IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2016-014290-CA-01
SECTION: CA02
JUDGE: Lisa Walsh

NAHUM BERKOVITZ

Plaintiff(s)

vs.

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY

Defendant(s)

_____/

ORDER ON DEFENDANTS MOTION FOR ATTORNEYS' FEES AND COSTS FOR MISTRIAL MISCONDUCT (DE 217, 398)

THIS MATTER came before the Court at the conclusion of three evidentiary hearings which took place on January 17, 2023, March 10, 2023 and May 26, 2023 on Defendant's Motion for Attorney's Fees and Costs for Mistrial Misconduct (DE 217, amended by DE 398), filed by Universal Property & Casualty Insurance Company ("Universal" or "Defendant"). The Court also conducted proceedings on a motion for mistrial on November 3, 2021. All transcripts are incorporated into this order. This Court also incorporates the trial transcript for trial conducted from November 1-3, 2021 in this matter, which contains testimony both on the facts surrounding the insurance claim in question as well as facts surrounding the misconduct at issue here. Having considered the evidence and testimony admitted at the evidentiary hearings, heard the arguments of counsel and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Sanctions (DE 217) is **GRANTED**.

The Court has carefully considered Defendant's Motion for Sanctions considering the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) and its progeny, as well as the Court's inherent authority to impose sanctions against a party and party's attorney for bad faith conduct. *See also Rhoades v. Rodriguez,* 359 So. 3d 359 (Fla. 5th Dist. App. 2023), *reh'g denied* (Apr. 11, 2023) (holding no error to sanction counsel for deliberate misconduct during trial which led to a mistrial), *citing Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002), and other similar cases. This Court has the inherent power to enforce its orders, to conduct its business in a proper manner, and to protect the Court from acts obstructing the administration of justice. *See Levin, et al. v. United States Fire Ins. Co*., 639 So. 2d 606, 608-09 (Fla. 1994).

The Court makes the following findings of fact and expressly finds that the following actions by Plaintiff's counsel Perry & Neblett, PA constitute willful, deliberate and contumacious misconduct and bad faith litigation tactics, based upon which this Court hereby imposes sanctions upon the firm of Perry & Neblett, P.A.:

Introduction

This sanctions order bottoms on a decision made by Plaintiff's trial counsel to conceal evidence. The trial was about an alleged underpayment for a water loss causing damage to property. Over the weekend before the first day of trial, Plaintiff's counsel emailed Plaintiff's adjuster and its expert witness to turn over sign-up photographs better depicting the loss in this case. These sign-up photographs were requested by the defense in multiple discovery requests to produce. Plaintiff's counsel denied their existence. Plaintiffs' counsel assured the defense in an email six months before trial that there were no such sign-up photographs depicting the loss on the day it occurred.

This turned out to be false. Shortly before trial, Plaintiff's counsel emailed the adjuster asking for the sign-up photographs. The adjuster emailed 98 never-before-seen sign-up photographs to Plaintiff's counsel on the first day of trial. These photos proved that what the Plaintiff described occurred to his apartment was indisputably true – his property suffered a profound water event.

Yet even though Plaintiff's counsel previously denied that these pictures existed, and even though Plaintiff's counsel filed a misleading exhibit list with the court, Plaintiff's counsel decided not to say anything and did not turn them over. Plaintiff's counsel decided instead that so long as the Plaintiff did not use the photographs, they need not disclose them to the defense nor advise the court. This decision led to a mistrial and warrants sanctions now.

Facts Regarding the Loss, Claims Process and Discovery

1. Universal issued a homeowner's insurance policy bearing Policy Number 1503-1501-6846 ("Policy") to Nahum Berkovitz for the property located at 1301 NE Miami Gardens Drive, Apt 521W, Miami, FL 33179 (the "Property") from June 9, 2015 to June 9, 2016.

2. Mr. Berkowitz resided in a small condominium unit. On the reported date of loss, November 3, 2015, he returned home to find water running out of the front door of his unit. He called Stellar Public Adjusting Services ("Stellar") to assist him in remediating the loss and to help him adjust his insurance claim. Mr. Berkowitz testified that water flowed from his kitchen throughout the home to the front door. He testified that his lower and upper cabinets were damaged, and his appliances ruined.

3. Mr. Berkowitz is a chef. He kept books from his home country on a shelf in the kitchen. When the water sprayed throughout the kitchen, the pages were stuck together, and the books were ruined. The cause of the loss was a broken supply line in the refrigerator which, according to Mr. Berkowitz, sprayed water throughout the kitchen. But Mr. Berkowitz had no photographs in his possession depicting the ruined books, part of his claim and a subject of his cross-examination.

4. Mr. Berkowitz contracted with Stellar on November 3, 2015, the date of loss, to serve as his agent and public adjuster responsible to investigate the loss, manage the claims process and liaise with his attorneys regarding all requests for documents and information.

