

IN THE COUNTY COURT FOR  
POLK COUNTY, FLORIDA

CIVIL DIVISION  
CASE NO: 53-2012SC-00001444-  
0000-LK

RAYMOND E. GUNDER, JR.,  
on behalf of James King,  
Plaintiff,

v.  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendants.

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TRANSCRIPT OF PROCEEDINGS  
Motion for Final Summary Judgment  
(Volume 1 of 1)

DATE TAKEN: Thursday, October 31, 2013

TIME: 10:07 a.m. - 10:51 a.m.

PLACE: Polk County Government Center  
930 East Parker Street  
Lakeland, Florida 33801

BEFORE: Honorable John Kirkland

Stenographically Reported By:  
Allison Howell, Certified Court Reporter  
Notary Public, State of Florida

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:  
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ON BEHALF OF THE DEFENDANTS:

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1 October 31, 2013 10:07 a.m.  
2 P R O C E E D I N G S  
3 THE COURT: We're here on Gunder vs.  
4 State Farm, 2012SC-1444. And I believe it is  
5 State Farm's motion for summary -- for final  
6 summary judgment.  
7 This is the issue with OEM parts versus  
8 LKQ parts, like kind and quality, which could  
9 possibly be recycled parts.  
10 And State Farm filed a motion and a  
11 supporting affidavit. And on 10/29, there  
12 was responding sworn testimony filed by the  
13 Plaintiff. And that's what was handled over  
14 the attached -- all right.  
15 MR. MOORE: Your Honor, may it please  
16 the Court. My name is Josh Moore with  
17 Carlton Fields on behalf of State Farm.  
18 I have a paper copy of the motion if you  
19 would like that if it helps.  
20 THE COURT: I've got it but I already  
21 read it yesterday.  
22 MR. MOORE: The motion itself, Your  
23 Honor?  
24 THE COURT: No, I've got the motion. I  
25 don't have a paper copy but I read your

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1 motion.  
2 I'm guessing the key is the construction  
3 of the contract?  
4 MR. MOORE: That's correct.  
5 THE COURT: The reading of it, whether  
6 or not it is so clear as to grant summary  
7 judgment or whether it is not so clear under  
8 the circumstances?  
9 MR. MOORE: Correct, the dispositive  
10 legal question before the Court is does the  
11 contract require State Farm to pay for new  
12 OEM parts.  
13 THE COURT: Well, let's take a look at  
14 this, Madam Clerk.  
15 MR. MOORE: It's here, Your Honor, if  
16 you'd like. It's on page 23 of the policy  
17 itself.  
18 And just so we're clear, you went  
19 through it a little bit but for the record so  
20 that we're all going to be talking about the  
21 same thing, OEM means original equipment  
22 manufactured part. Non-OEM means non -- you  
23 go to AutoZone you can buy Ford Mopar or you  
24 can buy FRAM. FRAM is non-OEM; Ford Mopar  
25 obviously would be OEM.

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1 LKQ parts, as Your Honor reflected, are  
2 recycled parts. There are LKQ dealers all  
3 over the state. You go to a LKQ dealer, you  
4 find a vehicle of the same model or within a  
5 sufficient year range that has the same part,  
6 take that part and put it on the other car.  
7 THE COURT: Except that would be a used  
8 part.  
9 MR. MOORE: It's a used part. It's a  
10 used recycled part. That's correct.  
11 THE COURT: And the issue here is that  
12 we are not talking about body parts that are  
13 FRAM or otherwise not subject to continuous  
14 use.  
15 But I think the issue here is we're  
16 talking about suspension parts, which  
17 basically would be subject to all kinds of  
18 stresses once the car is put back on the  
19 road.  
20 That seemingly was the problem raised by  
21 the Plaintiff; is that correct?  
22 MR. MOORE: Sure.  
23 MR. GEOHAGAN: Yes, sir, generally  
24 speaking.  
25 THE COURT: I just wanted to make sure I

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1 got that. I didn't mean to invite them. I  
2 just wanted to confirm that's what I was  
3 looking at.  
4 So basically, what we're looking at is  
5 the Section 3, page 8, looks like -- is it  
6 8107?  
7 MR. MOORE: I believe that's a form  
8 number on the State Farm contract so it's  
9 page 23.  
10 THE COURT: Yeah, page 23 and it's under  
11 their limit of liability comprehension and  
12 collision coverage.  
13 Is it Sub A or is it Sub 11 or is it Sub  
14 --  
15 MR. MOORE: Mine is actually cut off  
16 too. I don't think it's numbered actually  
17 there.  
18 It says the cost of repair or  
19 replacement in that bottom left column. And  
20 then Option 3 is an estimate based upon  
21 prevailing credit price.  
22 THE COURT: We will include in the  
23 estimate parts sufficient to restore the  
24 vehicle to its pre-loss condition.  
25 You agree with us that such parts may

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1 include but it doesn't say must.  
2 MR. MOORE: That's correct.  
3 THE COURT: May include either parts  
4 furnished by the vehicle's manufacturer or  
5 parts from other sources, including  
6 non-original equipment manufacturers.  
7 MR. MOORE: That's correct.  
8 THE COURT: Okay.  
9 MR. MOORE: Your Honor --  
10 THE COURT: So I'm guessing the  
11 Plaintiff is stating that State Farm by this  
12 you're talking about either original  
13 equipment parts or parts from non-original  
14 equipment?  
15 In other words, are you talking about  
16 parts made by an outside source but designed  
17 for this vehicle because I'm looking here and  
18 I don't see any statement that says it could  
19 be a used or recycled part?  
20 MR. MOORE: Well, it says other sources.  
21 And other sources may include non-original  
22 equipment.  
23 THE COURT: Manufacturers, not  
24 suppliers.  
25 MR. MOORE: It is actually an OEM part.

