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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

VICKIE A. HART and CASE NO.:5D2024-2021
HART TO HART REAL ESTATE INC. L.T. NOS: 05-2023-CC-052624

APPELLANT,

v.

CAROLYN SIEROTA KILLICK,

APPELLEE.
_____/

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS..... iii

PRELIMINARY STATEMENT 1

RESPONSE AND REBUTTAL ARGUMENT 1

I. HART AND REAL ESTATE DID NOT WAIVE THE REQUIREMENT OF AN EVIDENTIARY HEARING ON THE DISPUTED ISSUE OF WAIVER BECAUSE KILLICK RATHER THAN HART OR REAL ESTATE HAD THE EVIDENTIARY BURDEN OF PROOF ON THE WAIVER CLAIM, AND, THEREFORE WAS REQUIRED TO NOTIFY THE COURT OF THE NEED FOR AN EVIDENTIARY HEARING AND PROVIDE SUBSTANTIAL COMPETENT EVIDENCE SUPPORTING WAIVER TO THE COURT. 2

II. KILLICK FAILED TO PROVIDE SUFFICIENT COMPETENT SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE TRIAL COURT'S FINDING OF WAIVER..... 10

A. The Trial Court Failed to Hold an Evidentiary Hearing or To Take Evidence on The Disputed Factual Issue of The Existence of an Implied Waiver. 10

B. The Argument, Opinions, And Commentary of Counsel on Prospective Evidence Does Not Constitute Evidence Upon Which a Trial Court May Rely in Rendering a Decision on a Factual Issue..... 11

C. None Of Killick's Legal Filings Constituted Substantial Competent Evidence..... 14

D. The Exhibits to The Complaint Are Hearsay and

Do Not Constitute Substantial Competent Evidence. 16

E. Killick's Affidavit Did Not Constitute Competent Evidence. 18

III. KILLICK INCORRECTLY ARGUES THAT HART AND REAL ESTATE'S PROCEDURAL AND WAIVER APPRAISAL LAW IS DISTINGUISHABLE AND INAPPLICABLE TO ARBITRATION WAIVER CASES. 23

CONCLUSION 25

CERTIFICATE OF FONT AND LENGTH COMPLIANCE 25

CERTIFICATE OF SERVICE..... 25

TABLE OF CITATIONS

Cases

Allstate Ins. Co. v. Suarez, 786 So. 2d 645 (Fla. 3d DCA 2001) 24

B.C.S., S.R.L. v. Wise, 910 So. 2d 871 (Fla. 5th DCA 2005) 18, 19, 20

Black Knight Servicing Technologies, LLC v. PennyMac Loan Services, LLC, 310 So. 3d 1116 (Fla. 1st DCA 2021) 10

Blackwood v. State, 777 So. 2d 399 (Fla. 2000) 19, 20

Booker v. Sarasota, Inc., 707 So. 2d 886 (Fla. 1st DCA 1998) 17

Citizens Property Ins. Corp. v. Maytin, 51 So. 3d 591 (Fla. 3rd DCA 2010) 23

Craven v. TRG-Boynton Beach, Ltd., 925 So. 2d 476 (Fla. 4th DCA 2006) 14, 22

Daeda v. Blue Cross & Blue Shield of Fla., Inc., 698 So. 2d 617 (Fla. 2d DCA 1997) 17

Daughtrey v. Daughtrey, 944 So. 2d 1145 (Fla. 2d DCA 2006) 12, 13

Dep't of Transp. v. Spioch, 642 So. 2d 788 (Fla. 1st DCA 1994) 14, 22

Doug Sears Consulting, Inc. v. ATS Servs., Inc., 752 So. 2d 668 (Fla. 1st DCA 2000) 18

Eden Owners Ass'n, Inc. v. Eden III, Inc., 840 So. 2d 419 (Fla. 1st DCA 2003) 10

Eight Hundred, Inc. v. Florida Dept. of Revenue, 837 So. 2d 574 (Fla. 1st DCA 2003) 12

Elser v. Law Offices of James M. Russ, P.A., 679 So. 2d 309 (Fla. 5th DCA 1996) 21

Epstein v. Precision Response Corp., 883 So. 2d 377 (Fla. 4th DCA 2004) 3, 25

First Protective Insurance Company v. Ahern, 278 So. 3d 87 (Fla. 4th DCA 2019) 23

Florida Ins. Guar. v. Sill, 154 So. 3d 422 (Fla. 5th DCA 2014) 23

Fortune v. Fortune, 61 So. 3d 441 (Fla. 2d DCA 2011) 18

Garbark v. Gayle, 312 So. 3d 1286 (Fla. 1st DCA 2021) 17

Heitmeyer v. Sasser, 664 So. 2d 358 (Fla. 4th DCA 1995) 14, 15, 22

Hurricane Boats, Inc. v. Certified Indus. Fabricators, Inc., 246 So. 2d 174 (Fla. 3d DCA 1971) 15