5. Mr. Berkowitz's public adjuster, Stellar, reported the loss to Universal on November 6, 2015, with a date of loss of November 3, 2015.

6. Stellar inspected the Property on November 3, 2015 and took 98 photographs of the alleged loss and cause of loss ("sign-up photographs"). These sign-up photographs clearly depicted the extent of the loss to Mr. Berkowitz's property. They showed the water flowing from the kitchen through the front door. They showed water on the cabinets in the kitchen. The sign-up photographs were never disclosed to Universal during the claims process and during discovery.

7. Stellar also took photographs at the Property on December 14, 2015 during Universal's inspection of the property. These photographs were disclosed. The December 14, 2015 photographs were taken after water remediation occurred and do not depict the extent of the loss described by Mr. Berkowitz.

8. On November 13, 2015 and November 23, 2015, Universal submitted correspondence to Mr. Berkowitz and Stellar requesting documents, including a photograph of the damaged

property, citing to the "Duties After Loss" provision of the Policy.

9. On February 11, 2016, Universal issued an undisputed settlement payment in the amount of $12,051.27 to Mr. Berkowitz. Mr. Berkowitz's position in this lawsuit was that this was an underpayment, given the severity of the loss.

10. On June 4, 2016, Mr. Berkowitz filed suit. At the time the lawsuit was filed, neither Stellar, the public adjuster, nor Mr. Berkowitz provided any photographs to Universal, including the 98 sign-up photographs. On November 11, 2017, the Plaintiff sold the subject Property.

11. During litigation, Universal requested information from Plaintiff, including photographs and information regarding photographs, related to the claimed damages and loss in: Defendant's Request for Production to Plaintiff (DE 63); First Set of Interrogatories to Plaintiff (DE 62); Plaintiff's Notice for Deposition Duces Tecum (DE 57/58); Expert Request for Production (DE 126) and Expert Interrogatories (DE 127). The 98 sign-up photographs are responsive to each of these written discovery requests.

12. Neither Stellar nor Plaintiff's counsel turned over the 98 sign-up photos taken on November 3, 2015 to the insurance company or its attorneys. Stellar did not turn them over during the claims process, even though the insurance company requested documents and proof of loss. Neither did Stellar cooperate with its client and client's counsel and turn over the photos to the Plaintiff's firm or to Universal during the discovery process. In short, none of these photographs were produced to Universal, neither during discovery nor in the exchange of trial exhibits.

13. Mr. Berkowitz, through counsel, affirmatively represented to Universal in response to expert discovery responses that [all of] Stellar's photographs were "provided as part of Plaintiff's document production."

14. On January 8, 2021, Rami Boaziz (the corporate representative of Stellar, the public adjuster) was disclosed as a [hybrid] damages expert.

15. Mr. Boaziz was deposed on June 2, 2021. Mr. Boaziz testified about 98 sign up photographs

in response to defense counsel's questions. On June 3, 2021, June 8, 2021 and June 9, 2021, counsel for Defendant requested that Plaintiff produce the sign up photographs referenced by Mr. Boaziz in his deposition (Exhibit K of Evidentiary Hearing).

16. On June 3, 2023, Universal emailed Mr. Berkowitz's counsel, "During the deposition of Rami Boaziz yesterday, he referenced 96 photographs that were taken at the property which were not produced in response to Defendant's First Request for Production or Defendant's Expert Request for Production. Please provide same immediately as such documents are responsive to the pre suit and post suit requests for documents." (DE 405 at p. 28). Universal sent two more emails when Plaintiff's counsel failed to respond. (Exh. K)

17. Mr. Neblett responded, "Please allow this to again clarify **the Defendant's misunderstanding**. During Mr. Boaziz's deposition, Mr. Boaziz testified that he looked at approximately 96 photographs. **It is not that there are 96 "new" photographs, the 96 photographs referred to simply includes Plaintiff's photos, and Defendant's photos and EMS photos that were produced in discovery. He discussed this and explained this at deposition.**" (DE 405 at p. 29) (emphasis added). (Exhibit K of Evidentiary Hearing). We know now that this was false. The Defendant had no misunderstanding. Boaziz was in possession of 98 sign-up photographs which had never been disclosed.

18. At the hearing on sanctions, Perry & Neblett, PA and Stellar confirmed that Perry & Neblett PA did not take any steps to follow up with Mr. Boaziz after his deposition wherein Boaziz referenced the 98 sign-up photographs.

19. Perry & Neblett, PA through Mr. Neblett, also specifically confirmed that it did not take any steps to confirm the veracity of the representations made by Mr. Neblett in his June 9, 2021 email correspondence identified as Exhibit K at the evidentiary hearings.

20. Thus, the 98 sign-up photographs were never provided to Universal, not in the claims process and not during the discovery process.

