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## STATEMENT OF THE FACTS AND CASE

Appellant, [REDACTED] (hereinafter “Appellant”), leased residential property located at [REDACTED], Jacksonville, Florida 32216 (hereinafter the “Property”) from Appellees, Mr. and Mrs. Phillips (hereinafter “the Phillips”), via entry into an occupancy agreement (hereinafter the “Lease”) on May 15, 2012. (R. at 102-116.) The Lease states Appellant was to pay the Phillips’ one thousand three hundred fifty dollars (\$1,350.00) at the outset of the Lease (hereinafter the “Security Deposit”) (R. at 105.) The Lease term was from May 15, 2012 through May 14, 2013. *Id.* A renewal lease was not entered into after May 14, 2013, therefore, Appellant’s tenancy defaulted to a month-to-month tenancy per the terms of the Lease. (R. at 108.)

On or about August 14, 2013, the Phillips’ sent Appellant a Notice of Termination of Lease terminating the Lease as of September 30, 2013 (hereinafter the “Notice of Termination”) (R. at 117-118.) There was conflicting testimony at the trial as to what date Appellant permanently vacated the Property, however, Appellate testified that Appellant did not give notice to the Phillips’ of his vacating of the Property prior to doing so. See Appellant Br. 8 (stating notice Appellant’s notice of vacating the Property was not given until September 22, 2013—at least six days after Appellant testified he vacated). Additionally, Appellant failed to surrender possession of the Property to the Phillips’ by returning the Property’s

keys and garage door openers. (R. at 114-115.)

On or about October 30, 2013, the Phillips' mailed to Appellant via certified mail a Notice of Intent to Impose a Claim for Damages on the Security Deposit (hereinafter the "Notice of Claim") (R. at 147-150.) The Phillips' claims against the Security Deposit surpassed the monetary amount of the Security Deposit, however, the Phillips' testified and Appellant admitted that the Phillips' took no further action to collect that deficiency from Appellant. (R. at 210.) It was also admitted by Appellate at trial that Appellant did not object to the Notice of Claim with fifteen (15) days of his receipt of same. (*Id.*) On or about January 10, 2014, Appellant, through his counsel, mailed the Phillips a demand letter requesting the return of the Security Deposit (hereinafter the "Demand Letter").

Appellant then filed a Statement of Claim in the County Court in and for Duval County, Florida, which contained three causes of action: (1) Count I for Civil Theft; (2) Count II for Conversion; and (3) Count III for Violation of Section 83.49(3)(a), Florida Statutes. (R. at 1-5.) A trial was held by the Honorable Judge Brent Shore, after which Judge Shore requested the parties' counsel prepare Memorandums of Law in Support of Final Judgment for Judge Shore's consideration. In the Phillips' Memorandum of Law (hereinafter the "Phillips' Memorandum"), the undersigned, on at least two occasions, stated what Appellant's burden of proof was for both the Conversion cause of action and the

Civil Theft cause of action. (R. at 219, 224.) Specifically, the Phillips' Memorandum states the correct burden of proof for Conversion is preponderance of the evidence (R. at 219) and the correct burden of proof for Civil Theft is clear and convincing evidence. (R. at 224, 226.) *Nowhere* in either Appellant's Memorandum of Law in Support of Final Judgment or in Appellant's Initial Brief does Appellant state what burden of proof he should have been held to.

Judge Shore entered an Order of Dismissal (hereinafter the "Order of Dismissal") on June 2, 2015, finding in favor of the Phillips' on all three causes of action. (R. at 99-101.) In its Order of Dismissal, the lower court made several findings of fact and ultimately held Appellant "failed to meet his burden of proof as to any of the three Counts set for on the Statement of Claim." (R. at 101.) The Order of Dismissal granted relief in the form of the Phillips' retention of the Security Deposit and a reservation of jurisdiction to determine the prevailing party's attorney's fees and costs. (*Id.*)

### **SUMMARY OF THE ARGUMENT**

The Phillips' terminated the Lease as of September 30, 2013 via a Notice of Termination dated August 14, 2013. The Notice of Termination stated Appellant was to deliver the Property keys to the Phillips' or to an agent of the Phillips' at the Property on September 30, 2013. Appellant failed to do so. Rather, Appellant vacated the Property at some date prior to September 30, 2013 and failed to leave

the keys at the Property or deliver the keys to one of the several agents of the Phillips’—whom Appellant both knew and had dealt with in the past. Both Mr. and Mrs. Phillips testified they were not sure what date Appellant actually vacated and that they did not regain possession of the Property until the Lease was terminated.

Appellant failed to provide prior notice to the Phillips’ of his vacation of the Property prior to vacating, which in turn waived his right to receive—within thirty (30) days of vacating—a Notice of Intent to Impose a Claim on the Security Deposit. Despite this waiver, the Phillips’ sent Appellant their Notice of Claim within the allotted time period—on October 30, 2013. Appellant received the Notice of Claim on November 12, 2013 but failed to object to same within fifteen (15) days of receiving it, as mandated by the Statute. This failure to object afforded the Phillips’ the right to deduct from the Security Deposit all monies required to satisfy their Notice of Claim.