Jalis Construction, Inc. v. Mintz, 724 So. 2d 1254 (Fla. 4th DCA 1999) 24

Linden v. Auto Trend, Inc., 923 So. 2d 1281 (Fla. 4th DCA 2006) 3, 5, 7, 8, 9, 13, 24

Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 425 So. 2d 127 (Fla. 4th DCA 1982) 5

Mexicanos v. Executive MFE Aviation, LLC, 310 So. 3d 76 (Fla. 4th DCA 2021) 3, 24

Miami Dolphins, Ltd. v. Cowan, 601 So. 2d 301 (Fla. 3d DCA 1992) 10

Mobile Attic, Inc. v. Cash, 2012 U.S. Dist. LEXIS 81189; 2012 WL 2149889 (M.D. Ala. 5/21/12) 15

Palmcrest Homes of Tampa Bay, LLC v. Bank of America, N.A., 67 So. 3d 1169 (Fla. 2d DCA 2011) 3, 24

Parker v. State, 873 So. 2d 270 (Fla. 2004) 19

Pino v. Lopez, 361 So. 2d 192 (Fla. 3d DCA) 15

S. Developers & Earthmoving, Inc. v. Caterpillar Fin. Servs. Corp., 56 So. 3d 56 (Fla. 2d DCA 2011) 17

Scott v. State, 922 So. 2d 1024 (Fla. 5th DCA 2006) 12

Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999) 2, 3, 24

Seinfeld v. Commercial Bank & Trust Co., 405 So.2d 1039 (Fla. 3d DCA 1981) 15

Sherman v. Weintraub, 132 So. 2d 421 (Fla. 3d DCA 1961)

..... 15

Sperdute v. Household Realty Corp., 585 So. 2d 1168 (Fla. 4th DCA 1991) 13

State Farm Mutual Automobile Insurance Company v. Hollywood Diagnostic Center, Inc., 329 So. 3d 152 (Fla. 4th DCA 2021) 14, 21

Sweet v. Sheehan, 932 So. 2d 365, 369 (Fla. 2d DCA 2006) 14, 22

Thompson v. Citizens Nat. Bank of Leesburg, Fla., 433 So. 2d 32 (Fla. 5th DCA 1983)..... 21

U.S. Fidelity & Guar. Co. v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999)..... 24

Vitelli v. Hagger, 268 So. 3d 246 (Fla. 5th DCA 2019)..... 14, 15, 22

Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275 (11th Cir. 2001)..... 15, 22

Statutes

Section 682.03, Florida Statutes 4, 5, 7, 24

Section 90.801(1)(c), Florida Statutes (2009) 19

Section 921.141(1), Florida Statutes..... 19

Rules

Fla. R. Civ. P. 1.510(e) 21

PRELIMINARY STATEMENT

The Appellants are VICKIE A. HART ("Hart") and HART TO HART REAL ESTATE, INC. ("Real Estate"). The Appellee is CAROLYN SIEROTA KILLICK ("Killick"). Record citation to the Appendix to the Initial Brief will be as to the appendix document and the applied Bates Stamp numbering as follows: ("Appx. Doc. __, Bates Nos. __"). Record citation to the Initial Brief will as ("IB. P. __") and citation to the Answer Brief will be ("AB. P. ____")

RESPONSE AND REBUTTAL ARGUMENT

In her Answer Brief, Killick argued that: (1) the trial court did not need to hold an evidentiary hearing because Hart and Killick did not request an evidentiary hearing and, therefore, waived requirement of an evidentiary hearing (AB, P. 24 at ftn. 3); (2) there was substantial competent evidence in the record in the form of an unsworn composite exhibit to the Complaint, American Arbitration Association ("AAA") emails, and the affidavit of Killick (AB, P. 24-31); and (3) Hart's and Real Estate's appraisal waiver case as to the requirement for an evidentiary hearing on disputed factual issues is distinguishable and inapplicable to arbitration cases (AB, P. 29-30). None of the arguments have merit.

First, Killick bore the burden of evidentiary proof on her waiver issue, not Hart and Real Estate, and, therefore, Killick was obligated to secure and to notice an evidentiary hearing on her assertion of a waiver. Also, affidavits and hearsay evidence attached to affidavits do not constitute substantial competent evidence to support a trial court order of waiver in the context of a motion to compel arbitration. Pleadings, motions, responses, memoranda, affidavits, other unsworn documents, and the argument of counsel cannot substitute for the requirement of witness testimony or other cognizable substantial competent evidence.