21. There was no failing on the part of the defense here. Plaintiff's counsel's failures during the discovery process – the failures to produce these photographs in discovery or in expert disclosures, failures to communicate with their adjuster and expert to obtain said photographs, and the misrepresentation to the defense -- are crystalized in this email. But

these failures do not form the basis for the sanctions imposed here. They merely provide the backdrop.

Events Leading up to Trial, Trial Proceedings, and Mistrial

22. In response to a series of emails from Plaintiff's counsel to Stellar over the weekend prior to jury trial, Stellar emailed the sign-up photographs to Mr. Berkowitz's counsel right before opening statement. As set forth below, despite receiving them before the opening statement, counsel for the Plaintiff made the deliberate choice to say and do nothing – they kept the existence of these photographs to themselves. Plaintiff's counsel testified at the hearings held since, that they made the unilateral decision to keep the photographs hidden. They determined that there was no harm resulting from this decision so long as they did not attempt to use the photographs themselves at trial. They believed that there was no need nor obligation to disclose their existence to the defense nor to the court.

23. Once the court and defense discovered in the middle of trial (during cross-examination of Rami Boaziz) that these sign-up photographs existed and that Stellar sent them to Plaintiff's counsel on the first day of trial, but counsel failed to disclose them, Plaintiff's counsel, David Neblett and James Mahaffey, argued that defense counsel should have known about them. That this was all the defense's fault for its lack of diligence. Mr. Mahaffey and Mr. Neblett argued that Rami Boaziz's deposition testimony put the defense on notice that these photographs were in Stellar's possession. Plaintiff's counsel argued that this was just a misunderstanding stemming from the defense's failure to pay reasonable costs for copying documents at a deposition of Stellar. As set forth above, the defense **did follow up** after Rami Boaziz's depostion**.** They were assured in an email by David Neblett (Exh. K) that there were no additional photographs, that Rami Boaziz's testimony at his deposition caused a "misunderstanding" on the part of the defense.

24. Furthermore, Plaintiff's counsel's argument that this was all the defense's fault and that the defense should have learned at deposition that these photographs existed is rejected for another reason. These same Plaintiff's lawyers claimed that *they* did not know about the photographs either until the first day of trial. Plaintiff's counsel attended the same deposition. Rami Boaziz was their expert. If Plaintiff's counsel did not know of the 98 photos from Boaziz's deposition, then defense counsel certainly could not have known.

25. Plaintiff's counsel further argued that if the photographs were in Stellar's possession, Plaintiff had no duty to produce them. The court rejects their argument that they lacked the

ability (custody or control) to obtain the photographs from Stellar. This is obviously false when Plaintiff's counsel emailed Stellar and received the documents in the days before trial. It is also incorrect because Stellar is not some unrelated third party. Stellar has a contract with the insured to act as the claimant's representative with the insurance company. Further, Plaintiff's counsel retained Stellar as an expert witness. Considering all the testimony, the referenced passage in the deposition of the corporate representative of Stellar, and the claimed ignorance of Plaintiff's counsel, this court finds that until Stellar provided the sign-up photographs to Plaintiff's counsel on the first day of trial, defense counsel and Plaintiff's counsel did not know that November 3, 2015 sign-up photographs existed. This Court further finds that failure to discover the photographs is not attributable to the defense in any way.

26. On June 4, 2021, Universal filed a Motion for Sanctions and Motion to Strike the Deposition Testimony of Jesse Smith because Plaintiff had proceeded with the unilaterally scheduled deposition of independent adjuster Jesse Smith in the absence of defense counsel and over Universal's objection (DE 171). The Court permitted Universal to depose Jesse Smith and entered an order reserving fees and costs related to Defendant's Motion for Sanctions and Motion to Strike (DE 186).

27. On October 29, 2021, Plaintiff filed Plaintiff's Trial Exhibit List (DE 199) identifying Exhibit 1-A as "Stellar Public Adjusting Sign Up Photos." This pre-marked exhibit did not contain the 98 sign-up photographs – Plaintiff's counsel did not know of their existence until November 1, 2021. The parties exchanged exhibits but Plaintiff's exchanged photographs did not include the 98 sign up photographs.

28. On October 31, 2021, the Sunday before the Monday November 1, 2021 trial date, Perry & Neblett, PA sent an email to Stellar requesting "more EMS or sign-up photographs" and "better photographs" (Exhibit E and F of Evidentiary Hearing).

29. Trial in this case commenced the morning of November 1, 2021 at 8:55 AM (DE 127). At 1:04 PM, prior to swearing in the jury, Stellar sent an email with a PDF attachment of the 98 sign up photographs to Perry & Neblett, PA (DE 127). David Neblett confirmed at the hearing on mistrial that he received this email.

30. Plaintiff's counsel elected to not disclose to the Court or to the Defendant that they had received these photographs.

