DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

Case No.: 4D2024-1037

L.T. Case No.: 2009-CA-10465

PETER HERMAN,

Appellant,

v.

CIB MARINE CAPITAL, LLC, et al.,

Appellees.
_____/

APPELLANT PETER HERMAN'S INITIAL BRIEF

Peter G. Herman
PETER HERMAN, P.A.
Attorney for Appellant
3020 N.E. 32nd Ave., Suite 226
Fort Lauderdale, FL 33308
Telephone: (954) 882-1133
Email: pgh@phpalaw.com
servicepgh@phpalaw.com

Michele K. Feinzig
Michele K. Feinzig, P.A.
Co-counsel for Appellant
10101 W. Sample Road, Suite 402
Coral Springs, FL 33065
Telephone: (954) 255-5810
Facsimile: (954) 255-5835
Email: michele@feinziglaw.com
pleadings@feinziglaw.com

Attorneys for Appellant, Peter Herman

TABLE OF CONTENTS

Page

TABLE OF CITATIONS AND OTHER AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Other Authorities

Page(s)

PREFACE

References herein are as follows:

Appellant, Peter Herman, is “Peter.”

Appellee, Scott D. Smiley, P.A., is “Smiley” or “Smiley P.A.”

The Appendix to this Brief is “App:page.”

All emphasis is added, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Peter appeals an order denying his motion to dissolve garnishment writs and dismiss garnishment proceedings brought by Smiley ("Motion"), which argued Smiley is barred from collecting the Judgment against Peter under the Rules Regulating the Florida Bar [hereinafter Rules or Bar Rules] relating to a lawyer's inherent duty of loyalty and trust to a current and former client. App:18-27, 90-110, 1817-34. More specifically, the Motion contended Smiley cannot collect the Judgment against Peter, because Smiley obtained it by assignment from the very lawyers who represented Peter in defending against the Judgment (Matthew Herman and Bruce Herman), and because Smiley's principal's law partner (Alexander Brown) also represented Peter in defending against the Judgment. App:18-27, 90-110. Peter contends the conduct of the lawyers involved – in taking an adverse interest in the same case against Peter as a former client (and when he was a current client) without obtaining Peter's informed consent – is prohibited by the Rules, the law and public policy, rendering the assignment to Smiley unenforceable. App:18-27, 90-110.

I. Nature of the Case

Peter and his brother Bruce Herman (both Florida lawyers) were involved in a real estate development project in Indian River County that

failed during the 2007-08 recession. App:19. The lender brought a foreclosure action, and in 2011 a deficiency judgment was entered against Peter for approximately $4.5 million ("Judgment"). App:1818.

After the lender sought to collect the Judgment, Peter, unable to satisfy same, filed for bankruptcy. App:1818. Ultimately, in 2016, Peter entered into a Global Settlement Agreement ("GSA") with the lender and bankruptcy trustee. App:1818. The GSA provided for Peter to pay over $1 million to settle the matter with the lender and trustee, and was approved by the bankruptcy court. App:293-313, 791.

To fulfill the GSA's terms, Peter had the right to have the Judgment assigned to an entity of his choosing. App:637-38, 887, 1818-19. After consultation with his attorneys (Peter's brother Bruce and nephew Matthew), Peter chose, at Bruce's suggestion and before entering into the GSA, an entity called Lorac, owned 100% by Matthew. App:411, 883-92, 1818-19. Peter contends he did so based on an oral agreement with, and assurances from, Matthew and Bruce (also Lorac's attorney) that Lorac would carry out the intent and purpose of the GSA and not execute upon or assign the Judgment. App:883-87, 1823. Matthew contends no such agreement existed. App:1061, 1824. Lorac paid no consideration to Peter or the trustee to have Peter direct the assignment to Lorac, and was not a party to the GSA.

App:488, 510-13, 615, 772.

While the above events were occurring, the Florida Bar initiated proceedings against Peter based on information Peter had included in his bankruptcy filings on the advice of his bankruptcy counsel. App:565. Those proceedings ended in 2021 with Peter being completely exonerated. App:839, 869-70, 873-74, 941-43, 979-80; *Florida Bar v. Herman*, 297 So. 3d 516, 523 (Fla. 2020); *Florida Bar v. Herman*, SC17-2050, 2021 WL 4704793 (Fla. Oct. 8, 2021).

During the lender's collection of the Judgment, Peter's bankruptcy, the GSA's negotiation, execution and performance, and Bar proceedings, Peter was represented by lawyers who were friends and some are family. App:1695-96, 1828,1830. They are Peter's brother Bruce, nephew Matthew, and former mentee/co-worker Alexander Brown. *Id.*

With the GSA fully performed in 2016, and Bar proceedings nearing an end in 2020, Peter thought his decade-long nightmare was over. App:1813, 1820; *Herman*, 297 So. 3d 516. Unfortunately, though, Peter's relationships with his lawyers soured in 2020 when financial disputes arose between Peter and Bruce, Matthew, and Concept Law ("Concept"), whose partners include Alexander Brown and Scott Smiley – mainly concerning attorney's fees including substantial fees owed Peter by Concept. App:23-25, 92. Those

disputes led to lawsuits, including three pending in Broward County Circuit Court (and this Court). App:23-25, 1030-31; Case Nos. 4D2024-0586, 4D2024-1667, 4D2024-1938 and 4D2024-2210.

Instead of allowing that litigation to proceed, Peter's former lawyers implemented a scheme to get money from Peter and leverage Peter, particularly in the Broward Concept fee case where he is owed substantial fees. App:23-25, 93, 107-09. It was accomplished by Lorac, through its owner Matthew and attorney Bruce, assigning 55% of the Judgment against Peter to the P.A. of Scott Smiley, Alexander Brown's law partner. App:26-27. In December 2021, Smiley filed that assignment in the underlying foreclosure case and began attempting to collect the Judgment against Peter. App:7-15.[1] Smiley's efforts have included garnishing Peter's assets, freezing his bank accounts and 401K plan, and obtaining a break order to enter his home. App:52, 64, 66.

In January 2022, Peter filed his Motion to dissolve the writs obtained by Smiley and dismiss the garnishment proceeding, arguing the assignment by Lorac to Smiley and Smiley's collection of the Judgment violated Florida Bar Rules – namely as to duties owed to a current and former client and

[1] For brevity, the Appendix to this Brief only includes some of the writs filed below.

imputed disqualification. App:18-27. In February 2023 and January 2024, the trial court held evidentiary hearings, and in March 2024 denied the Motion. App:763-1135, 1196-1764, 1817-34.

The trial court (after "especially observing [the witnesses'] demeanor and judging their credibility) found Peter's testimony credible, Scott Smiley's testimony "neither believable *nor* credible," and Matthew's testimony self-serving and not believable. App:1817, 1820 (emphasis in original), 1824, 1828. The trial court also found the facts and timing of the assignment between Lorac and Smiley "unscrupulous and suspect." App:1834. However, the court refused to apply the Florida Bar Rules to invalidate the assignment from Lorac to Smiley or Smiley's collection against a former client. App:1834.

The lawyers involved here are:

Matthew Herman ("Matthew"), a Florida lawyer, is Bruce Herman's son and Peter's nephew. App:863, 1007-08, 1054. Matthew practices law with and controls The Herman Law Group ("THLG"). App:1001-08. Matthew is also the sole owner of shell entity Lorac Finance, LLC ("Lorac"). App:1008-09, 1819. Matthew undisputedly represented Peter in the underlying foreclosure, individually and/or through THLG. App:1819.

Bruce Herman ("Bruce")**,** also a Florida lawyer practicing law with

THLG**,** is Peter's brother and Matthew's father. App:863, 1001-08, 1054, 1819. Bruce undisputedly represented Peter through THLG in the underlying foreclosure and other matters, including negotiation of the GSA. App:767-70, 1003, 1623-25, 1819.

Scott Smiley, a Florida lawyer, practices law with Alexander Brown through Concept Law Group ("Concept"), and is managing co-owner of Concept. App:711-12, 1027. On November 19, 2020, Scott Smiley re-incorporated Scott Smiley, P.A. (later known as Scott D. Smiley, P.A.); he is its sole owner. App:1024-25. The only purpose of doing so was to pursue the Judgment against Peter**,** and (Peter contends) to leverage Peter in the Broward County case involving a significant attorney fee dispute between Peter and Concept. App:40-41, 919, 1024-25. Scott Smiley has known Peter and worked on cases with Peter and Alexander Brown since 2007. App:545, 872, 1027.

Alexander Brown ("Alex")**,** a Florida lawyer, is Scott Smiley's partner and a managing co-owner of Concept, with an office directly across from Scott Smiley's. App:739, 1120, 1470. Despite Alex's attempted disavowal of having represented Peter, the evidence showed he represented Peter in the underlying foreclosure (by defending Peter against the very Judgment Alex's partner Scott Smiley seeks to execute upon below through Smiley

P.A.) and Peter's bankruptcy and Bar proceedings, including while working at Concept with Scott Smiley. App:564, 799-801, 806-11, 859-60, 862, 866-67, 870-72, 1199-1327, 1526-36, 1700-01, 1828-29. Alex Brown has known and practiced law with Peter since Peter hired or participated in hiring him at Tripp Scott (disputed by Alex) around 2006-07. App:563, 863-64, 1470-73.

II. Proceedings Below

The Judgment and Peter's Attorney-Client Relationships with Bruce/THLG and Alex in the Underlying Case. The subject Judgment stemmed from a failed real estate development project in Indian River County involving Peter and his brother Bruce, during the 2007-08 recession. App:857-60. As a result of the failed project, the original Plaintiff/lender, CIB Marine Capital, LLC ("CIB") filed a foreclosure action against Peter in February 2009. App:136-37, 1336-61.

On December 9, 2011, the trial court entered a deficiency judgment against Peter for $4,569,464.48. App:1333-35. Both Bruce and Alex are attorneys of record on the Judgment, with Alex listed as co-counsel for Peter. App:1335.

