REL: May 10, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171062

Putnam County Memorial Hospital

v.

TruBridge, LLC, and Evident, LLC

Appeal from Mobile Circuit Court
(CV-17-902242)

MENDHEIM, Justice.

Putnam County Memorial Hospital ("Putnam") appeals from the denial by the Mobile Circuit Court of its motion to set aside a default judgment entered in favor of TruBridge, LLC

("TruBridge"), and Evident, LLC ("Evident").[1] We reverse and remand.

I. Facts

TruBridge and Evident are wholly owned subsidiaries of Computer Programs and Systems, Inc. In September 2015, Putnam entered into a "Master Services Agreement" with TruBridge ("the MSA agreement") and a license and support agreement with Evident ("the LSA agreement"). In the MSA agreement, TruBridge agreed to provide accounts-receivable management services for Putnam for five years. The MSA agreement provided that TruBridge would receive 5.65 percent of the "cash collections," as that term is defined in the MSA agreement, to be paid monthly, for its account and billing services. In the LSA agreement, Evident agreed to provide Putnam with Evident's electronic health-records system as well as maintenance and support for that system. According to the LSA agreement, Evident's payment for those services was "included in the fees paid to TruBridge" under the MSA agreement.

[1]Apparently there is a dispute in the circuit court concerning the correct name and legal status of Putnam. Putnam agrees for purposes of this appeal only to be referenced by the above-related name.

According to Putnam, starting in 2016, Putnam entered into a series of agreements with Hospital Partners, Inc. ("HPI"), in which HPI agreed to manage and control the operations of the hospital and its facilities. Putnam alleges that HPI exercised full control over Putnam's operations for two years, after which a dispute arose between HPI and Putnam concerning the quality of the management services HPI provided. Putnam alleges that David Byrns, whom Putnam describes as the chief executive officer of HPI, effectively ran the operations of Putnam during the period 2016 through 2018.

TruBridge and Evident allege that Byrns became chief executive officer of Putnam in 2016 and that at that time Putnam began entering patient information and billing services through a different computer system than the one provided by Evident pursuant to the LSA agreement and used by TruBridge for accounts receivable pursuant to the MSA agreement. By December 2016, admissions of patient data into the computer system provided by Evident and used by TruBridge had dropped precipitously, and, as a consequence, payments to TruBridge and Evident for their services also declined significantly.

TruBridge and Evident allege that, when a TruBridge manager contacted Putnam to inquire about this drop in new-patient admissions into their system, Byrns responded that Putnam had almost no new patients and that it was barely surviving. TruBridge and Evident allege that, Byrns's statement was deliberately false and that Putnam was, in fact, simply entering new patients into a different system but that TruBridge and Evident did not discover the falsehood at that time and continued to work with Putnam.

According to an affidavit from an administrative assistant for Putnam, Sue Ann Varner, on June 28, 2017, Putnam received a letter addressed to Byrns from counsel for TruBridge and Evident dated June 22, 2017, asserting that Putnam had breached the MSA agreement and the LSA agreement. Varner e-mailed Byrns about the letter and asked for direction concerning what to do with it, and Byrns instructed Varner to forward the letter to him. Varner forwarded the letter to Byrns the same day she received it.

On August 23, 2017, TruBridge and Evident sued Putnam in the Mobile Circuit Court, alleging breach of contract and fraud. Putnam received the summons and complaint on

August 28, 2017, and, according to Varner, on that date she forwarded the complaint and accompanying filings to Byrns, HPI vice president Jorge Perez, Michael Christensen, who was then managing Putnam for HPI, and J.T. Lander.[2]

No appearance from Putnam was entered in the circuit court. As a result, on November 23, 2017, TruBridge and Evident requested entry of default. On December 21, 2017, the circuit court entered a default judgment against Putnam.

