IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-21

LOWER TRIBUNAL CASE NOS.: 3D08-1713 & 01-13868 CA 11

BANCO INDUSTRIAL DE VENEZUELA, C.A. MIAMI AGENCY, a foreign corporation, and BIV INVESTMENTS AND MANAGEMENT, INC., a Florida Corporation, a/k/a BIV INVERSORES Y PROMOTORES,

Petitioners,

v.

ESPERANZA DE SAAD and
JOSEPH BEELER, P.A.,

Respondents.

ANSWER BRIEF ON THE MERITS OF RESPONDENT JOSEPH BEELER, P.A.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

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June 2010

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LEGEND

Along with this Brief, Respondent Joseph Beeler, P.A. is submitting herewith three volumes of its Appendix. Contained therein are pertinent parts of the Record, including:

- ► The U.S. District Court Opinion and Order Granting Esperanza de Saad's Motion for Judgment of Acquittal, dated July 13, 2000, App. 1;
- ► The United States District Court's Final Judgment acquitting de Saad on all money laundering counts, App. 2;
- ► The Affidavit of Joseph Beeler, with attached exhibits, App. 3; and
- ► The Fee Agreement between de Saad and Joseph Beeler, P.A, App. 4.

Also contained within the appendices are other pertinent parts of the Record, including excerpts from hearing and trial transcripts in this matter, and an index providing the record citation to each of the appendix materials. *See* Appendix Vols. I–II. In addition, the briefs in the Third District Court of Appeal in the instant appeal, *Banco Industrial de Venezuela, C.A., Miami Agency v. de Saad*, 21 So. 3d 46 (Fla. 3d DCA 2009), are included, as well the Third District's decision. *See* Appendix Vol. III.

Citations to documents in the Appendix will appear in this Brief as "App. __ at __" and will include, where appropriate, a parenthetical description of the document. Citations to hearing and trial transcripts contained in the Appendix will provide the date of the hearing and applicable page numbers followed by a

parenthetical containing the Appendix citation. For example, a citation to the April 30, 2007 hearing transcript in the trial court would appear as follows: April 30, 2007 Hearing Tr. at 12 (App. 14). The remaining citations to the Record will contain the volume and page number of the record and appear as follows: (1) citations to the original record will appear as "R. __:__"; (2) citations to the first supplement to the record will appear as "Supp. R. __:__"; and (3) citations to the second supplement to the record will appear as "2d Supp. R. __:__."

Also, for the Court's convenience, under Tab A of this Brief we reprint in full Florida's indemnification statute, § 607.0850, Fla. Stat., and under Tab B we reprint in full Delaware's indemnification statute, 8 Del. C. § 145.

Finally, Petitioners Banco Industrial de Venezuela, C.A., Miami Agency and BIV Investments and Management, Inc. will be referred to collectively as "BIV" and, where relevant, will be referred to individually as "BIV Miami" and "BIV Investments." Citations to BIV's Initial Brief on the Merits will appear as "BIV Br. at __," and to BIV's Appendix will appear as "BIV App. __ at __."

INTRODUCTION

The main issue presented in this appeal is whether the Third District correctly held that the standard of conduct under subsection (7) of Florida's indemnification statute, Fla. Stat. § 607.0850, is inapplicable to mandatory indemnification under subsection (3), where the trial court awarded such indemnification only on the charges for which the corporate officer was acquitted.

Both the Third District and the trial court held that the mandatory indemnification provision contained in subsection (3) of section 607.0850 requires that BIV indemnify its officer, Esperanza de Saad, on the charges for which she was acquitted. In so doing, both courts rejected BIV's argument that the standard of conduct contained in subsection (7), which on its face permits and only applies to permissive indemnification by a corporation outside of the statute, applies to mandatory indemnification under subsection (3).

Citing conflict with the Fourth District's decision in *Alternative Development Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n,* 608 So. 2d 822 (Fla. 4th DCA 1992), BIV sought discretionary review in this Court, which the Court granted. For the reasons that follow, this Court should now affirm the Third District's decision, disapprove the decision in *Alternative Development*, and reject the other arguments that BIV seeks to raise in this appeal.

* * *

Esperanza de Saad is the former vice president and general manager of BIV's Miami Agency. In May 1998 the United States indicted de Saad as part of an undercover sting operation on ten counts of money laundering and one count of

conspiracy to launder money while acting in her capacity as BIV's vice president. Following a lengthy jury trial, United States District Judge Bernard A. Friedman granted de Saad's motion for judgment of acquittal, ***acquitting*** her on all counts as a matter of law. App. 1. In his 25-page decision, Judge Friedman held – reviewing the evidence in the light most favorable to the Government – that ***no rational jury*** could have concluded that Government agents represented to de Saad that the funds deposited at BIV constituted proceeds of drug activity and, further, that she was entrapped as a matter of law. *Id*. at 18, 24; App. 2 (Final Judgment).

Following her acquittal, the Government threatened, for the first time, to bring a new, separate charge against de Saad, a single count of money structuring. App. 3 at 12, ¶ 24 . It also filed a notice of appeal of the district court's final judgment acquitting de Saad. *Id*. Then, seven months after her acquittal, the Government charged de Saad with its money structuring offense, and she pled guilty to that charge on the condition that the Government dismiss its appeal of the final judgment acquitting her on all money laundering counts. App. 7.

Thereafter, de Saad brought this indemnification action, and her lead counsel in the criminal matter, Joseph Beeler, P.A., filed a complaint in intervention based upon its fee agreement with de Saad. App. 15. The trial court, the Honorable Robert N. Scola, Jr., presiding, granted summary judgment on liability against BIV. App. 8; App. 14. It then held a ten-day bench trial on damages, entered a 73-

page verdict, and awarded indemnification only on the counts for which de Saad was acquitted. App. 9. On appeal, the Third District affirmed. App. 36.[1]

While those are the relevant facts, BIV spends considerable effort (and rhetoric) seeking to complicate this appeal with incorrect, incomplete, and irrelevant factual statements. For instance, at the beginning of its brief, BIV calls the facts "glaring" and suggests, without citation to the record, that de Saad knew and facilitated the deposit of drug money, stating that, "during the undercover sting operation, de Saad knowingly violated federal law by facilitating the deposit of roughly $4 million in drug proceeds into BIV accounts." BIV Br. at 1. Likewise, BIV suggests that de Saad knew that the confidential informant who opened accounts at BIV was a drug dealer and money launderer, stating that, "Fred Mendoza, 'a government informant, ***known*** money launderer, and drug dealer' had opened two accounts at BIV-Miami Agency through de Saad." *Id*. at 7 (citing BIV App. 1, ¶¶ 13, 17 and BIV App. 7 at 168) (emphasis supplied).

BIV's record citations (or lack thereof) do not support these statements. The Government presented no evidence that de Saad knew that Mendoza was a money launderer or drug dealer when opening accounts at BIV. App. 1 at 3. Nor did she knowingly violate federal law by facilitating the deposit of drug proceeds. Though never stated by BIV, Judge Friedman acquitted de Saad because the Government

[1] The trial court also granted summary judgment in favor of de Saad and Joseph Beeler, P.A. for BIV's breach of de Saad's employment contract. App. 10. However, because the law firm obtained ***no recovery*** whatsoever on the contract claims, App. 13 at 2-3, it relies upon and adopts the arguments set forth in de Saad's Answer Brief demonstrating that the circuit court properly granted summary judgment with respect to both liability and damages on those claims.

failed to present sufficient evidence from which any rational juror could reach any of these conclusions. *Id*. at 18. Also, having failed on its money laundering charges, neither the subsequent money structuring charge nor de Saad's plea to that charge contain any allegation, statement, or admission that de Saad ever knowingly facilitated the deposit of any drug proceeds at any time.