Alex's name also appears as co-counsel on documents filed in the underlying foreclosure, indicating he represented Peter individually. App:1333-35, 1385-87, 1413-14, 1643-46. Alex admitted representing Peter

personally in the underlying case. App:1526-30, 1808-09. The trial court found the record replete with evidence that Alex represented Peter in the underlying case and other matters, including when Alex was at Concept. App:1828-29.

Bruce filed, among other things, Peter's Answer in the underlying foreclosure, which Bruce signed as counsel of record for Peter. App:1392-1409, 1421-27, 1645-46. Bruce admitted representing Peter in the underlying foreclosure (and never withdrew) and other matters. App:426, 767-70, 1003, 1624-25, 1641-42, 1819. He also represented Peter and Lorac simultaneously during the GSA negotiations. App:423-24, 767-70, 789-98, 1819**.**

CIB's Collection of the Judgment and Peter's Bankruptcy. After the Judgment was entered, CIB began aggressive collection efforts. App:773, 1352-53. Unable to satisfy the Judgment, Peter sought bankruptcy protection in February 2012. App:773, 860-65.

Significant litigation ensued thereafter in the underlying post-Judgment collection, until all issues concerning the Judgment and Peter's bankruptcy were resolved in January 2016 via a Global Settlement Agreement ("GSA") between Peter, CIB and the bankruptcy trustee. App:771-86, 791, 881-85, 1343-51. Through the GSA, Peter paid over $1 million to CIB and the trustee

as consideration to conclude CIB's collection of the Judgment and the bankruptcy litigation, and obtain the release of Peter's garnished funds out of escrow. App:182-83, 554-55, 560, 635, 771-86, 881-83.

Oral Pre-GSA Agreement and Assignment of the Judgment to Lorac. Final negotiations to achieve the GSA moved quickly. App:884, 893-94. Peter's unrebutted testimony and the GSA indicate neither CIB nor the trustee wanted to spend any more time, effort or expense on the matter, including getting the garnished escrowed funds back to Peter. App:547-48, 776-77, 884-85. As such, after discussions with his brother Bruce and nephew Matthew, both Peter's attorneys, Peter agreed with Bruce's suggestion ***before*** executing the GSA to direct the assignment of the Judgment to Matthew's shell entity, Lorac. App:411, 883-92.

Peter undisputedly had the right to direct the bankruptcy trustee to assign the Judgment to any entity he chose, so that entity could substitute for CIB in the underlying foreclosure case to fulfill the GSA's terms and return to Peter monies CIB previously garnished. App:547, 635-37, 771-86, 882-87, 1818-19. Peter decided the entity would be Lorac based on his oral pre-GSA agreement with Lorac, Matthew and Bruce **that there would be no execution or further assignment of the Judgment**, as Lorac paid nothing for the assignment and was merely being utilized to implement the GSA.

App:251, 488, 776-77, 883-88, 893-94. As Peter testified,

> They [Matthew and Bruce] specifically said that they were not going to execute on it [the Judgment] or assign it … I fought this judgment for five or six years, went into bankruptcy, and then -- it makes no sense for me to say okay, well, here you go, have at it, a judgment, just wholesale give it to someone.

App:553, 559-60, 894.

Matthew (Lorac) disputed this pre-GSA agreement existed. App:1061. He claimed the "consideration paid from Lorac" was in the GSA, and that Lorac was assigned the Judgment at Peter's direction because Peter owed Matthew/THLG around $200,000 for expenses incurred by attorney Bart Houston using THLG office space, and owed Lorac $25,000 on a car loan; Peter denied owing anything other than the $25,000, which was repaid. App:480-81, 488-94, 500-16, 907, 954-55, 1058-61, 1068-69, 1082-89. The trial court found Matthew's testimony self-serving and not believable. App:1824.

A plethora of evidence (*see* Argument III, *infra*) corroborated the pre-GSA Agreement, including that Bruce and Matthew (through THLG and Lorac) acted in accordance – by Lorac accepting assignment of the Judgment, substituting for CIB, returning the escrowed funds to Peter (not Lorac), and not taking action to collect the Judgment for years, until unrelated disputes arose. App:92, 492, 789-98, 934-35, 1819-20, 1835-47.

Specifically, in March 2016 the bankruptcy trustee assigned the Judgment to Lorac, and Lorac was substituted for CIB below. App:789-98, 893, 1344, 1819-20. Peter undisputedly was at that time a current client of Bruce and Matthew through their law firm THLG, and Bruce also represented Lorac. App:789-98, 895, 901-02.

On March 31, 2016, the trial court entered an order releasing the escrowed funds to Peter, and Lorac returned them to Peter, consistent with the GSA and pre-GSA agreement between Peter, Bruce, Matthew and Lorac. App:92,106, 510-11, 776-77, 1343. And on May 9, 2016, the trial court entered an order to close the case, because "the parties have agreed that *all matters* have been resolved and that nothing remains outstanding …." App:1343, 1830 (emphasis in original). Lorac made no efforts thereafter to execute upon the Judgment, even choosing to allow the recorded certificate of lien relative thereto to expire. App:920-21, 967, 1343.

It is undisputed that Bruce and Matthew never told Peter that Lorac would collect on the Judgment. App:1006-07, 1010-11, 1067-68. Nor did they obtain written informed consent from Peter to their dual representation of Peter and Lorac in the above transaction, if Lorac was thereby taking or intended to take an interest adverse to Peter. App:934-36, 1006-11, 1067-68. Matthew claimed the GSA constituted informed consent, but admitted

THLG and Lorac were not parties to the GSA. App:771-86, 1010-11, 1067-68.

Unrelated Disputes Between Peter and Bruce, Matthew, Alex and Scott Smiley. In 2020, Bruce and Matthew (through THLG) and Alex and Scott Smiley (through Concept), sued Peter in Broward County concerning a fee division dispute in a significant case that Peter and Concept worked together ("Broward fee case"). App:92, 919-20, 1084, 1820.

Also in 2020, Peter and Bruce became embroiled in two disputes currently being litigated in Broward: (1) a family trust, where Peter seeks to remove Bruce as co-trustee for Bruce's alleged failure to properly manage trust assets, account to beneficiaries and pay taxes, and (2) THLG expenses that Bruce/Matthew claim Peter owes ("THLG expense case"). App:23, 1082-85.

Appellate proceedings in the above cases are pending in this Court. Case Nos. 4D2024-0586, 4D2024-1667, 4D2024-1938 and 4D2024-2210.

Lorac's Assignment of the Judgment to Smiley. In November 2020, nearly five years after the underlying foreclosure case was closed and soon after the Broward fee case was filed, Scott Smiley reincorporated his P.A., and Lorac assigned 55% of the Judgment to Smiley P.A. App:8-9, 919, 1024, 1343, 1820, 1830**.** The Assignment was prepared and witnessed by

Bruce/THLG, and executed by Matthew. App:8-9, 425. Lorac (Matthew) retained 45% of the Judgment and was to receive 50% of any funds Smiley collected from Peter. App:726-27, 802-05, 1010. The claimed consideration for this assignment was that Scott Smiley "would fund the collection efforts." App:495, 726.

Scott Smiley admitted reincorporating his P.A. (which he solely owns) specifically to pursue collection of the Judgment against Peter. App:717-18, 1024-25, 1820. Scott Smiley claimed he only discovered the Judgment by happenstance while doing Pacer research on Peter, though he admitted knowing the facts of Peter's bankruptcy and Bar proceedings relating to the Judgment, including watching oral argument in the Bar proceeding and texting Peter during it. App:121, 718-19, 765-66, 873, 1031, 1045, 1820. The trial court found Scott Smiley's testimony "neither believable *nor* credible." App:1820 (emphasis in original).

It is undisputed that neither Bruce nor Matthew (Lorac) informed Peter or obtained Peter's written consent to assign the Judgment to Smiley. App:425, 1067-68. Again, Matthew claimed the GSA constituted informed consent. App:1067-68. He also testified "Lorac can do whatever it pleases with the judgment … because Peter owed Lorac the debt stemming from the judgment," yet admitted the only debt Peter owed Lorac was the $25,000 car

loan (on which there was a note that Peter testified was paid off). App:511-12, 883-84, 907, 972-75, 1068-69.

Smiley contended there was no need for Peter's informed consent to the assignment from Lorac because Smiley was a bona fide purchaser of the Judgment, without knowledge that Scott Smiley's partner Alex represented Peter. App:131-32, 727-28. Smiley also claimed the information it gained about Peter and the Judgment was "widely disseminated" public information and not confidential, though Scott Smiley testified to being "fully briefed by Matthew Herman about what took place in the whole … situation" before Lorac assigned Smiley the Judgment. App:126-27, 1031-34, 1042, 1047, 1827. Despite finding Scott Smiley not believable, the trial court agreed with his "widely disseminated information" argument. App:1820, 1827.

Smiley's Garnishment. On December 21, 2021, Smiley filed the Lorac assignment and commenced garnishment proceedings against Peter. App:7-9, 121, 1343. Those proceedings have included issuing a break order for Peter's home, writs of garnishment freezing all of Peter's assets including his 401K plan held by Fidelity, and attempting to take control of Peter's P.A. App:10-15, 18, 64-67, 121, 1340-43.

Peter's Motion. On January 21, 2022, Peter filed the subject Motion to dissolve Smiley's writs and dismiss the garnishment proceeding, arguing

that Lorac's assignment of the Judgment to Smiley and Smiley's execution thereon violated Bar Rules concerning conflicts of interest. App:18-27. Peter later filed a Hearing Brief and more detailed motion.[2] App:90-110.

Smiley's Response maligned and besmirched Peter and argued Peter had no written agreement with Lorac not to pursue the Judgment, any conflict of interest was waived by the GSA and Lorac's substitution for CIB, and the Rules did not bar Smiley's collection of the Judgment. App:113-386. Peter's Reply refuted Smiley's arguments, attached testimony from Scott Smiley's partner Alex confirming Alex and Bruce represented Peter in the underlying foreclosure case, and argued that pursuing the Judgment against Peter was a blatant violation of an attorney's duty of loyalty to a client. App:387-402.

