTORY CONCLUSIVE PRESUMPTION THAT MS. SCHOCH'S SELECTION WAS KNOWING AND INFORMED.

#### 1. The conclusive presumption under section 627.727(9), Florida Statutes, regarding selection of non-stacked UM coverage.

The selection of non-stacked UM coverage is governed by section 627.737(9),[5] Florida Statutes (2015), which provides in pertinent part:

> (9) Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office, establishing that if the insured accepts this offer:
>
> > (a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident, except as provided in paragraph (c).
> >
> > * * *

[5] It is undisputed that Ms. Schoch did not reject, and that LM General's policy provided, UM coverage. The issue in this case is whether Ms. Schoch selected non-stacked coverage. Although a written *rejection* of UM coverage is governed by section 627.727(1) and must be "given in a manner approved by the [OIR]," a selection of non-stacked coverage under section 627.727(9) need only be "on a form approved by the [OIR]" that informs the applicant "of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations." Ms. Schoch's and Mr. Morell's Initial Brief repeatedly and inaccurately states that both subsections (1) and (9) govern Ms. Schoch's selection of non-stacked coverage. (Initial Br. 1, 12, 27, 36, 37, 56.)

> (c) If the injured person is occupying a motor vehicle which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.
>
> (d) The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in her or his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.
>
> (e) …
>
> In connection with the offer authorized by this subsection, insurers shall inform the named insured, applicant, or lessee, on a form approved by the office, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. *If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations on behalf of all insureds*.

Fla. Stat. § 627.737(9) (emphasis added).

Unless circumstances such as fraud, trickery or forgery are present, the insured is bound by her signature on the form, and the conclusive presumption applies. *Larusso v. Garner*, 888 So. 2d 712, 718 (Fla. 4th DCA 2004) (where form selecting non-stacked UM coverage was approved by OIR and signed by insured, insurer was entitled to conclusive statutory

presumption as a matter of law that insured knowingly selected non-stacked coverage). Specifically, this Court in *Larusso* said:

> So that the insurer can adequately establish its risks and charge appropriate premiums, the Legislature created a conclusive presumption that the signing of the approved form established a knowing acceptance of the limitations. Therefore, unless circumstances such as fraud, trickery, or forgery are present, the insured is bound by his signature on the form.

*Larusso*, 888 So. 2d at 718.

Ms. Schoch and Mr. Morell presented no evidence of fraud, trickery, or forgery to circumvent the conclusive presumption. Nor did they present *any* evidence Ms. Schoch *did not* sign the three forms. At best, Ms. Schoch and Mr. Morell challenged the sufficiency of LM General's evidence that she signed, by arguing LM General should have presented additional evidence, consisting of an electronic trail of Ms. Schoch's three e-signing sessions.

Ms. Schoch's and Mr. Morell's characterization of their own expert's affidavit in their Initial Brief reflects he merely challenged the sufficiency of LM General's evidence that Ms. Schoch executed the three forms, and did not itself constitute evidence disputing that Ms. Schoch executed them. Ms. Schoch and Mr. Morell state: "Throughout his Declaration, Curtin explained in technical detail why, to a reasonable degree of scientific certainty, LM's production failed to contain sufficient data to allow one to

conclude that Mrs. Schoch took any action to do anything in the session." (Initial Br. 21-22.)

But an argument and an expert opinion that LM General should have presented more evidence does not defeat the conclusive presumption, particularly where LM General, through its own records and Ms. Schoch's own corroborating testimony, presented substantial, competent evidence that Ms. Schoch, on three separate occasions before the subject accident, electronically signed statutorily compliant forms selecting non-stacked UM coverage. *Larusso*; *State Farm Fire & Cas. Ins. Co. v. Wilson*, 330 So. 3d 67 (Fla. 2d DCA 2021) (citing *Larusso* and holding insurer entitled to statutory conclusive presumption that insured selected non-stacking UM coverage based on signed statutorily compliant form). This evidence includes LM General's production and authentication of the three forms bearing Ms. Schoch's electronic signature with the three respective dates of execution, email correspondence to Ms. Schoch directing her to sign the forms on the day they were signed, production and authentication of time-stamped LM General records reflecting when Ms. Schoch began and ended the e-signing sessions, and Ms. Schoch's own testimony that she created an e-service account with LM General, and accessed her LM General e-service account on the same day the forms reflect she electronically signed them.

(R. 1397-98, 1406-08, 1411, 1424, 1435-36, 1494, 1521-22, 1583-85, 1763-64, 1771-72, 1785-87, 1846-51, 2190, 2654; S.R.2 013-015, 017.)

Florida's Uniform Electronic Transaction Act, section 668.50, Florida Statutes, provides for legal recognition of electronic records, electronic signatures, and electronic contracts. Under section 668.50(7)(c), if a provision of law requires a record to be in writing, an electronic record satisfies such provision. And under section 668.50(d), if a provision of law requires a signature, an electronic signature satisfies such provision.