BIV's descriptions of the issues presented in this appeal fare no better. For example, it describes the first issue as "whether Florida mandates indemnification for a corporate officer who knowingly violates the law for personal gain and pleads guilty to a felony charge arising from that conduct." BIV Br. at 2. In so doing, BIV fails to acknowledge that (1) de Saad was acquitted on all money laundering charges; (2) indemnification was awarded ***only*** on those charges; and (3) ***no*** indemnification was awarded on the subsequent money structuring charge.[2]

STATEMENT OF THE CASE AND OF THE FACTS

Florida's Indemnification Statute

Where, as here, a corporation refuses to indemnify its officer, Florida's indemnification statute provides three alternative means by which a corporate director, officer, employee, or agent (collectively, "officer") may obtain indemnification. As set forth in subsection (9) of Fla. Stat. § 607.0850:

[2] Similarly, BIV claims that a "threshold issue" presented here is whether Florida's indemnification statute even applies in this case because BIV is a Venezuelan corporation authorized to conduct banking business in Florida. BIV Br. at 4. However, among other things, BIV fails to state that it ***never*** raised this issue in the Third District in the instant appeal, thus waiving the issue altogether. Also, on the merits, de Saad's contract with BIV expressly provided that Florida law solely and exclusively governed the parties' relationship. App. 34 at 6.

> (9) . . . [***T***]***he court***, after giving any notice that it considers necessary, may order indemnification . . . of expenses, . . . if it determines that:
>
> (a) The . . . officer . . . is entitled to ***mandatory indemnification under subsection (3)***, . . . [;]
>
> (b) The . . . officer . . . is entitled to indemnification or advancement of expenses, or both, ***by virtue of the exercise by the corporation of its power pursuant to subsection (7)***; ***or***
>
> (c) The . . . officer . . . is fairly and reasonably entitled to indemnification or advancement of expenses, or both, in view of all the relevant circumstances, ***regardless of whether such person met the standard of conduct set forth in subsection (1), subsection (2), or subsection (7)***.

(Emphasis supplied.) Thus, a judicial determination of whether an officer is entitled to mandatory indemnification under subsection (3) is a distinct and separate analysis from whether an officer is entitled to indemnification by virtue of the exercise by the corporation of its power pursuant to subsection (7).[3]

As for subsection (3), it mandates indemnification to the extent that the officer has been successful in whole or ***in part*** in defense of a proceeding where the alleged conduct was committed in his or her capacity as a corporate officer. Complete success is not required; rather, subsection (3) expressly provides that:

> (3) ***To the extent that*** a[n] . . . officer . . . has been ***successful on the merits or otherwise in defense of any proceeding referred to in subsection (1)*** . . ., ***or in defense of any claim, issue, or matter therein***, he or she ***shall be indemnified*** against expenses actually and reasonably incurred by him or her in connection therewith.

[3] Because "the court" determines whether indemnification shall be awarded, *id*. § 607.0850(9), BIV's whole attack on the propriety of the trial court granting summary judgment on the issue of liability for mandatory indemnification overlooks that BIV would never have a right to a jury trial on that issue.

(Emphasis supplied.) Moreover, for purposes of subsection (3), a "proceeding" under subsection (1) is "any proceeding" against an officer, "by reason of the fact that he or she is or was a[n] . . . officer . . . of the corporation . . . ." *Id*. § 607.0850(1). Thus, to obtain mandatory indemnification, an officer, such as de Saad, must only show that (1) she was successful in whole or in part in the defense of a proceeding and (2) she was a party to the proceeding based on alleged conduct committed by the officer in her capacity as an officer.

Indeed, neither subsection (3), when referencing a subsection (1) "proceeding," nor subsection (9)(a) provides that the "standard of conduct" under subsection (1) or subsection (7) must also be satisfied to obtain mandatory indemnification. *Compare id.* § 607.0850(9)(a) (providing for indemnification where officer "is entitled to mandatory indemnification under subsection (3)") *with id.* § 607.0850(9)(c) (permitting indemnification "in view of all the relevant circumstances, regardless of whether such person met ***the standard of conduct set forth in subsection (1), subsection (2), or subsection (7)***") (emphasis supplied).

As the statutory language shows, the "standard of conduct" under subsection (1) only applies when a corporation provides permissive indemnification to its officer under the statute. That is, in contrast to mandatory indemnification under subsection (3), a corporation has "the power to indemnify" its officer under subsection (1) if it determines that the officer "acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful." *Id.* § 607.0850(1);

see also id. § 607.0850(4) (permitting a corporation to indemnify its officer under subsection (1) where "he or she has met the ***applicable standard of conduct set forth in subsection (1)***" (emphasis supplied)).

As for subsection (7), the corporation is granted additional power, beyond the power granted under the statute, to voluntarily indemnify an officer under circumstances not otherwise provided by section 607.0850, Fla. Stat. But, in that case, the standard of conduct under subsection (7) must be satisfied:

> (7) The ***indemnification*** and advancement of expenses provided ***pursuant to this section are not exclusive***, and ***a corporation may make any other or further indemnification*** or advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office. ***However***, indemnification or advancement of expenses shall not be made to or on behalf of any director, officer, employee, or agent if a judgment or other final adjudication establishes that his or her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:
>
> (a) A violation of the criminal law, unless the director, officer, employee, or agent had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful;
>
> (b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit; . . .

(Emphasis supplied.) Thus, while BIV claims that subsection (7) applies to all methods for obtaining indemnification under section 607.0850, BIV Br. at 6, subsection (7) is a grant of additional power to a corporation to indemnify its officer, and not a limitation on mandatory indemnification under subsection (3).

Esperanza de Saad's Acquittal in the Criminal Matter

Mrs. de Saad is the former vice president and general manager of BIV's Miami Agency. On June 12, 1997, a senior bank official at BIV's headquarters in Caracas, Venezuela referred a new client, Fred Mendoza, to de Saad in Miami. App. 1 at 2. A week later, Mendoza – who was a confidential informant secretly working for U.S. Customs – arrived at BIV in Miami with letters of reference from U.S. banking institutions, met de Saad, and opened two corporate accounts. *Id*. at 3. During the next ten months approximately $4 million in wire transfers (not cash money) were deposited into those accounts from accounts secretly controlled by the Government at Bank of America. *Id.* at 17. At no time did Mendoza or anyone else ever represent to de Saad that these funds were purported drug proceeds. *Id*.

Rather, on April 28, 1998, the last time that de Saad ever met with Mendoza, he inquired about opening a third account at BIV. And, at the end of the meeting, Mendoza told de Saad if he loses money, he faces the prospect of being killed. *Id.* at 6. In turn, de Saad did ***not*** open the new bank account, and she had ***no*** further contact with Mendoza. *Id*. As Judge Friedman observed when acquitting de Saad:

> The agents' biggest "hint" to de Saad that the money was drug money came at the very end of the operation when Mendoza told de Saad that he could be killed if he lost the money. At trial, the evidence showed that ***after Mendoza made this statement to de Saad, she did not open the new bank account that they had discussed earlier that day, and she had no further contact with Mendoza or the other government agents*** until her arrest approximately three weeks later.

Id. at 24 (emphasis supplied).