Hearing. On February 20, 2023, the trial court (predecessor Judge Croom) held an evidentiary hearing on Peter's Motion at which Peter, Matthew, Scott Smiley and David Rothman testified.[3] App:827-1135. Before the hearing, depositions of Bruce, Matthew, Peter, Andrew Lavin[4], David

[2] References to "Motion" include this document.

[3] David Rothman, a 46-year Florida Bar member and Florida Bar ethics attorney who has authored dozens of legal ethics opinions, represented Peter in his Bar proceedings. App:84, 977-79.

[4] Andrew Lavin, also an attorney, represented Peter in negotiating the GSA. App:605-13, 881.

Rothman and Scott Smiley and the parties' exhibits were filed. App:403-824.

Mr. Rothman's earlier-filed Declaration was also of record. App:82-85. Attached thereto was his email referencing "the patently unethical conduct by Alex Brown and his law partner [Scott Smiley] vis a vis Peter Herman" in "turn[ing] on Peter regarding the very judgment that was the cause of the bankruptcy and Bar cases." App:85.

As the hearing concluded, Judge Croom expressed serious concerns about Smiley's position.[5] App:1117-21, 1124-34. Three weeks later, Smiley moved to recuse Judge Croom, which she denied. App:1136-47. This Court granted Smiley's petition for writ of prohibition, causing reassignment of the case to Judge Cox. App:1340; Case No. 4D2023-0699.

Meanwhile, Smiley filed a written closing, and Peter filed proposed Findings of Fact and Conclusions of Law ("FF/CL"). App:1148-89.

Continued Hearing. On January 24, 2024, Judge Cox held a continued evidentiary hearing on Peter's Motion. App:1439-1764. Additional exhibits were filed, and these witnesses testified: Alex, Bruce, Peter, and Cynthia Buky, a litigation paralegal for Peter and Alex at Tripp Scott.

[5] At a previous hearing, Judge Croom, upon learning the facts of this case, said **"if that is a true statement, then it is a Florida Bar reportable offense. … If it develops as Mr. Vocelle [Peter's counsel] says …, then my expectation is that Mr. Vocelle will be reporting that to the Florida Bar …."** App:93, 135-49.

App:1199-1764, 1828. After the hearing, Peter filed updated proposed FF/CL. App:1765-1807.

III. Disposition in the Lower Court

On March 24, 2024, the trial court denied Peter's Motion. App:1817-34. Despite finding Matthew, Bruce and Alex represented Peter in the underlying foreclosure case, and that "the facts and timeliness of [Smiley's] purchase of the Judgment appear rather unscrupulous and suspect," the trial court decided the Bar Rules "cannot be used to invalidate the purchase or enforcement of the Judgment by SCOTT SMILEY, P.A." App:1817-34.

This timely non-final appeal followed.[6]

SUMMARY OF ARGUMENT

The outrageous conduct of Peter's former lawyers, in pursuing a Judgment against Peter that they previously defended him from, should be stopped by this Court. These lawyers have done this to leverage Peter in other litigation, contrary to our system of justice. Their actions run far afoul of the Bar Rules, and violate the Rules' very foundation – namely, the duty of loyalty and trust to current and former clients that defines our profession.

[6] After this appeal was filed, the trial court found the partial assignment of the Judgment from Lorac to Smiley invalid on grounds other than those raised herein. The trial court's order does not moot this appeal, because Smiley's relentless efforts to collect the Judgment against Peter continue. Additionally, Smiley has appealed that order (Case No. 4D2024-2164).

Allowing this conduct to continue would diminish the public's perception of lawyers and further dilute confidence in lawyers and our justice system.

Bruce (Peter's brother) and Matthew (Peter's nephew) violated Rules 4-1.7 and 4-1.8 by representing both Peter and Lorac (Matthew's entity) in the transaction (assignment of the Judgment from the bankruptcy trustee to Lorac per the GSA) that Matthew claims netted Lorac full rights to "do whatever it pleases" with the Judgment, including the right to assign it to Smiley and share in Smiley's collections against Peter. If Lorac acquired such rights adverse to Peter, Bruce and Matthew were unquestionably required to obtain Peter's written informed consent, which they failed to do.

Likewise, Bruce and Matthew were required to obtain Peter's informed consent when Lorac vindictively assigned the Judgment to Smiley years later – whether Peter was then a current or former client. Again, they failed to do so, violating 4-1.7, 4-1.8 and/or 4-1.9.

Due to these Rule violations, Lorac could not under Florida law take full rights to the Judgment, meaning Lorac had no rights to assign to Smiley, rendering the Lorac-Smiley assignment void. The GSA itself – to which Peter's attorneys and Lorac were not parties – did not provide the required informed consent.

The Lorac-Smiley assignment is also void because Smiley's owner

Scott Smiley's law partner, Alex, *also* represented Peter in this very case, leading to an irrefutable presumption that confidences passed to Alex (and Scott Smiley by imputed disqualification). Smiley obtaining the Judgment from Lorac and collecting it against Peter without Peter's informed consent violated Scott Smiley's duties to Peter, a former client, under Rules 4-1.7 and 4-1.9 – which he cannot avoid by forming his P.A. to pursue the Judgment. He should not be permitted to shirk his duties to a former client simply because he is not representing someone else in doing so, but rather, ***is himself*** going after a former client.

The entire premise of the Rules is to protect **clients** and the loyalty owed clients. The trial court's ruling not only failed to properly apply the Rules, but also failed to apply the duty of loyalty to squelch Smiley's (and Matthew's per Lorac's 45% retained interest) unethical collection of the Judgment against a former client.

Last, the trial court's finding that there was no pre**-**GSA agreement for Lorac not to pursue the Judgment has no credible (substantial) evidentiary support. The only evidence cited as supporting that finding is Matthew's testimony, which was disbelieved as self-serving. All other credible evidence, including Bruce's emails showing his understanding and intent, proves the pre-GSA agreement existed, and that Lorac was merely a conduit

to obtain the garnished funds **for Peter**, with no right to collect the Judgment.

The trial court's finding was thus clearly erroneous. Because the Lorac-Smiley assignment violated the pre-GSA agreement for Lorac not to execute on the Judgment, that assignment is void and the garnishment proceeding should be dismissed with prejudice.

STANDARD OF REVIEW

The trial court's decision involved both factual and legal issues. "'[F]actual findings must be supported by competent, substantial evidence, while legal findings are reviewed de novo.'" *Greenberg v. Bekins of S. Florida*, 337 So. 3d 372, 375 (Fla. 4th DCA 2022) (internal citations omitted).

Interpretation and application of the Rules of Professional Conduct is a pure legal issue, reviewed de novo. *Young v. Achenbauch*, 136 So. 3d 575, 580 n.3 (Fla. 2014). Likewise, the trial court's application of law to undisputed facts and interpretation of a contract are reviewed de novo. *Faller v. Faller*, 51 So. 3d 1235, 1236 (Fla. 2d DCA 2011); *Crapo v. Univ. Cove Partners, Ltd.*, 298 So. 3d 697, 700 (Fla. 1st DCA 2020) (unambiguous contract language must be given its plain meaning).

Regarding factual findings, "[c]ompetent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a

reasonable mind would accept as adequate to support a conclusion.'" *Duval Util. Co. v. Florida Pub. Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)).

Conclusory statements alone do not constitute "competent substantial evidence." *See id.*; *J.B.M. v. Dep't of Children & Families*, 870 So. 2d 946, 950 (Fla. 1st DCA 2004). Moreover, appellate courts have the "'right to reject "inherently incredible and improbable testimony or evidence."'" *Cartelli v. Green*, 331 So. 3d 839, 841 (Fla. 4th DCA 2021) (internal citation omitted).

A finding of fact by the trial court in a non-jury case should be set aside if "'there is no substantial evidence to sustain it, … it is clearly against the weight of the evidence, or … it was induced by an erroneous view of the law.'" *DG Sports Agency, LLC v. First Round Mgmt., LLC*, 174 So. 3d 541, 544 (Fla. 4th DCA 2015) (quoting *Holland v. Gross,* 89 So. 2d 255, 258 (Fla. 1956)). More specifically,

> [w]hen the appellate court is convinced that an express or inferential finding of the trial court is **without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts**, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.

Holland. *See also Williams v. Lutrario*, 131 So. 3d 801, 804 (Fla. 4th DCA 2013) (finding of fact resting on undisputed evidence "is in the nature of a

legal conclusion and is subject to the 'clearly erroneous' standard of review"); *Johnson v. Jaquith*, 189 So. 2d 827, 829 (Fla. 4th DCA 1966) (appellate court must reverse where findings contradict legal effect of the evidence).

Last, it is the fact finder's role to resolve conflicts in the evidence and weigh the witnesses' credibility. *Ferry v. Abrams*, 679 So. 2d 80, 81 (Fla. 5th DCA 1996). Great deference is afforded the fact finder "because it has the first-hand opportunity to see and hear the witnesses testify." *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO DISSOLVE THE WRITS AND DISMISS THE GARNISHMENT PROCEEDING, BECAUSE FLORIDA BAR RULES GOVERNING ATTORNEY CONFLICTS OF INTEREST PROHIBITED LORAC, OWNED BY PETER'S ATTORNEY MATTHEW HERMAN AND REPRESENTED BY PETER'S ATTORNEY BRUCE HERMAN, FROM TAKING A PECUNIARY INTEREST IN THE JUDGMENT ADVERSE TO PETER AND ASSIGNING THE JUDGMENT TO SMILEY WITHOUT OBTAINING PETER'S INFORMED CONSENT, AND PROHIBIT SMILEY, WHOSE LAW PARTNER ALEXANDER BROWN WAS ALSO PETER'S ATTORNEY, FROM COLLECTING THE JUDGMENT AGAINST PETER.