31. These photographs were important. They showed the condition of the apartment at the time of the loss. They confirmed that a major flood in the apartment had, in fact occurred. Absent these 98 sign-up photos, the remainder of the evidence told a completely different story. Because the insurance field adjuster did not inspect the Property until weeks later (through no fault of the insured), the only thing visible (and available through the disclosed photographs to the defense to depict the loss) at that time was minor water damage. The allegedly ruined cookbooks were discarded. There was no photo depicting their condition. Therefore, the defense argued at trial that the claim for additional damages should be denied because the insured failed to show proof that the additional damage had, in fact, occurred. Without the 98 sign-up photos, the Defendant had received proof of a loss, but not the catastrophic ruin that the sign-up photos depict.

32. On November 2, 2021, with the 98 sign up photographs in their possession but undisclosed to the court and the defense, Plaintiff moved into evidence another set of photographs which Plaintiff described as *Plaintiff's Exhibit 1-A Stellar Public Adjusting Sign Up Photographs* as "Plaintiff's 1" (DE 127). These were not in fact the sign-up photographs. Plaintiff's counsel knew this because they received the 98 sign-up photographs from Stellar the day before. But they decided to admit the document without altering the title in order not to call attention to any discrepancy or issue. This is particularly disturbing to the court, as the exhibit was not what it purported to be, and Plaintiff's counsel knew it.

33. Plaintiff's Counsel avoided any reference to or mention of the 98 sign up photographs throughout the trial including throughout the entirety of Plaintiff's testimony and Stellar's testimony on direct examination. (DE 127).

34. On November 3, 2021, during the cross-examination of Mr. Boaziz, Mr. Boaziz conceded to defense counsel that 98 sign-up photographs were taken on the date of the loss and had been provided to Plaintiff's counsel. (DE 127).

35. The court stopped the trial and excused the jury. Universal moved for mistrial on the basis that the failure to disclose the withheld photographs was prejudicial, that no curative instruction would have remedied the situation, and no other remedy would have cured the prejudice to Universal (DE 127).

36. On November 3, 2021, the Court declared a mistrial based on Plaintiff and his counsel's failure to disclose the Stellar public adjusting photographs. The Court acknowledged that the mid-trial disclosure of 98 day of loss photographs affected the fairness of the proceeding and

disrupted an orderly and efficient trial of the case (DE 127).

37. Later that day, after the mistrial and excusal of the jury, one of the Plaintiff's attorneys, David Neblett, disclosed to the court and counsel in an email that he contracted Covid-19. This was at the height of the Delta variant.

38. On November 24, 2021, Defendant filed its Motion for Sanctions (DE 127), and the Court instructed the parties to set the Motion for Sanctions for an evidentiary hearing. The Court further permitted Defendant to conduct limited discovery related to the issue of misconduct and the mistrial. Sanctions requested only included fees and costs.

39. Defendant issued non-party subpoenas to Stellar and to Perry & Neblett, PA. (DE 249). Defendant filed motions to compel compliance with the non-party subpoenas on Stellar and Perry & Neblett, PA (DE 255, 284 and 292). The Court entered four orders related to Defendant's efforts to obtain third-party discovery from Stellar and Perry & Neblett PA, (DE 270, 278, 298, and 317) related to discovery in anticipation of the evidentiary hearing. It is noted by the court that Exhibit K comprises an email exchange wherein the Defense specifically requests sign-up photographs after the deposition of Rami Boaziz. These emails were never turned over in response to the requests or orders compelling production.

40. Considerable efforts were made by Defendant to schedule the initial and the continued evidentiary hearings on the Motion for Sanctions. For example, the evidentiary hearing on Defendant's Motion for Sanctions was set on July 12, 2022 (noticed for hearing on June 14, 2022) and cancelled due to Mr. Neblett's request for a continuance on July 7, 2022 at Calendar Call. The evidentiary hearing was rescheduled to August 12, 2022 (noticed on August 4, 2022) and cancelled by Court Order dated August 9, 2022 due to the outstanding discovery due from Stellar and Perry & Neblett. The hearing was rescheduled again for October 17, 2022 (noticed on September 7, 2022) and did not proceed due to Mr. Boaziz's failure to appear at the hearing. The hearing was rescheduled again for January 6, 2023 (noticed on December 22, 2022) and cancelled due to Plaintiff's notice of the unavailability of his witness Mr. Boaziz. The evidentiary hearing was eventually completed over the course of three separate sessions which commenced on January 17, 2023 and concluded on May 26, 2023. Since the defense filed its Motion for Sanctions in November 2021, there have been multiple notices of unavailability stating Plaintiff's counsel's unavailability on the following dates: January 28, 2022-February 4, 2022; April 12, 2022; June 24, 2022- July 10, 2022; August 1, 2022-August 5, 2022; September 1, 2022-September 5, 2022; October 13, 2022-October 14, 2022; October 20, 2022-October 24, 2022; November 11, 2022-November 14, 2022; December 19, 2022-January 1, 2023; January 2, 2023-January 12, 2023; January 23, 2023-January 26, 2023; February 1, 2023-February 10, 2023; February 9, 2023-February 14,