The presentation by an insurer on a summary judgment motion of an electronically signed UM form selecting non-stacked UM coverage creates the conclusive presumption that the insured knowingly waived stacked UM coverage pursuant to section 627.727(9). *Rodriguez v. Progressive Select Ins. Co.*, No: 5:22-cv-528-JSM-PRL, 2023 WL 11262695 (M.D. Fla. Nov. 13, 2023) (granting insurer summary judgment based on electronically signed form rejecting UM coverage, noting that "a conclusive presumption is one that cannot be overcome by any additional evidence or argument" and rejecting argument that electronic form and procedure were invalid because insurer filled out form rejecting UM coverage ahead of time, stating: "The temporal requirement posited by Plaintiff is completely absent from the statute. When the Rodriguez's were taken to the DocuSign website and

presented with the UM selection/rejection form, it simply reflected the choice Mrs. Rodriguez made during the September 10, 2019, phone call to purchase a policy without UM coverage"); *Pflug v. Allstate Fire & Cas. Ins. Co.*, No. 8:20-cv-2480-TPB-SPF, 2022 WL 61199 (M.D. Fla. Jan. 6, 2022) (granting insurer summary judgment based on electronically signed UM form selecting non-stacked coverage, where insured presented no evidence of forgery, fraud or trickery). In *Pflug*, the court rejected the argument that an electronic signature in the form of a block of the insured's name was insufficient, citing section 668.50, Florida Statutes.

Ms. Schoch and Mr. Morell misplace reliance on *Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086 (Fla. 1982), *Quirk v. Anthony*, 563 So. 2d 710, 714 (Fla. 2d DCA 1990), *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624, 626-27 (Fla. 3d DCA 2006), and *Difin v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 753 F.2d 978, 982 (11th Cir. 1985), for the proposition that LM General is not entitled to the statutory presumption under section 627.727(9), and that the statute requires Ms. Schoch's selection of non-stacked coverage to be "informed and knowing."[6] *Kimbrell* and *Diffin* construed a much earlier version of section 627.727 that did not include the

[6] (Initial Br. 41) (arguing "That an insured's rejection, whether of UM limits equal to bodily injury limits, or of stacking, be informed and knowing has always been an integral part of the UM statutory scheme").

conclusive presumption based on the execution of a written OIR-approved form. *Kimbrell*, 420 So. 2d at 1088 ("The statute under consideration does not require written rejection nor does it mandate rejection in a specific form. [citation omitted]. What the statute does require is that a rejection of uninsured motorist coverage or a selection of lower limits of coverage must be knowingly made."); *Diffin*, 753 F.2d at 981 (citing *Kimbrell* and concluding insurer does not owe an absolute duty to inform insured of the UM options).

*Quirk* involved an insurer's failure to obtain a written rejection of UM coverage. The *Quirk* court specifically noted that the purpose of the conclusive presumption in section 627.727 is to *avoid litigation* over whether the selection is knowing. *Quirk*, 563 So. 2d at 714 ("[T]he nature and extent of the 1982 and 1984 amendments make it apparent that the legislature is attempting to avoid litigation over a 'knowing' rejection by placing far greater emphasis and importance upon the written rejection as a self-proving document…If the underwriting file contains a signed rejection, a policy can be issued without UM."). In *Anatkov*, it was undisputed the insured's signature on the form had been forged. *Anatkov*, 929 So. 2d at 626. The *Anatkov* Court, citing *Quirk*, noted that "If the underwriting file contains a signed rejection, a policy can be issued without UM." 929 So. 2d at 627.

And the other authorities Ms. Schoch and Mr. Morell cite for their argument that LM General is not entitled to the conclusive presumption even in the absence of fraud, trickery or forgery,[7] all support application of the conclusive presumption here. In *Collins v. GEICO*, 922 So. 2d 353 (Fla. 3d DCA 2006), the court affirmed dismissal of a class action to recover premiums paid for stacked coverage in years when the insured owned only one vehicle, concluding the insured was conclusively presumed to have knowingly accepted stacked UM coverage based on her failure to select non-stacked coverage. In *Long v. Prudential Prop. & Cas. Ins.*, 707 So. 2d 390 (Fla. 5th DCA 1998), the court held the insured was conclusively presumed to have rejected UM coverage based on his signature on a statutorily-compliant rejection form, although he separately selected non-stacked UM coverage in another part of his application. And in *Orion Ins. Co. v. Cox*, 681 So. 2d 760 (Fla. 4th DCA 1996), this Court held that because the signed UM coverage rejection form was statutorily compliant, the insurer was entitled to the conclusive presumption of a knowing rejection of coverage, although the form signed was not the issuing carrier's form.

