IN THE SUPREME COURT OF FLORIDA

Case No. SC12-100

FIRSTATE INSURANCE HOLDINGS, INC., FIRSTATE INSURANCE BY ELDRIDGE, FIRSTATE INSURANCE COMPANY PR, INC., CHARLES ELDRIDGE and RENEE ELDRIDGE,

Petitioners,

vs.

FIDELITY WARRANTY SERVICES, INC. and JIM MORAN & ASSOCIATES, INC.,

Respondents.

L.T. Case Nos.: 4D09-2411, 2003CA0129210XXCFAG

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONERS' BRIEF IN SUPPORT OF JURISDICTION

WHITE & CASE LLP
Raoul G. Cantero
David P. Draigh
Angela F. Benjamin
Southeast Financial Center, Ste. 4900
200 South Biscayne Blvd.
Miami, FL 33131
Counsel for Petitioners Firstate Insurance Holdings, Inc., Firstate Insurance By Eldridge, Firstate Insurance Company PR, Inc., Charles Eldridge and Renee Eldridge

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND OTHER AUTHORITY

JURISDICTIONAL STATEMENT

Firstate Insurance Holdings, Inc., Firstate Insurance by Eldridge, Firstate Insurance Company PR, Inc., Charles Eldridge and Renee Eldridge ("Firstate") seek review of the Fourth DCA's October 5, 2011 decision (the "Opinion"). This Court has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS[1]

Fidelity Warranty Services, Inc. and JM Moran & Associates, Inc. ("JMA") agreed with Firstate that Firstate would sell JMA's extended warranties in Puerto Rico. *Fidelity Warranty Servs., Inc. v. Firstate Holdings, Inc.*, 74 So. 3d 506, 508-509 (Fla. 4th DCA 2011). When the relationship soured, JMA sued for breach of contract and breach of fiduciary duty. *Id.* at 509-10. Firstate's counterclaims included tortious interference with a business relationship. *Id.* at 510.

As the trial court ruled, it is black-letter law that an owner, upon proper foundation, is allowed to testify as to the value of his property. Therefore, to establish damages for tortious interference, Firstate owner Charles Eldridge testified about the market value of his own business. *Id.* That lay testimony was based on Eldridge's "thirty years' experience as an insurance agent," including the

[1] These facts are taken from the Opinion, which is attached as **Appendix A**.

ten times he "had bought and sold insurance agencies." *Id.* at 510-11. When JMA objected that Eldridge was offering surprise expert testimony, the trial court allowed him to testify—as a lay witness on the value of his own business—after a mid-trial deposition. *Id.* at 510. The jury found for Firstate, awarding it $3.25 million on its counterclaim for tortious interference. *Id.* at 511.

On appeal, although the court acknowledged that an owner can testify about the value of his property, the Fourth DCA ruled that Eldridge "turned into an 'expert'" when he testified to "having specialized knowledge of the insurance agency market in Puerto Rico acquired through his experience in the industry." *Id.* at 512. The Fourth DCA concluded that Eldridge's testimony should have been excluded because (1) it was surprise expert testimony; and (2) even if it had been properly disclosed, it was too speculative. *Id.* Moreover, although the court acknowledged that "[g]enerally, after finding that a trial court erroneously failed to cure the prejudice caused by surprise, changed, or undisclosed expert testimony, we would reverse and remand for a new trial," it found that in this case, Firstate had presented no damages evidence other than Eldridge's surprise expert testimony. *Id.* at 513. It therefore reversed and remanded for entry of judgment in favor of JMA on Firstate's claim for tortious interference. *Id.*

SUMMARY OF ARGUMENT

The Fourth DCA's Opinion is in direct conflict with other district court

decisions on two independent grounds.

First, the Opinion held that Firstate owner Eldridge, who testified about his business's value based on 30 years of experience, could only testify as an expert witness disclosed before trial. That holding places business owners in a hopeless Catch-22—they can testify as owners about value if they have some, *but not too much*, knowledge of their own businesses—and directly conflicts with other DCAs, which allow owners to testify about value upon proper foundation.