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1 It is actually the same manufacturer. It's  
2 just a recycled LKQ part.  
3 Here's the issue --  
4 THE COURT: But I'm guessing the term  
5 "recycled" is never in here.  
6 MR. MOORE: Other sources would  
7 encompass recycled, Your Honor. That's our  
8 position.  
9 THE COURT: That's what you're saying?  
10 MR. MOORE: Correct.  
11 THE COURT: Okay. Go ahead.  
12 MR. MOORE: And the dispute is this.  
13 When the repair arrived at Mr. Gunder's shop,  
14 he prepared an estimate saying new OEM  
15 suspension parts. We prepared an estimate  
16 saying, no, LKQ suspension parts. Here's a  
17 price quote.  
18 Mr. Gunder repaired the vehicle with a  
19 new suspension part. And then said, State  
20 Farm, you have to pay me for the new part.  
21 THE COURT: But State Farm said -- now  
22 did State Farm tell him do not make the  
23 repairs we're not going to pay for it?  
24 MR. MOORE: I don't believe so. I mean  
25 the estimate is this is what we'll pay for.

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1 THE COURT: But you didn't say don't do  
2 the repairs, right?

3 MR. MOORE: I don't know the answer to  
4 that.

5 THE COURT: This is the same thing that  
6 comes up with the glass cases that I've dealt  
7 with before.

8 And there's nothing that says here -- is  
9 there anything that says in the policy that  
10 if State Farm directs them not to make the  
11 payment or if State Farm does not direct them  
12 not to make the payment they're responsible  
13 for it, the policyholder?

14 MR. MOORE: There is a provision that  
15 says the insured has to work with State Farm  
16 to cooperate for the purposes of the repair.  
17 I don't remember where that is.

18 Do you know that provision?

19 But here's what -- let's get to the meat  
20 of the issue because this is what we're going  
21 to talk about today.

22 THE COURT: That's what I want to do. I  
23 enjoy contract stuff like this. It's been a  
24 while since I've done it.

25 MR. MOORE: Mr. Geohagan is going to

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1 have no shortage of things to say I'm sure.  
2 But what you're not going to hear --

3 THE COURT: Primarily, he's going to  
4 basically say that apparently according to  
5 the manufacturer they don't recommend that  
6 you -- in suspension areas that you use pre  
7 -- parts that are used because you have no  
8 way, short of probably x-raying and magna  
9 fluxing the part, to show some type of damage  
10 or stress or fractures that aren't even  
11 visible to the naked eye that might only be  
12 available, as I said, through x-raying the  
13 part or through what is called -- I think  
14 it's called magna fluxing or something along  
15 those lines, which detects minute type of  
16 flaws.

17 Correct me if I'm wrong, Mr. Gunder, but  
18 I think that's the right term. It's called  
19 magna fluxing because I used to dabble in  
20 souping up cars so I kind of know about that  
21 but go ahead, Counsel.

22 MR. MOORE: Fair enough. But you're not  
23 going to hear any dispute of fact in this  
24 case that there was ever a LKQ part even  
25 considered by Mr. Gunder.

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1 He just said I'm going to use a new  
2 suspension part, and then he put a new  
3 suspension part on there. The dispositive  
4 question is are we obligated to pay for that  
5 new part.

6 And what you're not going to hear from  
7 Plaintiff and what none of the evidence  
8 submitted in opposition says is there's any  
9 dispute of material fact. It's undisputed  
10 what happened. They said new. We said used.

11 THE COURT: I agree with you, Counsel.  
12 And you're entirely correct that I don't  
13 think that there is a dispute on that from  
14 the Plaintiff; is that correct?

15 MR. GEOHAGAN: No dispute. Of course  
16 our position is you can't bring it back to  
17 pre-loss condition. They completely missed  
18 the provision.

19 Conspicuously, they highlight in their  
20 memo that you agree with us that such parts  
21 may --

22 THE COURT: Well, I think they're saying  
23 pre-loss condition in that it was a used and  
24 fatigued part before the loss since it was a  
25 used vehicle. And so I'm guessing they only

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1 agreed to replace it with a used or fatigued  
2 part. I'm guessing that's the argument.

3 MR. GEOHAGAN: And in Mr. Gunder's  
4 affidavit, Your Honor, he testifies that upon  
5 assessing the -- and you'll see this in an  
6 affidavit. Upon assessing the suspension, he  
7 came to the conclusion as part of that that  
8 the visible -- now, you'll have visible  
9 damage to the suspension.

10 THE COURT: Of course, but there is also  
11 invisible damage.

12 MR. GEOHAGAN: As a result from the  
13 collision.

14 The problem with suspension as opposed  
15 to a bumper -- and again, this goes -- they  
16 keep saying that we're saying that they're  
17 required to always use new OEM parts. We're  
18 not saying that.

19 We're saying, yeah, in some instances  
20 you can use other parts --

21 THE COURT: A bumper is a bumper is a  
22 bumper.

23 MR. GEOHAGAN: -- but not suspension.  
24 And in the affidavit, they don't even have an  
25 expert. They have a claim rep saying

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1 something. They don't even address the first  
2 -- we'll include in the estimate parts  
3 sufficient to restore the vehicle to its  
4 pre-loss condition.  
5 THE COURT: Time out. You're going  
6 above my request.  
7 There is no issue that in this case  
8 Gunder used OEM parts for the suspension?  
9 MR. GEOHAGAN: Oh, no issue, new OEM  
10 parts.  
11 THE COURT: I just want to make sure,  
12 Counsel. You made that supposition and I  
13 wanted to just confirm that is the case. I'm  
14 not surprised but I just wanted to make sure.  
15 MR. MOORE: Let's be clear about  
16 pre-loss condition just as a -- before I even  
17 get to the argument.  
18 If you have a 40,000 mile vehicle and  
19 you put a brand-new OEM suspension, you're by  
20 definition making it better than its pre-loss  
21 condition because now it has a brand-new  
22 suspension.  
23 THE COURT: That's what I suspected you  
24 were going to be arguing, which is why I  
25 brought that up.