In denying Peter's Motion, the trial court failed to properly interpret and apply the Bar Rules to the unscrupulous conduct of Peter's lawyers, including Scott Smiley by imputed disqualification. Those lawyers (Peter's brother Bruce, nephew Matthew and former mentee/co-worker Alex) advised and counseled Peter in defending against the lender's (CIB's) collection of the

very Judgment that Scott Smiley, Alex's partner, now seeks through his P.A. to collect against Peter. They also represented Peter in reaching a global settlement with the lender and bankruptcy trustee.

Peter's lawyers were his champions through years of grueling litigation that - if not resolved favorably - would have had drastic consequences for him professionally and personally. When those matters resolved, Peter thought his decade-long multi-faceted nightmare was over. But when unrelated disputes arose between Peter and Bruce, Matthew, Alex and Scott Smiley, Peter's attorneys turned on him. A scheme was concocted for Lorac (owned by Matthew) to assign the Judgment (that Lorac paid nothing for) to Smiley, so Smiley could collect it against Peter and share the bounty with Lorac (Matthew).[7] To be clear, **this case is not a claim for attorney's fees owed by a former client, but instead, a vindictive money grab by attorneys <u>to whom Peter owes nothing</u>, seeking revenge against their former client, Peter, and to leverage Peter particularly in the Broward fee case.** App:148-49.

This scheme – carried out by Lorac assigning the Judgment to Smiley and Smiley's collection of same against Peter – is unethical, unscrupulous

[7] Ms. Buky (Peter's and Alex's paralegal at Tripp Scott) testified that Smiley attempting to enforce the Judgment against Peter was a "dirty, low-down thing." App:1694-99.

and violates a lawyer's most basic duties owed to a client and former client. Under Florida law, an agreement in violation of Bar Rules is void and unenforceable as against public policy. *See Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185 (Fla. 1995) (concerning contingency fee agreements). *See also Santiago v. Evans*, 547 F. App'x. 923, 926 (11th Cir. 2013) ("Florida law supports a conclusion that contracts between a lawyer and a client that violate the Rules Regulating the Florida bar are void as against public policy").

As stated in *Katz v. Frank, Weinberg & Black, P.L.*, 268 So. 3d 773, 776 (Fla. 4th DCA 2019), "[w]hen a contract is void as against public policy, '**no alleged right founded upon the contract or agreement can be enforced in a court of justice**.'" (Internal citation omitted.) This Court should find the assignments at issue void and unenforceable as described herein, and reverse. *See Matter of Guardianship of J.W.*, 991 N.W.2d 143, 149-50 (Iowa 2023) (court's inherent authority to dismiss case due to ethics rule violations).

A. THLG's Dual Representation of Peter and Lorac, Lorac's Acquiring of a Pecuniary Interest Adverse to Peter, and Lorac's Assignment of the Judgment to Smiley Violated Florida Bar Rules.

Bruce and Matthew were required under the Bar Rules to obtain written informed consent from their client Peter, if Lorac was taking an interest

adverse to Peter in 2016 when Peter agreed to have the Judgment assigned to Lorac to carry out the GSA. Their failure to do so nullifies the bankruptcy trustee's assignment to Lorac ("trustee-Lorac assignment") to the extent it gave Lorac anything it could assign to Smiley (the evidence disproves any claim that it did), thereby nullifying Lorac's later assignment to Smiley ("Lorac-Smiley assignment").

Rule 4-1.7, R. Regulating Fla. Bar [hereinafter RRFB] states in relevant part:

> **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> **(b) Informed Consent.** Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> …
>
> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

The next applicable Rule, RRFB 4-1.8, states in relevant part:

> **(a) Business Transactions With or Acquiring Interest Adverse to Client.** A lawyer is prohibited from entering into a business transaction with a client or knowingly acquiring an

> ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:
>
> **(1)** the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client …;
>
> **(2)** the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> **(3)** the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction ….

See also RRFB 4-1.8(k) ("[w]hile lawyers are associated in a firm, a prohibition in … subdivision[] (a) … that applies to any one of them applies to all of them").

As the trial court found, and the record shows, when the GSA was negotiated and signed and the trustee-Lorac assignment occurred in 2016, **Peter was a current client of Matthew and Bruce** through their law firm THLG, and THLG also represented Matthew's shell entity, Lorac. Peter had the absolute right to direct the assignment of the Judgment to any entity he chose, and he chose Lorac after consultation with his attorneys (Bruce and Matthew) based on their assurances that Lorac would not thereafter pursue the Judgment. Peter only directed the Judgment be assigned to Lorac (the "transaction") because he had an agreement with Lorac/Matthew/Bruce for Lorac not to execute on or assign the Judgment thereafter.

If THLG's representation of Lorac in the transaction was adverse to Peter, or there was a substantial risk that THLG's representation of Peter would be materially limited by THLG's representation of Lorac, or Matthew's or Bruce's personal interests, RRFB 4-1.7(a)(1) and/or (a)(2) required THLG (Bruce and Matthew) to obtain written informed consent from Peter to its dual representation and the trustee-Lorac assignment. Such informed consent had to comply with 4-1.7(b), and 4-1.7(c) which in dual representation requires "an explanation of the implications of the common representation and … risks involved."

Moreover, if Lorac, by accepting the Judgment by assignment, knowingly acquired a "pecuniary interest adverse to a client [Peter]," the transaction had to be **fair and reasonable *to Peter* AND he had to give written informed consent *to the transaction's essential terms***. Matthew's claim that Lorac could "do whatever it pleases" with the Judgment, including collecting on it through the Lorac-Smiley assignment, is clearly **an adverse pecuniary interest against Peter, obtained at a time when THLG represented both Lorac and Peter**.

THLG undisputedly failed to obtain *any* written informed consent signed by Peter for THLG's dual representation **or** for the Judgment being assigned to Lorac under circumstances whereby Lorac would obtain a

pecuniary interest in the Judgment that it could collect against Peter, or assign. Without such informed consent, THLG's dual representation was prohibited under RRFB 4-1.7, **and** Lorac (Matthew-owned) was prohibited from entering into a business transaction with Peter to accept the assigned Judgment as an interest adverse to Peter under RRFB 4-1.8. *See The Florida Bar v. Petersen*, 248 So. 3d 1069, 1078-80 (Fla. 2018) (attorney's pecuniary interest adverse to client violated 4-1.8); *The Florida Bar v. Doherty*, 94 So. 3d 443, 446-50 (Fla. 2012) (finding "egregious misconduct" and approving recommendation of guilt for violating 4-1.7(a)(2) and 4-1.8(a), where attorney assumed multiple, concurrent, conflicting professional roles and entered into a business transaction with the client in which he had a personal financial interest, without obtaining the client's informed consent).

The trial court's finding that the GSA itself provided informed consent from Peter (App:1826) failed to properly apply the Rules as described above. Lorac and THLG were not parties to the GSA. So Peter's signing of the GSA did not avoid the need for written informed consent **as to THLG's dual representation and the essential terms of the transaction between Peter and Lorac**.

Moreover, the trial court's finding runs afoul of the law. When a contract is silent on a particular matter, in neither expressly nor by

reasonable implication indicating that the parties intended to contract regarding the matter, "'the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted.'" *Life Ins. Co. of N. Am. v. Cichowlas*, 659 So. 2d 1333, 1338 (Fla. 4th DCA 1995) (internal citations omitted).

Nowhere does the GSA say Lorac was obtaining a pecuniary interest adverse to Peter to "do whatever it pleases" with the Judgment, including collecting it by assigning it to a third party, or that "Peter owed Lorac the debt stemming from the judgment," as Matthew unbelievably claims.[8] App:772-86. Nor does the GSA explain the implications of THLG's dual representation, and the risks involved to Peter. *Id.*

Those were issues between Peter, his attorneys and Lorac – separate from the GSA **to which Peter's attorneys and Lorac were not parties**. Thus, the trial court's reliance on the GSA's statement that the Judgment was not satisfied (App:1825) was entirely misplaced.

Without question Peter knew of THLG's dual representation and the GSA's terms. However, his understanding of Lorac's role, per those terms,

[8] Matthew's testimony is patently absurd, considering he admitted Peter's only debt to Lorac was $25,000. *See* App:492-94, 1047-48, 1068-69. Like the trial court, this Court should reject Matthew's incredible, improbable testimony. *Cartelli*, 331 So. 3d at 841.

was that Lorac was merely a conduit to carry out the GSA's stated intent:

> **It is the intent of this Agreement that the assignee of the CIB Judgment [Lorac] shall control the disposition of all Garnishment Claims.** CIB and [bankruptcy] Trustee Welt shall execute all documents and take other action reasonably necessary **to ensure that all funds held in connection with the Garnishment Claims are delivered to the Judgment Creditor [Lorac]**, including a prompt stipulation of substitution of the party plaintiff and counsel in the State Court Case.

App:776-77. "Garnishment Claims" were "all pending writs of garnishment[,] the Wage Garnishment Escrow Funds and Bank Garnishment Funds." App:776. Thus, the specifically stated intent of the GSA was for Lorac to "control the disposition of all Garnishment Claims" (a defined term) which were to be returned to Peter, **as Lorac itself sought in the Joint Motion to Release Garnished Funds *to Peter***. App:1835-47 (¶9). Doing so required an unsatisfied judgment. App:547-49.

Furthermore, the parties to the GSA "resolve[d] all claims and issues between … them" including "all issues relating to the CIB Judgment," and CIB and the trustee fully released Peter. App:775, 778-79. The assignment of the Judgment from CIB to the trustee, and the trustee-Lorac assignment thereafter, each assigned "all of the right, title and interest **of the Assignor**" to the Judgment, which because of the release was limited to the "Garnishment Claims." App:794-98. Thus, the only interest in the Judgment assigned to Lorac was to "control the disposition of all Garnishment Claims,"

which Lorac was to do by substituting for CIB below, which occurred. App:136-37. The Joint Motion to Release Garnished Funds **to Peter**, filed by Peter and Lorac jointly **and signed by Bruce/THLG** confirms this. App:426, 1835-47.