And although Ms. Schoch and Mr. Morell cite *GEICO v. Douglas*, 627 So. 2d 102 (Fla. 4th DCA 1993), for the proposition that "[w]hen an

[7] (Initial Br. 43 n.7.)

insurer fails to comply with the statute by obtaining a written rejection of UM coverage, the insured is entitled to UM coverage by operation of law,"[8] neither the proposition nor the case helps them here. LM General's Policy provided UM coverage. The issue is whether Ms. Schoch selected non-stacked UM coverage. In *Douglas*, the insurer did not produce any written, signed rejection of UM coverage. Here, LM General produced three forms electronically signed by Ms. Schoch selecting non-stacked UM coverage, as well as other evidence corroborating Ms. Schoch's execution of the forms.

**2. <u>The pre-population of an "X" selecting non-stacked UM coverage based on Ms. Schoch's conversation with the insurance agent did not render the forms void under Florida law.</u>**

Neither the text of section 627.727, Florida Statutes (2015), nor any binding case law, supports Ms. Schoch's and Mr. Morell's argument that LM General placing an "x" on the form she signed selecting non-stacked uninsured motorist coverage, based on the insured's telephone communications with the insurance agent, renders the selection invalid under Florida law. *See Rodriguez*, 2023 WL 11262695, at *4 ("The temporal requirement posited by Plaintiff is completely absent from the statute. When the Rodriguez's were taken to the DocuSign website and presented with the

[8] (Initial Br. 44.)

UM selection/rejection form, it simply reflected the choice Mrs. Rodriguez made during the September 10, 2019, phone call to purchase a policy without UM coverage.")

Ms. Schoch and Mr. Morell most heavily rely on *Jervis v. Castaneda*, 243 So. 3d 996 (Fla. 4th DCA 2018), but it does not support their argument that LM General's placement of the "x" on the form selecting non-stacked coverage renders the forms invalid. The sole issue decided by the appellate court in *Jervis* is whether an insurer that fails to comply with the written notice provisions of section 627.727 can prove the insured *orally* rejected stacked coverage. The trial court in *Jervis* ruled on summary judgment that Geico's online form was void because Jervis did not sign the form, the signing page did not have the required statutory language, *and* Jervis could not reject or deselect non-stacked coverage, but that ruling was left unchallenged by Geico. Thus, the issue of whether Geico's online form complied with section 627.727 was never an issue on appeal before this Court.

Specifically, this Court in *Jervis* stated:

> The core issue in this case is whether an insurance company that completely fails to comply with the written notice provisions of section 627.727(1) & (9), Florida Statutes (2010), is entitled to establish that an insured knowingly rejected stacked coverage or knowingly accepted non-stacked uninsured motorist coverage. We hold that the failure to serve the mandatory notice precludes the insurance company from claiming that the

> insured orally made a knowing choice regarding the stacking of UM coverage. …
>
> The first circuit judge assigned to the case ruled on summary judgment that Geico's online form was void; the form was not actually signed by Jervis, Jervis had no ability to reject or deselect non-stacked coverage, and the signing page did not have the warning language required by statute. …
>
> **Geico has not challenged this order on appeal**. After summary judgment was granted, Geico amended its affirmative defenses to assert that Jervis "made an oral rejection of stacked UM coverage."

*Jervis*, 243 So. 3d at 997 (emphasis supplied).

Although Geico is bound by its decision in *Jervis* not to appeal the trial court's order that its online form was void, Geico's failure to appeal that issue cannot bind LM General or any other insurer, who never had any opportunity to present arguments to this Court in *Jervis* about the validity of an online form or process. Nor does Geico's failure to appeal that issue vest the unchallenged trial court order with the weight of an appellate decision, even if the trial court's order is referenced approvingly in *dicta*.

*Brown Peterkin v. Williamson*, 307 So. 3d 45 (Fla. 4th DCA 2020), also does not support Ms. Schoch's and Mr. Morell's argument that the pre-population of the "x" selecting non-stacked coverage renders LM General's form or process void. This Court in *Williamson* did not decide whether Geico's forms or processes complied with Florida law. Instead, this

Court affirmed denial of certification of a class of Geico policyholders seeking a declaration that Geico's UM coverage rejection and stacking selection processes fail to comply with Florida law, because the validity of Geico's process had already been decided, and the proposed class lacked commonality and typicality due to variations in Geico's forms and processes over the years. *Williamson*, 307 So. 3d at 47. Although the *Williamson* Court noted that in 2016, Geico began displaying the form to customers without requiring them to click a hyperlink, and the form preselected the choice of no UM coverage, which the customer could not change, this Court did not determine or suggest the pre-population rendered a process or form void. Instead, the *Williamson* Court stated that in *Jervis* it upheld a summary judgment finding that Geico's online process, *as it existed prior to 2013*, failed to comply with section 627.727 "because Geico did not present the form to the customer with the required bold type warning, and the customer could not sign the form." *Williamson*, 307 So. 3d at 49. Ms. Schoch and Mr. Morell misplace reliance on *GEICO Indem. Co. v. Perez*, 260 So. 3d 342 (Fla. 3d DCA 2018), because *Perez* involved forms that failed to track the language specified in section 627.727(1), and an online process that did not permit the customer to view the statutory language when signing. Here,

however, it is undisputed that LM General's forms contain the required statutory language, visible to the customer when signing the form.