14

1 MR. MOORE: But I think it's irrelevant  
2 and here's why it's irrelevant. Here's why  
3 we don't get to pre-loss condition because  
4 the contract language says we will include in  
5 the estimate parts sufficient to -- there's  
6 two reasons under this language.  
7 We will include in the estimate parts  
8 sufficient to restore the vehicle to pre-loss  
9 condition. You -- in bold in the contract --  
10 you agree with us that such parts may include  
11 either parts furnished by the vehicle's  
12 manufacturer or parts from other sources,  
13 including non-equipment manufacturers.  
14 If the contract gives us the choice,  
15 this is reason number one we don't even get  
16 to pre-loss condition in this case. If the  
17 contract gives the insured the choice to use  
18 new parts, non-OEM parts, or parts from other  
19 sources, exercise of that option by itself by  
20 definition cannot be a failure to return it  
21 to pre-loss condition because you the insured  
22 have agreed we have the option.  
23 So you cannot allege a breach of  
24 contract just by the insured's exercise of  
25 that option under the contract language.

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1 That can't be a breach. That's reason number  
2 one.  
3 Reason number two is this and this is  
4 why there's no dispute of fact. Had we sent  
5 a LKQ part to Mr. Gunder and he looked at it  
6 and said this LKQ part is worn, this LKQ part  
7 is broken, the suspension won't work, this  
8 suspension part won't return it to pre-loss  
9 condition, then we might have a question of  
10 fact. Well, was it going to return the  
11 vehicle to pre-loss condition. That never  
12 happened.  
13 The repair shop's position was I'm  
14 putting in a new. I refuse to use non-OEM.  
15 The affidavits in opposition say we will  
16 never use new OEM or we will never use  
17 recycled LKQ parts.  
18 THE COURT: Not for suspension.  
19 MR. MOORE: That's fine. That may be  
20 their opinion but it doesn't change the  
21 contractual obligation of State Farm, which  
22 is do we have an obligation to pay for the  
23 new suspension part.  
24 Their argument is not, State Farm, the  
25 LKQ part you sent us will not return the

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1 vehicle to pre-loss condition. Theirs is I,  
2 as a repair shop owner, will never use a used  
3 suspension.  
4 And again, they can do that but the  
5 difference is collected from the insured  
6 because this contract doesn't obligate us to  
7 pay for the new suspension part. That's the  
8 issue.  
9 They came to us and said you have to pay  
10 for a new suspension part. So one way or  
11 another the case ends today on the ruling on  
12 the dispositive question under these  
13 circumstances on these undisputed facts.  
14 Is State Farm obligated to pay for the  
15 new suspension part and the answer under that  
16 contract language we would submit is no.  
17 They've agreed there can be parts from other  
18 sources.  
19 THE COURT: Okay.  
20 MR. GEOHAGAN: That's absurd.  
21 THE COURT: Obviously, you disagree.  
22 MR. GEOHAGAN: I'll bring case law --  
23 THE COURT: Counsel, the term "absurd"  
24 is probably a little harsh.  
25 MR. GEOHAGAN: And there's case law with

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1 regard to it. I'm going to get to it. So  
2 I'm going to link the case law in here. That  
3 is an absurd interpretation. The courts say  
4 you don't do that.  
5 THE COURT: First, Mr. Geohagan, let me  
6 ask you a question.  
7 Did State Farm ever instruct Mr. Gunder  
8 not to make the repairs once he corresponded  
9 back and said this is what I intend to use?  
10 Did they ever say don't do that, we're  
11 not going to pay for that?  
12 MR. GEOHAGAN: There is no evidence of  
13 that.  
14 THE COURT: So he was never put on  
15 notice that they said we're not paying for  
16 original --  
17 MR. GEOHAGAN: Well, no, they -- I mean  
18 I don't know if they did or they didn't. But  
19 that's neither here nor there because we're  
20 in the shoes of the insured.  
21 THE COURT: I understand that. But once  
22 again, if we're talking about the shoes of  
23 the insured I just want to -- at any time,  
24 did they basically say, insured, you're on  
25 your own; if Gunder makes these repairs and

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1 uses OEM, you're going to be responsible for  
2 the balance?  
3 Did they ever say that?  
4 MR. GEOHAGAN: Your Honor, they do that  
5 all the time. I don't know if they did it in  
6 this case but they may very well have.  
7 THE COURT: You don't have any evidence  
8 of that?  
9 MR. GEOHAGAN: I don't have any evidence  
10 either way that I'm aware of. I haven't  
11 looked at it.  
12 THE COURT: And the respondent has not  
13 alleged that they gave them that warning and  
14 told them you're on your own?  
15 MR. GEOHAGAN: Not that I'm aware.  
16 THE COURT: Very good. Thank you, sir.  
17 That's the first part. But it's his turn  
18 because I asked you about that previously.  
19 MR. GEOHAGAN: This is often what  
20 they'll do and this is how they short pay and  
21 don't do their obligation.  
22 THE COURT: We know that. That's why  
23 we're here. But I'm just stating -- because  
24 to me, the contract language says you agree  
25 with us that such parts may. It doesn't say

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1 that such parts must be one or that you must  
2 attempt to do this.  
3 They basically acknowledge that in some  
4 repairs new parts have to be used, in some  
5 repairs used parts can be used or else that  
6 provision wouldn't be in there.  
7 But they do not say that we can instruct  
8 them not to use that and, like I said, warn  
9 the policyholder by the way any part above  
10 what we're going to agree to pay you're on  
11 your own or anything like that.  
12 MR. GEOHAGAN: And let me first say with  
13 regard to that, Your Honor, you're right and  
14 here's the --  
15 THE COURT: Well, I'm not always right.  
16 MR. GEOHAGAN: The fact of the matter is  
17 they completely again ignore the first part.  
18 We have the affidavits. They have  
19 nothing to rebut this by the way. The  
20 affidavits -- and we'll get into that a  
21 little bit more in a second.  
22 THE COURT: You've got State Farm --  
23 MR. GEOHAGAN: They say you cannot bring  
24 a car back to pre-loss condition using used  
25 suspension. And it is done by two people:

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1 Mr. Gunder, as well as an independent expert  
2 that say that's not possible.  
3 Now, in the --  
4 THE COURT: Well, not safely is what  
5 you're saying?  
6 MR. GEOHAGAN: Well, yeah, exactly, for  
7 pre-loss purposes -- for pre-loss condition  
8 purposes.  
9 And if you look at the affidavit of  
10 Mr. Burns (phonetic), which you will see what  
11 he says there. Now, yeah, you can -- there's  
12 some instances we acknowledge you can.  
13 THE COURT: Like I said, a bumper. A  
14 bumper is a bumper is a bumper.  
15 MR. GEOHAGAN: Exactly, you can bring it  
16 back to pre-loss condition. What he says in  
17 paragraph 4 -- well, let me go to paragraph  
18 3.  
19 It is my understanding that at least one  
20 of the issues presented in the above  
21 captioned case is whether, quote/unquote,  
22 LKQ/used suspension is sufficient and may be  
23 used in the repair of a vehicle, and it goes  
24 on, to restore that vehicle to its pre-loss  
25 condition.