On May 19, 1998, however, the Government charged de Saad with conspiracy to launder money represented to be the proceeds of drug activity and with ten substantive counts of such money laundering. The indictment expressly alleged that de Saad committed these purported offenses while acting at all times material as "a Vice President at Banco Industrial de Venezuela's agency in Miami, Florida." App. 5 at 1, ¶ 2; *see id*. at 4 (alleging that de Saad "would arrange to open bank accounts at [her] bank[ ] and introduce [Mendoza] to bank employees who would be responsible for handling transactions involving the accounts"). The indictment also alleged that over $4 million had been laundered through accounts opened at BIV with de Saad's assistance. *Id.* at 9–11, ¶¶ 30–54; *id.* at 14–15.[4]

While the May 1998 indictment charged de Saad with money laundering, neither that indictment nor any of the Government's subsequent indictments charged that de Saad committed money structuring. For example, in February 1999 – more than eight months after its initial indictment – the Government filed a Second Superseding Indictment which included allegations that de Saad helped a co-defendant cash four $5,000 checks totaling $20,000, but the Government did not charge her with money structuring. *See* App. 6 at 11–12, ¶¶ 44–50 (Second Superseding Indictment). In fact, prior to de Saad's acquittal on all money

[4] Faced with those charges, de Saad retained Joseph Beeler, P.A. as her lead defense counsel and, as part of their fee agreement, assigned to Joseph Beeler, P.A. the right to seek indemnification against BIV as security for unpaid fees, costs, and expenses. App. 4. However, BIV refused to advance funds to support de Saad's defense despite repeated requests that it do so and after meetings where defense counsel explained that no representation had ever been made to de Saad that the funds deposited at BIV constituted drug proceeds. *See* App. 3, at 21; App. 30.

laundering charges in July 2000, the Government never charged (or even threatened to charge) her with any money structuring offense. App. 3 at 12, ¶ 24.

In November 1999, de Saad, along with two co-defendants, went to trial in the United States District Court for the Central District of California. Despite the Government's accusations, the evidence showed that neither Mendoza nor any other Government agent ever informed de Saad that the funds deposited at BIV constituted purported drug proceeds, an essential element of the charged offenses. App. 1 at 2– 6 & 9. Also, neither Mendoza nor any Government agent approached de Saad because they believed that she was involved in any illegal act. *Id.* at 2. Thus, even though the jury returned a guilty verdict as to all defendants, Judge Friedman granted de Saad's motion for judgment of acquittal. *Id.* at 25.

In his Opinion and Order, Judge Friedman held – reviewing the evidence in the light most favorable to the Government – that no rational jury could have concluded that Government agents represented to de Saad that the funds deposited at BIV constituted drug proceeds and, further, that she was entrapped as a matter of law. *Id*. at 18, 24. As Judge Friedman stated, when Mendoza and the undercover agents met de Saad to open accounts at BIV (having been referred to de Saad by her superior in BIV), "they had no evidence that she knew the illegal nature of the banking services they sought, or that she was predisposed to launder drug money." *Id.* at 2. Judge Friedman also observed that "the government went to great lengths to conceal the nature of the money it was depositing into the accounts at B.I.V. Miami." *Id*. at 23. For instance, when de Saad conducted a "Know-Your-Customer" meeting at Mendoza's sham business, "[the] office had 'employees'

posing as workers, secretaries, assistants, etc. Thus, when de Saad arrived for the meeting, Mendoza's Emerald Empire business appeared legitimate." *Id*. at 5.[5]

Thereafter, the United States district court entered its Final Judgment, adjudicating in favor of de Saad the conspiracy and money laundering counts, and stating that "**THE DEFENDANT:** has been acquitted on all Counts, and is discharged as to such Counts." App. 2 at 1 (footnote omitted). The district court's decision acquitting de Saad and its Final Judgment thereon stand to this day.

The Government's Subsequent Money Structuring Charge

After de Saad's acquittal, the Government threatened, for the first time, to prosecute her for a money structuring offense based upon the four checks. App. 3 at 12, ¶ 24. It advised Joseph Beeler, P.A. that it was considering bringing a separate action in the Southern District of Florida charging her with that offense.

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[5] According to BIV, however, Judge Friedman "noted that although he felt the government had failed to prove de Saad's involvement in money laundering 'beyond a reasonable doubt,' the government had presented evidence that she 'received four $5,000 checks from [a co-defendant] for the services she provided, and a jury certainly could have considered her receipt of the checks and the manner in which they were cashed as evidence of some wrongdoing.'" BIV Br. at 10 (quoting, in part, the court's decision at 23). BIV is incorrect. The district court did not hold that the Government failed to prove its case "beyond a reasonable doubt." It held, pursuant to Rule 29, Fed. R. Crim. P., that "no rational jury" could have found that the Government proved the essential elements of money laundering "beyond a reasonable doubt." App. 1 at 25. As for the four checks, BIV fails to quote the entire passage from the court's decision, omitting the next sentence, which states: "However, the court believes that because the government failed to present sufficient evidence that it represented to de Saad that the money involved was the proceeds of narcotics trafficking, de Saad's receipt of the four checks cannot be considered as evidence that she was predisposed to launder drug money, ***the conduct for which she was charged***." *Id*. at 23 (emphasis supplied).

Id. at 13, ¶ 25. It also noticed an appeal of the final judgment acquitting de Saad, and de Saad noticed a cross-appeal. App. 17 (Docket, Entry Nos. 465 & 494).

In February 2001, the Government and de Saad agreed that she would plead to an information brought in the Central District of California charging a single count of money structuring. App. 3 at 13, ¶ 26.[6] The plea agreement states that de Saad caused BIV employees to cash four checks at Barclays Bank in Miami. App. 7 at 3-4, ¶ 6. As part of the plea, the parties recommended that de Saad receive a sentence of probation for one year, pay a $50,000 fine, and not engage in banking absent the Government's permission. *Id*. at 5, ¶ 8 & 7, ¶ 12(i). The parties further agreed to dismiss their respective appeals. *Id.* at 7, ¶ 12(h) & 8, ¶ 13(c).

The plea agreement makes no mention of money laundering, does not set forth that de Saad's conduct with respect to the money structuring offense was material to the alleged money laundering offenses, and leaves in place Judge Friedman's decision and Final Judgment acquitting de Saad on all money laundering charges. Similarly, Judge Snyder's judgment on the money structuring information does not establish that de Saad's actions or omissions were material to the money laundering offenses for which she was acquitted. *See* App. 16.

The Government's Civil and Regulatory Actions and BIV's Complaint Against BankUnited

When the Government indicted de Saad in May 1998, various federal and state agencies instituted civil and regulatory actions against BIV based upon the

[6] BIV states that the plea was "before the same federal judge" as the money laundering trial. BIV Br. at 10. In fact, Judge Friedman presided over the trial, while Judge Christina A. Snyder presided over de Saad's plea. App. 3 at 14, ¶ 29.

same conduct as alleged in the Government's May 1998 indictment. *See, e.g.*, App. 18 (Fed. Reserve Temp. Cease and Desist Order and Notice of Charges); App. 19 (N.Y. Banking Dep't Order). The Government also seized and attempted to forfeit approximately $4 million from BIV. App. 20. After the Government's forfeiture theories proved unsupportable, it commenced a civil monetary penalty action against BIV. App. 21. De Saad was not a party in any of these actions.

Following de Saad's acquittal, the Government's civil action against BIV remained pending and the Federal Reserve's Cease and Desist Order remained in place. However, in December 2000, the Federal Reserve lifted its Order, and in February 2001, de Saad entered her money structuring plea, leaving only the Government's civil action. While not stated in its brief, BIV then filed a fraud action against BankUnited. *See Banco Indus. de Venez., C.A., Miami Agency v. BankUnited Fin. Corp.*, Case No. 01-13104 (Fla. 11th Jud. Cir.). BankUnited (and Bank of America) had participated in the Government's sting operation, falsely vouching for the legitimacy of Mendoza, the Government's confidential informant.