Second, after ruling that Eldridge's testimony was surprise expert testimony, the Fourth DCA acknowledged that the remedy for such improper testimony is remand for new trial. But it applied a different rule in this case, remanding for entry of judgment as if the testimony had not been offered, because it found that the testimony should have been excluded as speculative. This ruling is in direct conflict with *All American Pool Surface, Inc. v. Jordan*, 870 So. 2d 885 (Fla. 3d DCA 2004), in which the Third DCA held that, when surprise expert testimony is based on speculation, the case should be reversed and remanded for new trial.

ARGUMENT

I. IN CONFLICT WITH OTHER DCAs, THE FOURTH HELD THAT AN OWNER WITH KNOWLEDGE OF HIS INDUSTRY COULD *NOT* TESTIFY ON THE VALUE OF HIS OWN BUSINESS

As shown above, Eldridge testified at trial, as owner of Firstate, about the value of his company. The foundation for that lay testimony was Eldridge's 30

years of experience in his industry. That is consistent with the established rule in other districts that upon proper foundation, an owner may testify about his own property's value. *See, e.g., Reliance Ins. Co. v. Pro-Tech Conditioning & Heating*, 866 So. 2d 700, 702 (Fla. 5th DCA 2003) ("The rule allowing an owner to testify regarding the value of his property is based on the owner's presumed familiarity with the characteristics of the property, his knowledge or acquaintance with its uses and purposes, and his experience in dealing with it."); *Fritts v. State*, 58 So. 3d 430, 432 (Fla. 1st DCA 2011); *Christopher Adver. Grp., Inc. v. R&B Holding Comp., Inc.*, 883 So. 2d 867, 871 (Fla. 3d DCA 2004).

Although the Fourth DCA acknowledged this rule, *see* 74 So. 3d at 512, it refused to allow Eldridge to testify about the value of his own property, excluding his testimony as improper expert testimony because Eldridge has "specialized knowledge" of how to "calculate the market value of a niche insurance agency in Puerto Rico," even though that was precisely the nature of Eldridge's business. *Id.*

Therefore, the Fourth DCA's Opinion either (1) announces a new rule of law—that an owner whose background in his own business might otherwise qualify him as an expert *cannot* provide lay testimony on the value of that business; or (2) failed to apply the established rule that an owner, upon proper foundation, may offer lay testimony as to the market value of his business.

Indeed, the Opinion hamstrung Eldridge as a witness. He could not testify

as an owner without giving a foundation for his opinion about market value, but that same foundation—his experience in his own industry—made his testimony impermissible expert testimony. Either way, the Opinion is in irreconcilable conflict with the law of the other DCAs, which clearly allows an owner to testify about the value of his property upon a showing that he is sufficiently familiar with that property, "whether or not the owner is qualified as an expert." *See Craig v. Craig*, 982 So. 2d 724, 729 (Fla. 1st DCA 2008). *See also Reliance Ins. Co.*, 866 So. 2d at 701-702; *Fritts*, 58 So. 3d at 432; *Christopher Adver.*, 883 So. 2d at 867, 872 n.4. Therefore, the Opinion expressly and directly conflicts with a decision of another district court of appeal and announces a rule of law which conflicts with a rule previously announced by other districts. *See, e.g.*, *Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1166 (Fla. 2006) (granting jurisdiction on conflict grounds when the holdings of two district courts of appeal are irreconcilable).