The items claimed against the Security Deposit were either due to Appellant’s violation of terms of the Lease or items that required cleaning or repair beyond normal wear and tear. The Phillips’ claim amount exceeded the amount of the Security Deposit, however, they did not pursue Appellant for this deficiency. At no time did the Phillips’ possess a felonious intent to deprive Appellant of the Security Deposit, as both Mr. and Mrs. Phillips testified they felt their claims were reasonable, and the lower court held the same.

Appellant failed to prove by a preponderance of the evidence that the Phillips' were liable for conversion in that they intentionally interfered with Appellant's right to possess the Security Deposit, causing damages to Appellant. Furthermore, Appellant failed to satisfy the heightened burden of clear and convincing evidence required for civil theft by failing to show that when the Phillips' retained the Security Deposit, they did so with criminal intent. While Appellant now argues the lower court did not apply the correct burden of proof in making its holding, the only proffered burden of proof on the trial level came from the Phillips' Memorandum of Law, and nothing in the record indicates Judge Shore applied different or incorrect burdens of proof. Furthermore, in his initial brief, Appellant fails to both assert what burdens of proof should have been applied by the lower court or to lend any support whatsoever for his assertion that an incorrect burden of proof was applied at the trial level.

Appellant's failure to provide notice of vacating the Property prior to vacating, coupled with his failure to deliver the keys to the property—and therefore deliver possession of the Property—alleviated the duty of the Phillips' to send their Notice of Claim. Despite this alleviation, the Notice of Claim was served timely, and the items claimed thereon were reasonable. Appellant further failed to object to the Notice of Claim in a timely manner, thus allowing the Phillips' to retain the Security Deposit. The lower court's findings of fact were reasonable and thus

should be given great deference. Based on the lower court's findings of fact and based on the application of the law to those findings of fact, judgment in favor of the Phillips' was proper and should be upheld by this Honorable Court.

### **STANDARD OF REVIEW**

There are three separate causes of action being appealed in this matter, and as such, each cause of action necessitates its own separate standard of review. The first cause of action entails the application of findings of fact to a determination of whether both Appellant and the Phillips' complied with Section 83.49, Florida Statutes. As such, it is a mixed question of law and fact. *See Morel v. Wilkins*, 84 So. 3d 226 (Fla. 2012) (stating that a mixed question of law and fact exists when determining whether the factual circumstances surrounding a particular situation amount to a violation of law).

When evaluating mixed questions of fact and law, the ultimate ruling must be subject to de novo review, however, the lower court's factual findings must be sustained if supported by competent substantial evidence. *Id.* at 231 (quoting *Twilegar v. State*, 42 So. 3d 177, 192 (Fla. 2010)) (internal citations omitted). "Mixed questions of fact and law require an appellate court to defer to the trial court on factual matters but provide independent review of legal determinations." *Florida v. Alexis*, No. SC14-1341, 2015 WL 4112372 at \*5 (Fla. July 9, 2015) (citing *State v. Glatzmayer*, 789 So. 2d 297, 301 (Fla. 2001) (stating that while

reviewable issues may be couched in broad legal terms, the actual rulings below are often discrete and factual, thus necessitating a presumption of validity on all fact-based issues). Because this Court's review of the lower court's decision requires an analysis of whether the facts as determined by the lower court evidenced compliance with Florida Statutes, the issue is one of mixed law and fact.

Regarding both the Conversion and Civil Theft causes of action, the lower court's findings of fact as to whether the Phillips' were liable for conversion and civil theft are pure questions of fact. Whether or not a defendant possessed felonious intent—which is the necessary intent for civil theft—is a question of fact. *Am. Fire and Cas. Co. v. Sunny South Aircraft Serv.*, 151 So. 2d 276, 278 (Fla. 1963); *State v. Barthell*, 554 So. 2d 17, 18 (Fla. 3d DCA 1989). Because the determination of whether these torts were committed are questions of fact, the lower court's ruling must be sustained if supported by competent substantial evidence. *Twilegar v. State*, 42 So. 3d 177, 192 (Fla. 2010).

## **ARGUMENT**

### **I. THE PHILLIPS' DID NOT VIOLATE FLORIDA STATUTE 83.49, AS THEY SENT THEIR NOTICE OF CLAIM IN A TIMELY MANNER, AND EVEN IF THEIR NOTICE OF CLAIM WAS NOT TIMELY, THE PLAIN LANGUAGE OF THE STATUTE STATES THAT APPELLANT'S FAILURE TO SEND NOTICE OF VACATING THE PROPERTY PRIOR TO VACATING ALLEVIATED THE PHILLIPS' OF THEIR DUTY TO SEND THEIR NOTICE OF CLAIM.**

The Phillips' sending of their Notice of Claim within thirty (30) days of both

the termination of the Lease and their repossession of the Property satisfied Florida Statute 83.49(3)(a), but even if this Court finds their Notice of Claim was not timely, Appellant's failure to notify the Phillips of his vacating the Property prior to doing so resulted in a waiver of Appellant's right to receive a notice of intent to impose a claim against the Security Deposit.

In its Order of Dismissal, the lower court found Appellant's testimony that he vacated the property on September 15, 2013 to be contradictory with the fact that he testified to paying a cleaning company to clean the Property on September 18, 2013 and then notified the Phillips' on September 22, 2013 via email that he had already vacated the Property but did not specify when. (R. at 100.) The Order of Dismissal further provides, "[c]learly, Plaintiff did not comply with th[e] section of" Florida Statute 83.49(5), which requires a tenant to give at least seven (7) days' notice to the landlord *prior* to vacating the property and said notice *shall* include the address where the tenant may be reached. (R. at 100-101.) (emphasis added). The Order of Dismissal further provides that Appellant's failure to provide this required notice relieved the Phillips' of their duty to send a notice of claim against the security deposit. (R. at 101.)