In its complaint, BIV tracked Judge Friedman's opinion. It alleged that Mendoza was referred to BIV Miami (*i.e.*, to de Saad) by BIV's Caracas office. App. 22 at 2-3. It also alleged that when Mendoza and the agents opened their accounts, they presented documents attesting to their legitimacy, including a recommendation letter from BankUnited. *Id.* at 3. BIV alleged that banks (and, hence, de Saad) properly rely upon recommendation letters when opening new accounts. *Id*. at 5-6. BIV then cited de Saad's acquittal, *id*. at 6-7, and claimed that BankUnited had defrauded it. *Id*. at 7. Thus, BIV blamed BankUnited (not de

Saad) for the Government's sting operation, and it sought the attorneys' fees and costs it incurred in the various actions arising from that operation. *Id.* at 8-12.[7]

The Instant Lawsuit, Settlement of the Government's Civil Action, and Dismissal of BIV's Action Against BankUnited

In June 2001 de Saad brought this action against BIV. R. I:23-39. BIV and the Government then settled their civil action and BIV dismissed its lawsuit against BankUnited. In particular, in October 2001, BIV and the Government entered into a "Stipulation for Mutual Release of Claims," releasing each other from all claims against one another. App. 23. BIV also released BankUnited, among others, though the Government and BIV carved out de Saad from BIV's releases. *Id.*[8]

In January 2002, Joseph Beeler, P.A. moved to intervene in this action based upon the assignment contained in its fee agreement. R. IV:567-70. The motion was denied (per Circuit Judge Bernard S. Shapiro), and the law firm appealed to

[7] BIV wrongly accuses de Saad of having caused these alleged damages. BIV Br. at 11. As Judge Scola held, however, when dismissing in part BIV's counterclaims, the cause of BIV's purported damages was the Government's charging decisions, not de Saad's conduct. App. 34. BIV offers no substantive response to that decision. Rather, it merely (and erroneously) argues that "this ruling is in error for many of the same reasons that the indemnity and breach of contract summary judgment rulings were in error." BIV Br. at 12 n.8.

[8] Ignoring the Mutual Release, its action against BankUnited, and de Saad's lawsuit against it, BIV states that the Government "ultimately dismissed its [civil] claims after determining that de Saad" was the only culpable BIV employee. BIV Br. at 11. However, because the Government had originally charged de Saad, it was no surprise – though legally irrelevant – that it did not confess error and admit that it had wrongly indicted her on conspiracy and money laundering charges.

the Third District, which reversed and granted intervention. *Joseph Beeler, P.A. v. Banco Industrial de Venezuela*, 834 So. 2d 952 (Fla. 3d DCA 2003).

Meanwhile, BIV Miami moved for judgment on the pleadings on de Saad's indemnification claim, arguing that it was not governed by section 607.0850. R. IV:426-560. The circuit court, Judge Shapiro still presiding, granted BIV Miami's motion and de Saad appealed. The Third District reversed and remanded for entry of judgment in favor of de Saad on this issue. *De Saad f/u/b/o Joseph Beeler, P.A. v. Banco Industrial de Venezuela, C.A.*, 843 So. 2d 953 (Fla. 3d DCA 2003); *see id*. at 954 n.1 (noting that "De Saad's employment with BIV Miami was pursuant to an employment contract which provided that the parties' contract would be governed solely and exclusively by Florida law"). For its part, BIV Miami did not seek to invoke the discretionary jurisdiction of this Court in that appeal.

On remand, Joseph Beeler, P.A. filed its complaint in intervention. App. 15.[9] It alleged that BIV Miami was subject to Florida's indemnification statute because, among other things, the de Saad's employment contract with BIV Miami specified that Florida law governed the parties' relationship. App. 15 at ¶ 43. Thereafter, BIV Miami never raised the issue of whether it was subject to section

[9] BIV mistakenly says that "[f]our years" after de Saad filed her complaint, Joseph Beeler, P.A. intervened in this action. BIV Br. at 12. In fact, Joseph Beeler, P.A. moved to intervene in January 2002, seven months after de Saad filed her complaint. *Joseph Beeler, P.A.*, 834 So. 2d at 953.

607.0850 – it did not do so on summary judgment, when the trial court entered final judgment, or in the Third District in the instant appeal.[10]

Summary Judgments on Liability for Mandatory Indemnification and the Court's Verdict on Indemnification Damages

In January 2006 Judge Scola heard motions for summary judgment by de Saad and BIV on the indemnification claims.[11] De Saad relied upon the mandatory indemnification provision in subsection (3) of Florida's indemnification statute and her acquittal on all money laundering and conspiracy counts. R. VI:818-902. BIV argued that the facts involving the structuring plea were related to the laundering counts, and it relied upon *Alternative Development Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992), arguing that subsection (7) applies to subsection (3). Jan. 25, 2006 Hearing Tr. at 32-34 (App. 25). It also argued that the standard of conduct in subsection (1) applies to subsection (3), *id.* at 37, and that it was entitled to summary judgment against de Saad because of her assignment with Joseph Beeler, P.A., *id.* at 44.

As for Joseph Beeler, P.A., it did not file a summary judgment motion at that time (discovery having yet to conclude). Instead, it opposed BIV's motion, explaining that neither subsection (7) nor the standard of conduct in subsection (1) applies to subsection (3), and distinguished the decision in *Alternative*

[10] Instead, BIV filed counterclaims against de Saad and Joseph Beeler, P.A., seeking the same damages it had previously sought against BankUnited. R. II:134-242; R. VIII:1294-1429.

[11] BIV incorrectly states that it and de Saad moved for summary judgment "after discovery." BIV Br. at 13. In fact, discovery would not be complete for over a year following those motions.

Development. Jan. 25, 2006 Hearing Tr. at 71-83 (App. 25). *See* R. IX:1497-1519 (Memo. In Opp. to BIV's Sum. J. Mot.).[12] With respect to BIV's claim that the money structuring charge was related to the money laundering counts, the law firm explained that the issue was irrelevant on the question of liability:

> [W]here the cases generally arise where this becomes an issue isn't on the question of liability. It's the question of money damages and indemnification at the end. Because you get in disputes about well, which goes to what count, what attorneys hours went to Count I, what attorneys hours went to Count II. So forth. That's easy in this case. Because the case went to trial and was tried strictly on money laundering. There was no money structuring.

Jan. 25, 2006 Hearing Tr. at 69 (App. 25). The court then granted summary judgment in favor of de Saad and denied BIV's motion. *Id*. at 90-91; App. 8.[13]

After discovery concluded, Joseph Beeler, P.A. moved for summary judgment on the issue of liability on its cause of action for indemnification, *see* R.

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[12] As for BIV's assignment argument, Beeler noted that the assignment secured the payment of outstanding fees, costs, and expenses, the law firm was not seeking to recover more than what it was owed, and, to the extent BIV was liable in excess of that amount, de Saad was entitled to the excess. App. 3 at 19 n.4.

[13] Thereafter, BIV moved for reconsideration. Supp. R. LVIII:7217-7238. It submitted expert affidavits from attorneys Marcos Jiménez, Esq. and Robert B. Serino, Esq., who opined that de Saad had not succeeded in the criminal matter. App. 26; App. 27. Mr. Serino also opined that de Saad was acting as an individual, outside the scope of her employment, with respect to the money structuring charge. App. 27 at 4, ¶ 9. And, BIV argued that the court should reconsider its decision because at the summary judgment hearing its arguments were lost "in the confusion of a lot of lawyers talking . . . ." May 15, 2006 Hearing Tr. at 4 (App. 28). Judge Scola denied BIV's motion, stating that "I certainly did not make my decision because I was confused about what was happening in court." *Id.* at 27.

XIV:2583-2590; *see also* R. :XV:2591-2794 (Summary Judgment Evidence), which the circuit court granted. April 30, 2007 Hearing Tr. at 12 (App. 14).