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1 Also, please note that the name LKQ or  
2 like kind and quality does not necessarily  
3 mean that the part is in fact the like kind  
4 and quality of the original equipment  
5 manufacturer for that part. In fact, many  
6 times such parts are not like kind and  
7 quality.  
8 The term, however, is one that is  
9 prevalently used and perpetuated in the auto  
10 body repair industry by the vendors of LKQ,  
11 quote/unquote, parts and some of the  
12 automobile insurance companies.  
13 And you'll see in the memo that they  
14 just say like kind and quality. They have no  
15 evidence of that other than the vendor called  
16 himself LKQ.  
17 Then it goes on. Most importantly, with  
18 regard to what I'm talking about here,  
19 paragraph 4, the answer to that question  
20 slash issue, based upon my extensive  
21 experience -- and, Your Honor, if you look at  
22 his CV you'll see how extensive it is --  
23 training and education as set forth above is  
24 an emphatic no.  
25 Although, some other LKQ used parts may

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1 be used and may be sufficient as replacement  
2 parts -- now, key in on that. Yes, there are  
3 some instances as he acknowledges, this  
4 expert, where there will be used parts that  
5 can be used and be sufficient, which is the  
6 language in their contract, sufficient to  
7 restore the vehicle to its pre-loss condition  
8 under certain circumstance that LKQ used --  
9 I'm sorry.  
10 Although some other LKQ used parts may  
11 be used and may be sufficient as replacement  
12 parts to restore a vehicle to its pre-loss  
13 condition under certain circumstances, a LKQ  
14 used suspension is not sufficient to restore  
15 a vehicle to its pre-loss condition.  
16 So if you have an expert, the only one  
17 -- actually, the only two on our side, they  
18 don't have one -- that is saying when it  
19 comes to a suspension you cannot have a used  
20 suspension and bring it back to pre-loss  
21 condition although you can have other parts,  
22 then they're violating the contract because  
23 their contract says we will include the  
24 estimate parts sufficient to restore the  
25 vehicle to its pre-loss condition. And yes,

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1 you agree with us that such parts may include  
2 and that's fine.  
3 Your Honor, let's extrapolate their  
4 argument out to its extreme logical  
5 conclusion. Basically, what they're saying  
6 is any time they can use from any other  
7 source. So that means they could even --  
8 let's say a suspension is visibly diminished.  
9 There is nothing saying they can't.  
10 So his argument, if you take it to its  
11 extreme logical conclusion, is they can just  
12 bring in whatever they want, a crumpled hood,  
13 whatever it is. And there might be laughter  
14 --  
15 THE COURT: I don't think crumpled would  
16 be pre-loss unless the vehicle came in with a  
17 crumpled hood.  
18 MR. GEOHAGAN: That's the point, Your  
19 Honor, because he's saying the pre-loss is of  
20 no matter. He's saying that you agree that  
21 we can just use any source.  
22 And what we're saying, and they have no  
23 evidence to rebut it, is with a used  
24 suspension you just can't do it. But his  
25 argument --

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1 THE COURT: You can do it. You just  
2 don't -- it's just not safe is what you're  
3 saying?  
4 MR. GEOHAGAN: You can do it because  
5 there is no -- and if you'll go again to  
6 Mr. Burns' affidavit with regard to that, he  
7 goes on, paragraph 5, to that extent only a  
8 new suspension is sufficient to replace the  
9 suspension that has been materially damaged  
10 and to which its integrity has been  
11 compromised in order to restore a vehicle to  
12 its pre-loss condition.  
13 Paragraph 6, this is so, partly and  
14 first, because the suspension of a vehicle is  
15 so integral to the safety of the vehicle.  
16 And used suspension does not possess the  
17 inherent assurance of not being materially  
18 defective and safe that a new suspension does  
19 possess.  
20 Used suspension means that it was  
21 previously on another used vehicle and so,  
22 therefore, is taken from that other vehicle  
23 for a reason. Those reasons most often, if  
24 not all the time, are because the other  
25 vehicle had been involved in a collision, the