The lower court's findings of fact must be sustained if supported by competent substantial evidence. *Morel*, 84 So. 3d at 331 (internal citations omitted). Subsequent to deferring to the trial court on factual matters, this Court

may then conduct an independent review of legal determinations. *Alexis*, 2015 WL 4112372 at \*5.

Florida Statute 83.49(3)(a) states, “[u]pon the vacating of the premises *for termination of the lease* . . . the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant’s last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim.” F.S. § 83.49(3)(a) (emphasis added). Subsection (3)(b) further states, “[u]nless the tenant objects to the imposition of the landlord’s claim or the amount thereof within 15 days after receipt of the landlord’s notice of intention to impose a claim, the landlord may then deduct the amount of his or her claim and shall remit the balance of the deposit to the tenant . . . .” F.S. § 83.49(3)(b). Finally, the Statute states in Subsection (5) that any tenant who vacates the premises prior to the expiration of the lease shall give at least seven (7) days’ written notice by certified mail or personal delivery prior to vacating and *shall include the address where the tenant may be reached*, and failure to provide such notice shall relieve the landlord of the notice requirement regarding the claim on the security deposit. F.S. § 83.49(5) (emphasis added).

Not only was the Phillips’ Notice of Claim timely, but Appellant also waived his right to bring forth this cause of action by three separate acts: (1) failing to provide the Phillips’ with notice of his vacating prior to doing so; (2) failing to

object to the Phillips' Notice of Claim within 15 days of receiving it; and (3) failing to provide the Phillips' with a forwarding address to mail either his Security Deposit to or to mail a notice of claim against his Security Deposit to.

**A. The Phillips' Notice was timely, as it was sent thirty (30) days from both the date the Lease terminated and the date the Phillips' were able to regain possession of the Property.**

The Phillips' terminated the Lease as of September 30, 2013, and both Mr. and Mrs. Phillips testified that because Appellant had paid the majority of September's rent,<sup>1</sup> they could not interfere with his possession of the Property prior to the Lease termination date, and they were unsure as to what date Appellant actually vacated and surrendered possession of the Property. (R. at 213-214.) Appellant failed to leave the keys and garage door opener for the Property at the Property as instructed in the Notice of Termination, and he failed to hand-deliver the keys and garage door opener to any agent of the Phillips' despite his knowledge of the existence of, and previous dealings with, the Phillips' agents. (R. at 214. Finally, there was conflicting testimony from Appellant as to the actual date he no longer had possession of the Property. (R. at 100.)

First, the Lease was terminated as of September 30, 2013 per the Notice of Termination sent by the Phillips'. The Statute clearly states, "[u]pon the vacating of the premises *for termination of the lease* . . . the landlord shall have 30 days to

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<sup>1</sup> It was an issue of fact whether the rent for September was \$1,500.00 or \$1,350.00, but it is an agreed fact that Plaintiff paid \$1,350.00 for September's rent.

give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim." F.S. § 83.49(3)(a) (emphasis added).

Due to Appellant's failure to deliver possession of the Property to the Phillips by appropriately delivering the keys and garage door opener to an agent of the Phillips'—two of which the Appellant was aware of and one of which he had met before—rendered the Phillips' unable to ensure they in fact could regain possession of the Property. (R. at 214.) On September 16, 2013, the Phillips' real estate agent, Earlene Paschall, notified Appellant via email that she was the Phillips' realtor and asked for access to the Property in order to show it to new potential tenants. (R. at 124-127.) This email illustrates two pertinent facts: (1) the Phillips' believed Appellant still had possession of the Property as of September 16, 2013; and (2) Appellant knew Ms. Paschall was an agent for the Phillips' regarding the Property. Appellant then emailed Ms. Paschall back four days later—on September 20, 2013—and instructed her to contact Anita Hiles for arrangement of the keys and garage clickers. (*Id.*) Despite this instruction from Appellant, Appellant testified that he did not in fact give the keys and garage door openers to Anita Hiles. (R. at 214-215.)

In an email sent from Appellant to the Phillips' dated September 22, 2013, Appellant notified the Phillips' he would not be able to deliver the keys to the

Phillips' at the Property on September 30, 2013, but stated he would deliver them either to Ms. Paschall or to Mr. Lee Osbourne the very next week. (R. at 131-32.) Then, in an email from Appellant to the Phillips' dated September 28, 2013, he stated via email that he sent the keys for the Property to the Phillips' out-of-state home address and instructed the Phillips' to send his Security Deposit to the office of Lee Osbourne as he had arranged to pick up the check from there. (R. at 135.) Despite the arrangement in which Appellant testified he made to pick up his Security Deposit from Mr. Osbourne's office, Appellant also testified that he failed to deliver the keys or garage door openers to either Mr. Osbourne or Ms. Paschall, but instead chose to mail them. (R. at 215.)