The GSA is silent on Lorac being anything other than a conduit to obtain the garnished funds to be returned to Peter, much less taking a pecuniary interest in the Judgment that would allow Lorac to turn on Peter and collect that very Judgment through assignment to a third party. As such, and because Lorac and THLG/Bruce/Matthew were not parties to the GSA, under *Cichowlas* the GSA did not provide the required informed consent.

Notably, Peter's understanding of Lorac's role and it not taking any actual pecuniary rights in the Judgment is supported by attorney Andrew Lavin's testimony. He represented Peter in drafting and negotiating the GSA, and testified, unrebutted, that:

> … my understanding always was that the whole reason that this judgment as part of the settlement was being assigned to the entity that it was for the purpose of assisting and protecting Peter Herman and for no other purpose**, and certainly not to put him in a position one day that he would find himself having to defend himself from Lorac or some third party now holding that Judgment**. …
>
> It certainly was nothing I ever intended in my drafting of that document.

App:551, 1018-21. Mr. Lavin's testimony at App:634-39 is particularly telling ("it was **we** who proposed a disposition of the judgment through an assignment as opposed to a satisfaction **to accomplish that same objective**," as "the bank was flexible with it").

Peter's understanding is also supported by the GSA's language and CIB-trustee and trustee-Lorac assignments, explained above, showing Lorac received no actual pecuniary rights in the Judgment. **Lorac only received what was assigned from CIB through the trustee.** *Farkus v. Florida Land Sales & Dev. Co.*, 915 So. 2d 688, 689 (Fla. 5th DCA 2005) ("an assignment gives the assignee no greater rights against the principal debtor than those held by the assignor"). If CIB were to try and collect this Judgment now, it would clearly be prohibited by the GSA's release. As such, since Lorac's rights are limited to what CIB assigned, Lorac never acquired the right to collect the Judgment.

If Lorac's intentions were any different, Peter's attorneys Matthew and Bruce were obligated under Rules 4-1.7 and 4-1.8 to obtain the proper ***informed*** consent, specifically telling Peter of Lorac's intentions and the risks to Peter of THLG's dual representation. App:553. They did not.

Additionally, if Lorac could "do whatever it pleases" with the Judgment, including collecting half of what Smiley collects (clearly a pecuniary interest

adverse to Peter), the transaction had to be "fair and reasonable" **to Peter** (the client) under RRFB 4-1.8(a)(1). How is it "fair and reasonable" for Peter to have paid over $1 million to resolve the lender's collection of the Judgment after years of litigation, only to give Lorac or Lorac's assignee the right to collect against Peter all over again on that very same Judgment? It makes no sense whatsoever and defies logic.

Peter would NEVER have given informed consent to what Matthew claims the transaction gave Lorac. That would have been the opposite of Peter's understanding of the transaction (his pre-GSA agreement with Lorac/Matthew/Bruce for Lorac not to execute upon or assign the Judgment), which was consistent with the GSA's language indicating Lorac was merely the conduit to obtain the garnished funds to be returned to Peter.[9] And Peter's understanding is supported by Lorac acting in accordance and consistent therewith until almost five years later when unrelated disputes arose. *See* App:1835-47.

Moreover, **Lorac paid nothing for the Judgment**. Although Matthew

[9] The trial court's finding of no pre-GSA agreement lacked substantial evidentiary support and should be reversed. *See* Argument III, *infra*. Even if this Court disagrees, the Court should still reverse on Argument I, because regardless of whether a pre-GSA agreement existed, the failure to comply with Bar Rules invalidates Lorac obtaining *any* pecuniary interest adverse to Peter and thus the Lorac-Smiley assignment.

claimed consideration existed because Peter purportedly owed Matthew/THLG or Lorac money, the trial court disbelieved Matthew's testimony, finding it self-serving. App:1824. There was no testimony Lorac paid *anything* to the trustee or Peter; the evidence is to the contrary (*see*, *i.e.*, App:488); and Peter was not indebted to Lorac or Matthew/THLG.

Lorac did not receive from CIB through the trustee *any* ability to collect the Judgment. And Bruce's and Matthew's failure to comply with Rules 4-1.7 and 4-1.8 renders the Peter-Lorac transaction – to the extent Lorac believes it had such rights – void and unenforceable. *Katz*, 268 So. 3d at 776. Because the Lorac-Smiley assignment rests on Lorac *having* a pecuniary interest in the Judgment to assign, which it did not due to these Rule violations and Lorac being a mere conduit with no right to collect, the Lorac-Smiley assignment based thereon is also void and unenforceable. *Id.*

In addition, the Lorac-Smiley assignment violated Rules 4-1.7 and 4-1.8 because it was done without Peter's written informed consent **when Bruce and Matthew still represented Peter since they had not withdrawn from that representation**. App:426-27, 1090, 1343-44 (no motion to withdraw between May 9, 2016 and December 20, 2021 case reopening based on the 2020 Lorac-Smiley assignment). The trial court's finding to the contrary was based on its belief that the 2016 closure of the

underlying foreclosure case automatically ended Bruce's and Matthew's representation of Peter under Fla. R. Gen. Prac. & Jud. Admin. 2.505(f)(3) (stating a lawyer's appearance ends upon "termination of an action or proceeding …"). App:1829-30.

But as this Court recognized in *Accardi v. Regions Bank*, 309 So. 3d 672, 676 (Fla. 4th DCA 2020), "post-judgment collection efforts such as … garnishment … are neither 'civil actions' nor 'proceedings' …. [but] [r]ather … efforts to 'effectuate' a judgment lien already in existence, **so the law views them as an extension of the main case**." Thus, Smiley's garnishment is merely an *extension* of the underlying foreclosure case, so Rule 2.505(f)(3) does not apply.

Consequently, by not withdrawing, Bruce and Matthew **still represented Peter in the same case** when Lorac (Matthew) assigned the Judgment to Smiley and agreed to receive 50% of Smiley's collections against Peter. Since Peter was therefore a *current client* of Bruce/Matthew/THLG in 2020, the Lorac-Smiley assignment violated Rules 4-1.7 and 4-1.8 for failure to obtain Peter's informed consent.

Accordingly, the trustee-Lorac assignment is void **to the extent it gave Lorac *any* interest adverse to Peter**, meaning Lorac had nothing to assign to Smiley, rendering the later Lorac-Smiley assignment void and

unenforceable. Even if the trustee-Lorac assignment *was* valid, the Lorac-Smiley assignment should still be held void as violative of Bar Rules.

Alternatively, if this Court finds Peter was only Bruce/Matthew/THLG's *former client* when Lorac assigned the Judgment to Smiley, the assignment still violated RRFB 4-1.7(a)(2), because THLG's representation of Lorac was (or should have been) materially limited by its "responsibilities to … a former client [Peter]." The trial court misconstrued RRFB 4-1.7 by finding it did not apply based on its title (and erroneously quoted subsection (a)(1) (as (2)), when (a)(2) applies in a former client situation). App:1830-31. RRFB 4-1.7(a)(2) plainly requires considering a ***former client's interests***.

The Lorac-Smiley assignment also violated RRFB 4-1.9, which the trial court *also* failed to properly construe and apply. RRFB 4-1.9 states:

> A lawyer who has formerly represented a client in a matter must not afterwards:
>
> **(a)** represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
>
> **(b)** use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
>
> **(c)** reveal information relating to the representation except as these rules would permit ….

The trial court erroneously found 4-1.9(a) inapplicable because "this is not a question of representation," and only considered 4-1.9(b). App:1831. But subsection (a) *does* apply because THLG prepared the Lorac-Smiley assignment, with Bruce/THLG representing Lorac, Matthew's entity. Doing so violated 4-1.9(a), because Lorac's interests in assigning the Judgment to Smiley (retaining 45% thereof, to receive 50% of what Smiley collects from Peter) were materially adverse to Peter's interests. THLG could not, under 4-1.9(a) "represent another person" (Lorac) "in the same or a substantially related matter in which that person's [Lorac's] interests are materially adverse **to the interests of the former client [Peter]**."

RRFB 4-1.9(b) separately (*see* n.10, *infra*) prohibits a lawyer from "us[ing] information relating to the representation" to a former client's disadvantage except as the rules permit "or when the information has become generally known." Bruce and Matthew clearly possessed Peter's confidential information concerning the Judgment, including the Peter-Lorac transaction, why the GSA was structured as it was, and whether the Judgment would be satisfied. App:411, 547-52, 557-58, 767-70, 960. Those communications were privileged, with Peter having no burden to prove what confidential information passed to his lawyers (discussed *infra*). *See* App:614-16.

In assigning the Judgment to Smiley, Matthew and Bruce used Peter's confidential information to his disadvantage without his informed consent, in complete disregard of Bruce's/Matthew's responsibilities to Peter under Florida law. RRFB 4-1.9(b); *Ford v. Piper Aircraft Corp.*, 436 So. 2d 305, 307 (Fla. 5th DCA 1983) ("[a]n attorney is forbidden to use a confidence or secret of a client to the client's disadvantage **or to use a confidence or secret, absent informed consent by the client, for the attorney's own benefit or the benefit of a third person**"); *Rombola v. Botchey*, 149 So. 3d 1138, 1141 (Fla. 1st DCA 2014) (attorney's ethical responsibilities of fidelity and protection of client confidences "remain inviolate" through post-judgment proceedings, absent client consent or waiver).

The trial court incorrectly found no "use[] [of] any confidential information to the disadvantage of PETER" because "the information regarding the Judgment and Assignment to Lorac were all publicly recorded and known throughout multiple means." App:1827, 1831. That finding was based on the "widely disseminated" information comment to 4-1.9, and the trial court's belief that "news articles about PETER …, the Final Judgment …, PETER…'s Bankruptcy and his Bar troubles were all 'widely disseminated by the media to the public'" (even though no articles were introduced in evidence). App:763-824, 1199-1438, 1827 (quoting RRFB 4-

1.9 cmt., discussing the "generally known" information exception to 4-1.9(b)'s prohibition against using a former client's confidential information[10]).