The court then conducted a ten-day bench trial on damages. Mr. Beeler testified, along with co-counsel who had represented de Saad in the criminal matter. Among other things, the evidence showed that BIV's former counsel had in 1998 (that is, two years prior to de Saad's acquittal) affirmatively acknowledged that she was entitled to be indemnified should she be acquitted on the money laundering charges. April 30, 2007 Trial Tr. at 223 (App. 29). Also, attorney Robert C. Josefsberg, Esq. testified as an expert on behalf of Joseph Beeler, P.A., opining that the fees, costs, and expenses incurred in de Saad's defense were necessary and reasonable. May 2, 2007 Trial Tr. at 573–80 (App. 31).[14]

In contrast, BIV's expert, attorney John W. Toothman, Esq., testified that the law firm was not entitled to any recovery on its indemnification claim for unpaid fees, costs and expenses. May 10, 2007 Trial Tr. at 2152 (App. 32).

In its 73-page verdict, the court awarded Joseph Beeler, P.A. damages on its indemnification claim in the amount of $1,013,661.92. App. 9 at 71. It did not award any recovery (as none was requested) for fees, costs, and expenses after July 19, 2000 (that is, subsequent to the Government indicated an intent to charge de Saad with money structuring). *See id.* at 14. As for Mr. Josefsberg's testimony,

[14] In addition, Joseph Beeler, P.A. introduced over 200 exhibits documenting its work and supporting the fees and costs incurred in de Saad's defense. It also introduced correspondence from it to BIV's counsel, dated August 28, 1998, which urged that BIV advance de Saad's fees, costs, and expenses and outlined the grounds showing that de Saad had not engaged in money laundering. App. 30.

the court noted that it was his opinion that "the result obtained for De Saad by Beeler was the equivalent of a home run." *Id.* at 18. As for BIV's expert, the court remarked that "some of [his] opinions defy logic and common sense. *Id.* at 57.

With respect to de Saad, the court awarded $2,596,913.80 on her indemnification claim. The court emphasized that it had given great thought to its verdict, stating, "[o]ne cannot criticize BIV for the business decision it made[,]" but BIV's refusal to provide support to de Saad greatly increased her expenses, especially those related to the loans she obtained to post bond. *Id.* at 72.

Summary Judgment on the Contract Claims and BIV's Counterclaims

Following the bench trial, the court heard the parties' motions for summary judgment with respect to the claims for breach of contract and granted summary judgment in favor of de Saad and Joseph Beeler, P.A. App. 10; App. 11.

The court also heard de Saad's and the law firm's summary judgment motions on BIV's counterclaims. It held that BIV could not show that de Saad's alleged conduct caused it damages for expenses incurred in the civil and regulatory actions (as well as in monitoring de Saad's criminal matter), because, as a matter of law, the Government's charging decisions were the superseding and intervening causes for those alleged damages. App. 34 at 2. The court, however, permitted BIV to pursue its counterclaims to the extent that they sought damages for personnel expenses, fees and costs incurred in "internal investigations." *Id.* at 2-3.

The Parties' Joint Stipulation and Final Judgment

Thereafter, the parties reached a joint stipulation allowing for entry of final judgment. App. 12. They agreed that the circuit court would enter partial

judgment in favor of de Saad and Joseph Beeler, P.A. on the remaining portion of BIV's counterclaims, and final judgment in favor of de Saad and Joseph Beeler, P.A. on their indemnification and contract claims and on BIV's counterclaims. *Id.* at 1-2, ¶ 1 & 3, ¶ 3. They also agreed that de Saad and Joseph Beeler, P.A. would not seek attorneys' fees, costs, and expenses for work performed specifically and identifiably in the defense of BIV's counterclaims. *Id.* at 2, ¶ 2.[15]

Thereafter, the circuit court entered final judgment in favor of de Saad and Joseph Beeler, P.A., awarding damages on their indemnification claims consistent with its verdict. App. 13. BIV then filed a notice of appeal, R. XXXV:6641, and de Saad and Joseph Beeler, P.A. cross-appealed the court's partial denial of their summary judgment motions on BIV's counterclaims. R. XXXV:6654; R. XXXVI:6680.

The Parties' Briefs and the Third District's Decision

In its briefs in the Third District, BIV failed to raise several of the issues it has now attempted to argue in this Court. It failed to raise its so-called "threshold issue" that section 607.0850 does not apply to BIV Miami. It also failed to raise the issue of whether the standard of conduct under subsection (1) of Florida's indemnification statute applies to mandatory indemnification under subsection (3).

[15] The parties further agreed that if the indemnification and/or contract judgments are overturned and remanded for trial, then the stipulation dismissing the remaining portion of BIV's counterclaim would have no effect (unless it is also determined that BIV cannot recover any amount on its counterclaim). *Id.* at 4–5, ¶ 6. However, with respect to Joseph Beeler, P.A., the parties agreed that, even in that event, the stipulation would remain in effect unless the amount of the Final Judgment (as affirmed on appeal) that de Saad obtains against BIV is less than the amount that BIV could recover on remand of its counterclaim. *Id*.

Rather, BIV argued that factual questions existed as to whether de Saad was successful in the criminal matter and whether she was prosecuted by reason of the fact she was an officer of BIV. App. 37 at 23-34. It also argued that the standard of conduct under subsection (7) applies to subsection (3). *Id*. at 34-36.

In its decision, the Third District affirmed. It reviewed Florida's mandatory indemnification provisions, App. 36 at 4-5, and the nearly identical provisions of Delaware's statute, *id.* at 5 n.3. It also reviewed relevant case law, holding that the "by reason of the fact" element is satisfied where, as here, "'the conduct resulting in the prosecution was done in [the defendant's] capacity as a corporate officer, without regard to what his motivation may have been . . . .'" *Id.* at 6 (quoting *Perconti v. Thornton Oil Corp*. 2002 WL 982419 (Del. Ch. 2002)). As for the requirement that the officer be "successful on the merits or otherwise," the Third District observed that the court in *Perconti* found "dismissal of charges was equivalent to 'success on the merits' under the statute," *id.* at 7, and held that de Saad's acquittal on all money laundering charges met this requirement. *Id*.

As for BIV's claim that subsection (7) applies to mandatory indemnification, the court rejected that argument, stating that, "[w]e find that the proscription against indemnification in subsection (7) applies to ***voluntary indemnification*** by the corporation ***separate and apart*** from the ***mandatory indemnification*** required by subsections (1) and (3). Compare *Alternative Dev., Inc. v. St. Lucie Club & Apartment Homes Condo. Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992)." *Id*. at 7

n.4 (emphasis supplied); *see also id.* at 11 (Schwartz, Sr. J., specially concurring in part) ("agree[ing] entirely with the court as to the indemnification issue").[16]

SUMMARY OF THE ARGUMENT

The Third District correctly held that subsection (7) of Florida's indemnification statute does not apply to mandatory indemnification under subsection (3). The plain language of the statute makes that so. Indeed, subsection (7) is not a limit on mandatory indemnification, but rather, it is a grant of additional power to a corporation to provide voluntary indemnification. Fla. Stat. § 607.0850(7) ("The ***indemnification*** . . . provided ***pursuant to this section are not exclusive***, and ***a corporation may make any other or further indemnification*** . . . under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise . . . ."") (emphasis supplied); *id*. § 607.0850(9)(b) (setting forth an officer's entitlement to indemnification "***by virtue of the exercise by the corporation of its power pursuant to subsection (7)***") (emphasis supplied).

Both BIV and the Fourth District in *Alternative Development* fail to address this plain statutory language. In fact, when quoting subsection (7), the decision in *Alternative Development* wholly omits the first sentence of that subsection and the transition word "However," which begins the second sentence, statutory language establishing that the limitations contained in the second sentence of subsection (7) only apply where a corporation seeks to provide voluntary indemnification. Likewise, neither BIV nor the decision in *Alternative Development* even mentions

[16] Because the Third District affirmed on the issues raised by BIV in its appeal, it did not reach the limited issue raised by the cross-appeal. *Id.* at 9 n.6.

subsection (9), statutory language which also demonstrates that subsection (3) and subsection (7) are alternative, mutually exclusive means by which an officer may obtain indemnification. Thus, for these reasons alone, the decision in *Alternative Development* is mistaken. Subsection (7) simply does not apply to subsection (3).