<p>25</p> <p>1 details of which we unfortunately cannot have</p> <p>2 any useful knowledge of.</p> <p>3 Many times they are referred to as</p> <p>4 junkyard parts in the auto body repair</p> <p>5 industry. Therefore, it is very possible, if</p> <p>6 not very likely, that the used suspension on</p> <p>7 the other vehicle is damaged itself. And the</p> <p>8 safety of the vehicle being repaired and the</p> <p>9 safety of the owner and his or her family is</p> <p>10 dangerously compromised.</p> <p>11 At the very minimum, it cannot be</p> <p>12 represented that a used suspension is</p> <p>13 sufficient to restore a vehicle to its</p> <p>14 pre-loss condition.</p> <p>15 And then in paragraph 7 he goes on to</p> <p>16 say -- Your Honor, it would be wholly</p> <p>17 different because Mr. Moore continues to say,</p> <p>18 well, he didn't even look at it.</p> <p>19 Well, paragraph 7 explains from this</p> <p>20 expert, which they don't have one, why you</p> <p>21 can't inspect it because even if you were to</p> <p>22 disassemble it, which would be the best to</p> <p>23 determine any internal damage, the</p> <p>24 disassembly itself would further compromise</p> <p>25 the integrity and the safety of that</p>	<p>27</p> <p>1 policy must be considered in its entirety.</p> <p>2 Individual policy provision should not be</p> <p>3 read in isolation.</p> <p>4 And again, Your Honor, they're reading</p> <p>5 that second sentence in isolation and without</p> <p>6 reference to the first sentence. That's</p> <p>7 contrary to the law. It's not appropriate</p> <p>8 contractual interpretation.</p> <p>9 The next one -- actually, the next one,</p> <p>10 Your Honor, is General Star vs. Florida</p> <p>11 Village Inn, 874 So.2d 26, Second DCA 2004</p> <p>12 And again, this is one cited by the</p> <p>13 Defendants.</p> <p>14 And if you go to the third practical</p> <p>15 page and technically page 29 -- well, it will</p> <p>16 be page 29 and 30 but page 29, third</p> <p>17 practical page under the reference in the</p> <p>18 left-hand column, the law going down to the</p> <p>19 second full paragraph.</p> <p>20 It says general principals of Florida</p> <p>21 insurance law guide our resolution of this</p> <p>22 appeal. Like other contracts, contracts of</p> <p>23 insurance should receive a construction that</p> <p>24 is reasonable, practical, sensible and just.</p> <p>25 Then it goes on. Terms used in a policy</p>
<p>26</p> <p>1 suspension.</p> <p>2 So if you look at -- Your Honor, I'm</p> <p>3 going to hand you just three cases here, one</p> <p>4 of which I think they already have --</p> <p>5 actually, two of which I think they already</p> <p>6 have, my respective colleagues here or</p> <p>7 counterparts I should say.</p> <p>8 May I approach, Your Honor?</p> <p>9 THE COURT: Sure.</p> <p>10 MR. GEOHAGAN: Here is the third one.</p> <p>11 Now, the first two, Your Honor, are ones they</p> <p>12 even cite in their own memorandum of law.</p> <p>13 THE COURT: It's great you all agree on</p> <p>14 one thing.</p> <p>15 MR. GEOHAGAN: The usefulness of the</p> <p>16 case law.</p> <p>17 Your Honor, the first one is South</p> <p>18 Carolina Insurance Company vs. Heuer, 402</p> <p>19 So.2d 480. Practically speaking, if you turn</p> <p>20 to the second page, the left-hand column, the</p> <p>21 last full paragraph on the second page,</p> <p>22 left-hand column and that's technically page</p> <p>23 481.</p> <p>24 In order to discern the true intent of</p> <p>25 the parties to an insurance contract, the</p>	<p>28</p> <p>1 should be read in the light of the skill and</p> <p>2 experience of ordinary people. Then it goes</p> <p>3 on and here is where the absurd comes in.</p> <p>4 Insurance policies will not be construed to</p> <p>5 reach an absurd result.</p> <p>6 And then it goes on at the top</p> <p>7 right-hand column. In construing an</p> <p>8 insurance policy, courts should read the</p> <p>9 policy as a whole endeavoring to give every</p> <p>10 provision its full meaning and operative</p> <p>11 effect, Your Honor.</p> <p>12 And with regard to the absurdity, again,</p> <p>13 if any of us engage right now in a logical</p> <p>14 analysis of their argument what Mr. Moore is</p> <p>15 saying right now to this Court is somehow or</p> <p>16 another we can use whatever we want to and</p> <p>17 that equals pre-loss condition or restoring</p> <p>18 the vehicle to pre-loss condition. He has no</p> <p>19 restrictions.</p> <p>20 And can you laugh all you want, not you</p> <p>21 but one can laugh all they want with regard</p> <p>22 to what I'm saying here. But his argument</p> <p>23 is, as a matter of course when you take it to</p> <p>24 its extreme logical conclusion, that they can</p> <p>25 use a crumpled bumper, a crumpled hood,</p>

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1 anything, because in the agreement --  
2 THE COURT: Well, if the hood was  
3 crumpled to start with, as long as it was  
4 crumpled reasonably the same as it was  
5 crumpled before?  
6 MR. MOORE: Of course. But assuming --  
7 let's assume it wasn't, which most of the  
8 time they're not. He's saying, whether he's  
9 going to say it explicitly or not, that's his  
10 argument, that, hey, we can use -- to bring  
11 anything back to pre-loss condition, we can  
12 use anything we want as long as it's an  
13 outside source.  
14 You can't tell us -- and there is  
15 nothing in the policy that has a restriction  
16 if you interpret the contract his way.  
17 The problem is he's interpreting it the  
18 wrong way because the caveat with that first  
19 sentence that says we agree to bring your  
20 vehicle back to -- we agree to use sufficient  
21 parts to bring your vehicle back to pre-loss  
22 condition. And yes, you may use it but  
23 that's not going to be in a situation with a  
24 suspension.  
25 The third case, Your Honor, is Weldon v.

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1 All American Life Insurance Company, 605  
2 So.2d 911. And I --  
3 THE COURT: So now you're getting back  
4 to general contract. It's been a while.  
5 MR. GEOHAGAN: That's a 1992 case. It's  
6 fun stuff, right, Your Honor?  
7 The fourth practical page, technically  
8 page 915, and you'll read there in the --  
9 it's not the first full paragraph but the  
10 first paragraph nonetheless. And it's the  
11 last sentence of that first paragraph that's  
12 not full on the second-hand column.  
13 Although an ambiguity -- that's not what  
14 I meant to read. Go down to the first full  
15 paragraph actually and it reads that since an  
16 insurer as draftsman of the form policy will  
17 not be allowed to use obscure terms to defeat  
18 the purpose for which a policy is purchased,  
19 the terms must be liberally construed in an  
20 insurance contract, Your Honor, in favor of  
21 coverage so that where two interpretations  
22 are available the one allowing greater  
23 indemnity will prevail.  
24 And then it goes on. Furthermore, in  
25 construing contracts of insurance we must