But even if the trial court's summary judgment order in *Jervis* were somehow binding, Geico's forms and processes at issue in *Jervis* materially differ from LM General's. Under LM General's processes and procedures, an insured cannot electronically sign a UM coverage selection form without accessing and viewing the form itself. (R. 1563, 1693, 1716-17, 1732, 1758-59.) A "click to sign" button appears on the form itself, which allows the insured to electronically execute it while the form is on the screen. (R. 1759-60, 1764.) LM General's forms each contain the language required by section 627.727. (R. 1846-51.) And the Policy's effective date is the day *after* the insured, Ms. Schoch, electronically executed the first of the three uninsured motorist coverage selection form. (R. 1491-93, 1550.)

In contrast, the *Jervis* trial court found Geico's forms and processes did not comply with section 627.727 because Mr. Jervis was not shown and never electronically signed a form that contained the required statutory language. Specifically, the *Jervis* trial court found as follows:

> The Court finds that the form containing the twelve (12) point bold type was not actually signed by the insured. It incorporated the warning by reference. It was not electronically possible to actually sign on the M9 form. One must sign on a precursor screen. Therefore the M9 waiver of uninsured motorist coverage is void.

(R. 2014-15.) The *Jervis* trial court's summary judgment order is consistent with the testimony of John Jervis in that case, who, in striking contrast to Ms. Schoch, testified unequivocally that he never saw or signed the statutory form. Specifically, *Mr. Jervis* testified:

> Q. Do you recall doing this form or going through any consents or screens on the computer on December 14th?
>
> A. Absolutely not. One hundred percent categorically, no, I did not. And you're going to ask me how I can be so sure but I am sure.
>
> Q. How can you be so sure?
>
> A. There is [sic] two reasons that I can be that sure. Number one, I never sign my name John Jervis, ever…The second thing is the first time I saw this was on the 3rd of March. The third reason I know it didn't happen is that if you look at the logs, I had activity for roughly six minutes. I can definitively tell you what I did during those six minutes, because I have confirmations from GEICO at each of the steps along that way. And the first four minutes of it was getting my user ID and password and getting – giving permission to have my bills come to me online, leaving me two, three, whatever you want to call it, minutes to have accomplished --- I couldn't read this in that time and I would have read it.

(R. 2384-85.)

Because neither the text of section 627.727, nor any case law construing the 2015 version of the statute supports Ms. Schoch's and Mr. Morell's argument that pre-population of the "x" selecting non-stacked coverage, based on Ms. Schoch's telephone conversation with the insurance

agent, renders LM General's form or process void, the summary judgment below should be affirmed.

### 3. LM General was entitled to the conclusive presumption under section 627.727(9) as a matter of law.

LM General, through its records and Ms. Schoch's corroborating testimony, presented substantial, competent, evidence that Ms. Schoch, on three separate occasions before the subject accident, electronically signed statutorily compliant forms selecting non-stacked UM coverage. This evidence includes LM General's production and authentication of the three forms bearing Ms. Schoch's electronic signature with the three respective dates of execution, email correspondence to Ms. Schoch, that she authenticated, directing her to sign the forms on the day they were signed, production and authentication of time-stamped LM General records reflecting when Ms. Schoch began and ended the e-signing sessions, and Ms. Schoch's testimony that she created an e-service account with LM General, and accessed her LM General e-service account on the same day the forms reflect she electronically signed them. (R. 1397-98, 1406-08, 1411, 1424, 1435-36, 1494, 1521-22, 1583-85, 1763-64, 1771-72, 1785-87, 1846-51, 2190, 2654; S.R.2 013-015, 017.)

In contrast, Ms. Schoch and Mr. Morell failed to produce *any* evidence that Ms. Schoch *did not* electronically sign the forms, or that her electronic

signature was the product of fraud, forgery, or trickery, to defeat LM General's summary judgment motion. Ms. Schoch repeatedly testified that she did not remember, one way or the other, whether or not she signed the forms selecting non-stacked UM coverage. (R. 1415-17, 1427-29, 1432-34.) And Ms. Schoch's testimony corroborates her electronic execution of the forms, because she admits accessing her LM General e-service account on days that the forms reflect she electronically signed them. (R. 1397-98, 1406-08, 1411, 1424, 1429-30, 1435-36, 1494, 1498-1500, 2190.) Ms. Schoch's and Mr. Morell's expert did not opine that Ms. Schoch did not electronically sign the forms, and even their characterization of their expert's affidavit reflects that he merely challenged the sufficiency of LM General's evidence that Ms. Schoch executed the three forms and is not evidence disputing that she executed them. Ms. Schoch and Mr. Morell state: "Throughout his Declaration, Curtin explained in technical detail why, to a reasonable degree of scientific certainty, LM's production failed to contain sufficient data to allow one to conclude that Mrs. Schoch took any action to do anything in the session." (Initial Br. 21-22.)