Even assuming there was sufficient evidence to find "wide dissemination" of the Judgment's existence and Peter's bankruptcy and Bar issues (App:1827), that does not mean *the details of the Peter-Lorac transaction*, including Peter's personal finances and that Lorac held an unsatisfied Judgment, were "widely disseminated" or "generally known." *See* ABA Opinion, *supra* (discussing the meaning of "generally known").

In fact, Scott Smiley testified he spoke to Matthew "pretty quickly" after discovering the "generally known" information, **and only then learned the details of the Peter-Lorac transaction, as Matthew "fully briefed … [Scott Smiley] about what took place in the whole … situation, how it had been assigned to him**, how Peter owed him money, it was his [Matthew's] security …." App:1031-34, 1038-39, 1047. As such, the unsatisfied Judgment in Lorac's hands and Peter's confidential information concerning the Peter-Lorac transaction were *not* "widely disseminated," **yet**

[10] The 4-1.9(b) prohibition is disjunctive from what 4-1.9(a) prohibits, given RRFB 4-1.9's use of the word "or" to separate its subsections. So even if the information here *were* "widely disseminated" such that it was "generally known," satisfying the 4-1.9(b) exception, it would not cure a RRFB 4-1.9(a) violation, which also existed here. *See* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 479 (2017) [hereinafter ABA Opinion].)

were used against Peter contrary to 4-1.9(b) (and revealed contrary to 4-1.9(c)). And the transaction's details and Peter's personal information is not information "typically … obtained by any reasonably prudent lawyer" (RRFB 4-1.9 cmt.), because Scott Smiley had to contact Matthew to get it, nor was Scott Smiley even acting as a lawyer then since the information was for his personal benefit. App:483-85 (August 5, 2020 Scott Smiley email), 1038.

Importantly, Peter did not need to prove which confidences passed to his lawyers, as Smiley contended below. Under *State Farm Mutual Automobile Insurance Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991), an attorney-client relationship "giv[es] rise to **an <u>irrefutable</u> presumption that confidences were disclosed during the relationship**." "The presumption acknowledges the difficulty of proving that confidential information useful to the attorney's current client was given to the attorney." *Id.* at 634. *See also Key Largo Rest., Inc. v. T.H. Old Town Associates, Ltd.*, 759 So. 2d 690, 692 (Fla. 5th DCA 2000) (no departure from essential requirements of law in disqualifying attorney where former clients thought information given was confidential, and were never advised it could later be used against them).

More specifically, requiring the client to prove confidences passed would put the client in the awkward position of revealing attorney-client privileged information – precisely why such proof is not required. *See Health*

Care & Ret. Corp. of Am. Inc. v. Bradley, 944 So. 2d 508, 512 (Fla. 4th DCA 2006). Bruce/Matthew could have provided all manner of Peter's confidential information to Scott Smiley that would have assisted him in deciding whether to pursue the Judgment against Peter (and at least some likely was, given Matthew's "full briefing") – like Peter's finances, ultimate disposition of the Judgment and the accounting for same. Those topics had been actively discussed among Peter, his lawyers and accountants, and Matthew had knowledge of it. App:614-16, 767-70.

But again, once Peter's attorney-client relationship with Bruce/Matthew was established, **proof of the confidential information given was unnecessary**. Peter's unrebutted testimony *that he gave* his attorneys confidential information (App:949-50) sufficed. *Metcalf v. Metcalf*, 785 So. 2d 747, 750 (Fla. 5th DCA 2001); *Bradley*, 944 So. 2d at 512-13 (error in finding client failed to prove former attorney received confidential information, as the law required application of the irrefutable presumption that confidences were divulged).

Because Bruce/Matthew/THLG failed to obtain informed consent from Peter permitting Peter's confidential information to be used and revealed to Smiley (which clearly occurred per Scott Smiley's testimony and the irrefutable presumption), their use/revealing of former client Peter's

information culminating in the Lorac-Smiley assignment violated RRFB 4-1.9(b) and (c). As such, the Lorac-Smiley assignment is void and unenforceable.

B. Smiley's Garnishment Against Peter Violates Florida Bar Rules.

This Court should also disqualify and prohibit Smiley from enforcing the Judgment, because Scott Smiley's partner Alex represented Peter in the underlying foreclosure case and others, and no informed consent was given for Smiley to pursue the Judgment against Peter. Both requirements for disqualification under *K.A.W.*, 575 So. 2d at 633, exist, given Alex's representation of Peter **in the same underlying case including while at Concept** (his firm with Scott Smiley) and that the attorney-client relationship extended to Scott Smiley by imputed disqualification.[11] RRFB 4-1.10.

The trial court's finding of no evidence that client confidences passed to Smiley because relevant information was "publicly recorded and known" (App:1831) was misplaced. *See* Argument I(A). It also ignored that confidences passed to Alex, Scott Smiley's partner whose office is "directly across" from his, and who was aware of the ramifications of the Lorac-Smiley

[11] Scott Smiley claimed he was not familiar with imputed disqualification (App:739), but "every lawyer is responsible for observance of the Rules of Professional Conduct." Preamble to Chapter 4, Rules of Professional Conduct.

assignment.[12] *See* App:614-16, 634. Although Peter was Alex's former client when the Lorac-Smiley assignment occurred, Alex's duties to Peter (and Scott Smiley's by imputed disqualification) remained. *Ford*, 436 So. 2d at 307; *Rombola*, 149 So. 3d at 1141; R. RRFB 4-1.9, 4-1.7(a)(2).

First, under 4-1.9(b) Scott Smiley (Smiley P.A.'s owner) was forbidden from ***using*** *Peter's information relating to the representation to Peter's disadvantage* without Peter's informed consent. Yet, that is exactly what he did – by obtaining the Lorac-Smiley assignment (after Matthew "fully briefed" him, App:1047) and then executing on the Judgment against Peter. The trial court's analysis (App:1831) incorrectly focused on Smiley's *receipt* of the information rather than its *use* of the information adverse to Peter, which violated 4-1.9(b).

The trial court also failed to apply *K.A.W.*'s **irrefutable presumption** that confidences passed from Peter to Alex, who represented Peter **in this very case** and related bankruptcy and Bar proceedings. *Bradley*, 944 So. 2d at 511-12. Smiley was required to obtain Peter's informed consent to use the confidential information Alex was given (or that Scott Smiley knew, *see* App:766), the details of which Peter had no obligation to prove under *K.A.W.*

[12] Scott Smiley's testimony that he never discussed the Judgment or related information with Alex (App:1038-44) should be rejected as "inherently incredible and improbable." *Cartelli*, 331 So. 3d at 841.

That never happened, rendering Smiley's use of Peter's information to Peter's disadvantage barred by 4-1.9(b).

Second, Smiley's enforcement of the Judgment against Peter separately (disjunctive from its 4-1.9(b) violation, *see* n.10, *supra*) violates 4-1.9(a) because Smiley's interests "are materially adverse to the interests of the former client [Peter]" in the same action. The trial court found 4-1.9(a) and 4-1.10 did not apply because they would only prevent Smiley from "represent[ing] a client" adverse to Peter, and Smiley is not representing anyone, but rather, is represented by counsel. App:1831-32.

This Court should reject that literal interpretation because it fails to comport with the law and the Rules' overriding purpose. Allowing Smiley to pursue the Judgment against Peter would ratify Scott Smiley shirking his professional responsibilities to a former client, by forming a shell entity and hiring a lawyer to do that which he cannot ethically do himself. While *Scott Smiley* is not representing someone against a former client, ***he is himself going after a former client*****,** accomplishing same by hiring another lawyer.

While this situation is not explicitly addressed by the Rules (other than through the duty of loyalty referenced in 4-1.7's comments), that does not prevent the Court from addressing it. "The rules do not … exhaust the moral and ethical considerations that should inform a lawyer, … [and] simply

provide a framework for the ethical practice of law." Preamble, *supra* n.11. This supports a non-literal interpretation, as the Rules do not cover every scenario that could arise, especially the inconceivable one here.

At least one court has interpreted 4-1.9 as preventing such outrageous, unethical conduct against a former client. In *Mac Naughton v. Harmelech*, 932 F.3d 558, 560 (7th Cir. 2019), an attorney acquired a judgment entered against his former clients in the same case where he previously represented them, and sought to collect it in multiple cases. In one, Judge Holderman disqualified him from doing so both personally and by representing his company, but he defied the order. *Id.* Successor Judge Feinerman dismissed the claims and other judges followed suit, rejecting the attorney's efforts to collect the judgment against former clients, and the Seventh Circuit affirmed. *Id.*

In the underlying decision, Judge Feinerman rejected the attorney's argument that the phrase "representing another client" in the rule did not apply because Mac Naughton was acting pro se. *Mac Naughton v. Harmelech*, 338 F. Supp. 3d 722, 727-28 (N.D. Ill. 2018), *aff'd*, 932 F.3d 558 (7th Cir. 2019). Judge Feinerman found the attorney ***was*** representing another client (himself), and moreover, there is no "plausible policy basis for reading the term 'client' so strictly." *Id. See also Oasis West Realty, LLC v.*

Goldman, 250 P.3d 1115, 1122 (Cal. 2011) ("duties of loyalty and confidentiality bar an attorney … from 'taking the [former client's confidential] information significantly into account in framing a course of action' such as 'deciding whether to make a personal investment'—**even though … no second client exists** and no confidences are actually disclosed'"); .

New Jersey Rule of Professional Conduct 1.9(a) was the applicable rule in *Mac Naughton*, 338 F. Supp. 3d at 725. RRFB 4-1.9(a) uses the phrase "represent another person," **which is even more broad per its plain text**. *J.W.*, *supra*, 991 N.W.2d at 152-54.

No other cases involving this scenario have been located, "likely because no attorney before now has had the audacity to purchase … a judgment entered against his or her own client and then attempt to enforce that judgment against the client." *Mac Naughton*, 338 F. Supp. 3d at 728. Except for Scott Smiley (and Matthew via Lorac's retained 45% interest).