Appellant testified that he mailed the keys to the Phillips' on September 26, 2013, however he has shown no proof that the package mailed to the Phillips' was in fact the keys and garage door openers. The Phillips' testified that they did not receive this package due to them being at the hospital with their son during surgery. (*Id.*) As of the date of this Answer Brief, the keys and garage door openers are in not in the possession of the Phillips' and their location is unascertained.

Finally, Appellant's testimony was conflicting regarding what date he no longer had possession of the Property. Appellant testified that he vacated the Property on September 15, 2013, however he also testified that he hired a cleaning service to clean the Property on September 18, 2013. (R. at 119-20; 215.)

Appellant relied on his email sent to the Phillips' on September 22, 2013, stating he had *already* vacated the Property, but that email does not state what date he actually vacated. Finally, Appellant testified that he mailed the keys and garage door opener on September 26, 2013, despite stating in his September 22nd email that he would hand-deliver the keys to either Ms. Paschall or Mr. Osbourne. Per Appellant's own testimony, it is unclear as to what date he no longer had possession of the Property.

Appellant incorrectly relies on the two notices posted on Appellant's door on September 17, 2013, to alleviate his duty to notify the Phillips' of his vacating the Property. (R. at 128-130.) According to Appellant's own testimony, he would have vacated the Property by the time these notices were posted on the Property, and thus, they had no bearing whatsoever on his duty to provide the Phillips' with notice prior to vacating. (R. at 216.)

It was in bad faith that Appellant failed to deliver the keys and garage door openers—and thus deliver possession—to either Ms. Paschall or Mr. Osbourne, despite having knowledge that they were both agents of the Phillips', and even after allegedly arranging pick-up of his Security Deposit from Mr. Osbourne's office. Appellant's failure to deliver the keys rendered the Phillips' unable to enter the Property, as Appellant was still in possession of same. The only concrete date the Phillips' knew they had lawful possession of the Property was the date of

termination—or September 30, 2013. Therefore, their Notice of Claim sent on October 30, 2013 was timely beneath the Statute.

**B. Even if this Court finds the Phillips’ Notice of Claim was not timely, Appellant’s failure to provide the Phillips’ notice of vacating the Property *before* vacating alleviated the Phillips’ of their duty to send their Notice of Claim.**

Appellant’s failure to notify the Phillips’ of his vacation of the Property prior to vacating and his failure to provide the Phillips’ with a forwarding address relieved the Phillips’ of their duty to send their Notice of Claim to Appellant. This Court need look no further than the plain language of Subsection (5) of Florida Statute 83.49, which states that any tenant who vacates the premises prior to the expiration of the lease *shall* give at least seven (7) days’ written notice by certified mail or personal delivery *prior to vacating* and shall include the address where the tenant may be reached, and failure to provide such notice shall relieve the landlord of the notice requirement regarding the claim on the security deposit. F.S. § 83.49(5) (emphasis added).

Appellant not only testified that he failed to give prior notice of vacating the Property before vacating, he also testified that upon vacating, he never gave the Phillips’ an address where Appellant could be reached. (R. at 217.) The entire purpose of Subsection (5) is to eliminate the landlords’ guessing games, which here, the Phillips’ had to play in order to send Appellant his Notice of Claim. Not only did they have to guess as to what the date of vacating was, but they were also

forced to send their Notice of Claim to the Property in the hopes that Appellant forwarded his address with the postal service.

Florida Jurisprudence is clear on the duty of a tenant to give at least seven day's written notice to the landlord prior to vacating a rental property, and failure to do so relieves the landlord's obligation to provide notice to a tenant of the intent to impose a claim on a security deposit. Stephanie A. Giggetts, J.D., et al., *Landlord and Tenant*, 34 Fla. Jur. 2d § 80 (2015). Furthermore, it is not merely the tenant's vacation of the property, but also the delivery of possession of the property to the landlord that begins the 30-day count for notice purposes. John P. Ludington, L.L.B., *Landlord Tenant Security Deposit Legislation*, 63 A.L.R. 4th 901, 19(i) (1988).

A landlord's obligation to provide notice beneath Florida Statute 83.49(3)(a) is excused when a tenant fails to give the landlord notice of vacating the leased premises prior to vacating. *Plakhov v. Serova*, 126 So. 3d 1221, 1223 (4th DCA 2012). In *Plakhov*, the tenant alleged—as in the case at bar—that he was entitled to his security deposit because the Landlord failed to comply with the notice requirement of Section 83.49(3)(a), Florida Statutes. *Id.* There, the court stated the tenant's failure to provide notice of vacating to the landlord prior to vacating relieved the landlord of his duty to provide notice of intent to impose a claim on the security deposit. *Id.* Furthermore, a landlord's knowledge that a tenant may

have vacated the leased property does not alleviate the tenant from his or her duty to provide prior notice of vacating. *See Laster v. Rhoden*, 19 Fla. L. Weekly Supp. 666a (Broward County 17th Cir. May 2, 2012) (finding that even though the tenant and landlord had discussed tenant's vacation of the subject property, because the tenant did not give 7 days' written notice to the landlord of her definite date of vacating prior to vacating, the landlord was relieved of his duty to send a notice of claim against the security deposit).