LM General's evidence that Ms. Schoch, on three separate occasions, electronically signed the OIR-approved forms selecting non-stacked UM coverage, entitled it to the conclusive presumption under section 627.727(9)

that she knowingly waived stacked UM coverage. *Rodriguez*, 2023 WL 11262695 (granting insurer summary judgment based on electronically signed form, noting that "a conclusive presumption is one that cannot be overcome by any additional evidence or argument" and rejecting argument that electronic form and procedure were invalid because insurer pre-filled form); *Pflug*, 2022 WL 61199 (granting insurer summary judgment based on electronically signed UM form). Ms. Schoch's and Mr. Morell's argument that LM General also had to produce "screenshots, metadata, native files, session logs, or audit trails that shed light on Mrs. Schoch's alleged specific interactions with the selection forms"[9] is contrary to Florida law, and unsupported by any legal authority.[10] Ms. Schoch and Mr. Morell further ask to impose an evidentiary burden inconsistent with Florida law, arguing "LM failed to present any evidence to show that [the e-signing]

[9] (Initial Br. 51, 52, 53.)

[10] Puzzlingly, Ms. Schoch and Mr. Morell cite *Inspired Capital, LLC v. Howell*, No. 3D22-1220, 2023 WL 4919501 (Fla. 3d DCA Aug. 2, 2023), as support for their argument that LM General had to produce screenshots, metadata, native files, session logs and audit trials to prove Ms. Schoch signed the forms, because "speculative evidence" is "insufficient to survive an opponent's motion for summary judgment." (Initial Br. 52.) *Howell* is inapposite, as it involved a damages expert's projections of lost profits and lost market value based on "extraordinary assumptions" and "hypothetical conditions" the expert admitted were "never accurate," and the court found speculative and inadmissible. *Howell* has nothing to do with section 627.727(9), or proving a document was electronically signed.

process was not electronically automated or that Mrs. Schoch's signature had not been pre-filled." (Initial Br. 53.) LM General was not required to disprove something Ms. Schoch does not even contend (fraud in her electronic signature). Once LM General produced and authenticated the forms bearing Ms. Schoch's electronic signature, Ms. Schoch and Mr. Morell had the burden to present evidence she did not sign them, or her signature was the product of fraud, forgery or trickery. But they have no such evidence.

Ms. Schoch's and Mr. Morell's argument that they are entitled to summary judgment because both parties' experts agreed that Ms. Schoch's e-signature was placed on the forms by "docengine" software also lacks merit. That software was involved in generating Ms. Schoch's e-signature is not evidence she did not sign them electronically. Ms. Schoch could not complete an e-signing session without clicking to sign the statutorily required forms. (R. 1732.) And LM General produced and authenticated time-stamped records that system-generated forms, including UM forms, were sent to Ms. Schoch for e-signature on June 22, 2015, at 10:19:29 a.m., and on February 15, 2016, at 09:23:47 a.m., and that she completed the e-signing sessions on June 22, 2015, at 10:30:18 a.m., and on February 15,

2016, at 05:49:13 p.m. (R. 1583-85, 1785-87; S.R.2 014-015, 017.) The experts did not contradict this evidence.[11]

## B. MS. SCHOCH AND MR. MORELL DID NOT CREATE A GENUINE DISPUTE OF MATERIAL FACT TO DEFEAT SUMMARY JUDGMENT.

LM General, through records and Ms. Schoch's testimony, presented substantial, competent, evidence Ms. Schoch, on three separate occasions before the subject accident, electronically signed statutorily compliant forms selecting non-stacked UM coverage. This evidence includes LM General's three forms bearing Ms. Schoch's electronic signature, email correspondence to Ms. Schoch directing her to sign the forms on the day they were signed, time-stamped records from LM General reflecting when Ms. Schoch began and ended the e-signing sessions, and Ms. Schoch's own testimony that she created an e-service account with LM General, and accessed her LM General e-service account on the same day the forms reflect she electronically signed them. (R. 1397-98, 1406-08, 1411, 1424, 1435-36, 1494, 1521-22, 1583-85, 1763-64, 1771-72, 1785-87, 1846-51,

[11] LM General's expert's report states the "Original PDF document was signed by 'docengine' when Ms. Schoch clicked to sign, which in turn generated the digital signature via docengine." (R. 2352.) Ms. Schoch's and Mr. Morell's expert states: "The digital signatures in the PDF documents presented are the result of software, in this case docengine, run by Liberty rather than Ms. Schoch;" and "I have not been presented with records that connect docengine to presentation, much less verification of options, to Ms. Schoch." (R. 1963.)

2190, 2654; S.R.2 013-015, 017.) Ms. Schoch and Mr. Morell did not present any record evidence disputing that Ms. Schoch electronically signed the three forms selecting non-stacked UM coverage.

### 1. Ms. Schoch did not dispute that she electronically signed the UM selection forms and her testimony corroborated that she signed them.