I. HART AND REAL ESTATE DID NOT WAIVE THE REQUIREMENT OF AN EVIDENTIARY HEARING ON THE DISPUTED ISSUE OF WAIVER BECAUSE KILLICK RATHER THAN HART OR REAL ESTATE HAD THE EVIDENTIARY BURDEN OF PROOF ON THE WAIVER CLAIM, AND, THEREFORE WAS REQUIRED TO NOTIFY THE COURT OF THE NEED FOR AN EVIDENTIARY HEARING AND PROVIDE SUBSTANTIAL COMPETENT EVIDENCE SUPPORTING WAIVER TO THE COURT.

A trial court must apply the following test to determine if a party may be compelled to arbitration: (1) whether a valid arbitration provision exists, (2) whether there is an arbitrable issue, and (3) whether the right to arbitrate has been waived. *See* Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). The trial court is

required to resolve all three of the Seifert threshold issues. *See* Palmcrest Homes of Tampa Bay, LLC v. Bank of America, N.A., 67 So. 3d 1169, 1173 (Fla. 2d DCA 2011) ("Under Florida law, each of the threshold issues raised by Appellants should have been decided on their merits by the trial court before any referral of the claims and counterclaims to arbitration. On the threshold issue of waiver, Florida law requires the trial court—not the arbitrators—to determine whether a party has waived the right to arbitrate. *See Seifert v. U.S. Home Corp.,* 750 So .2d 633, 636 (Fla. 1999)." *See also* Mexicanos v. Executive MFE Aviation, LLC, 310 So. 3d 76, 78-79 (Fla. 4th DCA 2021) holding:

> We therefore reverse the order denying Pemex's motion to compel arbitration and remand for the court to determine whether the plaintiffs are bound by the arbitration clauses in the purchase agreements. The court also may consider whether Pemex waived its right to compel arbitration… An evidentiary hearing may be required. *See* Linden v. Auto Trend, Inc., 923 So. 2d 1281, 1282-83 (Fla. 4th DCA 2006); Epstein v. Precision Response Corp., 883 So. 2d 377, 379 (Fla. 4th DCA 2004). If the court determines that the plaintiffs are bound by the arbitration clauses and that Pemex did not waive its right to compel arbitration, then it must stay the litigation and compel arbitration, leaving any other issue for the arbitrator to decide.

See Mexicanos, 310 So. 3d at 78-79.

When a trial court addresses a threshold issue as to a motion

to compel arbitration, its actions are governed by § 682.03, Fla. Stat.

Section 682.03, Fla. Stat. governs motions to compel arbitration. It provides in pertinent part as follows:

> (1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> > (a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate.
> >
> > (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.
>
> (2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.
>
> (3) If the court finds that there is no enforceable agreement to arbitrate, it may not order the parties to arbitrate pursuant to subsection (1) or subsection (2).
>
> (4) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

See § 682.03, Fla. Stat. Under § 682.03 (1)-(3), if the trial court finds an enforceable agreement to arbitrate with an arbitrable issue, then

the trial court must order the parties to arbitration. *See* Linden v. Auto Trend, Inc., 923 So. 2d 1281, 1282-1283 (Fla. 4th DCA 2006) holding:

> Section 682.03(1), Florida Statutes (2005), governs proceedings to compel arbitration. The statute provides that a party seeking arbitration "may make application to the court for an order directing the parties to proceed with arbitration." Id.
>
> > If the court is satisfied that no substantial issue exists as to the making of the [arbitration] agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.
>
> Id. The statute "requires a hearing to determine whether there are disputed issues regarding the making of the agreement." Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 425 So. 2d 127, 128-29 (Fla. 4th DCA 1982). "*If the court discerns that there are no disputed issues, it is required to enter an order compelling arbitration pursuant to the terms of the parties' agreement*." Id. at 129. If the court finds disputed issues concerning the making of the agreement, it must set "an expedited evidentiary hearing." Id. Melamed thus contemplates that a court will decide if there is a disputed issue before setting the expedited evidentiary hearing. Id.

See Linden, 923 So. 2d at 1282-1283 (Emphasis supplied.).[1]

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[1] The Linden decision occurred under the 2005 version of § 682.03. Although

Consequently, if Hart and Real Estate met its burden to demonstrate an enforceable agreement and an arbitrable issue, then the trial court was mandated to order arbitration in the absence of a sufficient showing of a disputed issue of waiver resolved in favor of Killick, as the party refusing arbitration. Hart and Real Estate met their burden. As discussed herein, Killick appeared at the hearing, but Killick did not oppose the motion with a showing of substantial competent evidence on the waiver issue. Consequently, the trial court should have granted the motion to compel arbitration.