It is neither disputed that Appellant failed to notify the Phillips' of his vacation of the Property prior to vacating, nor that he failed to provide the Phillips' with a forwarding address upon vacating, as Appellant testified to both of these facts. The Legislature's intent with regards to the purpose of this section of the Statute is clear. This section is in place to protect landlords from the very issue being litigated in the case at bar. If a landlord is not afforded notice of a tenant vacating, the landlord cannot know when their thirty-day clock begins. Furthermore, if a landlord is not provided with a forwarding address, he or she cannot guarantee receipt of either a returned security deposit or a notice of claim against same. Appellant failed to follow Subsection (5) of the Statute, which in turn alleviated the Phillips' of their duty to send timely notice.

- C. **Even if this Court finds both that the Phillips' Notice of Claim was not timely, and that Appellant's failure to notify the Phillips' of vacating the Property prior to vacating did not alleviate the Phillips' of their duty to send their Notice of Claim, Appellant still waived his right to bring forth this cause of action due to his failure to object to the Phillips' Notice of Claim with fifteen (15) days of receiving it.**

Appellant's failure to object to the Phillips' Notice of Claim within 15 days of receiving it, as mandated by Section 83.49(3)(b), Florida Statutes, permitted the Phillips' to deduct the amount of their claim from the Security Deposit. Appellant testified that he did not object to the Phillips' Notice of Claim within 15 days of receiving it. (R. at 218.) Subsection (3)(b) of the Statute allows tenants the opportunity to establish their rights to a security deposit. *Plakhov*, 126 So. 3d at 1223. Again, the Legislature's intent with this subsection of the Statute is clear. This affords a tenant the right to object to a claim against the security deposit without having to litigate the matter in court. It also puts the landlord on notice of the tenant's objections so to provide an opportunity for the landlord to reevaluate his claims and avoid future litigation.

Here, Appellant did not object to the Phillips' Notice of Claim within 15 days of receipt, however, Appellant's counsel sent a letter dated January 10, 2014, which accused the Phillips' of committing civil theft and demanded treble damages. (R. at 151-153.) Subsection (3)(b) was created to prevent just this type of action—to prevent a tenant from failing to timely object to a claim against the

security deposit and then several months later, demanding return of the security deposit along with treble damages before filing suit in a court of law. Appellant's failure to timely object to the Phillips' Notice of Claim permitted the Phillips' to deduct their claims from the Security Deposit and precludes Appellant from now asserting that the Phillips' unlawfully deducted said monies.

In conclusion as to this cause of action, the Phillips' did not violate Section 83.49(3)(a), Florida Statutes, because their Notice of Claim was sent in a timely manner; however, even if this Court finds it was not sent in a timely manner, the Phillips' duty to send their Notice of Claim was relieved and their ability to deduct said monies permitted, by Appellant's failure to provide notice of vacating the Property prior to vacating, Appellant's failure to provide the Phillips' with a forwarding address, and by Appellant's failure to timely object to the Notice of Claim.

**II. APPELLANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PHILLIPS' ARE LIABLE FOR CONVERSION, AS THE PHILLIPS' WERE AUTHORIZED TO RETAIN THE SECURITY DEPOSIT DUE TO EITHER APPELLANT'S VIOLATIONS OF THE LEASE OR IN ORDER TO REPAIR ITEMS IN THE PROPERTY THAT WERE DAMAGED BEYOND NORMAL WEAR AND TEAR.**

The Phillips' retention of the Security Deposit was lawful, as said retention was due to either Appellant's violation of the Lease terms or due to damages in the home that were beyond normal wear and tear. The Lease states in Paragraph 10

(hereinafter the “Security Deposit Clause”) that the Security Deposit is intended to pay for the cost of damages, cleaning, excessive wear and tear, unreturned keys, and unpaid charges or attorney’s fees suffered by the Landlord due to Tenant’s default of the Lease. Because the Security Deposit was retained in accordance with the Security Deposit Clause, and it was retained in accordance with Section 83.49, Florida Statutes, the Phillips’ are not liable for conversion.

After reviewing pictures and listening to testimony at the trial, the lower court was able to make factual determinations regarding the Phillips’ claimed damages. In his Order of Dismissal, the lower court recognized the Phillips’ total claim exceeded the amount of the Security Deposit by eight hundred and fifty-nine dollars and seventy-nine cents (\$859.79), and that while the Phillips’ were not necessarily entitled to an award exceeding the amount of the Security Deposit, they were entitled to retain the full amount of the Security Deposit. (R. at 101.) As this was a purely factual determination, this Court should give great deference to the lower court’s findings.

**A. The Lease allowed the Phillips’ to retain the Security Deposit for Appellant’s violations of the Lease, to repair items damaged beyond normal wear and tear, to conduct cleaning, and for unreturned keys.**

The pertinent portions of Lease for the purposes of this cause of action are as follows:

- i. Paragraph 6(B): rent is due on or before the 1st day of

each month (R. at 8);

ii. Paragraph 8(A): if the rent is not received eight (8) days after the due date, Tenant must pay a late fee of fifty dollars (\$50.00) (*Id.*);

iii. Paragraph 11(A): Tenant understands and agrees that utilities and services are to be maintained and operational at all times (*Id.* at 9);

iv. Paragraph 13(B): if any required repair is caused by the negligence of the Tenant, the Tenant will be fully responsible for the cost of the repair and/or replacement as needed (*Id.*);

v. Paragraph 13(E): Tenant shall properly use and operate all electrical, cooking, and plumbing fixtures and keep them clean and sanitary (*Id.*);

vi. Paragraph 14(C): Tenant agrees to return the Property to Landlord in the same condition as it was at the beginning of the Lease term (R. at 10);

vii. Paragraph 18: Tenant is required to obtain personal property/renter's insurance (R. at 11);

viii. Paragraph 21(A): at the end of the Lease term, if the Landlord or Tenant does not give 45 days' written notice to the other party to

end this Lease, it will automatically continue on a month-to-month basis (*Id.*); and

ix. Paragraph 24: if Tenant violates any part of the Lease, Tenant is in default of the Lease (R. at 12).