Ms. Schoch repeatedly testified she did not recall, one way or another, whether she read or electronically signed the three UM selection forms. Specifically, she testified:

> Q. Let me have you turn now to Exhibit 7. And just confirm with you, if you will, that Exhibit 7 that you have in front of you contains the Bates label LM General 402 through 403?[12]
>
> A. Yes.
>
> Q. Have you seen this document before?
>
> A. I don't recall.
>
> Q. Do you know whether you -- well, strike that. Just to be clear about that since you don't recall having seen it, you can't tell us whether this was something that you accessed and saw on your eService account around the time that you were buying insurance with LM General; is that right?
>
> A. I don't recall.
>
> * * *
>
> Q. Do you remember seeing documents on your eService account that you didn't take the time to read?

[12] The June 22, 2015 UM selection form selecting non-stacked UM coverage and bearing Ms. Schoch's electronic signature.

A. I don't recall.

Q. Do you know whether there were any documents on your eService account in June of 2015, and let's make it specific, June 22, 2015, that were only accessible to you by clicking a link?

MR. STAHL: Objection, form.

A. I do not recall.

BY MR. LAPIN:
Q. Do you know whether there were any documents on your eService account on June 22nd, 2015, that you can only physically see if you used a drop-down menu or clicked on some box to call the document up?

A. I don't recall.

(R. 1415-16.)

Q. Hearing you say that, do you know whether what appeared on the documents we've been looking at including at the bottom of Exhibit 13, the second page,[13] appeared there as a result of you clicking anything on your computer screen or your phone screen?

A. No.

Q. No, you don't know, or no, you're certain that didn't happen?

A. No, I don't know.

(R. 1427-29.)

Q. Let me flip to Exhibit 16, please. I mean, flip to Exhibit 16. This is Bates labeled 274 and 275 of course you notice it's the same type form involving Florida uninsured

[13] The February 15, 2016 UM selection form selecting non-stacked UM coverage and bearing Ms. Schoch's electronic signature.

> motorist coverage, but if you look at in the election of stacked or nonstacked, but if you look at the bottom, this one corresponds to the change of your policy in which you added a vehicle that we were talking about it because it has an eSignature date of August 9, 2016 by Colleen Schoch. Again the question is do you have any recollection of having done anything to have the eSignature appear on this document on August 9, 2016?
>
> A. No.

(R. 1431-32.)

Thus, Ms. Schoch neither disputed nor admitted electronically signing the forms. But she corroborated her electronic signature by admitting accessing and receiving correspondence directing her to access her LM General e-signature account on the same dates that the three forms selecting non-stacked UM coverage reflect her electronic signature. (R. 1397-98, 1406-08, 1411, 1435-36, 2190.)

The trial court accurately construed Ms. Schoch's testimony as stating she does not recall signing,[14] (R. 2671,) not, as Ms. Schoch and Mr. Morell incorrectly contend, that Ms. Schoch admitted she signed. (*See* Initial Br. 57.) And testimony from Ms. Schoch that she signed or clicked a button to sign is unnecessary here because LM General presented

[14] Immediately before the language quoted on page 57 in the Initial Brief, the trial judge said: "So then the issue is, what about the fact that [Ms. Schoch] argues that she does not recall signing this?" (R. 2671.)

substantial, uncontroverted evidence she signed forms selecting non-stacked coverage three times. Ms. Schoch's doubt regarding the printed February 15, 2016 form because "this is a stamp, it's not my signature," (R. 1428,) is just speculation, insufficient to defeat summary judgment. *Terrell v. Sec'y, Dep't of Veterans Affairs*, 98 F.4th 1343 (11th Cir. 2024) ("Contentions based on mere speculation and conjecture cannot defeat summary judgment"). Likewise, Ms. Schoch's testimony that *outside* the LM General Insurance program she had not used a software program where her eSignature appeared on a document in a printed form after clicking a button--after testifying multiple times that she did not remember whether or not she electronically signed the LM General forms--even if ambiguous, is insufficient to defeat summary judgment and irrelevant. (R. 1428-29.) *Geter v. Schneider Nat'l Carriers, Inc.*, No. 22-11285, 2023 WL 7321610, at *10 (11th Cir. Nov. 7, 2023) (vague and equivocal testimony insufficient to create a genuine issue of material fact); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1343 (11th Cir. 2000) (testimony supporting non-moving party on summary judgment "simply [was] too indefinite to meet" that party's burden and other testimony "too ambiguous to create a genuine dispute of material fact"); *Sharman v. City of Tallahassee*, 831 F. App'x 923, 925 (11th Cir. 2020) ("Sharman cannot defeat summary judgment with a mere scintilla of

evidence"); *Anzio Ironworks Corp. v. Gerber*, No. 8:20-cv-2132-KKM-AAS, 2022 WL 1500856, at *4 (M.D. Fla. May 12, 2022) ("[A] nonmovant cannot defeat summary judgment with merely a scintilla of evidence").