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1 apply construction that is practical and  
2 reasonable as well as just.  
3 Now, Your Honor, if you look to further  
4 bolster how absurd this position is on the  
5 part of State Farm, if you look at  
6 Mr. Gunder's affidavit and you look at -- I  
7 believe it's the last paragraph and the last  
8 paragraph, Your Honor --  
9 THE COURT: That you filed along with  
10 this?  
11 MR. GEOHAGAN: Yes, sir. Mr. Gunder has  
12 an affidavit in there and it's paragraph 8  
13 actually.  
14 THE COURT: Got it.  
15 MR. GEOHAGAN: Moreover, over all those  
16 years and currently I interact with  
17 automobile insurance companies and their  
18 representatives on a frequent if not daily  
19 basis.  
20 I have personal knowledge of what each  
21 automobile insurance company includes on  
22 their respective estimates, which is what  
23 they're talking about here, and/or pays with  
24 regard to Gunder's Auto Centers.  
25 And actually, their estimate is what's

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1 referred to in the contractual language,  
2 and/or pays regarding Gunder Auto Center's  
3 repairs and repair charges.  
4 And I have personal knowledge of what  
5 each automobile insurance company does not  
6 include on their respective estimates and/or  
7 does not pay with regard to Gunder Auto  
8 Center's repairs or repair charges.  
9 We keep each insurance company's  
10 estimate with regard to the repairs we  
11 perform in the regular course of our business  
12 at Gunder's Auto Center.  
13 Defendant State Farm Mutual Automobile  
14 Insurance Company is the only automobile  
15 insurance company that does not include new  
16 suspension on their respective estimates and  
17 instead includes used suspension on their  
18 estimates and is the only insurance company  
19 that does not pay for new suspension as it  
20 relates to repairs at Gunder's Auto Center.  
21 Further bolstering the fact as to how absurd  
22 this interpretation is, Your Honor.  
23 And then paragraph 7 above that:  
24 furthermore, as an auto body repair  
25 professional, as part of our business at



1 Gunder's Auto Center we always refer to,  
2 among other reliable sources, the  
3 manufacturer's training materials and  
4 official statements regarding repairs and  
5 replacement parts for purposes of ensuring  
6 that we provide the highest quality repair  
7 and the safest vehicle possible as part of  
8 sufficiently restoring the vehicles we repair  
9 to pre-loss condition.

10 As part of such, we keep any such  
11 manufacturer training materials and official  
12 statements in the regular course of our  
13 business at Gunder's Auto Center. To that  
14 extent, for purposes of this case attached as  
15 Exhibit 1 is a statement from Toyota --

16 THE COURT: Both in No. 187?

17 MR. GEOHAGAN: Yes, sir. In that,  
18 you'll see Toyota -- which this is a Toyota  
19 that's at issue, Your Honor. This is a  
20 Toyota Corolla.

21 And it plainly states in that steering  
22 and suspension components, including wheels,  
23 tires, bearings are important to the control  
24 of vehicle steering and handling, blah, blah,  
25 blah. And then it goes on --

1 His argument is you agree we can use any  
2 source and magically that restores it to  
3 pre-loss condition. And somehow or another  
4 they're the only insurance company on -- the  
5 only one on earth apparently that thinks that  
6 used suspension is something that otherwise  
7 could bring it back to pre-loss condition.

8 This is further pronounced, Your Honor  
9 --

10 THE COURT: Maybe all the other  
11 insurance companies are simply incorrect. I  
12 don't know.

13 MR. GEOHAGAN: This is a motion for  
14 summary judgment and unless there is a  
15 material issue of -- there's not a material  
16 issue of fact, this goes on to a trial, Your  
17 Honor.

18 And we have two affidavits of experts in  
19 this area. They have none.

20 THE COURT: Okay, very good. State  
21 Farm?

22 MR. MOORE: Sure, Your Honor. This case  
23 isn't about experts. It's not about  
24 Plaintiff's opinions for LKQ --

25 THE COURT: It's about affidavits filed

1 THE COURT: Precautions.

2 MR. GEOHAGAN: Right, under precautions.

3 As with all steering and suspension  
4 components as well as wheels, those  
5 components are not designed to be  
6 straightened once bent.

7 Toyota also does not condone the use of  
8 salvage and aftermarket parts because their  
9 integrity and quality cannot be verified. In  
10 these cases, replace any and all damaged  
11 components with genuine new OEM replacement  
12 parts.

13 So again, Your Honor, further bolstering  
14 the position that this is an absurd  
15 interpretation. And then, Your Honor, if you  
16 look back at Mr. Burns' --

17 THE COURT: Maybe not absurd, you're  
18 just saying that it's not a correct  
19 interpretation under the --

20 MR. GEOHAGAN: I think consistent with  
21 the case that I just read, Your Honor, I  
22 truly -- because, again, I stand by this.  
23 His argument means -- and you can't -- no one  
24 can escape it here unless he's going to bring  
25 out some other clause that I'm not aware of.

1 in opposition to summary judgment is what I  
2 thought.

3 MR. MOORE: This case is about a  
4 contract. The experts don't opine on the  
5 contract. Experts don't interpret the  
6 contract. The Court interprets the contract  
7 as a matter of law. The expert's opinions  
8 have no bearing on the contract.

9 And you engage as a matter -- as a  
10 matter of law, you only engage in  
11 interpretation or construction of the  
12 contract if it's ambiguous. So the  
13 interpretation of the clause doesn't apply in  
14 terms of construing it against the insurer  
15 unless there's an ambiguity. There is no  
16 ambiguity.

17 In bold and italics it says you,  
18 parenthetical insured, agree with us that  
19 such parts may include either parts furnished  
20 by the vehicle's manufacturer or parts from  
21 other sources.