Because the Security Deposit Clause allows for the imposition of a claim due to violation of any of the above terms of the Lease, the Phillips are not liable for conversion due to their retention of the Security Deposit.

**B. The Phillips' proved that all items claimed against the Security Deposit were either due to Appellant's violations of the Lease, due to damages in the Property beyond normal wear tear, or due to other items permitted to be claimed against in the Security Deposit Clause.**

Every item the Phillips' listed in their Notice of Claim was reasonable in light of the terms of the Lease, the violations of the Lease by Appellant, and/or the condition of the Property upon the Phillips' repossession of same.

The first item claimed against the Security Deposit was the attorney's fee for the unfulfilled lease renewal. (R. at 24.) Appellant failed to provide the Phillips' with notice of his intent to vacate the Property forty-five (45) days in advance of the termination date of the Lease. (R. at 221.) Appellant testified that he desired to renew the Lease for eleven months, and in fact went to the office of Mr. Lee Osbourne, the Phillips' then-attorney, to sign a renewal lease. (*Id.*) Both Mr. and Mrs. Phillips testified that a requirement to enter into a renewal lease was that

Appellant show proof of renter's insurance in accordance with Paragraph 18 of the Lease. (*Id.*) Mr. Phillips testified as to the importance of renter's insurance and why they were requiring that as a condition to entering into a new eleven-month lease. (*Id.*) Appellant testified that he could not remember whether he had renter's insurance either at the time of trying to renew his Lease or at any time during his entire tenancy. (*Id.*) Both Mr. and Mrs. Phillips testified, however, that they declined to enter into the eleven-month lease due to Appellant's failure to show proof of renter's insurance. (*Id.*) Appellant's failure to fulfill the known preconditions to renewing the Lease after the Phillips' had expended monies to have a new lease drafted for the parties rendered the imposition of this claim reasonable. In its Order of Dismissal, the lower court recognized that while the parties attempted to negotiate a new lease, they were unable to enter into one. (R. at 99.)

Per Paragraph 21(A), the failure of Appellant to enter into a new lease defaulted the tenancy to a month-to-month tenancy, and the Phillips' letter to Appellant dated July 9, 2013 notified Appellant that the new month-to-month rental amount would be one thousand five hundred dollars (\$1,500.00). (R. at 158-59.) While the Phillips' waived this new rental amount for the month of August, they testified that they notified Appellant his rent for September was \$1,500.00 per their previous notice. (R. at 221.)

Appellant testified he did not pay rent for the month of September, but merely relied on his initial deposit paid at the beginning of the original Lease term, which included the last month's rent in the amount of \$1,350.00. (R. at 221.) In the Order of Dismissal, the lower court recognized that the Phillips' letter dated July 9, 2013 did in fact notify Appellant of the rental increase in the case that a new rental agreement was not entered into. (R. at 99-100.) Thus, the Phillips' claims of one hundred and fifty dollars (\$150.00) for the remainder of September's rent and the late fee of fifty dollars (\$50.00) due to Appellant's failure to pay the full and correct amount of rent were reasonable.

Mr. Phillips testified as to repairs required for the dishwasher and plumbing and proffered receipts for same. (R. at 163-64.) These damages were due to the Appellant's failure to comply with Paragraph 13(E) of the Lease, which states the Tenant shall properly use and operate all electrical, cooking, and plumbing fixtures and keep them clean and sanitary. (R. at 9.) These claims were also permitted by Paragraph 13(B) of the Lease, which states that if any required repair is caused by the negligence of the Tenant, the Tenant will be *fully* responsible for the cost of the repair and/or replacement as needed. (*Id.*)

The garage door openers required replacement and the locks required changing due to Appellant's failure to take due care in returning same to either the Phillips' or an agent of the Phillips', and thus these charges were reasonable. The

Phillips' never received the keys or garage door openers, and thus, all had to be replaced. The Phillips' provided receipts as proof of both of these charges. (R. at 165.)

Regarding the cleaning service and carpet cleaning charges, Mr. Phillips testified there were several items throughout the home that had not been cleaned, including a rust stain on the bathroom floor, mold in the sinks, and grease splatter in the stove.<sup>2</sup> He also testified there were carpet stains beyond normal wear and tear, specifically in the master bedroom. Mr. Phillips provided an itemized receipt for the cleaning service and testified as to the amount of the carpet cleaning service. (R. at 167.)