Ms. Schoch and Mr. Morell also misplace reliance on the trial court order on Daubert motions in *Doctors Licensure Grp. v. Cont'l Cas. Co.*, No.: 3:10-cv-98-RV/MD, 2011 WL 13182969 (N.D. Fla. Sept. 26, 2011) to argue the trial court erred because Ms. Schoch's testimony was "conflicting… and subject to differing interpretations." (Initial Br. 59.) A party's equivocal, vague, inconsistent or ambiguous testimony does not create a genuine issue of fact on summary judgment. *Geter*, 2023 WL 7321610, at *10; *Wolf*, 200 F.3d at 1343. Ms. Schoch and Mr. Morell cite language from the "background" section of the *Doctors Licensure* trial court order ruling on Daubert issues that refers to a prior order denying summary judgment because of "numerous disputed issues of material fact… including but not limited to [a witness's testimony that was] conflicting on this point and subject to differing interpretations." 2011 WL 13182969, at *2. And Ms. Schoch and Mr. Morell rely on the inapplicable principle that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[15] The trial court here did not

[15] (Initial Br. 59.)

make any credibility determinations or weigh evidence to support summary judgment. Instead, Ms. Schoch and Mr. Morell failed to present evidence to create a genuine issue of material fact.

### *2.* Ms. Schoch and Mr. Morell did not controvert LM General's evidence that Ms. Schoch on three separate occasions signed forms selecting non-stacked UM coverage.

LM General's presentation of three statutorily compliant UM forms selecting non-stacked UM coverage bearing Ms. Schoch's electronic signature was by itself sufficient to support summary judgment in its favor. *Rodriguez*, 2023 WL 11262695 (granting insurer summary judgment based on electronically signed form rejecting UM coverage, noting that "a conclusive presumption is one that cannot be overcome by any additional evidence or argument" and rejecting argument that electronic form and procedure were invalid"); *Pflug*, 2022 WL 61199 (granting insurer summary judgment based on electronically signed UM form selecting non-stacked coverage, where insured presented no evidence of forgery, fraud or trickery). In *Pflug*, the court rejected the argument that an electronic signature was insufficient, citing section 668.50, Florida Statutes. Here, in addition to the three electronically signed forms, LM General also presented email correspondence to Ms. Schoch directing her to sign the forms on the day they were signed, authenticated time-stamped records from LM General

reflecting when Ms. Schoch began and ended the e-signing sessions, and Ms. Schoch's own testimony that she created an e-service account with LM General, and accessed her LM General e-service account on the same day the forms reflect she electronically signed them. (R. 1397-98, 1406-08, 1411, 1424, 1435-36, 1494, 1521-22, 1583-85, 1763-64, 1771-72, 1785-87, 1846-51, 2190, 2654; S.R.2 013-015, 017.)

In contrast, Ms. Schoch and Mr. Morell failed to produce *any* evidence Ms. Schoch *did not* electronically sign the forms, or her electronic signature was the product of fraud, forgery, or trickery. Their arguments that LM General needed additional evidence to prevail, like certificates of completion from OneSpan, screenshots showing Ms. Schoch's interactions, and metadata, would impose an evidentiary standard inconsistent with Rule 1.510, and unsupported by any legal authority. (Initial Br. 60-61.)

Ms. Schoch's and Mr. Morell's contention that "the nature and alleged involvement of 'docengine' provides another source of disputed facts requiring reversal," utterly lacks merit. The fact that software was involved in the mechanics of generating Ms. Schoch's e-signature is not evidence of "the absence of a human element in knowingly affixing one's signature," or that "Mrs. Schoch's signatures themselves were prepopulated," as Ms. Schoch and Mr. Morell argue. (Initial Br. 61-62.) And the fact that

LM General required Ms. Schoch to manually sign an Insurance Verification Form and a Good Student Discount Form is not evidence she did not electronically sign the UM forms. *Id.* Ms. Schoch could not have completed an e-signing session without clicking to sign the statutorily required forms. (R. 1732.) And the authenticated time-stamped records reflect UM forms were sent to Ms. Schoch for e-signature on June 22, 2015, at 10:19:29 a.m., and on February 15, 2016, at 09:23:47 a.m., and Ms. Schoch completed the e-signing sessions on June 22, 2015, at 10:30:18 a.m., and on February 15, 2016, at 05:49:13 p.m. (R. 1583-85, 1785-87, S.R.2 014-015, 017.)

Ms. Schoch and Mr. Morell misplace reliance on *Zupan v. Nationwide Mut. Fire Ins. Co.*, 710 So. 2d 594, 595 (Fla. 4th DCA 1998) and *Johnson v. Stanley White Ins. Co.*, 684 So. 2d 248 (Fla. 2d DCA 1996) to argue they raised a genuine issue of material fact. (Initial Br. 62.). *Zupan*, a two-paragraph opinion, references a dispute of fact whether the UM selection form, at the time it was signed, was sufficiently completed to reflect whether the insured rejected coverage or selected lower limits. Similarly, in *Johnson*, the insureds filed affidavits attesting the forms were blank when they signed them, and no agent told them they were selecting reduced coverage. Here, it is undisputed the three UM forms reflected a selection of non-stacked UM coverage *before* they were sent for Ms. Schoch's e-signature.