Having failed to discuss this statutory language, BIV turns legislative intent on its head to argue that the Third District's decision runs afoul of this State's public policy. *See* BIV Br. at 20. BIV is mistaken. The Third District's decision is fully faithful to public policy, as reflected in Florida's indemnification statute. Pursuant to subsection (3), where an officer succeeds in the defense of criminal charges, she is entitled to be indemnified for the expenses incurred in connection with ***those charges***. In contrast, an officer is not entitled to be indemnified on a charge for which she is convicted. Thus, as with Delaware, the Florida Legislature has made the unremarkable decision that an officer need not be wholly successful in order to be indemnified, provided that she is only entitled to mandatory indemnification on charges for which she succeeded. That is exactly this case.

The Government charged de Saad with conspiracy and money laundering, alleging that she committed those offenses while acting as Vice-President of BIV's Miami Agency. Thereafter, the U.S. district court acquitted de Saad on all counts. The Government then threatened to bring a new charge, a money structuring offense. The Government and de Saad entered into a plea agreement in which she pled guilty to that new charge and the Government dismissed its appeal of de Saad's acquittal. This indemnification action ensued and the trial court correctly granted summary judgment on liability.

Indeed, contrary to BIV's arguments, *see* BIV Br. at 21, no genuine issue of material fact exists here. The Government indicted de Saad for alleged conduct – money laundering – committed in her capacity as an officer (and employee) of BIV, and she was acquitted on those charges. As for damages, the trial court issued a 73-page verdict and awarded damages only on the charges for which de Saad was acquitted. That award is fully faithful to Florida's indemnification statute and supported by substantial, competent evidence.

BIV further argues, however, that the trial court and the Third District erred because the standard of conduct under subsection (1) also applies to subsection (3). *See id*. at 21 (claiming that "[b]oth lower courts ignored these statutory requirements"). BIV is again mistaken. The trial court rejected all of BIV's summary judgment arguments, *see* Jan. 25, 2006 Hearing Tr. at 92 (App. 25), and, thereafter, BIV failed to raise this issue in the Third District. Having thus waived the argument in the Third District, BIV has waived it here. And, even if BIV could raise the issue anew in this Court, the plain language of the statute shows that the standard of conduct under subsection (1), as with the standard of conduct under subsection (7), does not apply to mandatory indemnification under subsection (3).

Finally, BIV is wrong on its "threshold issue." Procedurally, it waived any argument that Florida's indemnification statute is inapplicable to BIV Miami when it failed to preserve the issue upon remand after the Third District's 2003 decision and when failed to raise the issue in the Third District in the instant appeal. Also, BIV ***never*** raised the "internal affairs" doctrine at ***any*** time in the trial court, whether before or after the Third District's 2003 decision. On the merits, de

Saad's employment agreement provides that it is governed solely and exclusively by Florida law. That law includes section 607.0850, making the "internal affairs" doctrine inapplicable. In fact, BIV's former counsel stated in 1998 that de Saad was entitled to be indemnified if acquitted on the money laundering counts.

ARGUMENT

I. THE THIRD DISTRICT CORRECTLY AFFIRMED SUMMARY JUDGMENT, HOLDING BIV LIABLE FOR MANDATORY INDEMNIFICATION UNDER SECTION 607.0850, FLA. STAT.

A. Standard of Review

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).[17]

B. The Statutory Elements for Mandatory Indemnification

As we have explained, pursuant to subsection 9(a) of Florida's indemnification statute (which BIV fails to cite), a court must order indemnification if it determines that the officer "is entitled to mandatory indemnification under subsection (3), . . ." And, pursuant to subsection (3), an officer need only satisfy two elements to obtain such indemnification.

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[17] Also, a party cannot defeat summary judgment by expert testimony that seeks to attach a legal conclusion to undisputed facts. *Briggs v. Jupiter Hills Lighthouse Marina*, 9 So. 3d 29, 32 (Fla. 4th DCA 2009) (rejecting argument that experts created a fact dispute where no conflict existed in the facts, "just a conflict in the ultimate legal conclusions reached by the experts"); *see Lee County v. Barnett Banks, Inc.*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997) ("Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'").

First, the officer must show success, in whole or in part, in the defense of a proceeding. Fla. Stat. § 607.0850(3) (providing that an officer "***shall*** be indemnified" to the extent that the officer has "been successful on the merits or otherwise in defense of any proceeding referred to in subsection (1) or subsection (2), ***or in defense of any claim, issue, or matter therein*** . . . ") (emphasis supplied). *See Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974) (reviewing Delaware's analogous mandatory indemnification provision, 8 Del. C. § 145(c), and explaining that "[t]he statute does not require complete success. It provides for indemnification to the extent of success 'in defense of any claim, issue or matter' in an action."). Second, the officer must show that she was a party to a proceeding based on alleged conduct committed by the officer in her capacity as an officer. Fla. Stat. § 607.0850(1) (providing that a "proceeding" is "any proceeding" against an officer, "by reason of the fact that he or she is or was a[n] . . . officer . . . of the corporation . . . .").[18]

[18] As the court stated in *Merritt-Chapman*, "[t]he invariant policy" of the Delaware statute (which is substantively identical to the Florida statute) is:

> [T]o promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation that they serve if they are vindicated. Beyond that, its larger purpose is to encourage capable men to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.

321 A.2d at 141 (citation and internal quotes omitted).

BIV argues, however, that the standards of conduct under subsections (1) and (7) also apply to mandatory indemnification. BIV Br. at 24. BIV is mistaken.

1. The Standards of Conduct under Subsections (1) and (7) Do Not Apply to Mandatory Indemnification Under Subsection (3), and BIV Has Waived Any Claim that Subsection (1) Applies Here

We begin with BIV's waiver. To obtain discretionary review, BIV cited conflict with *Alternative Development*, a decision addressing the standard of conduct under subsection (7). Of course, with this Court having accepted jurisdiction, it has the "authority to address other issues properly raised" by the parties. *E.g.*, *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005). However, BIV has not properly raised the issue of whether the standard of conduct under subsection (1) applies to mandatory indemnification under subsection (3).

In particular, while BIV raised this issue (albeit mistakenly) in the trial court, it failed to raise it in the Third District. Indeed, a review of the BIV's briefs in the Third District show that the issue was never addressed – a point that Joseph Beeler, P.A. made in its Answer Brief in that court. App. 38 at 32. Having thus bypassed intermediate appellate review, BIV should be deemed to have waived the issue or this Court should exercise its discretion and decline to hear it. *Cf. Sunset Harbour Condo. Assoc. v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding issue waived where party failed to raise it in the trial court or the district court). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (declining to address issue not raised in the Court of Appeals, and stating, "[a]lthough in some instances we have allowed a respondent to defend a judgment on grounds other

than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it") (citation omitted).

With that said, BIV is also wrong on the merits. As for the standard of conduct under subsection (1), neither subsection (3) nor subsection (9)(a) incorporates that standard for mandatory indemnification. Instead, subsection (3) provides for mandatory indemnification to the extent that the officer has been successful in "any proceeding referred to in subsection (1) . . . ." It does not require that the officer also satisfy the "standard of conduct" under subsection (1). *See Perconti v. Thornton Oil Corp.*, 2002 WL 982419, *4 & n.22 (Del. Ch. 2002) (explaining that the good faith standard for permissive indemnification by a corporation under 8 Del. C. § 145(a) – the equivalent to subsection (1) of the Florida statute – does not apply to mandatory indemnification).