2023; March 20, 2023-March 24, 2023. (DE 319, 320, 321, 323, 324). The court set the hearing for March 3, 2023. Plaintiff then filed its notice of unavailability for March 3, 2023, citing a list of cases which were set for trial on that date. (DE 357). The Plaintiff filed notices of unavailability for the following dates: March 23, 2023-March 28, 2023; April 19, 2023-April 25, 2023; June 19, 2023-July 25, 2023 (paternity leave), and dates stretching beyond the final hearing in this matter. (DE 368, 369, 370, 372). In short, Plaintiff's counsel cited approximately 20 weeks of unavailability to complete this hearing.

41. Regarding scheduling of the evidentiary hearing, the Court entered two orders warning Mr. Boaziz, Plaintiff and/or Perry & Neblett, PA that the failure to appear at the evidentiary hearing would be met with sanctions (DE 326 and 365).

42. On May 17, 2023, Perry & Neblett, PA inaccurately represented to the newly assigned division judge, Judge Thomas, that the mistrial that Judge Walsh granted in November 2021 was the result of Defendant's conduct (DE 393).

43. At the last hearing on this motion, the court pointed out that the Defendant's motion did not request dismissal as a sanction. On June 1, 2023, the court granted Defendant's motion to conform its request for dismissal sanctions. (DE 396).

Analysis

In imposing sanctions, this Court will apply the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). They are: (1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; (2) whether the attorney has been previously sanctioned; (3) whether the client was personally involved in the act of disobedience; (4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; (5) whether the attorney offered reasonable justification for noncompliance; and (6) whether the delay created significant problems of judicial administration.

Before addressing these factors, the court will address various arguments made by Plaintiff's counsel.

Defense counsel has reported in proceedings on this motion that in front of the successor judge, Judge Thomas, Plaintiff's counsel stated that the mistrial granted in this case was the defense's fault, that the defense simply lacked diligence. As the multiple production requests and emails regarding sign-up photographs establish, this representation is inaccurate, and the court trusts that Plaintiff's counsel will not attempt to make such representation to Judge Thomas going forward.

During the pendency of this case and hearings on the motions for sanctions, Plaintiff's counsel argued that it had no obligation to obtain these photographs from the adjuster. Because the photographs were not in the possession of the insured himself, Plaintiff's counsel argued, the Plaintiff was not required to produce the photographs. In other words, the adjuster was not the Plaintiff's agent and Plaintiff's counsel had no obligation nor ability to obtain these photographs from the adjuster in response to discovery requests. This argument is belied by the simple fact that when Plaintiff's counsel sent the adjuster emails the weekend before trial requesting sign-up photographs, the adjuster sent the photographs immediately. Had the firm sent an email to the adjuster during discovery in response to the multiple requests, there is no reason why the adjuster would not have complied.

Further, the adjuster signed a contract with the insured which set forth that it agreed to act as the insured's representative with the insurer. The adjuster sent correspondence to the Defendant which stated, "our office has been retained to represent" the insured, and "if there is any information or documentation that the carrier needs," the adjuster would comply with any request. Stellar later testified that its responsibility was to gather documentation over which it was the custodian and provide it upon request to the insurance company. (DE 405 at p. 11) Thus, both Plaintiff's counsel and the adjuster were agents of the insured. Indeed, both Stellar's testimony and its representations to Universal confirm that providing documentation in support of the claim was within the scope of its responsibilities to the insured. This Court rejects the argument that counsel had no obligation nor ability to request the photographs from the adjuster. Plaintiff's counsel clearly had control over the ability to procure these photographs. His lawyers just had to ask.

Moreover, any argument that the law firm did not possess the photos or have the ability to produce them was never made during the pendency of discovery in this case. Perry & Neblett never took the position in response to the many discovery requests here that the insurer was required to request proof of the claim directly from the nonparty Stellar. Had Plaintiff's counsel taken that position, it could have been litigated, and the defense could have subpoenaed such proof from Stellar itself. These after-the-fact arguments – that the adjuster is not the agent of the insured, that Plaintiff has no ability to procure the items from the adjuster – aside from being wrong, are waived. In any case, Plaintiff's counsel's arguments are academic. Once the firm asked for the photos – on the eve of trial – they were promptly sent to the firm by email. The ability of the firm to obtain the photographs from the insured's adjuster is undebatable.