22 And the sentence before that says you  
23 agree with us that the parts, including those  
24 we just defined, can be used to return the  
25 vehicle to pre-loss condition. That's our

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1 obligation. It's a dispositive question of  
2 law as to whether we have to pay for it.  
3 Here's why the affidavits are also  
4 irrelevant. They don't relate to this  
5 repair. They say we're never going to  
6 consider used OEM parts.  
7 THE COURT: No, they didn't say that.  
8 MR. MOORE: They said used OEM  
9 suspension parts we will never consider. We  
10 will never put in.  
11 We're not making an absurd argument.  
12 We're not suggesting we could put a damaged  
13 hood on a vehicle that didn't have a damaged  
14 hood.  
15 All we're saying is --  
16 THE COURT: You basically might put a  
17 damaged hood on because -- I mean if a hood  
18 is not OEM, a hood is a hood is a hood. It's  
19 not subject to stresses when you operate a  
20 vehicle like a frame and suspension, wheels  
21 and drive shaft.  
22 MR. MOORE: That's all irrelevant.  
23 MR. GEOHAGAN: And it doesn't bring it  
24 back to pre-loss condition.  
25 THE COURT: So you're saying that State

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1 Farm can repair the vehicle even if it's  
2 repaired and the manufacturer feels it's  
3 unsafe by using this stuff?  
4 MR. MOORE: What the manufacturer says  
5 is irrelevant to whether it returns it to  
6 pre-loss condition.  
7 The only issue is this. Mr. Gunder  
8 insisted from the beginning we have to pay  
9 for the new OEM suspension. We were never  
10 given the choice.  
11 THE COURT: Are you saying pre-loss this  
12 was a dangerous vehicle that was a time bomb,  
13 if it's driven down the road the suspension  
14 is going to suddenly collapse on it or  
15 anything?  
16 MR. MOORE: I'm saying there is no  
17 dispute of material fact as to whether  
18 Mr. Gunder ever considered a LKQ part. He  
19 never looked at a LKQ part.  
20 THE COURT: He didn't use any LKQ parts  
21 in this estimate? Because I've read the  
22 estimate and he did.  
23 MR. MOORE: Excuse me. I'm only talking  
24 about the suspension when I say part because  
25 it's the only thing at issue. He never

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1 considered a LKQ suspension. He never looked  
2 at it.  
3 Had he looked at one and said this one  
4 will not -- this one will not return it to  
5 pre-loss condition, it would be a different  
6 case. But because he didn't, because he  
7 insisted on new at the beginning, the only  
8 issue is are we obligated to pay for the new  
9 and the contract says we're not.  
10 Now, I understand that he doesn't like  
11 LKQ suspension. That's fine but it doesn't  
12 change our contractual obligation. That's  
13 the only question, do we -- because  
14 Mr. Gunder, who is not party to the insurance  
15 contract, believes that a LKQ suspension  
16 would never be safe, are we obligated to pay  
17 for a new part in every case and the answer  
18 is no.  
19 Had he looked at the one we proposed and  
20 said it wouldn't return it to pre-loss, we  
21 would have a different case. Then we would  
22 have to look at it and we might have a  
23 dispute over whether it was going to return  
24 it to pre-loss.  
25 But he can't categorically refuse to

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1 consider anything other than a new part and  
2 then insist we pay for it under the contract  
3 language that says we have no such  
4 obligation. That's the case.  
5 MR. GEOHAGAN: Your Honor, he sure can  
6 given the evidence that we have submitted  
7 that rebuts theirs. He continues --  
8 THE COURT: We're still talking about --  
9 he does have a point there.  
10 We're talking about looking at the  
11 contract, correct?  
12 MR. GEOHAGAN: Absolutely, and again,  
13 Your Honor --  
14 THE COURT: And your argument is that  
15 the facts that you've alleged does have  
16 something to due with interpreting the  
17 contract language?  
18 MR. GEOHAGAN: Absolutely. All they  
19 have said, Your Honor -- their memo, if you  
20 read it all, it talks about -- in fact, they  
21 don't highlight the first provision.  
22 All they say is we can ipse dixit  
23 whenever we want use any other source. What  
24 they fail to miss is the first provision.  
25 And I just read law that says you have to

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1 read it in its entirety. And I also read law  
2 that you can't bring it to an absurd result.  
3 This provision says we will, not we may,  
4 maybe we'll do it. No, it says we will  
5 include in the estimate parts sufficient to  
6 restore the vehicle to its pre-loss  
7 condition. You agree with us that such parts  
8 may include.  
9 Yeah, there's some instances where you  
10 can include those parts and it brings it back  
11 to pre-loss condition.  
12 What the experts in the field say, and  
13 they're just ignoring this, is that with used  
14 suspension you can never because of the  
15 nature of it because of how it's impossible  
16 to check it.  
17 Mr. Moore once again talked about the  
18 fact that Mr. Gunder didn't even look at it.  
19 Well, that's the point. You can't.  
20 And, Your Honor, if you look in  
21 Mr. Burns' -- and the reason why the other  
22 insurance companies don't do it is because  
23 they understand this too. They reason why  
24 Toyota says it is because they understand it  
25 too, Your Honor. Mr. Burns says it in there.

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1 The problem is there's an internal  
2 defect that no one sees. Apparently, State  
3 Farm doesn't care. And so when they go over  
4 a bump as in the affidavit and that thing  
5 jerks and it comes out in their hand and they  
6 go over a mountain cliff, State Farm doesn't  
7 care.  
8 You know why? They don't have liability  
9 and they're saving a bunch of money when you  
10 take this all and extrapolate it out with  
11 regard to what they should be paying for like  
12 all the other insurance companies do.  
13 The point is, Your Honor, with regard to  
14 this contract they are breaching it because  
15 they are not including an estimate with parts  
16 sufficient to restore the vehicle to its  
17 pre-loss condition as it relates to  
18 suspension. And they don't have anybody to  
19 rebut that.  
20 And he wants to look -- State Farm wants  
21 to look at the second clause in isolation to  
22 the first clause.  
23 It's absurd to think that you can always  
24 bring it back to pre-loss condition by using  
25 any other used part at any time.