Specifically, the first sentence of subsection (1) shows that a "proceeding" thereunder is one in which the officer is a party "by reason of the fact" that she is an officer. The rest of that first sentence, beginning with the clause ", if he or she acted in good faith . . . ," does not define the "proceeding." Rather, it is a limitation on the corporation's power to provide permissive indemnification under subsection (1). Or, to put it another way, the fact that subsection (3) only references a "proceeding" under subsection (1) and not the standard of care clause shows that the clause was deliberately excluded. The principle of statutory construction is the canon, "expressio unius est exclusio alterius." Indeed, when the

Legislature wanted to reference a standard of conduct, it knew how to do so. *See* Fla. Stat. § 607.0850(4) (permitting a corporation to indemnify its officer under subsection (1) where "he or she has met the ***applicable standard of conduct set forth in subsection (1)*** . . .") (emphasis supplied); *id*. § 607.0850(9)(c) (permitting a court to order indemnification "in view of all the relevant circumstances, regardless of whether such person met ***the standard of conduct set forth in subsection (1), subsection (2), or subsection (7)***") (emphasis supplied).[19]

As for subsection (7), it makes no mention of subsection (3). Also, the first sentence of subsection (7) provides a grant of additional power to a corporation to indemnify its officer where section 607.0850 would not otherwise permit, stating:

> The ***indemnification*** . . . of expenses provided ***pursuant to this section are not exclusive***, and ***a corporation may make any other or further indemnification*** . . . of expenses of any of its . . . officers . . . under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office.

(Emphasis supplied). The second sentence of subsection (7), which contains the standard of conduct upon which BIV relies, then begins with the transition word "However," showing that the standard of conduct merely limits the grant of additional power to the corporation under the first sentence of subsection (7). And, subsection (9)(b) confirms this statutory construction demonstrating that

[19] *See also Perconti*, 2002 WL 982419, at *4 ("[T]o require the corporate officer seeking indemnification under Section 145(c) to demonstrate that he pursued his course of conduct for the benefit of the corporation or for purposes other than self-interest would limit the rights clearly conferred by Section 145(c) in a manner that was not (but could have been) included in the legislative standard.").

subsection (7) is merely another means to obtain permissive indemnification separate and apart from mandatory indemnification under subsection (3).[20]

Nowhere in its brief does BIV confront this basic statutory analysis. It ignores the entirety of subsection (9) and reads out of context the second sentence of subsection (7). In so doing, BIV manufactures the argument that the public policy of this State prohibits indemnification of an officer on the claims for which she has succeeded unless the standard of conduct under subsection (7) has also been met. BIV Br. at 24-25. In other words, BIV re-writes the statute.

Indeed, all provisions and parts of a statute must be given their meaning and, to do that, they must be read in context. As this Court has explained:

> A basic tenet of statutory interpretation is that a "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Acosta v. Richter*, 671 So. 2d 149, 153-54 (Fla.1996). Accordingly, "statutory phrases are not to be read in isolation, but rather within the context of the entire section." *Id*. at 154. In other words, "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute. . . . A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Smith v. United States*, 508 U.S. 223, 233, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001). Yet, under BIV's analysis, much of section 607.0850 has no meaning at all, including:

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[20] This plain reading of the statute is also consistent with Delaware's statute, which includes a similar subsection. *See* 8 Del. C. § 145(f). In fact, subsection (7) only differs from Delaware's subsection (f) by including the second sentence that BIV reads in isolation. Yet, when read in context, it is clear that the Florida Legislature only intended to restrict the power of corporations to provide for indemnification on their own accord outside of the statute, and not to add additional burdens under subsection (3) or any other part of section 607.0850.

► The entire first sentence of subsection (7);

► The transition word "However" that begins the second sentence of subsection (7);

► The requirement under subsection (3) that an officer "shall be indemnified" to the extent of her success "in defense of any claim, issue or matter" in a proceeding referred to in subsection (1); and

► The three alternative means for obtaining court-ordered indemnification under subsections (9)(a), (9)(b), and (9)(c).

Those provisions have meaning. They show that subsection (7) grants a corporation additional power to indemnify an officer even though section 607.0850 does not otherwise provide for such indemnification.[21]

2. The Fourth District's Decision in *Alternative Development* is Both Incorrectly Decided and Distinguishable on its Facts

Despite the plain language of the statute, BIV relies on the Fourth District's decision in *Alternative Development Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992). *See* BIV Br. at 25-26.

The Fourth District's decision in *Alternative Development* is both mistaken and distinguishable. To begin with, it makes the same statutory construction errors

[21] BIV also erroneously relies upon Fla. Stat. § 608.4229(2), which applies to limited liability corporations. BIV Br. at 25. In contrast to section 607.0850, which contains a mandatory indemnification provision under subsection (3), section 608.4229 has no such mandatory indemnification provision, only providing for permissive indemnification by the limited liability corporation. In addition, BIV cites this Court's decision in *Ranger Inc. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla. 1989). However, that case holds that "the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination." *Id*. at 1009. It does not preclude an award of indemnification where, as here, an officer – pursuant to the express terms of the statute – is indemnified upon the charges for which she has been ***acquitted***.

as BIV – it ignores the first sentence of subsection (7) and the word "However" that begins the second sentence. *See Alternative Dev., Inc.*, 608 So. 2d at 827-28 (purporting to quote subsection (7) "in pertinent part" but omitting the first sentence and the transition word "However" that begins the second sentence). It also fails to cite subsection (9), though subsections (9)(a)-(9)(c) show that a court's determination of whether an officer is entitled to mandatory indemnification is separate and part from whether an officer has (or has not) met the standards of conduct for permissive indemnification under subsection (7) (or subsection (1)).

Moreover, even if we overlook the first sentence of subsection (7), ignore the word "However" that begins the second sentence, and disregard subsection (9) in its entirety (all of which BIV has done), *Alternative Development* is still distinguishable for numerous reasons. In that civil case, officers were seeking indemnification in a suit brought by an association and its shareholders. *Id*. at 827. When an officer is sued by the corporation, it is especially important for the courts to scrutinize the indemnification request because the corporation faces the possibility of having to pay the legal fees of the very individuals it has sued. *See Turkey Creek Masters Owners Ass'n v. Hope*, 766 So. 2d 1245, 1247 (Fla. 1st DCA 2000). In the present case, however, the underlying action was not one between BIV and de Saad. Rather, it was between de Saad and the Federal Government.

In addition, the Fourth District states that subsection (7) is applicable when the officer's conduct gives rise to the "cause of action." 608 So. 2d at 828. Here, however, de Saad's conduct did not give rise to the criminal action. Rather, de Saad's superior at BIV referred the undercover agents to her. App. 1 at 2. Also, it

was the Government that indicted de Saad even though its agents ***never*** informed her that the funds deposited in BIV were purported drug proceeds, *id*. at 17, and de Saad, after Mendoza finally made his "biggest 'hint,'" did not have any further contact with him or any Government agent or open a new account at BIV, *id*. at 24 – uncontroverted facts not lost on Judge Friedman when he acquitted de Saad.

Indeed, even if read in isolation, the second sentence of subsection (7) states that "indemnification . . . of expenses shall not be made . . . if ***a judgment*** or other final adjudication ***establishes*** that [the officer's] actions, or omissions to act, ***were material to the cause of action so adjudicated*** and ***constitute*** (a) A violation of the criminal law . . . [or] (b) A transaction from which the . . . officer . . . derived an improper personal benefit." (Emphasis supplied.) Thus, even under *Alternative Development*, subsection (7) only applies to the "cause of action so adjudicated" by the "judgment or other final adjudication." Also, that judgment must "establish[]" that the officer's actions or omissions were "material" to the cause of action so adjudicated and "constitute" a violation of law or a transaction from which the officer derived an improper personal benefit. Here, however, the judgment on the money laundering offenses, *see* App. 2 – the only judgment for which mandatory indemnification was obtained – does not establish that de Saad's actions or omissions constitute a violation of criminal law or a transaction from which she derived an improper personal benefit. To the contrary, the judgment acquits her.