Hart and Real Estate were the parties moving to compel arbitration. They bore the burden of proof as to the first Seifert threshold determination, which were contractual in nature and not factually disputed. The trial court reviewed the contract attached to the Complaint and determined that the contract contained a valid and enforceable arbitration provision. (Appx. Doc. B at Exhibit 1, Bates No. 0020 at ¶ 7 and Appx. Doc. T, Bates No. 0306 at ¶ 4). The trial court also found that there was an arbitrable dispute. Id. Neither

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subsequent versions of the statute changed some language in the statute, the process and the evidentiary hearing mandates of Linden remained unaffected by the changes. *See* Mexicanos, 310 So. 3d 76.

of these elements were in dispute before the trial court. Therefore, Hart and Real Estate as the parties moving to compel arbitration carried their burden to establish entitlement to arbitration. Pursuant to § 682.03, Fla. Stat., the trial court was mandated by statute to grant the motion to compel arbitration absent a showing of waiver by Killick. Therefore, Hart and Real Estate were not obligated to seek an evidentiary hearing. Hart and Real Estate did not have an affirmative burden to disprove the waiver issue.

Killick bore the burden of proof and persuasion as to the third threshold issue. Killick, as the party opposing the motion to compel arbitration was required to appear to oppose the motion, raise any disputed factual issue as to a threshold issue (waiver in this case), present substantial competent evidence as to the existence of a waiver, and to advise the trial court of the need for an evidentiary hearing. *See* § 682.03. Fla. Stat. *and see* Linden, 923 So. 2d 1283 (holding that the party refusing arbitration and asserting a disputed factual issue had the obligation to advise the trial court of the need for an evidentiary hearing on the disputed factual issue.). Killick successfully raised the issue of waiver. A party may raise a disputed factual issue as to one of the disputed threshold arbitration issues in

one of four ways: "… (1) arguments of counsel at a hearing…; (2) the filing of a written response in opposition to arbitration…; (3) the filing of affidavits; and (4) review of documents furnished by counsel." (Internal citations omitted). *See* Linden, 923 So. 2d 1283. In multiple filings Killick raised the disputed issue of a waiver of the contractual right to arbitration. (Appx. Doc. B at Exhibit 1 and Doc. S, *passim*). Killick raised the waiver issue in the record at:

A. Complaint at Composite Exhibit 1 (Appx. B, Bates Nos: 0017-0023);

B. Plaintiff's Motion To Strike Answer and Motion to Dismiss (Appx. G, Bates Nos: 0077-0080);

C. Plaintiff's Reply to Answer and Affirmative Defense (Appx. Q, Bates Nos: 0279-0283);

D. Plaintiff's Memorandum of Law in Opposition to Motion to Stay and to Compel Arbitration (Appx. S, Bates Nos: 0287-0304); and

E. In argument at the hearing on the motion to stay and to compel arbitration.

However, as argued below, merely raising an issue is not sufficient to prove the issue to support an order compelling or denying the right to arbitration. The party asserting the disputed issue must present more than pleadings and unsworn documents in support of the asserted factual dispute; the refusing party must

provide substantial competent evidence and obtain an evidentiary hearing to present its evidence in support of the waiver claim. As argued below, after raising the issue, Killick wholly failed to present substantial competent evidence of record to support a finding of waiver and failed to obtain an evidentiary hearing to allow her to present competent evidence to the trial court on the issue. Because Killick had the evidentiary burden of proof as to its waiver claim, Killick was obligated to secure and to notice an evidentiary hearing in order to obtain a valid order of waiver and to advise the trial court of the need for an evidentiary hearing on its disputed issue. *See* Linden, 923 So. 2d at 1283.

Therefore, Hart and Real Estate did not waive the requirement for the trial court to conduct an evidentiary hearing on the waiver issue. Instead, Killick waived her opportunity to prove her disputed issue with substantial competent evidence by failing to advise the court of the need for an evidentiary and failing to request an evidentiary hearing. The trial court should have granted the motion to compel arbitration in the presence of an enforceable agreement and the absence of substantial competent evidence as to waiver in the trial record.

II. KILLICK FAILED TO PROVIDE SUFFICIENT COMPETENT SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE TRIAL COURT'S FINDING OF WAIVER.

Killick bore the burden of proof of providing competent evidence to the trial court to establish a waiver. *See* Black Knight Servicing Technologies, LLC v. PennyMac Loan Services, LLC, 310 So. 3d 1116 (Fla. 1st DCA 2021) ("[The] party arguing waiver of arbitration bears a heavy burden of proof." Eden Owners Ass'n, Inc. v. Eden III, Inc., 840 So. 2d 419, 420 (Fla. 1st DCA 2003) (citing Miami Dolphins, Ltd. v. Cowan, 601 So. 2d 301 (Fla. 3d DCA 1992)). Killick failed to provide the trial court substantial competent evidence of a waiver. Killick failed to meet the heavy burden of proof to demonstrate a clear case of waiver.

A. The Trial Court Failed to Hold an Evidentiary Hearing or To Take Evidence on The Disputed Factual Issue of The Existence of an Implied Waiver.