According to Varner, on December 29, 2017, she e-mailed a copy of the summons and complaint to attorney Dylan Gauldin, counsel for HPI, who Putnam believed was representing Putnam in the lawsuit. In that e-mail, Varner told Gauldin that she had previously forwarded the summons to Byrns, Perez, Christensen, Lander, and Howard Luscan, the chairman of Putnam's board of trustees, and she copied that e-mail to Christensen and hospital employee Gayle Pickens. On December 29, 2017, Varner also forwarded to Gauldin, Lander, and Perez the June 22, 2017, letter from TruBridge and Evident's counsel to Putnam, TruBridge and Evident's request

[2]The record does not disclose Lander's role with either HPI or Putnam.

for production of documents and request for admissions, and a copy of the general pretrial order, dated August 23, 2017.

According to Varner, on January 16, 2018, Putnam received a copy of an order from the circuit court stating that "[t]he damages hearing scheduled in this cause of action for January 26, 2018, is hereby reset to March 2, 2018, at 9:00 a.m." According to Varner, the notice of the hearing was not forwarded to anyone because Christensen had told Pickens that "Dylan [Gauldin] was handling things" and that Putnam representatives should not talk to or have anything further to do with TruBridge.

On March 2, 2018, the circuit court entered a final order awarding TruBridge and Evident $586,210.76 in compensatory damages and $100,000 in punitive damages.

On April 4, 2018, Putnam filed a motion to set aside the default judgment pursuant to Rule 55(c), Ala. R. Civ. P., or, in the alternative, for relief from the judgment under Rule 60(b), Ala. R. Civ. P. On July 2, 2018, the circuit court denied Putnam's motion to set aside the default judgment. The order stated: "Motion to set aside default

judgment filed by Putnam County Memorial Hospital is denied."

Putnam appeals.

II. Standard of Review

> "A trial court has broad discretion in deciding whether to grant or deny a motion to set aside a default judgment. Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600 (Ala. 1988). In reviewing an appeal from a trial court's order refusing to set aside a default judgment, this Court must determine whether in refusing to set aside the default judgment the trial court exceeded its discretion. 524 So. 2d at 604. That discretion, although broad, requires the trial court to balance two competing policy interests associated with default judgments: the need to promote judicial economy and a litigant's right to defend an action on the merits. 524 So. 2d at 604. These interests must be balanced under the two-step process established in Kirtland.
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> "We begin the balancing process with the presumption that cases should be decided on the merits whenever it is practicable to do so. 524 So. 2d at 604. The trial court must then apply a three-factor analysis first established in Ex parte Illinois Central Gulf R.R., 514 So. 2d 1283 (Ala. 1987), in deciding whether to deny a motion to set aside a default judgment. Kirtland, 524 So. 2d at 605. The broad discretionary authority given to the trial court in making that decision should not be exercised without considering the following factors: '1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct.' 524 So. 2d at 605."

Zeller v. Bailey, 950 So. 2d 1149, 1152-53 (Ala. 2006).

III. Analysis

Putnam's first contention on appeal is that the circuit court's order must be reversed because its order does not reflect a consideration of any of the three factors set out in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988).

> "In Kirtland, we held that a trial court's broad discretionary authority to set aside a default judgment under Rule 55(c) should not be exercised without considering the following three factors: 1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct. 524 So. 2d at 605. '"'However, in order to trigger the mandatory requirement that the trial court consider the Kirtland factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the Kirtland factors.'"' Hilyer [v. Fortier], 176 So. 3d [809,] 813-14 [(Ala. 2015)] (quoting D.B. v. D.G., 141 So. 3d 1066, 1070-71 (Ala. Civ. App. 2013), quoting in turn Brantley v. Glover, 84 So. 3d 77, 81 (Ala. Civ. App. 2011))."

Hilyer v. Fortier, 227 So. 3d 13, 20 n.3 (Ala. 2017). Our appellate courts have reversed orders denying motions to set aside a default judgment in several cases in which trial courts failed to consider the Kirtland factors. See, e.g., Hilyer v. Fortier, 176 So. 3d 809 (Ala. 2015); Reliable Auto.