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1 Again, the absurd result is they can  
2 come in and again tell me how this is not  
3 extrapolated out with regard to its extreme  
4 logical conclusion that they can just say,  
5 okay, here's a hood. Let's just use a hood.  
6 That's not like a suspension that's so  
7 important to safety.  
8 So the guy is in a wreck. He has a  
9 straight hood. It gets crumpled and he goes  
10 in and State Farm says, well, pursuant to our  
11 policy here we're going to give you this hood  
12 we found out in the junkyard. It will fit on  
13 there and it's a hood.  
14 And we say here you agree with us that  
15 such parts may include either parts furnished  
16 by the vehicle's manufacturer or parts from  
17 other sources. This is a part from another  
18 source, too bad so sad.  
19 Well, they ignore the fact that they  
20 even with a hood have to bring it back to  
21 pre-loss condition. You can't just ipse  
22 dixit just use any source.  
23 The problem with suspension though is  
24 you cannot, because of the nature of  
25 suspension, bring it back to pre-loss

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1 condition if you use used suspension. And  
2 that is based upon --  
3 THE COURT: What you're saying is you  
4 can't safely do it?  
5 MR. GEOHAGAN: Well, you can't bring it  
6 back to pre-loss -- the pre-loss condition,  
7 even as testified by Mr. Gunder in his  
8 affidavit, was that the damage to that  
9 suspension that was visible was solely caused  
10 by the collision so that, therefore, the only  
11 reasonable conclusion is that suspension was  
12 just fine and not compromised prior to the  
13 collision, Your Honor. And that's in his  
14 affidavit as testimony of --  
15 THE COURT: There is no evidence to show  
16 that the suspension was already defective or  
17 damaged before the accident?  
18 MR. GEOHAGAN: Exactly. So with regard  
19 to that, then he gets a suspension restoring  
20 the vehicle to its pre-loss condition.  
21 When you take a used suspension by the  
22 way, as Mr. Burns talks about, you're not  
23 just driving around one day and State Farm  
24 comes up to you or a LKQ vendor and says,  
25 hey, can we have your suspension.

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1           These used suspensions come from cars  
2 that are in accidents, Your Honor. And the  
3 problem with that -- and this is the big  
4 problem. Mr. Burns talks about that he's  
5 seen numerous situations where the internal  
6 damage to those suspensions are revealed  
7 later; whereas, as with new suspensions he's  
8 never seen that.

9           And that's why you can never bring it  
10 back to pre-loss condition because of the  
11 uncertainty that cannot be rectified.

12           Again, the best way to do that would be  
13 to disassemble it. Unfortunately,  
14 disassembling, as he testified to as an  
15 expert, disassembling it means you're further  
16 compromising the integrity and safety of that  
17 suspension.

18           The point is that with suspension, as  
19 all the other insurance companies all seem to  
20 recognize, you can never restore it to  
21 pre-loss condition or at least say that you  
22 are --

23           THE COURT: All right.

24           MR. MOORE: Can I say one sentence?

25           THE COURT: Absolutely.

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1           MR. MOORE: One sentence, I promise.

2           THE COURT: You filed the motion. You  
3 always get the last word, Counsel, when you  
4 file the motion that is.

5           MR. MOORE: Mr. Gunder's right to refuse  
6 to consider categorically non-new OEM  
7 suspension parts does not change State Farm's  
8 obligation under the contract so that it  
9 requires them to pay for new OEM suspension  
10 parts. That's the issue the Court has to  
11 decide.

12           THE COURT: I gave him the last word.

13           MR. GEOHAGAN: You had asked a question  
14 earlier. I was going to answer the question  
15 but I'll --

16           THE COURT: Which one was that?

17           MR. GEOHAGAN: You had asked --

18           THE COURT: About magna fluxing?

19           MR. GEOHAGAN: Yeah, we -- Mr. Gunder  
20 and Gunder's Auto Center agrees to try used  
21 suspension State Farm identified only if they  
22 would pay to magna flux. They would not.

23           You have to understand magna fluxing  
24 costs more than a new suspension would just  
25 so you know.

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1           THE COURT: That's what I was going to  
2 bring up. I know how much magna fluxing  
3 costs.

4           It's primarily done for drag racers  
5 because it determines even microscopic  
6 inherent manufacturing issues in pistons,  
7 crank shaft, rods, and other things that  
8 really cause big issues. And it goes along  
9 with what is called shot peening and magna  
10 fluxing, which is a special way to ensure  
11 toughness and durability.

12           But it's really the only way to  
13 determine internal damage. Even x-ray would  
14 be not be sufficient because it can't show  
15 small enough issues.

16           MR. GEOHAGAN: And by the way, Your  
17 Honor, with regard to the testimony that's  
18 been presented that's not been rebutted and  
19 we're obligated to do in a motion for summary  
20 judgment defending against it, there is the  
21 liability.

22           Guess who's going to be liable if that  
23 used suspension got put on there?

24           THE COURT: That can't be a  
25 consideration for the court.

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1           MR. GEOHAGAN: Your Honor, it further  
2 bolsters the reasoning as to why State Farm  
3 doesn't care if they pay for it or not.

4           THE COURT: Because then it falls on  
5 Mr. Gunder.

6           MR. GEOHAGAN: Yes, sir.

7           THE COURT: All right. Very good. I  
8 will give you all a result within ten days.  
9 Is that sufficient time?

10           MR. MOORE: That will work, Your Honor.

11           THE COURT: In fact, I've got plenty of  
12 cases here unless you all would like to print  
13 up some more trees.

14           MR. GEOHAGAN: Your Honor, this is not  
15 directed at you but just for the record for  
16 the standard review on motion for summary  
17 judgment, just two cases and I'm not even  
18 going to talk about them.

19           Moore vs. Morris, 475 So.2d 666 at page  
20 -- and again, I'm not going to get into -- at  
21 page 668, that's a Florida Supreme Court  
22 1985.

23           And then also for the record one other  
24 case, Pilot Construction Services vs. Babe's  
25 Plumbing, 111 So.3d 955. That's a 2013

1 Second DCA case and that is at page 957 where  
 2 the standard of review is.  
 3 Thank you.  
 4 (The proceedings concluded at 10:51  
 5 a.m.)

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1 TRANSCRIPT CERTIFICATE

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4 STATE OF FLORIDA )  
 5 COUNTY OF POLK )

7 I, Allison Howell, Court Reporter and Notary  
 8 Public in and for the State of Florida at Large,  
 9 certify that I was authorized to and did  
 10 stenographically report the foregoing proceedings and  
 11 that the transcript is a true and complete record of my  
 12 stenographic notes.

14 Dated this 31st day of October, 2013.

17 Allison Howell  
 Allison Howell  
 Notary Public - State of Florida  
 My Commission No. FF 015932  
 Expires: May 7, 2017



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