Nor is the appearance of a small question mark on the printed versions of the forms evidence of fraud, forgery or trickery, or evidence Ms. Schoch did not sign the forms. The question marks appear because the printed versions of the forms were generated through Adobe Reader software without the plugin for the Silanis Signature that was electronically signed through the OneSpan platform. (R. 1767, 2285, 2288, 2349.) The question mark would not have been visible to Ms. Schoch during the e-signing session, (R. 1767,) and therefore has no bearing on whether she signed or intended to sign the forms.

### 3. Ms. Schoch's and Mr. Morell's computer expert's affidavit does not create a genuine dispute of material fact.

The affidavit of Ms. Schoch's and Mr. Morell's computer forensic expert challenged the sufficiency of LM General's evidence, but did not constitute evidence disputing that Ms. Schoch electronically signed the three UM forms selecting non-stacked coverage. He opined that "the records presented in this matter fail to provide the kind of replay needed to resolve disputes of fact" and "the records do not demonstrate the presentation, selection, and affirmation of an option on any form presented by Liberty to Ms. Schoch on or around June 22, 2015, February 15, 2016 or August 9, 2016." (R. 1963.) But he did not opine that Ms. Schoch's signature was

autopopulated by LM General or OneSpan, or that she did not execute the forms selecting non-stacked UM coverage. (R. 1962-69.)

And the fact that "docengine" software generated Ms. Schoch's signatures is not evidence she did not electronically sign the forms. The evidence demonstrated that an applicant like Ms. Schoch cannot complete an e-signing session without clicking to sign the statutorily required forms. (R. 1732.) LM General also produced and authenticated time-stamped records reflecting that system generated forms, including UM forms, were sent to Ms. Schoch for e-signature on June 22, 2015, at 10:19:29 a.m., and on February 15, 2016, at 09:23:47 a.m., and that Ms. Schoch completed the e-signing sessions on June 22, 2015, at 10:30:18 a.m., and on February 15, 2016, at 05:49:13 p.m. (R. 1583-85, 1785-87; S.R.2 014-015, 017.) Ms. Schoch's and Mr. Morell's expert did not contradict this evidence.

Ms. Schoch and Mr. Morell also misstate Florida law, contending "where there are conflicting expert opinions summary judgment is improper," for which they cite *Dumigan v. Holmes Reg'l Med. Ctr.*, 325 So. 3d 112, 113 (Fla. 5th DCA 2020), *State Farm Mut. Auto Ins. Co. v. Hollywood Diagnostics Ctr.*, 329 So. 3d 152, 153-54 (Fla. 4th DCA 2021), and *Gonzalez v. Citizens Prop. Ins. Corp.*, 273 So. 3d 1031, 1036 (Fla. 3d DCA 2019). (Initial Br. 64.) A conflict in expert opinions only precludes summary judgment when the

conflict regards a genuine issue of material fact. *Dumigan* was a medical malpractice case with conflicting expert reports on whether the defendant medical center administered contaminated heparin; *Hollywood Diagnostics* involved competing expert affidavits on the medical necessity of x-rays, and *Gonzalez* holds that an expert affidavit that does not create a genuine issue of material fact *will not* defeat summary judgment. And the parties' experts' affidavits here do not conflict on any genuine issue of material fact. Ms. Schoch's and Mr. Morell's expert opined the data he had was insufficient to "demonstrate the presentation, selection, and affirmation of an option on any form presented by Liberty to Ms. Schoch," while LM General's expert, using the plug-in and viewing original metadata, was able to electronically verify Ms. Schoch's signature. (R. 1963, 2353.) Thus, the opinions do not conflict on any genuine issue of material fact. Besides, the summary judgment is supported without considering the affidavit of LM General's expert because Ms. Schoch's electronic signature on the three forms is supported by substantial other competent admissible evidence. And the affidavit of Ms. Schoch's and Mr. Morell's expert does not defeat summary judgment because, instead of creating a genuine dispute of material fact, it only challenges the sufficiency of LM General's evidence. And if Ms. Schoch and Mr. Morell wanted additional discovery, they needed to have sought to

do so, and moved to continue the summary judgment hearing. *Schwartz v. Bank of Am., N.A.*, 267 So. 3d 414 (Fla. 4th DCA 2019) (affirming final summary judgment despite appellants' argument that discovery was incomplete and outstanding, where trial court denied a motion for continuance and no abuse of discretion was shown.) They elected not to do either, instead pursuing their own motion for summary judgment.

## CONCLUSION

For all the reasons outlined above, the final summary judgment in favor of LM General should be affirmed.

## CERTIFICATE OF SERVICE

**WE HEREBY CERTIFY** that on July 31, 2024, the foregoing was served upon the parties listed on the service list via e-mail using the Florida Courts e-Filing Portal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), that the font size and style of this Answer Brief is Arial 14-point and it does not exceed 13,000 words or 50 pages.

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