Ctr. v. Jackson, [Ms. 2170366, Aug. 24, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018); Von Alvensleben v. Dubuisson, [Ms. 2170520, July 27, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018); Gilbert v. Gilbert, 207 So. 3d 741, 743 (Ala. Civ. App. 2016); D.B. v. D.G., 141 So. 3d 1066 (Ala. Civ. App. 2013); Maiden v. Federal Nat'l Mortg. Ass'n, 69 So. 3d 860 (Ala. Civ. App. 2011); Jarrett v. Federal Nat'l Mortg. Ass'n, 72 So. 3d 682 (Ala. Civ. App. 2011); Cobb v. Loveless, 807 So. 2d 566, 567 (Ala. Civ. App. 2001); CHO Real Estate Holding, Inc. v. Wyatt, 680 So. 2d 372 (Ala. Civ. App. 1996).

TruBridge and Evident admit that the circuit court's order did not include a discussion of the Kirtland factors, and they do not dispute the history of appellate judgments returning cases to trial courts to perform the mandatory review of the Kirtland factors. However, TruBridge and Evident contend that instead of reversing the circuit court's order, we should review de novo Putnam's motion to set aside the default judgment. TruBridge and Evident argue that this Court conducts a de novo review when a motion to set aside a default judgment is denied by operation of law under Rule 59.1, Ala. R. Civ P., and that it should not "treat

orders that deny motions to set aside a default judgment without discussing the Kirtland factors" any differently. TruBridge and Evident's brief, p. 14.

In support of this argument, TruBridge and Evident cite Steele v. Federal National Mortgage Ass'n, 69 So. 3d 89 (Ala. 2010), an appeal of a judgment resulting from the denial by operation of law of a motion to set aside a default judgment. In Steele, this Court explained:

> "Typically, this Court reviews a trial court's decision granting or denying a motion to set aside a default judgment to determine whether the trial court, in so deciding, exceeded its discretion. Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600, 603 (Ala. 1988). However, this Court has previously determined that the judgment that results from a trial court's failure to rule on a motion subject to denial by operation of law under Rule 59.1 is not automatically entitled to the same deference that is afforded a judgment arrived at after due deliberation. Edgar v. State, 646 So. 2d 683, 686-87 (Ala. 1994); and Perdue v. Gates, 403 So. 2d 165 (Ala. 1981). ... [B]ecause the trial court took no valid action indicating that the decision to deny Jeffery's motion was the product of due deliberation, we review Jeffery's motion to set aside the default judgment de novo, applying the analysis mandated by Kirtland."

69 So. 3d at 91.

There are at least two problems with TruBridge and Evident's reliance on Steele for requesting this Court to

conduct a de novo review of the Kirtland factors. First, this Court in cases subsequent to Steele has not followed its example of reviewing de novo the denial of a motion for default judgment when there is no indication from a trial court that it considered the Kirtland factors even though the motion presented arguments and evidence on each factor. For example, Hilyer v. Fortier, 176 So. 3d 809 (Ala. 2015), like Steele, involved the denial by operation of law of a motion to set aside a default judgment. Even so, this Court concluded:

> "[T]he trial court allowed the motion to set aside to be denied by operation of law without any indication that the denial of the motion was the product of due deliberation and without any indication that the denial was based upon a consideration of the Kirtland factors. Therefore, we reverse the denial by operation of law of Hilyer's motion to set aside the default judgment and remand this case for the trial court to consider the Kirtland factors in determining whether to set aside the default judgment."[3]

176 So. 3d at 821. In addition to Hilyer, as our citations above indicate, the Court of Civil Appeals has remanded

[3]The Hilyer Court engaged in extensive discussion of each Kirtland factor, but, at the conclusion of each discussion, the Court repeated that it could not determine if the trial court had made its judgment in light of those factors, which therefore required a reversal and remand for the trial court to provide an evaluation of the Kirtland factors. See Hilyer, 176 So. 3d at 816-17, 818-19, 820.

several cases since our decision in Steele because a trial court failed to indicate that it had considered the Kirtland factors; the Court of Civil Appeals did not perform a de novo review of those factors in any of those cases. TruBridge and Evident have not distinguished Hilyer or any of the cases from the Court of Civil Appeals.[4]