The trial court was required to resolve any factual disputes relating to either party's right to arbitration prior to entering an order either denying or granting arbitration. Where a factual dispute exists bearing on the right to arbitration, the trial court must take evidence and hold an evidentiary hearing prior to granting or denying

arbitration. The trial court failed to hold an evidentiary hearing or to take evidence on the factual issue of waiver. The hearing was a non-evidentiary hearing scheduled for 30 minutes. (Appx. Doc. R, Bates Nos. 0284-0286). The hearing was not scheduled as an evidentiary hearing by Killick or legal counsel for Hart or Real Estate. (Id.)

Killick provided no evidence at the hearing. Killick relied on the argument and commentary of her legal counsel and on her exhibits to her memorandum in opposition to the motion to stay and to compel arbitration and the attachments to the Complaint. The trial court also merely relied on the argument of Killick's counsel and the exhibits to the Complaint, motions, and memoranda in determining that Hart and Real Estate waived their right to arbitration.

B. The Argument, Opinions, And Commentary of Counsel on Prospective Evidence Does Not Constitute Evidence Upon Which a Trial Court May Rely in Rendering a Decision on a Factual Issue.

Counsel for Killick's statements and arguments in the Complaint, motion to strike Hart and Real Estate's answer and affirmative defenses, and Killick's memorandum of law in opposition to the motion to stay and to compel arbitration, did not constitute substantial competent evidence upon which the trial court could rely

in finding waiver. Statements by a party's counsel do not constitute evidence unless they are stipulated to by the opposing party. *See* Daughtrey v. Daughtrey, 944 So. 2d 1145, 1148 (Fla. 2d DCA 2006) ("…unsworn representations by counsel about factual matters do not have any evidentiary weight in the absence of a stipulation."). Hart and Real Estate never stipulated counsel's statements to be used as evidence.

Killick's legal filings addressing the waiver issue are replete with counsel's opinions and legal argument as to alleged facts in the case. Plaintiff Counsel's argument commentary and opinions as to alleged evidence do not constitute evidence upon which this Court may rely in resolving a motion for summary judgment. *See* Eight Hundred, Inc. v. Florida Dept. of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) ("Representations by an attorney for one of the parties regarding the facts, and documents attached as exhibits to a motion, do not constitute evidence."). *See also* Scott v. State, 922 So. 2d 1024, 1027 (Fla. 5th DCA 2006) (**"…**it is well-settled that '[r]epresentations by an attorney for one of the parties regarding the facts … do[es] not constitute evidence.' Eight Hundred, Inc. v. Florida Dept. of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003) ("The trial court may not

merely rely on the State's unproven assertions that people had unsuccessfully looked for Scott's property."); and Sperdute v. Household Realty Corp., 585 So. 2d 1168, 1169 (Fla. 4th DCA 1991) ("Neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.").

Counsel's representations regarding actual formal evidence only constitutes evidence when the statements are verified and stipulated to by the opposing party. *See* Daughtrey v. Daughtrey, 944 So. 2d 1145, 1148 (Fla. 2d DCA 2006) stating: "…unsworn representations by counsel about factual matters do not have any evidentiary weight in the absence of a stipulation." In this case, there is no such stipulation. Therefore, the many representations and commentary on alleged facts of Plaintiff's Counsel in Killick's legal filings did not constitute substantial competent evidence in the record before the trial court.

Consequently, Killick failed in her burden of proof and failed to seek an evidentiary hearing from the trial court. *See* Linden, 923 So. 2d 1283 (holding that the party refusing a disputed issue had the obligation to advise the trial court of the need of an evidentiary hearing on the disputed issue). Additionally, the trial court failed to

obtain competent substantial evidence on the disputed issue of fact to the extent that it relied on counsel's statements and arguments as evidence.

C. None Of Killick's Legal Filings Constituted Substantial Competent Evidence.

A legal filing, if verified, can constitute evidence for the purpose of summary judgment. *See* Vitelli v. Hagger, 268 So. 3d 246, 248-249 (Fla. 5th DCA 2019). However, the allegations of the sworn legal filing must not be opinion, conclusory, legal argument, or self-serving. Id. *See also* State Farm Mutual Automobile Insurance Company v. Hollywood Diagnostic Center, Inc., 329 So. 3d 152, 153 (Fla. 4th DCA 2021) ("Testimony is conclusory and self-serving when it amounts to no more than a "net opinion." Sweet v. Sheehan, 932 So. 2d 365, 369 (Fla. 2d DCA 2006)"); Craven v. TRG-Boynton Beach, Ltd., 925 So. 2d 476, 480 (Fla. 4th DCA 2006) ("Conclusory, self-serving testimony is not sufficient to shift the burden of proof." *See* Heitmeyer v. Sasser, 664 So. 2d 358 (Fla. 4th DCA 1995); and Dep't of Transp. v. Spioch, 642 So. 2d 788, 791 (Fla. 1st DCA 1994)."). Conclusory allegations based on subjective beliefs are likewise insufficient to create a genuine dispute of material fact and, therefore, do not suffice to

oppose a motion for summary judgment. *See* Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275 (11th Cir. 2001). *See also* Mobile Attic, Inc. v. Cash, 2012 U.S. Dist. LEXIS 81189; 2012 WL 2149889 (M.D. Ala. 5/21/12). In Vitelli, a panel of this Court stated: "Here, we conclude it was error to grant summary judgment based on the conclusory allegations in the verified Complaint. Vitelli, 268 So. 3d at 248.