II. IN CONFLICT WITH THE THIRD DCA, AFTER FINDING THE IMPROPER ADMISSION OF SURPRISE EXPERT TESTIMONY, THE FOURTH DCA DID NOT REMAND FOR NEW TRIAL

The Fourth DCA held that Eldridge's testimony was expert testimony and that it was surprise expert testimony creating uncured prejudice to JMA. *Fidelity Warranty Servs.*, 74 So. 2d at 512-13. The Fourth DCA also acknowledged the rule that, "[g]enerally, after finding that a trial court erroneously failed to cure the prejudice caused by surprise, changed or undisclosed expert testimony, we would

reverse and remand for a new trial." *Id.* at 513. Nevertheless, the court applied a different rule, remanding for entry of judgment against Firstate because, "even if [the testimony] had been properly disclosed, [it] should have been excluded because it was based on speculation and conjecture." *Id.*

That holding is directly contrary to *All American Pool Surface, Inc. v. Jordan*, 870 So. 2d 885, 886 (Fla. 3d DCA 2004), in which the court decided whether damages testimony from a forensic accounting expert was speculative, where the "expert's figures [were] not finalized until shortly before her testimony." *Id.* at 885. The Third DCA held that, because the last-minute expert "testimony was based on speculation, conjecture, and incorrect assumptions, we reverse for a new trial on the issue[.]" *Id.* at 886. Thus, the Third DCA announced a rule that whenever an expert's surprise testimony is based on speculation, conjecture, or incorrect assumptions, the remedy on appeal is a new trial.

The Fourth DCA announced a different rule—that whenever an expert's surprise testimony is based on speculation or conjecture, the testimony should be stricken entirely, and judgment should be entered as if that testimony had never been presented. *Fidelity Warranty Servs.*, 74 So. 3d at 513-14. That rule is in direct conflict with the rule from *All American Pool.* This Court has jurisdiction. *See Aravena,* 928 So. 2d at 1166-67.

III. THIS COURT SHOULD CLARIFY THAT AN OWNER, AS A KNOWLEDGEABLE LAY WITNESS, MAY TESTIFY ON HIS BUSINESS'S VALUE, AND THAT THE REMEDY FOR IMPROPER EXPERT TESTIMONY IS REMAND FOR NEW TRIAL

The Court should exercise its discretion to accept review. Although Florida courts allow property owners to testify on the value of their property, the Fourth DCA's rule puts most business owners in a hopeless Catch-22. They can only testify as an owner about value upon proper foundation—their experience in their own business—but if that foundation is extensive they *cannot* testify as an owner because they are deemed to be an expert and can only testify if they are disclosed as such before trial and qualified as such at trial. This Court should clarify that a business owner, upon proper foundation, may testify as a lay witness about the value of his business.

The Court should also clarify that the proper remedy when an appellate court reverses on the basis of improperly admitted, speculative expert testimony is remand for a new trial. The rule applied in the Fourth DCA's Opinion—that the remedy is reversal and remand for entry of judgment—is in direct conflict with the rule applied by the Third DCA, under which the case is remanded for new trial.

CONCLUSION

For all of the foregoing reasons, this Court should accept jurisdiction and decide the case on the merits.

Respectfully submitted,

WHITE & CASE LLP
Southeast Financial Center
200 South Biscayne Blvd., Suite 4900
Miami, Florida 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

By: /s/ David P. Draigh
Raoul G. Cantero
Florida Bar No. 55235
Email: rcantero@whitecase.com
David P. Draigh
Florida Bar No. 624268
Email: ddraigh@whitecase.com
Angela F. Benjamin
Florida Bar No. 0015914
Email: abenjamin@whitecase.com

CERTIFICATE OF SERVICE

I certify that on January 25, 2012, a copy of the brief was served by U.P.S. upon the following:

Kannon K. Shanmugam,
Williams & Connolly, LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
Email: kshanmugam@wc.com

Nancy A. Copperthwaite,
AKERMAN SENTERFITT,
One Southeast Third Avenue, 25th Floor
Miami, FL. 33131-1714
Telephone: (305) 374-5600
Facsimile: (305) 374-5095
Email:
nancy.coppeerthwaite@akerman.com

Scott A. Weires, Esq.,
Buckingham, Doolittle & Burroughs, LLP
5355 Town Center Road Suite 900,
Boca Raton, Florida 33486
Telephone: (561) 241-0414
Facsimile: (561) 241-9766
Email: sweires@bdblaw.com

By: /s/ David P. Draigh
David P. Draigh

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

By: /s/ David P. Draigh
David P. Draigh