More importantly, TruBridge and Evident overlook a distinction between this case and those in which a motion to set aside a default judgment is denied by operation of law. When a motion to set aside a default judgment is denied by operation of law, there is no "affirmative statement of the trial judge on the merits of the motion" that "giv[es] the ruling a presumption of correctness." Edgar v. State, 646 So. 2d 683, 687 (Ala. 1994). Therefore, in such an instance, a de novo review is appropriate. In contrast, when the trial court enters an order on a motion to set aside a default judgment, but the order does not include an examination of the Kirtland factors, there is an affirmative statement from the trial court on the merits of the motion, but not one that indicates performance of "'"the mandatory requirement that the

[4]In light of the case history, we question the validity of Steele's conclusion on this issue.

trial court consider the Kirtland factors."'" Hilyer, 176 So. 3d at 813 (quoting D.B. v. D.G., 141 So. 3d 1066, 1071 (Ala. Civ. App. 2013), quoting in turn Brantley v. Glover, 84 So. 3d 77, 81 (Ala. Civ. App. 2011)). Given that "[a] trial court has broad discretion in deciding whether to grant or deny a motion to set aside a default judgment," Zeller, 950 So. 2d at 1152, we cannot simply engage in our review as if the trial court did not perform any review of its own when we have an affirmative statement from the trial court on the merits, as is the case here.

As we have already observed, however, in order to trigger the mandatory requirement that the trial court consider the Kirtland factors, the party filing a motion to set aside the default judgment must allege and provide arguments and evidence regarding all three Kirtland factors. Thus, we must examine whether Putnam met its threshold burden as to the Kirtland factors in its filings relating to its motion to set aside the default judgment before deciding that a remand is necessary.

> "'The first Kirtland factor is whether the defaulting party presented a meritorious defense. To present a meritorious defense, for Rule 55(c)[, Ala.

> R. Civ. P.,] purposes, does not require that the movant satisfy the trial court that the movant would necessarily prevail at a trial on the merits, only that the movant show the court that the movant is prepared to present a plausible defense. Kirtland, 524 So. 2d at 605.
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> "'"...."'

"Sampson v. Cansler, 726 So. 2d 632, 634 (Ala. 1998).

> "'... A meritorious defense need not be a perfect defense, nor one that would necessarily prevail at trial. Rather, a meritorious defense is merely a "plausible" defense. Kirtland, 524 So. 2d at 605. That is, a meritorious defense must simply "induce the trial court reasonably to infer that allowing the defense to be litigated could foreseeably alter the outcome of the case." 524 So. 2d at 606 (emphasis added).
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> "'We have specifically stated that a defendant can successfully present a meritorious defense either by setting forth allegations that, if proven at trial, would constitute a complete defense or by submitting evidence that would at least create a jury question. Kirtland, 524 So. 2d at 606. The defendant's allegations "must be more than mere bare legal conclusions without factual support"; they must set forth "relevant legal grounds substantiated by a credible factual basis." 524 So. 2d at 606.'

"Royal Ins. Co. of America v. Crowne Invs., Inc., 903 So. 2d 802, 808 (Ala. 2004)."

Hilyer, 176 So. 3d at 814-15.

In the circuit court, Putnam presented as a meritorious defense that its contracts with TruBridge and Evident were not exclusive but were simply fee-for-service contracts and that, therefore, Putnam could not be liable for breaching those contracts. In support of that argument, Putnam submitted copies of the MSA agreement and the LSA agreement. Putnam notes that there does not appear to be express language of exclusivity in either contract. Additionally, Putnam observes that the definition in the MSA agreement of "cash collections" could imply that the MSA agreement -- which is the contract upon which the parties' arguments focused in the circuit court -- was not exclusive. The MSA agreement provided that the monthly fee for both TruBridge's and Evident's services was to "be calculated as a percentage of total Cash Collections" based upon certain rates. The MSA agreement further defined "cash collections," in part, as

> "all patient accounts receivable receipts which are directly related to hospital, medical practice and/or home health patient accounts and collected for professional medical and ancillary services rendered by or through [Putnam], during the term of this Agreement, <u>on such patient accounts receivables that are receiving services under this Agreement</u> ...."