In Heitmeyer v. Sasser, 664 So. 2d 358, 360 (Fla. 4th DCA 1995), the Fourth District Court of Appeal stated:

> *See* Seinfeld v. Commercial Bank & Trust Co., 405 So.2d 1039 (Fla. 3d DCA 1981) (recognizing that **general statements in an affidavit which are framed in terms only of conclusions of law** do not satisfy a movant's burden of proving the nonexistence of a genuine material fact issue); Hurricane Boats, Inc. v. Certified Indus. Fabricators, Inc., 246 So. 2d 174 (Fla. 3d DCA 1971) (affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law); Sherman v. Weintraub, 132 So. 2d 421 (Fla. 3d DCA 1961) (affidavit of defendant, denying liability as a conclusion of law, was insufficient to raise genuine issue as to material fact); Pino v. Lopez, 361 So. 2d 192 (Fla. 3d DCA), cert. denied, 365 So. 2d 714 (Fla. 1978) (plaintiff's affidavit in opposition to motion for summary judgment was insufficient as a matter of law because it alleged conclusions of law without supporting facts).

See Heitmeyer, 664 So. 2d at 360 (emphasis in the original).

In this case, none of Killick's legals filings are sworn, except for

Killick's affidavit. Also, none of the legal filings cite to record evidence before the trial court. All of the filings are replete with legal arguments and conclusory or self-serving statements as to the waiver issue. Therefore, none of the filings constitute substantial competent evidence.

D. **The Exhibits to The Complaint Are Hearsay and Do Not Constitute Substantial Competent Evidence.**

Killick argued that Killick's Composite Exhibit 1 to the Complaint, the AAA emails, which are also attached to the Killick affidavit, constituted sufficient substantial competent evidence to support the trial court's evidentiary ruling in the absence of an evidentiary hearing. (AB at Pages 27 and 31). However, unsworn attachments to pleadings and affidavits do not constitute competent evidence or substitute in lieu of other competent testimonial or documentary evidence to be adduced and confronted at an evidentiary hearing.

Killick's Complaint was unverified. Killick attached to the Complaint various unsworn AAA documents/emails as Composite Exhibit 1. (Appx. B at Composite Exhibit 1). Unsworn statements or documents attached to a pleading or other document do not

constitute record evidence upon which to base a ruling or judgment. *See* Garbark v. Gayle, 312 So. 3d 1286, 1287 (Fla. 1st DCA 2021) (holding unsworn statement was not admissible evidence to be considered by the trial court). In Garbark, the First District Court of Appeal stated:

> The only counter-evidence submitted by Appellants was an unsworn letter from a person who claimed to have attended the meeting where she heard Appellee make the alleged defamatory statements. However, this unauthenticated letter did not constitute "summary judgment evidence" and, therefore, was properly rejected by the court. *See* Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) ("A Florida court may not consider an unauthenticated document in ruling on a motion for summary judgment, even where it appears that the such document, if properly authenticated, may have been dispositive."); Daeda v. Blue Cross & Blue Shield of Fla., Inc., 698 So. 2d 617, 618 (Fla. 2d DCA 1997) (holding that "only competent evidence may be considered by the court in ruling upon a motion for summary judgment "); *see also* S. Developers & Earthmoving, Inc. v. Caterpillar Fin. Servs. Corp., 56 So. 3d 56, 62 (Fla. 2d DCA 2011) (holding that summary judgment evidence, consisting of a letter from an auctioneer, was properly excluded because it was not sworn to or otherwise authenticated so as to make it admissible in evidence).

See Garbark, 312 So. 3d at 1287 (Fla. 1st DCA 2021). Since none of the emails and other correspondence attached to the Complaint or Killick's affidavit were sworn to by the authorities and did not fall under any exception to the hearsay rules, they cannot constitute

evidence before the trial court.

E. Killick's Affidavit Did Not Constitute Competent Evidence.

Killick filed an affidavit in support of her opposition to the motion to stay and to compel arbitration. Killick argued that her affidavit constituted sufficient substantial competent evidence to support the trial court's evidentiary ruling in the absence of an evidentiary hearing. (AB at Pages 24-31).