This Court should interpret RRFB 4-1.9(a) by looking to the "wording of the rule, read in context." *In re Complaint as to the Conduct of Hostetter*, 238 P.3d 13, 19 (Or. 2010). The rule "focuses on the *interests* of the former client … that pertain to the matter in which the lawyer previously represented the former client." *Id.* (emphasis in original). That Smiley **IS** the client does not obviate Scott Smiley's violation of 4-1.9, read as intended and not

literally.

This same analysis applies to RRFB 4-1.7(a)(2), which Scott Smiley also violated because his pursuit of this Judgment is (or should be) materially limited by his "responsibilities to … a former client [Peter]." As with Bruce/Matthew, the trial court misconstrued 4-1.7(a)(2) in this regard (App:1830-31), because 4-1.7(a)(2) plainly requires considering a ***former client's interests***. *See* Argument I(A).

Scott Smiley's use of his shell corporation to do his bidding against Peter (Smiley P.A., which does no other business) does not insulate him. "Florida would not allow lawyers to 'shirk their fiduciary duties' simply by forming a corporation" through which to operate. *Scherer v. Austin Roe Basquill, P.A.*, 325 So. 3d 175, 188 (Fla. 2d DCA 2021). *See also In re Florida Bar*, 133 So. 2d 554, 556 (Fla. 1961) ("[t]he corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical").

Last, Scott Smiley's attempt to portray himself as a "bona fide good-faith purchaser" ("BFP") falls flat, as his testimony was found "neither believable *nor* credible." App:1820 (emphasis in original). Moreover, it is absurd and should be rejected. *Cartelli*, 331 So. 3d at 841. Peter's former attorney Alex has an office directly across from Scott Smiley's. The very

Judgment Scott Smiley claims he innocently "purchased" after stumbling on it while doing Pacer research and supposedly not knowing Alex represented Peter, **has Alex's name emblazoned on it as co-counsel for Peter**. App:1052-53, 1333-35.

Scott Smiley clearly ***did*** know the facts, considering his incendiary texts to Peter during the November 2019 oral argument **denigrating Florida Supreme Court Justices and intimating his superior knowledge of the facts** – nine months before he supposedly discovered the Judgment while researching Peter online. App:718, 766, 873, 1031-32, 1045. The Judgment is the very thing that led to Peter's bankruptcy and Bar proceedings, so given Scott Smiley's texts, he knew about it. Like the trial court, this Court should reject Scott Smiley's patently absurd claim to be a BFP.

Under these egregious circumstances, where the ramifications of Scott Smiley's actions are longstanding and devastating to Peter, this Court should protect Peter's interests as RRFB 4-1.7(a)(2) and 4-1.9 intend. *See also* App:85 (noting "the patently unethical conduct by Alex Brown and his law partner [Scott Smiley] vis a vis Peter Herman" in "turn[ing] on Peter regarding the very judgment that was the cause of the bankruptcy and Bar cases"). Peter is entitled to broad protection from his former attorney (Scott Smiley by imputed disqualification), who, as evidenced by his texts (App:766), "ha[s]

literally gone from [Peter]'s 'champion' to his 'nemesis,'" which Florida law forbids. *See Rombola*, 149 So. 3d at 1142–43.

Like Judge Holderman did with Mac Naughton, this Court should reverse, holding Scott Smiley is barred from pursuing the Judgment (that he paid nothing for, App:495, 726, 1036), and remand for dismissal of the garnishment proceeding with prejudice.

II. THE TRIAL COURT ERRED IN REFUSING TO DISSOLVE THE WRITS AND DISMISS THE GARNISHMENT PROCEEDING, BECAUSE THE DUTY OF LOYALTY TO A CLIENT AND FORMER CLIENT PROHIBITED LORAC FROM TAKING AN INTEREST IN THE JUDGMENT ADVERSE TO PETER AND ASSIGNING THE JUDGMENT TO SMILEY, AND PROHIBITS SMILEY FROM COLLECTING THE JUDGMENT AGAINST PETER.

In denying Peter's Motion, the trial court failed to apply the duty of loyalty owed to a client and former client – the very foundation of the Rules governing the practice of law in Florida. As explained long ago in *Gerlach v. Donnelly,* 98 So. 2d 493, 498 (Fla. 1957),

> There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. **The relationship has its very foundation in the trust and confidence the client reposes in an attorney selected to represent him. The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity.** Business transactions between attorney and client are and always ought to be subject to the closest scrutiny because of this underlying relationship. It is an ancient and firmly

> established principle of the law that the burden is placed upon an attorney to established by clear and convincing evidence the fairness of an agreement or transaction purporting to convey a property right from a client to his attorney. Moreover, the burden is cast upon the attorney in transactions of this kind to establish that such was made upon full and adequate consideration.

Thus, Florida law recognizes not only the need to protect client confidences but also the **loyalty *and* trust upon which the attorney-client relationship is based**, and scrutinizes business transactions between attorney and client. *Id.*; *see also Brent v. Smathers*, 529 So. 2d 1267, 1269 (Fla. 3d DCA 1988) ("[a]lthough lawyer-client confidentiality is an important factor in determining the appropriateness of representation, nowhere do the rules reflect that it is the sole determining factor").

"**Loyalty is an essential element in the lawyer's relationship to a client.**" *Brent* (quoting RRFB 4-1.7 cmt.) (also noting that each client in cases of common representation has the right to loyalty and the protection of RRFB 4-1.9).[13] *See also Zarco Supply Co. v. Bonnell*, 658 So. 2d 151, 153 (Fla. 1st DCA 1995) ("[u]nder the Rules Regulating the Florida Bar,

[13] A later Third District panel disapproved of reading *Brent* as "modify[ing] Rule 4-1.9 by adding a new substantive prohibition requiring a lawyer to recuse in a lawsuit against a former client if the representation can be deemed 'disloyal' or creates an 'appearance of impropriety.'" *Alters v. Villoldo*, 230 So. 3d 115, 118 (Fla. 3d DCA 2017). Peter submits that the instant case is factually like *Brent*, not *Alters*, and that the duty of loyalty recognized in Florida Supreme Court cases (like *K.A.W.*, 575 So. 2d at 633 (citing *Brent* with approval)) must be followed.

attorneys owe a duty of confidentiality and loyalty to all their clients, including present and former co-clients").

When considering conflicts of interest, the appearance of impropriety and "possibility of discredit to the bar and the administration of justice" must be avoided. *K.A.W.*, 575 So. 2d at 633-34. Public policy considerations in preserving public faith in the fair administration of our justice system are thus paramount. *Id.*

Peter was entitled to broad protection from each of his former attorneys, "who … had literally gone from [Peter]'s 'champion' to his "nemesis." *Rombola*, 149 So. 3d at 1142-43. The evidence here – particularly the finding below that the Lorac-Smiley assignment was "**unscrupulous and suspect**" – clearly show an appearance of impropriety. Most importantly, since Peter was a current client when he agreed to the trustee-Lorac assignment, and either a current or former client of THLG and former client of Scott Smiley's partner Alex when Lorac assigned the Judgment to Smiley, the Court should not allow Lorac's assignment to Smiley to be enforced against Peter.

Doing so would completely undermine the loyalty and trust upon which Peter's attorney-client relationships were based. And it would flout the **broad**

protection to which Peter as client was entitled. Applying the duty of loyalty to these facts warrants reversal.

III. THE TRIAL COURT'S FINDING THAT A PRE-GSA AGREEMENT FOR LORAC NOT TO PURSUE THE JUDGMENT DID NOT EXIST SHOULD BE SET ASIDE BECAUSE IT LACKS SUBSTANTIAL EVIDENTIARY SUPPORT, IS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE, AND MISAPPLIED THE LAW TO THE ESTABLISHED FACTS.

Peter argued below that a **pre**-GSA agreement existed between him, Bruce and Matthew that Lorac would only carry out the intent and terms of the GSA – by substituting as Plaintiff to retrieve escrowed settlement funds (the "Garnishment Claims") and return them to Peter, which it did – and not collect or assign the Judgment. App:547-48, 776-77 ¶¶6, 8, 1835-47. The trial court's finding that no such pre-GSA agreement existed lacks substantial evidentiary support, is clearly against the weight of the evidence showing that agreement *did* exist, and/or misapplied the law to established facts. It should therefore be set aside. *DG Sports*, 174 So. 3d at 544; *Holland,* 89 So. 2d at 258.

First, as explained in Argument I(A), the trial court's finding that the GSA itself negated a pre-GSA agreement by saying the Judgment was *not satisfied* by its transfer from CIB to Lorac (App:1825) is legally incorrect, as Lorac was not a party to the GSA. The only reasonable view of the evidence

is that the agreement between Peter and Bruce/Matthew/Lorac was separate from ***and preceded*** the GSA. The GSA's statement in no way negates a *pre*-GSA agreement for Lorac not to execute upon or assign the Judgment.

Importantly, it was Peter's choice which entity the trustee would assign the Judgment to, to carry out the GSA's intent and purpose. As Peter explained, the substituted plaintiff (Lorac) had to have an unsatisfied judgment to accomplish retrieving the garnished funds to be returned to Peter, which was the **specifically stated intent of the GSA**. App:547-49, 635, 776-77. Peter chose Lorac based on his pre-GSA agreement with Bruce and Matthew that Lorac would not execute upon or assign the Judgment. Logically this agreement *had to precede* the GSA itself (the evidence shows it did).

Second, the trial court rejected a pre-GSA agreement as "not supported by the record evidence." App:1823-25. But the only evidence the trial court cited as *supporting* the pre-GSA agreement was: (1) one email from Bruce to Peter on February 17, 2016 with a link concerning cancellation of debt; and (2) attorney Andrew Lavin's testimony about Lorac being utilized "for the purpose of assisting and protecting Peter and for no other purpose" and there being no intent for the Judgment to be collectible against Peter in the future. *See* Argument I(A); App:1824 (citing 787-88, 1018-21). A

plethora of additional evidence (discussed *infra*), in addition to Peter's testimony, ***overwhelmingly and undisputedly*** **shows the pre-GSA agreement existed**.