(Emphasis added.) Putnam argues that the emphasized language implies that not all Putnam patients had to be billed using the system provided, serviced, and maintained by TruBridge and Evident. In short, Putnam contends that it was contractually obligated to pay only the patient account receivables being serviced by TruBridge and that it was not obligated to route all of its patients through the TruBridge-Evident system.

TruBridge and Evident counter that the MSA agreement lists Putnam's responsibilities as including: "The capture of all patient demographic, insurance and encounter information" and the "[m]aintenance of all business office, insurance, contract management and item master tables." (Emphasis added.) The MSA agreement also lists TruBridge's services as including: "The billing of all patients, to include sub-acute patients, outpatients, skilled nursing facility patients, emergency room patients and all professional fees ...." (Emphasis added.) They contend that the foregoing portions of the MSA agreement demonstrate that the MSA agreement and the LSA agreement were exclusive contracts.

On appeal, Putnam also argues as a meritorious defense to TruBridge and Evident's fraud claim that Putnam is immune from

tort claims under Missouri law. Putnam contends that it is a Missouri corporation[5] and that, under the laws of Missouri, "county hospitals organized pursuant to Mo. Rev. Stat. § 205.160 are entitled to sovereign or State immunity from tort liability, unless a certain prescribed exception applies." Putnam's brief, p. 19. Putnam further argues that because State entities in Alabama are entitled to immunity from tort actions, failing to apply Missouri sovereign-immunity law in this instance would "evince[] a '"policy of hostility"'" toward Missouri. Franchise Tax Bd. of California v. Hyatt, 578 U.S. ___, ___, 136 S. Ct. 1277, 1281 (2016).[6]

[5]TruBridge and Evident alleged in their complaint that Putnam is "an entity existing under the laws of Missouri" and that "its principal place of business is Unionville, Missouri." The contract between Putnam and HPI that Putnam introduced also indicates that Putnam is a Missouri entity.

[6]In Franchise Tax Board, the United States Supreme Court explained:

> "A statute is a 'public Act' within the meaning of the Full Faith and Credit Clause. See, e.g., Carroll v. Lanza, [349 U.S. 408] at 411 [(1955)]; see also 28 U.S.C. § 1738 (referring to '[t]he Acts of the legislature' in the full faith and credit context). We have said that the Clause 'does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy.' Carroll v. Lanza, 349 U.S., at 412. But when affirming a State's decision to

TruBridge and Evident respond by arguing that Putnam failed to introduce evidence sufficient to establish that it was organized under the Missouri statute it cites. They also argue that the Full Faith and Credit Clause of the United States Constitution does not require application of Missouri's sovereign-immunity law to Putnam because, they say, county hospitals do not have immunity from tort actions under Alabama law, so not extending immunity to Putnam would not constitute the adoption of a policy of hostility.

The correct interpretation of the MSA agreement and the proper application of the Full Faith and Credit Clause are not our concern, however, at this stage of the litigation. What matters is that Putnam has provided arguments and evidence concerning the meritorious-defense prong of the Kirtland test.

With regard to the second Kirtland factor -- whether TruBridge and Evident will be unfairly prejudiced if the default judgment is set aside -- Putnam argued in the circuit

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> decline to apply another State's statute on this ground, we have consistently emphasized that the State had 'not adopt[ed] any policy of hostility to the public Acts' of that other State. Id., at 413."

Franchise Tax Bd. of California, 578 U.S. at ___, 136 S. Ct. at 1281.

court that TruBridge and Evident would not be prejudiced by setting aside the default judgment because, it argued, the complaint had been filed less than a year before Putnam filed its motion to set aside the default judgment, TruBridge and Evident had "only done the minimum necessary to effectuate service and argue their damages," and a delay would not result in a loss of evidence or create increased difficulties for discovery. TruBridge and Evident contend that Putnam failed to meet its prima facie burden of establishing that setting aside the default judgment would not be unfairly prejudicial to TruBridge and Evident.