Moreover, Rami Boaziz was listed not only as the custodian of records for Stellar Public Adjuster, but also as the Plaintiff's expert witness on the loss. The photographs were also not turned over in response to requests for expert disclosures. Plaintiff's counsel advanced another argument – that the expert/adjuster never relied on the sign-up photos to give his expert opinion, so they need not have been disclosed. The court rejects this argument. It is belied by Rami Boaziz's own deposition testimony that he did rely on them. Defense counsel did not ignore Boaziz's testimony about the 98 (or 96) sign-up photographs, sending emails to Plaintiff's counsel chasing down this discovery in June 2021. When Plaintiff's counsel responded (Exh. K) that this was a "misunderstanding" on the part of defense counsel and the sign-up photographs were actually EMS and Universal's photographs, and that no other sign-up photos existed, defense was entitled to rely upon this (mis)representation.

Plaintiff's counsel also argued that Universal never made a clear request from the insured for the sign-up photographs in the claims process. The list of items requested by the insurer in the claims process included "a photo of the damages property." The adjuster provided "**a**" photo of the damaged property. Ergo, the adjuster complied with the request, and it was okay for the adjuster to hold back 98 photographs depicting the extensive damage to Mr. Berkowitz's property. It boggles the mind that the adjuster would read Universal's request to *not include* 98 day-of-loss photographs detailing damage to the entire property, including the upper cabinets, appliances, personal property, floor and carpet leading to the exit. It was the adjuster's obligation and responsibility to act on behalf of the insured. Why would a public adjuster *not* turn them over? Wasn't it the adjuster's obligation to obtain a quick resolution of the claim, achieving the maximum recovery of its client? This argument is rejected as well.

Plaintiff urges the court to accept that turning over a single photograph to the insured and retaining the 98 sign-up photographs means that there is no affirmative defense for failure to comply with post-loss obligations here. The 98 photos are irrelevant to the issues surrounding this claim, and thus, no harm, no foul. The court rejects that argument too. The entire claim was about whether the property sustained a minor or a major loss. Was the amount paid sufficient to comply with the insurer's obligations? Certainly, there is a jury issue on whether the insurer can be faulted for breach of contract when the insured's adjuster withheld critical information from which the insurer could have made sufficient payment, had it only seen the photographs.

Plaintiff's counsel next argues that the independent field adjuster testified at trial that he had sufficient information in his possession to decide coverage. According to Plaintiff's counsel, disclosure of the sign-up photographs is utterly irrelevant here, because the field adjuster retained by the insurer testified that he did not *need* the photographs to write his report. On this point, the photographs speak for themselves. What do they depict? They depict the extent of damage caused by this loss, a literal flood throughout the apartment, that the broken supply line sprayed the upper

and lower cabinets like an outdoor water sprinkler. These were the fact issues tried. Without the photos, Universal could have reasonably concluded that the homeowner's adjuster was inflating the loss. With the photos, the extent of the loss was undebatable.

The Kozel Factors

Plaintiff's counsel decided at trial not to disclose its receipt of the 98 sign-up photographs. Plaintiff's counsel moved into evidence an exhibit purporting to be the sign-up photographs, when counsel knew full well that the "sign-up" photographs offered into evidence as Plaintiff's Exhibit 1 were not the sign-up photographs. Plaintiff's counsel never corrected the misapprehension they caused to Universal's attorneys by stating that there were no additional sign-up photographs taken by Stellar in this case. Plaintiff's counsel carefully treaded around the issue in its direct examinations to avoid disclosing the late-discovered evidence. This Court will apply the factors in *Kozel* in order to determine whether sanctions are warranted.

Again, this Court is not considering imposing sanctions because of Plaintiff's counsel's conduct during the discovery process, although evidence of counsel's actions or failures during discovery are relevant to some of the factors.

(1) Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience

As David Neblett testified at mistrial proceedings on November 3, 2021, he and James Mahaffey made a deliberate choice once they received the photographs on November 1, 2021, not to reveal them. This was not neglect, inexperience, or negligence. This was a deliberate and willful choice, as admitted by counsel.

Perry & Neblett, PA decided not to correct the affirmative misrepresentations made regarding the subject 98 sign-up photographs to Defendant during and since the discovery phase of litigation. Notably, during discovery on this post-mistrial sanctions motion, they did not disclose (as requested by the defense in discovery on the sanctions motion) the June 2021 email exchange with defense counsel after the deposition of Rami Boaziz – instead, defense counsel found it shortly before the final hearing. Perry & Neblett, PA has not offered any credible explanation for its misrepresentations. Perry & Neblett, PA has offered no justification or explanation for its failure to disclose, lack of candor, and ultimate deliberate concealment of the 98 sign up photographs.

Plaintiff counsel argued that because they had no continuing duty under the discovery rules to disclose or turn over these photographs, therefore, there was no intentional misconduct. Disclosure was not required under any continuing duty under the discovery rules. It was required because there was a factual misapprehension on the part of the defense that Plaintiff failed to comply with post-loss duties. There was a duty to disclose the photographs because Plaintiff's

responses to discovery requests were false. There was a duty to disclose because the trial exhibit exchanged with counsel and offered by the Plaintiff in evidence was likewise misleading and false.