Regarding the charge for the irrigation service/repair and the water softener service/repair, both Mr. and Mrs. Phillips testified that Appellant told them he was going to turn the irrigation system off despite instructions from Mr. and Mrs. Phillips via email not to alter the settings on the irrigation system. (R. at 156-57.) Mr. Phillips testified that upon entering the Property on September 30, 2013, he found the irrigation system turned off (R. at 196) and was told by the utility company that the irrigation system had only been run three (3) times during Appellant's entire tenancy. Appellant's turning off of the irrigation system was a

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<sup>2</sup> The Phillips' entered into evidence several different pictures showing the uncleanliness of the Property. These pictures are on pages 182-87 of the Record and pages 194-95 of the Record.

violation of Paragraph 11(A), which states that Tenant understands and agrees that utilities and services are to be maintained and operational at all times. (R. at 9.)

It was also a violation of this same Paragraph for Appellant to allow the water softener to become so low in salt levels that it caused film build-up and corrosion around several of the water fixtures inside the Property.<sup>3</sup> Mr. Phillips testified that upon entering the Property on September 30, 2013, the salt level in the water softener was at zero percent (0%). (R. at 188.) The Phillips' produced receipts for both the service to the irrigation system (R. at 166) and the service to the water softener system. (R. at 168.)

Regarding the replacement of the glass stovetop, Mr. Phillips testified that the stovetop was brand new upon Appellant's taking possession of the Property and also testified that the stovetop was so heavily scratched upon the termination of Appellant's tenancy, that he was advised it was not repairable, but had to be replaced. The Phillips' produced *zoomed in—or close-up*—pictures of the heavily scratched surface as well as a receipt for the replacement of same. (R. at 170, 175-76.)

Finally, with regards to the JEA charges, Mr. Phillips testified that the utility company required minimal utilities to be operational at all times, and he produced a bill for these charges. (R. at 169.)

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<sup>3</sup> The Phillips' entered four pictures evidencing this damage, which are located on Pages 190-93 of the Record.

Even assuming that not all of the above-stated items were claimable, the total claim surpassed the amount of the Security Deposit by eight hundred and fifty-nine dollars and seventy-nine cents (\$859.79). (R. at 147-150.) Beyond their Notice of Claim, all parties testified that the Phillips' did not further pursue Appellant for this balance. (R. at 224.) Thus, even if this Court finds that not all of the above items were claimable, the Phillips' still had valid claims in the amount of at least \$1,350.00—or the amount of the Security Deposit. Because the items claimed against the Security Deposit were done so in accordance with the terms of the Lease, Appellant had no possessory right to the Security Deposit monies, and thus the Phillips are not liable for conversion.

**III. APPELLANT HAS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE PHILLIPS' HAD FELONIOUS INTENT WHEN THEY RETAINED APPELLANT'S SECURITY DEPOSIT, AND THAT FAILURE RENDERS APPELLANT LIABLE FOR THE PHILLIPS' ATTORNEY'S FEES AND COSTS.**

The Phillips' did not have felonious or criminal intent when retaining the Security Deposit, and neither the facts nor any law support a finding of liability for civil theft on the part of the Phillips', rendering Appellant liable for the Phillips' attorney's fees and costs in defending this cause of action. The "felonious intent to steal" requirement of the civil theft statute must be established by clear and convincing evidence. *Westinghouse Elec. Corp., Inc. v. Bay Cnty. Energy Sys., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991). A plaintiff must prove by clear and

convincing evidence that one “knowingly obtained or used or endeavored to obtain or use” plaintiff’s property with felonious intent to either temporarily or permanently deprive plaintiff of its use of the property. *Almeida v. Amazon.com*, 456 F. 3d 1316 (11th Cir. 2006).

Section 772.11, Florida Statutes, states that a prevailing defendant to a civil theft claim is entitled to an award of fees upon a showing that the civil theft claim “was without substantial fact or legal support.” F.S. § 772.11(1). *See also, Bronson v. Bronson*, 685 So. 2d 994 (Fla. 5th D.C.A. 1997) (stating that in determining whether to award a defendant attorney’s fees for successfully defending against a civil theft claim, a less stringent standard of test than the frivolous suit standard should be applied, asking whether plaintiff “raised a claim which was without substantial fact or legal support”). Because the determination of whether a defendant possesses felonious intent is a question of fact, *American Fire and Casualty Co. v. Sunny South Aircraft Services*, 151 So. 2d 276, 278 (Fla. 1963), the lower court’s determination that Appellant did not carry his burden to establish civil theft (R. at 101) should be given great deference by this Court.

Appellant not only failed to meet his burden of clear and convincing evidence, but also failed to even raise substantial facts that could support a finding of criminal intent. In its Order of Dismissal, the lower court found Appellant failed to carry its burden with regards to this cause of action as well, and because said

determination was a question of fact, this determination should be given great deference by this Court. Therefore, this Court should not only find the Phillips' are not liable for civil theft, but should also award the Phillips' their attorney's fees and costs in defending this cause of action.

**A. The Phillips' were without felonious intent when they retained Appellant's Security Deposit.**

In a civil theft claim, the plaintiff must prove that the defendant acted with "felonious intent to steal," and where there is no "felonious intent to steal," a civil theft cause of action fails. *Lewis v. Heartsong*, 559 So. 2d 453, 454 (Fla. 1st DCA 1990). A necessary element of proof in a civil theft claim is a felonious intent to steal by the defendant. *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (1st DCA 1991). A plaintiff in such an action has the burden of proving this element by clear and convincing evidence. *Id.* In the absence of proof of criminal intent, a finding of civil conversion alone does not justify an award of treble damages. *Bertoglio v. Am. Sav. & Loan Ass'n of Fla.*, 491 So. 2d 1216, 1217 (Fla. 3d DCA 1986); *Westinghouse*, 590 So. 2d at 988. Where the parties are engaged in a contractual dispute over an amount owed and no fraud is involved, *no civil theft or conversion can occur*. *Pathway Fin. v. Miami Intern. Realty Co.*, 588 So. 2d 1000, 1004 (Fla. 3d DCA 1991) (emphasis added).