An affidavit is a classic hearsay document. Case law is clear that an affidavit cannot be used as evidence unless the opposing party stipulates to admission of the hearsay as evidence, or the hearsay affidavit falls under one of the exceptions to the hearsay rule. The basis for the prohibition is due process because the opposing party is deprived of the right of confrontation against the affidavit. *See*:

B.C.S., S.R.L. v. Wise, 910 So. 2d 871, 874 (Fla. 5th DCA 2005):

> Affidavits are not admissible to prove facts in issue at an evidentiary hearing because they are not subject to cross-examination, and they shift the burden to the other party. Doug Sears Consulting, Inc. v. ATS Servs., Inc., 752 So. 2d 668, 670 (Fla. 1st DCA 2000).

Fortune v. Fortune, 61 So. 3d 441, 445 (Fla. 2d DCA 2011):

> It is first necessary to address the affidavit of Mr. Cendrowski. It was the sole corroboration for the

> husband's testimony that Prosperitas advanced the husband $150,000. The affidavit, an out-of-court statement offered to prove the truth of the matter asserted, is the most basic form of hearsay. *See* § 90.801(1)(c), Fla. Stat. (2009). It is well settled that affidavits are not admissible to prove facts in issue at an evidentiary hearing because they are not subject to cross-examination and because they impermissibly shift the burden of proof to the other party. B.C.S., S.r.l. v. Wise, 910 So. 2d 871, 874 (Fla. 5th DCA 2005).

Parker v. State, 873 So. 2d 270, 282 (Fla. 2004):

> B. Affidavits of Unavailable Witnesses
>
> [11] Parker also asserts that the trial court erred in failing to admit certain affidavits of witnesses who were found to be unavailable to testify during his penalty phase. These witnesses were Elmira Parker (Parker's deceased mother), Douglas Smith (the companion of Parker's mother who is also deceased), Katie Lee Parker (Parker's sister who is suffering from Alzheimer's and is therefore incompetent to testify), Rosie Lee Parker (Parker's sister), and Gloria Marshall and Martha Rahming (both former teachers).
>
> [12] This Court has recognized that "even though section 921.141(1) relaxes the evidentiary rules during the penalty phase of a capital trial" a party cannot introduce hearsay evidence unless the opposing party has a fair opportunity to rebut the hearsay. *See* Blackwood v. State, 777 So. 2d 399, 411 (Fla. 2000). In Blackwood, we upheld the exclusion of the deceased victim's hearsay statements to a friend, explaining that the State had no fair opportunity to rebut because the State could not question the

victim. *See* id. at 412.

Even if an affidavit could be used at a hearing on a motion to compel arbitration, which it cannot, Killick's affidavit, even though verified, cannot stand in place of the testimony of Ms. Killick at an evidentiary hearing by operation of Hart's and Killick's right of confrontation. *See* B.C.S., S.r.l. v. Wise, 910 So. 2d 871, 874 (Fla. 5th DCA 2005). Also, the affidavit has no sworn attachments in support of the conclusory averments in the affidavit. Third, the pertinent part of Killick's affidavit addressing the arbitration and waiver issue is complete hearsay. (Appx. S at Exhibit 1, Bates Nos. 294-297 ¶¶ 16-22). For instance, the affidavit at ¶ 16 asserts the conclusory statement that Hart and Real Estate ignored Killick's attempts at scheduling an arbitration and referenced the unsworn AAA emails contained in Composite Exhibit 1 of the Complaint. There is no evidence or support that either Hart or Real Estate received or failed to respond to Killick's alleged overtures or that either failed to respond in any manner. In ¶ 22, Killick stated, "It is my understanding that Ms. Hart even ignored emails…" This is either a statement of belief or a statement of representations made to Killick by third parties. All of these statements relating to arbitrations and

an alleged waiver are pure hearsay not subject to any hearsay exception.

An affidavit made without personal knowledge is unreliable and inadmissible. *See* Elser v. Law Offices of James M. Russ, P.A., 679 So. 2d 309, 312 (Fla. 5th DCA 1996) ("…affidavit was insufficient to support summary judgment because it was not made on personal knowledge, and therefore, the affiant was not competent to testify to the matters set forth therein. *See* Fla. R. Civ. P. 1.510(e)"). Killick's affidavit was not based on her personal knowledge; therefore, it does not constitute competent evidence. Thompson v. Citizens Nat. Bank of Leesburg, Fla., 433 So. 2d 32, 33 (Fla. 5th DCA 1983) ("An affidavit based on information and belief rather than personal knowledge is not admissible into evidence and should not be considered by the trial court on a motion for summary judgment.") and Elser, 679 So. 2d at 312 (Fla. 5th DCA1996) ("…affidavit was insufficient to support summary judgment because it was not made on personal knowledge, and therefore, the affiant was not competent to testify to the matters set forth therein.").