The court is particularly concerned about Plaintiff's counsel's decision to offer into evidence an exhibit they knew was false and misleading. Plaintiff's counsel filed an exhibit list filed with the court at the time of trial which listed "sign-up photos." The exhibit list was filed before Stellar emailed the photos to counsel. As they have now admitted, the photos exchanged for that exhibit list were not the sign-up photos. In addition to the obligation to correct the many misleading representations made during the discovery process, counsel did not correct the exhibit with the actual sign-up photos on November 1, 2021, once they received the 98 photos. Instead, they moved into evidence the wrong photos under the misleading description.

Perry & Neblett, PA's conduct cannot be explained away by neglect or inexperience. David Neblett, Esq. and James Mahaffey, Esq. were the Plaintiff's counsel with the most involvement in this case. Both Mr. Neblett and Mr. Mahaffey tried the case as first and second chair, handled the evidentiary hearings, and engaged in all motion practice and discovery efforts, pre and post-trial. Perry & Neblett, PA have tried approximately ten cases before the instant Court. Further, Mr. Neblett is a Florida Bar board certified attorney practicing for over 22 years. Mr. Neblett's website biography states that he "spends a considerable amount of time at Court and has represented clients in well over 1,000 hearings and 1,000 depositions. He prides himself as one of the few attorneys that actively tries cases. He has tried over 100 jury and bench trials and evidentiary hearings in both State and Federal Courts." Mr. Mahaffey was admitted to the Florida Bar in September 2013, and his website states that he "has acted as first chair or second chair in ten jury Trials with Perry & Neblett, winning verdicts for his clients in each Trial that went to the jury." Neither counsel is inexperienced.

This Court concludes that these actions were willful, deliberate, or contumacious, rather than acts of neglect or inexperience.

In addition to meeting one of the *Kozel* factors, Plaintiff's counsel's decision to conceal the existence of evidence, move the misleading exhibit into evidence and their failure to correct the exhibit violates both Rules 4-3.1 and 4-3.3 of the Florida Rules of Professional Conduct. Rule 4–3.1 specifies that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous ...." Rule 4–3.3 requires candor toward the tribunal and provides:

(a) False Evidence; Duty to Disclose. A layer shall not knowingly;

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

....

(4) offer evidence that the lawyer knows to be false....

Here, that is exactly what counsel did by secreting the 98 documents, by failing to correct the misapprehension created by the exhibit list, which was filed by counsel with the court, and by going forward and admitting the exhibit containing the wrong photographs. It is particularly disturbing as this constitutes lack of candor to the court in not correcting what they knew was a false exhibit list.

(2) Whether the attorney has been previously sanctioned

Perry & Neblett has not been previously sanctioned. However, this Court has already granted several of Defendant's motions to compel, and entered orders warning Plaintiff's counsel and/or Plaintiff's expert that continued misconduct would result in sanctions. Additionally, This Court has given Plaintiff's counsel several warnings regarding their conduct, warned about the consequence of future failures to comply with court orders, and reserved on a motion for sanctions (DE 171).

Perry & Neblett, PA has also been previously warned by the Third District Court of Appeal about bad faith litigation tactics employed in hopes of improving a case. In *Perez v. Safe Point,* 299 So. 3d 1087 (Fla. 3d DCA 2019), the Third District Court of Appeal highlighted the following in their written opinion:

> The trial court's reaction, and ours, to such hyperbole is a teaching point and a caution that a client's personal knowledge, however imperfect, is not to be gilded, excessively bolstered, or embellished by her counsel in the hope of improving a case.

While not sanctioned, they have been warned against sharp litigation tactics by the appellate court.

(3) Whether the client was personally involved in the act of disobedience

Defense counsel argues that Mr. Berkowitz personally participated in the misconduct in this trial. Plaintiff executed interrogatories under penalty of perjury and in his sworn responses, Plaintiff did not disclose the 98 sign-up photographs. But these interrogatories do not convince the court that

Mr. Berkowitz was aware that his lawyers never obtained the sign-up photos from the adjuster and that they would not be admitted in his trial. Neither does this court conclude that Plaintiff participated in the decision to conceal the existence of these photos at trial.

This Court had the opportunity to listen to Mr. Berkowitz testify and accepts his testimony that he was aware that photographs were taken by the adjuster on the day that the loss occurred, but he trusted his adjuster and lawyer to take care of preparing the case for trial. The court does not find that Plaintiff participated in his counsel's decision to secrete these photos on November 1-3, 2021 at trial.

This Court concludes that the client was not personally involved in the act of disobedience.

(4) Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion

The misconduct exhibited by Plaintiff and his counsel caused substantial undue burden and expense to Defendant. The Court reviewed the 98 sign up photographs at the time of Defendant's motion for mistrial, and again thereafter. The Court finds that the 98 sign up photographs are among the most relevant forms of proof of Plaintiff's claim and alleged damages in this case, and the failure to produce the 98 sign up photographs was highly prejudicial to the Defendant's defense of the litigation.