To prove the Phillips' had felonious intent, Appellant would have had to prove that the Phillips' knowingly retained the Security Deposited wrongfully, and

Appellant failed to meet that burden. Both Mr. and Mrs. Phillips testified they believed they had until October 30, 2013 to send their Notice of Claim, as that was both the date of termination of the Lease, and the date the Phillips' were able to regain possession of the Property. (R. at 225-26.) Furthermore, both Mr. and Mrs. Phillips testified that they would have sent the Notice of Claim sooner had they received the receipt for the stovetop replacement prior to October 30, 2013. (*Id.*)

Additionally, Mr. Phillips testified that there were several damages throughout the home that they did not impose claims for due to the fact that they believed those damages were normal wear and tear. (R. at 226.) The Phillips' proffered pictures of dents in the walls, missing baseboards, and damage to the front door<sup>4</sup> that they declined to impose claims for. The Phillips' only imposed claims against items they honestly felt were beyond normal wear and tear and had no felonious intent to retain any monies of Appellant which Appellant had a possessory right to.

**B. Civil theft causes of action are subject to a heightened evidentiary standard, in which the testimony must be credible and the evidence must be strong.**

Appellant did not present strong evidence or elicit testimony to support a finding of felonious or criminal intent on the part of the Phillips' with regards to

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<sup>4</sup> The Phillips' entered two pictures showing dents in the wall, one picture showing a missing baseboard, and pictures of the damaged front door, which are located on pages 177-80 and 172-73 of the Record.

retention of the Security Deposit. In *Westinghouse*, the court stated,

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

590 So. 2d at 988 (citing *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

In the case at bar, Mr. and Mrs. Phillips testified as to the reasons they sent their Notice of Claim on October 30, 2013, as well as the reasons for making the claims they made. (R. at 226.) They testified that they believed their Notice of Claim was timely and their claimed items reasonable. (*Id.*) Their testimonies were consistent with one another despite the fact that Mr. and Mrs. Phillips were not in the courtroom when one another was testifying. (R. at 226-27.) Appellant failed to elicit any testimony which would support a finding by clear and convincing evidence that the Phillips' had any felonious intent when retaining the Security Deposit.

Because Appellant failed to show by clear and convincing evidence that the Phillips' had criminal intent when imposing a claim against the Security Deposit, this Court should uphold the lower court's holding in its Order of Dismissal for

this cause of action. Additionally, because this specific cause of action is not supported by any substantial facts or legal authority, the Phillips' are entitled to recover their reasonable attorney's fees and costs per the Civil Theft Statute.

### **CONCLUSION**

Appellant vacated the Property without providing prior notice to the Phillips' of his intent to vacate and without providing a forwarding address, thus waiving his right to receive a Notice of Intent to Impose a Claim on the Security Deposit. Despite this waiver, the Phillips' sent their Notice of Claim within 30 days' of both the termination of the Lease and the date on which the Phillips' were certain Appellant no longer had possession of the Property due to their termination of the Lease. Appellant failed to send an objection to the Notice of Claim within 15 days of receiving same, therefore, the Phillips' were statutorily authorized to deduct their claims from the Security Deposit. While their claims exceeded the amount of the Security Deposit, they at no time pursued any monies above and beyond the amount of the Security Deposit.

Because the Phillips' were within their legal rights to retain the Security Deposit, they are not liable for either conversion or civil theft. The lower court found Appellant failed to meet his burden of proof in showing by a preponderance of the evidence that the Phillips are liable for conversion or by clear and convincing evidence that the Phillips' are liable for civil theft. This Court must

sustain the lower court's decision that Appellant failed to meet his burden, as those findings of fact are supported by competent substantial evidence. Furthermore, because Appellant failed to proffer any substantial facts or legal authority in support of their civil theft claim, the Phillips' are entitled to recover their reasonable attorney's fees and costs per the Civil Theft Statute.

For the foregoing reasons, this Court should find in favor of the Phillips' on all causes of action, award the Phillips' reasonable attorney's fees and costs in defending these causes of action, and for such other relief this Court deems just and proper.

**Respectfully Submitted,**

**HEEKIN LAW**

/s/ Theresa Carli Kunnen  
Theresa Carli Kunnen, Esq.  
4540 Southside Blvd., Ste. 202  
Jacksonville, Florida 32216  
Tel.: (904) 998-9733  
Fax: (904) 998-9736  
**eservice@heekinlaw.com**  
*Attorney for Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of November, 2015, a true and correct copy of foregoing was served to counsel for Appellant, Preston H. Oughton, Esq. at poughton@oughtonlaw.com.

/s/ Theresa Carli Kunnen  
Attorney

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing Answer Brief is in Times New Roman 14-point font in compliance with the font requirements in Rule 9.210(a)(2), Fla. R. App. P.

/s/ Theresa Carli Kunnen  
Attorney