This Court has previously concluded that "'mere allegations and conclusory statements do not constitute sufficient evidence to establish facts.'" Hilyer v. Fortier, 227 So. 3d at 26 (quoting Ex parte Gilliam, 720 So. 2d 902, 906 (Ala. 1998)). However, this is not an instance in which the defendant "offered no explanation," Ex parte Ward, 264 So. 3d 52, 56 (Ala. 2018), or "provided no allegation or argument," Brantley v. Glover, 84 So. 3d at 82, concerning the second factor in the Kirtland analysis. See also Von Alvensleben v. Dubuisson, [Ms. 2170520, July 27, 2018] ___

So. 3d ___, ___ (Ala. Civ. App. 2018) (observing that the defendant "at least raised the probability that [the plaintiff] would not be prejudiced by setting aside the default judgment"). Therefore, based on the facts in this case, we conclude that Putnam presented a sufficient argument with respect to the second factor for the circuit court to review Putnam's argument and TruBridge and Evident's response.

The third Kirtland factor concerns the defendant's culpability in failing to respond to the plaintiff's action.

> "'To warrant a refusal to set aside a default judgment, the defaulting party's actions that resulted in the entry of the default judgment must constitute willful conduct or conduct committed in bad faith. Negligence alone is not sufficient. Bad faith or willfulness is identified by "incessant and flagrant disrespect for court rules, deliberate and knowing disregard for judicial authority, or intentional nonresponsiveness." Kirtland, 524 So. 2d at 608 (citing Agio Indus., Inc. v. Delta Oil Co., 485 So. 2d 340, 342 (Ala. Civ. App. 1986)).'
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> "Zeller v. Bailey, 950 So. 2d 1149, 1154 (Ala. 2006). In Sanders v. Weaver, 583 So. 2d 1326, 1328-29 (Ala. 1991), this Court addressed the lack-of-culpable-conduct prong as follows:
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> > "'Negligence by itself is insufficient for refusing to grant a Rule 55(c) motion. A reasonable explanation for inaction and

> noncompliance may preclude a finding of culpability ....'"

Hilyer, 176 So. 3d at 819.

Putnam provided a detailed explanation in the circuit court as to why it believed its failure to respond to the complaint was not due to its culpable conduct. It alleged that HPI managed Putnam during the time it was served with filings in this action and that Putnam was under the impression that counsel for HPI was representing Putnam in this action when, in fact, he was not doing so. In support of this argument, Putnam submitted affidavits from Varner and Luscan, Putnam's chairman of its board of directors, as well as a copy of a contract between Putnam and HPI. Thus, Putnam presented an argument and evidence with regard to the third factor.

IV. Conclusion

Based on the foregoing, we conclude that Putnam, in its motion to set aside the default judgment, met the pleading and evidentiary threshold showing of each of the three Kirtland factors necessary to trigger the mandatory requirement that the circuit court consider the Kirtland factors and present a written analysis of those factors in ruling on the motion.

Therefore, we reverse the denial of Putnam's motion to set aside the default judgment and remand this case for the circuit court to consider the Kirtland factors on the record in determining whether to set aside the default judgment.

> "As the Court of Civil Appeals noted in D.B. [v. D.G., 141 So. 3d 1066 (Ala. Civ. App. 2013)]:
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> > "'"[O]ur mandate in this case 'is not to be construed to mean that the trial court must set aside the default judgment, [but] only that the trial court must apply the Kirtland factors in deciding whether to set aside the default judgment.'" Richardson v. Integrity Bible Church, Inc., 897 So. 2d 345, 349 (Ala. Civ. App. 2004), quoting White v. Westmoreland, 680 So. 2d 348, 349 (Ala. Civ. App. 1996).'
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> "141 So. 3d at 1072-73."

Hilyer, 176 So. 3d at 821.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Bryan, and Sellers, JJ., concur.

Mitchell, J., recuses himself.