Universal has expended fees and costs related to the mistrial caused by the misconduct including but not limited to a three-day trial, mediations, additional discovery and extensive motion practice, countless motion calendar and special set hearings, and over three days of evidentiary hearings.

Having completed almost three full trial days, Plaintiff is now privy to Defendant's entire trial strategy for this case.

Additionally, the failure to disclose these photographs has caused prejudice to Defendant's litigation strategy including strategy at mediation, settlement analyses and evaluating and utilizing

any applicable fee shifting mechanism, like the proposal for settlement served by Defendant to Plaintiff in this case. Whether the photographs are included or stricken from a subsequent trial, this prejudice to the Defendant remains.

(5) Whether the attorney offered reasonable justification for noncompliance

Perry & Neblett, PA and Plaintiff have offered no reasonable justification for their intentional misconduct in this case. Perry & Neblett, PA, and its lawyers David Neblett and James Mahaffey, have not demonstrated any reasonable excuse or good cause for its misconduct at any of the three evidentiary hearings. Rather, Perry & Neblett, PA, after unsuccessfully advancing the arguments detailed above blaming the defense or refuting their duty to disclose the photographs, eventually acknowledged (at the final hearing) that "things could have been done differently." An apology, even if well-intentioned and appreciated by the recipients, does not constitute justification for the noncompliance.

This Court finds no reasonable justification for the noncompliance.

(6) Whether the delay created significant problems of judicial administration

The misconduct and bad faith tactics employed by Plaintiff and his counsel have caused substantial problems with judicial administration in the form of undue burden and expense to Defendant, the Court and the public, not to mention inordinate delay. This trial occurred in 2021. It took a year and a half to complete the evidentiary hearings on the motions for sanctions. Judicial administration has been thwarted in this case. Now the case has been assigned to a third judge for retrial.

The delay created by the mistrial because of the misconduct has created significant problems of judicial administration.

Sanctions are Merited Here

Based on the foregoing, this Court finds that Perry & Neblett, PA engaged in trial misconduct and bad faith litigation tactics that warrant the imposition of sanctions pursuant to the *Kozel* factors and this Court's inherent authority to impose sanctions.

What sanctions are warranted? The Defendant argues that only dismissal can cure the harm to it. The problem with accepting that argument is the court's finding that Mr. Berkowitz really did suffer a large insurance loss and did not personally participate in the misconduct here. A recent case is instructive. In *Rhoades v. Rodriguez*, 359 So. 3d 359 (Fla. 5th DCA. 2023), *reh'g denied* (Apr. 11, 2023), citing *Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002), the court reversed a trial court's decision to strike pleadings where counsel made intentionally deceptive and misleading statements and used improper discovery methods to obtain records of the Plaintiff. The court explained that dismissal was an inappropriate sanction where the party did not participate in the misconduct and the opponent was not prejudiced.

The court recognizes that here, the defense suffered extreme prejudice in the late disclosure of the 98 sign-up photographs. But because the Plaintiff was not personally involved in the decision not to disclose them, the court finds dismissal too harsh a sanction because it punishes the party for the actions of his counsel.

Accordingly, Defendant's Motion for Sanctions (DE 217 and related DE 398) is **GRANTED** and an award of fees and costs is justified.

In view of the prejudice to the Defendant, the court orders the firm of Perry & Neblett, P.A. to pay the Defendant as sanctions: the reasonable fees and costs for the Defendant's counsel to prepare and defend this case at trial in 2021 as well as fees and costs for filing and prosecuting this motion and participating in post-mistrial mediation. The court further finds that should the Plaintiff prevail at retrial, Perry & Neblett, P.A. are not entitled to recover as prevailing party fees their fees and costs expended in pretrial preparation and trial in 2021 nor for their fees and costs expended during these sanctions proceedings. No part of these sanctions shall be paid by the Plaintiff himself nor set off from any future recovery in favor of the Plaintiff.

The court further orders that additional mediation take place, with the cost of mediation and fees for defense counsel to be borne by Perry & Neblett. While settlement of the Plaintiff's claim will remain confidential, no settlement of outstanding amounts for this sanctions order shall be finalized without approval of this Court.

Further, the successor judge may wish to consider, at the Defendant's request, remedies at retrial to ameliorate the prejudice to Universal, including but not limited to: (1) exclusion of the 98 photographs, (2) amendment of the Answer and affirmative defenses based upon the late disclosure, (3) allowing the defendant to admit at trial the Plaintiff's counsel's and adjuster's late disclosure of the photos at retrial if relevant to the issues as framed by the pleadings, or other

remedy approved by successor trial judge.

This Court reserves ruling on the reasonable amount of attorney's fees and costs.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 12th day of June, 2023.

2016-014290-CA-01 06-12-2023 12:02 AM
Hon. Lisa Walsh

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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