Most importantly, the ONLY evidence the trial court cited as supporting its finding of no pre-GSA agreement was Matthew's testimony, which was "disbelieve[d]" as "self-serving." App:1824. Matthew's conclusory, non-credible testimony is not "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion," and therefore not "competent substantial evidence." *Duval Util.*, 380 So. 2d at 1031; *J.B.M.*, 870 So. 2d at 950; *Dennehy v. Herzog Const., Inc.*, 229 So. 2d 885, 886 n.1 (Fla. 3d DCA 1969) (appellate court will not disturb trial court's finding in non-jury case "if the record reveals credible testimony which forms a rational basis for the finding"). With NO credible evidence supporting this finding, it should be set aside under *Holland* and other cases cited herein.

The finding should also be set aside because it is "clearly against the weight of the evidence" and/or contradicts the legal effect of the evidence. *Holland*; *Jaquith*, 189 So. 2d at 829. The evidence showing there *was* a pre-GSA agreement (including Bruce's and Matthew's actions wholly consistent therewith) is as follows:

Emails between Bruce and Peter preceding the February 17, 2016

email (App:767-70). On January 12, 2016, at 10:37 am, Peter forwarded a draft GSA, during negotiations of same, to his lawyer Bruce and accountant Nancy Ingalls ("ningalls.com") for their review. App:557-58**.** This email shows Bruce was part of confidential communications with Peter's accountant concerning this transaction and how it would be structured from an accounting standpoint in the complicated bankruptcy context. App:547-53, 557-59**.**

Thirty-six minutes later, at 11:13 am, Bruce sent an email to Peter suggesting two changes to the draft GSA. The second says in part "… *add: or its assignee at the sole discretion of the Judgment creditor."* (Bruce testified that should have said "Judgment **debtor**" (Peter), App:429-30.) This suggested change shows Bruce's knowledge that Peter could have assigned the Judgment to anyone. It also shows no expectation that *Lorac* would receive the assigned Judgment, there being no suggested change for that.

Then at 11:26 am, Bruce emailed Peter again, asking "*why substitute parties in the state court actions. Can the parties agree to dismiss and release the funds to you [Peter]?"* App:430, 558 (the "subsequent thing" referenced). This statement, which again does not mention Lorac, shows Bruce believed the action could be dismissed without substituting Lorac if Peter so chose. Moreover, it confirms **Bruce thought the Judgment need**

not be assigned *to anyone*.

Peter's testimony quoted at App:1823 further supports the import of the above email chain – particularly Bruce's suggestion to Peter that "*it's **not bad** to have a judgment out there for asset protection."* That advice is entirely inconsistent with the position Bruce's other client, Lorac, now takes. Why would Bruce suggest to his brother/client Peter to "have a judgment out there" for protection, if his other client, Lorac, had intentions to collect it?

These unrebutted emails show Bruce's understanding of the GSA's purpose **was consistent with his co-counsel Andrew Lavin's**, and that Peter did NOT give Lorac an unrestricted Judgment. *See* Argument I(A); App:551-52, 634-39, 1018-21. Bruce's and Matthew's intent *before and after* execution of the GSA was clearly for Lorac **not to collect the Judgment**, considering Bruce's January 12 emails were sent two weeks *before* the GSA was executed on January 26, 2016 (App:772-86), and Bruce's February 17 email concerning cancellation of debt relating to satisfying the Judgment was sent three weeks afterward. Bruce knew full well Lorac would not have collection rights in the Judgment. Otherwise, why would Bruce be counseling his other client (Peter) on cancellation of debt?

Substitution of Lorac. Lorac undisputedly substituted as Plaintiff for CIB. App:1846-47.

Garnished Funds Returned to Peter. Lorac retrieved the garnished funds and returned them to Peter, without attempting to execute upon same, and Lorac expressly made no claim thereto. App:906-07, 1836.

Settlement Funds to Peter. Peter received approximately $600,000 (actual number $535,208.27) pursuant to the GSA in 2016, without Lorac attempting to execute upon same or making any claim thereto. App:274-75, 775-76, 1092.

Revenue Wired to Peter. Peter testified, unrebutted, he received an $800,000 fee from a settlement that went through THLG's account while Peter was working in THLG's office; THLG (controlled by Matthew) directly wired the money to Peter without attempting to execute upon same. App:276, 539-42, 1089-90.

Judgment Lien Expired. Lorac never recertified the Judgment lien CIB filed with the State when Lorac had the opportunity to do so, showing no intent to collect same. App:967-68**.**

THLG Accounts. Peter operated his business through THLG's accounts between January 2016 and 2020, with no attempt by Matthew to execute upon any of Peter's revenue. App:355, 447-49, 539-41.

Lorac's Conduct. Lorac took no action to collect the Judgment for nearly five years, only assigning the Judgment to Smiley in November 2020

when unrelated disputes arose. App:1820.

Office Condo Loan. In 2019 Matthew/THLG borrowed $162,500 from Peter, paid interest thereon to Peter, and paid Peter back around 2021-2022, despite Lorac (Matthew) supposedly holding an unrestricted Judgment. App:578, 1066, 1088-89. This belies any assertion that Peter owed money to Matthew or THLG.

Traino Loan/Garnishment. In 2019, Peter loaned Bruce/THLG client Frank Traino $141,000, which Smiley sought to garnish below. App:10-11, 16-17, 409-10, 434-39. Why would Peter loan money to a Bruce/THLG client if Peter was indebted to Lorac (Matthew) on the Judgment?

THLG Expense Case. As explained earlier, Lorac paid no consideration for the Judgment. Matthew's testimony that the consideration was money Peter supposedly owed THLG or Matthew/Lorac was disbelieved as "self-serving." It is also patently false, as THLG is seeking to recover those very same expenses from Peter in the Broward THLG expense case. App:953-55, 1082-85. If Matthew thought Lorac had an executable Judgment for those expenses why is THLG suing Peter for them? The answer is that Matthew fabricated the story to make it look like the trustee-Lorac assignment was backed by consideration, to buttress Matthew's belated, vindictive claim that Lorac has rights in the Judgment.

Bruce Sanction Order. The trial court issued a sanction order in the foreclosure proceeding against Bruce, and through the GSA Peter had CIB assign that Order to Lorac, thereby releasing Bruce from the order. App:427-28, 776 (¶¶6, 8). This shows the irrationality of Peter giving an unrestricted Judgment to Lorac while providing consideration to Bruce/Matthew/Lorac in the form of extinguishing a sanction order against Bruce (Lorac's attorney).

No Informed Consent. THLG/Bruce/Matthew undisputedly failed to obtain written informed consent from Peter if Lorac was taking an adverse pecuniary interest in the Judgment.[14] *See* Argument I(A).

The above unrebutted evidence shows the pre-GSA agreement existed for Lorac to substitute and retrieve the escrowed settlement funds for Peter, **and do nothing else with the Judgment thereafter, including executing upon or assigning it**. Per that agreement, Lorac obtained no rights in the Judgment to assign to Smiley, rendering the Lorac-Smiley assignment void and unenforceable. Since the trial court's finding that there was no pre-GSA agreement contradicts the legal effect of the undisputed evidence, it should be set aside, and the Order reversed.

[14] Lawyers Bruce and Matthew were obligated to follow Florida Bar Rules. *See* Argument I(A). The only way they did is if Lorac was not taking an adverse interest in the Judgment – consistent with the pre-GSA agreement for Lorac to obtain NO rights in the Judgment.

CONCLUSION

Based on the foregoing, this Court should reverse with instructions to the trial court to dissolve the writs and dismiss the garnishment action with prejudice as to Smiley, Lorac, and any other assignee of the Judgment.

If the Court decides to affirm, Peter respectfully requests that the Court state that its decision is limited to the facts developed before this appeal – to make it clear the "law of the case" doctrine does not preclude consideration of new evidence, because the garnishment proceeding is ongoing and new evidence has developed since this appeal was filed. *See Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001) (trial court must follow prior rulings of appellate court "**as long as the facts on which such decision are based continue to be the facts of the case**").

Respectfully submitted,

Peter G. Herman
PETER HERMAN, P.A.
Attorney for Appellant
3020 N.E. 32nd Ave., Suite 226
Fort Lauderdale, FL 33308
Telephone: (954) 882-1133
Email: pgh@phpalaw.com
servicepgh@phpalaw.com

By: */s/ Peter G. Herman*
Peter G. Herman
Florida Bar No. 353991

Michele K. Feinzig
Michele K. Feinzig, P.A.
Co-counsel for Appellant
10101 W. Sample Road, Suite 402
Coral Springs, FL 33065
Telephone: (954) 255-5810
Facsimile: (954) 255-5835
Email: michele@feinziglaw.com
pleadings@feinziglaw.com

By: */s/ Michele K. Feinzig*
Michele K. Feinzig
Florida Bar No. 0768340

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **e-filed and served via the Florida Courts E-Filing Portal** pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.516(b) on September 4, 2024, to:

Allison L. Friedman, Esq.
ALLISON L. FRIEDMAN, P.A.
20533 Biscayne Blvd., Ste. 4-435
Aventura, FL 33180
Ralfriedman@hotmail.com
Trial Attorney for Appellee, Scott D. Smiley, P.A.

Donna Greenspan Solomon, Esq.
SOLOMON APPEALS, MEDIATION & ARBITRATION
901 S. Federal Highway, Ste. 300
Ft. Lauderdale, FL 33316
Donna@SolomonAppeals.com
Appellate Attorney for Appellee, Scott D. Smiley, P.A.

Michele K. Feinzig, Esq.
Michele K. Feinzig, P.A.
10101 W. Sample Road, Suite 402
Coral Springs, FL 33065
michele@feinziglaw.com
pleadings@feinziglaw.com
Attorney for Appellant

/s/ Peter G. Herman
Peter G. Herman, Esq.
Fla. Bar. No. 353991

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this Brief complies with the applicable font and word count limit requirements of Fla. R. App. P. 9.045 and 9.210 and is in Arial 14-point font.

/s/ Peter G. Herman
Peter G. Herman, Esq.
Fla. Bar. No. 353991