Additionally, Killick's affidavit is insufficient because it is conclusory and self-serving. *See* State Farm Mutual Automobile

Insurance Company v. Hollywood Diagnostic Center, Inc., 329 So. 3d 152, 153 (Fla. 4th DCA 2021) ("Testimony is conclusory and self-serving when it amounts to no more than a "net opinion." Sweet v. Sheehan, 932 So. 2d 365, 369 (Fla. 2d DCA 2006)"); Craven v. TRG-Boynton Beach, Ltd., 925 So. 2d 476, 480 (Fla. 4th DCA 2006) (**"**Conclusory, self-serving testimony is not sufficient to shift the burden of proof. *See* Heitmeyer v. Sasser, 664 So. 2d 358 (Fla. 4th DCA 1995); and Dep't of Transp. v. Spioch, 642 So.2 d 788, 791 (Fla. 1st DCA 1994)."). The allegations of the sworn document must not be opinion, conclusory, legal argument, or self-serving. Id. Further, conclusory allegations based on subjective beliefs are likewise insufficient to create a genuine dispute of material fact and, therefore, do not suffice to oppose a motion for summary judgment. *See* Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275 (11th Cir. 2001). In Vitelli, The Fifth District Court of appeal stated: "Conclusory and self-serving testimony will not shift the burden to the opposing party." Vitelli, 268 So. 3d 246, 248-249. *See also* Heitmeyer v. Sasser, 664 So. 2d 358, 360 (Fla. 4th DCA 1995).

Because Killick's affidavit was not based on personal knowledge, refers to inadmissible hearsay not subject to any hearsay

exception, and was otherwise conclusory and self-serving, the portion of the affidavit relating to arbitration and the issue of waiver did not provide substantial competent evidence on the waiver issue.

Based on the above, Killick presented no substantial competent evidence of record to the trial court demonstrating waiver and there is no substantial competent of evidence of record to support the trial court's order finding a waiver of the right to arbitration.

III. KILLICK INCORRECTLY ARGUES THAT HART AND REAL ESTATE'S PROCEDURAL AND WAIVER APPRAISAL LAW IS DISTINGUISHABLE AND INAPPLICABLE TO ARBITRATION WAIVER CASES.

In the answer brief, Killick attempts to distinguish Hart and Real Estate's cited appraisal waiver case law as inapplicable to arbitration cases such as the case at bar. (AB at Page 30). In the Initial Brief, Hart and Real Estate cited Citizens Property Ins. Corp. v. Maytin, 51 So. 3d 591 (Fla. 3rd DCA 2010), First Protective Insurance Company v. Ahern, 278 So. 3d 87, 89 (Fla. 4th DCA 2019), and Florida Ins. Guar. v. Sill, 154 So. 3d 422, 425 (Fla. 5th DCA 2014) for the rule that the trial court is required to conduct an evidentiary hearing as required in appraisal cases involving factual disputes such as claims of waiver. Appraisal provisions and

arbitration provisions are generally treated the same. *See* Allstate Ins. Co. v. Suarez, 786 So. 2d 645,646 (Fla. 3d DCA 2001); U.S. Fidelity & Guar. Co. v. Romay, 744 So. 2d 467, 469 (Fla. 3d DCA 1999) ("Appraisal provisions in insurance policies such as the one in the instant case have generally been treated as arbitration provisions.")

Regardless, statutes and arbitration case law require the trial court to conduct an evidentiary hearing where a disputed factual issue is raised by a party as to one or more of the three Seifert threshold issues. *See* § 682.03. Fla. Stat.; Seifert; Palmcrest; and Linden. If the trial court determines there is a factual dispute as to one of the Seifert threshold determinations, then, pursuant to § 682.03, the trial court must conduct a "summary hearing" and an expected evidentiary hearing to resolve the disputed threshold issues. *See* § 682.03. Fla. Stat.; Seifert; Palmcrest; Linden; and Mexicanos. Florida courts have held that the statutory language of "summary hearing" in § 682.03 requires an expedited *evidentiary* hearing. *See* Jalis Construction, Inc. v. Mintz, 724 So. 2d 1254, 1254 (Fla. 4th DCA 1999) ("…[I]f the court finds disputed issues regarding the making of the agreement or the failure, neglect, or refusal to

perform the same, the court is mandated to "summarily hear and determine the issue...." In our view, the latter requirement contemplates an expedited evidentiary hearing.") *and see* Epstein v. Precision Response Corp., 883 So. 2d 377 (Fla. 4th DCA 2004).

Therefore, the trial court was required to hold an evidentiary hearing prior to determining the disputed factual issue of the existence of a waiver of the right to arbitration.

CONCLUSION

The Court should reverse and remand the case to the trial court with directions to compel the case to arbitration.

CERTIFICATE OF FONT AND LENGTH COMPLIANCE

I hereby certify that Appellants' Reply Brief has been prepared in Bookman Old Style 14-point with a Microsoft Word "word count" of 5334.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day October 2024, a true and correct copy of the foregoing was served via Florida E-Portal and

by email on the following:

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