Likewise, the judgment on the subsequent money structuring charge does not "establish[ ]" that de Saad's actions were "material" to the money laundering charges. It also does not "establish[ ]" that her actions "constitute" any money

laundering offense. Thus, for all these reasons, the Fourth District's decision in *Alternative Development* is both distinguishable and incorrectly decided.[22]

C. There Are No Genuine Issues of Material Fact

We turn now to the application of subsection (3) to the undisputable facts in this case. As both the trial court and the Third District correctly held, there are no genuine issues of material fact presented here and BIV is liable as a matter of law.

1. Esperanza de Saad Succeeded on all Conspiracy and Money Laundering Counts that the Government Brought Against Her

The U.S. district court's Opinion and Order and Final Judgment acquitted Mrs. de Saad on the conspiracy and money laundering counts. App. 1; App. 2. Those facts are not subject to any dispute, and they establish her "success" on every one of those counts – the only counts for which indemnification was granted.

[22] Curiously, BIV also relies upon the Model Business Corporation Act. *See* BIV Br. at 27 n.14. Yet, under that Act, to obtain mandatory indemnification, a director need only show success "in the defense of any proceeding to which he was a party because he was a director of the corporation . . . ." MBCA at § 8.52. And, while the Model Act requires a director to be "wholly successful," Florida has chosen – as with Delaware and other states, *see infra* at 35 n.23 – not to adopt that requirement, choosing instead to require indemnification ***to the extent that*** an officer has been successful in defense of any claim, issue or matter. In fact, prior to the decision in *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. Super. Ct. 1974), the Model Act also did not require that a director be "wholly successful." However, the ABA amended the Act to add this requirement following the decision in *Merritt-Chapman*. *See* MBCA at § 8.52, official cmt. The legislatures in Florida, Delaware, and many other states have chosen, however, not to amend their indemnification statutes. Indeed, 36 years have past since *Merritt-Chapman*, and if the Florida Legislature disagreed with that decision, it has had ample opportunity to amend subsection (3) and follow the Model Act.

BIV argues, however, that "both lower courts . . . apparently conclude[d] that de Saad's guilty plea constituted 'success of the merits or otherwise' under subsection (3) and that no other factor had to be considered." BIV Br. at 24; *see id.* at 28-29. It also argues that the trial court accepted the theory that the money laundering counts for which de Saad was acquitted were "unrelated" to the subsequent structuring charge upon which she pled guilty. *Id*. at 13, 29 & 31-32.

Not so. To begin with, the trial court granted summary judgment and the Third District affirmed because de Saad was acquitted on all counts for which indemnification was sought, *see* App. 36 at 7, not because she pled guilty to the subsequent money structuring charge. Also, at the summary judgment hearing, Joseph Beeler, P.A. made clear that an officer is entitled to indemnification on the counts for which she was acquitted, even if she is convicted on a ***related*** count. Jan. 26, 2006 Hearing Tr. at 70-71 & 79 (App. 25). Indeed, because subsection (3) does not require complete success, an officer is entitled to indemnification on all counts on which she succeeds even if she is unsuccessful on other counts, ***even related ones***. *Merritt-Chapman*, 321 A.2d at 141 ("Claimants are . . . entitled to partial indemnification if successful on a count of an indictment, which is an independent charge, ***even if unsuccessful on another, related count.***") (emphasis supplied). Therefore, BIV's arguments are based upon the false legal premise that mandatory indemnification requires complete success on all related counts.[23]

[23] In addition to Florida and Delaware, the laws of the following states also provide for partial indemnification: Alabama (*see* Ala. Code § 10-2B-8.52; *id.* § 10-2B-8.56(a)); California (*see* Cal. Corp. Code § 317(d)); Michigan (*see* Mich. Comp. Laws § 450.1563); Nevada (*see* Nev. Rev. Stat. § 78.7502(3)); and Utah

For instance, in *Merritt-Chapman*, the bedrock case on this issue, corporate agents were charged with multiple criminal counts involving a scheme to cause the corporation (MSC) to secretly purchase shares of its own common stock. 321 A.2d at 140. Count one charged conspiracy to violate the federal securities laws; counts two and three charged perjury; and counts four and five charged filing false annual reports with the SEC and New York Stock Exchange. *Id.* At trial, the court dismissed part of the conspiracy count, but the jury convicted on all other charges. *Id.* Those convictions were reversed on appeal, and two retrials of the perjury and false annual report charges resulted in an acquittal in part (count four), a conviction in part (count three), and hung juries with respect to the remaining charges. *Id.*

All charges where then settled as follows: One defendant (Wolfson) pled nolo contendere to count five and the other charges against him were dropped; he was fined $10,000 and given a suspended prison sentence. Another defendant (Gerbert) agreed not to appeal his conviction on count three; he was fined $2,000, given a suspended sentence, and the other charges were dropped. The prosecution also dropped charges against the other two defendants (Kosow and Stobb). *Id.*

(*see* Utah Code Ann. § 16-10a-903; *id.* § 16-10a-907(1)). In contrast, other states have different statutes and require that the officer or director be "wholly successful" or that she "entirely prevail" before mandatory indemnification may be obtained; those states include, for example, Arkansas (*see* Ark. Code Ann. § 4-33-852 ("wholly successful")); Colorado (Colo. Rev. Stat. § 7-109-103 ("wholly successful")); Connecticut (Conn. Gen. Stat. § 33-772 ("wholly successful")); and Virginia (*see* Va. Code Ann. § 13.1-698 ("entirely prevails")). Thus, BIV's arguments once again seek to rewrite section 607.0850. However, if the law in Florida is going to require that an officer be "wholly successful," "entirely prevail," or succeed on all related counts, then that is a decision for the Florida Legislature to make through amendment of subsection (3).

The defendants then sought mandatory indemnification against MSC, which opposed indemnification claiming that the criminal charges against the defendants "were dropped for practical reasons, not because of their innocence, and that in light of the conspiracy charged in the indictment, the judgment of acquittal on count four alone is not vindication." *Id.* at 141. The court disagreed, stating that:

> The statute requires indemnification to the extent that the claimant "has been successful on the merits or otherwise." Success is vindication. ***In a criminal action, any result other than conviction must be considered success. Going behind the result, as MCS attempts, is neither authorized by subsection (c) nor consistent with the presumption of innocence.***
>
> The statute does not require complete success. It provides for indemnification to the extent of success "in defense of any claim, issue or matter" in an action. ***Claimants are therefore entitled to partial indemnification if successful on a count of an indictment, which is an independent criminal charge, even if unsuccessful on another, related count.***

Id. (emphasis supplied).

Thus, in the present case, even if we assume that the money laundering counts for which Mrs. de Saad was acquitted were related to the subsequent money structuring count on which she pled guilty, indemnification remains proper with respect to the money laundering counts. As the court explained in *Merritt-Chapman*, any outcome other than conviction in a criminal matter constitutes success and the corporation, here, BIV, simply cannot go behind that result.

Moreover, de Saad's success was much greater than the success experienced by at least two of the defendants in *Merritt-Chapman*. She was acquitted, as a matter of law, by a U.S. district court judge on each and every count for which she

was tried, and only then did the Government even threaten to bring a new prosecution on the money structuring count upon which she ultimately pled guilty.

Furthermore (and despite BIV's claims to the contrary, *see* BIV Br. at 30-31), it is legally irrelevant that the Government dismissed its appeal of de Saad's acquittal on the conspiracy and money laundering counts as part of the parties' plea agreement on the structuring count. Again, because subsection (3) does not require complete success, an officer is entitled to be indemnified on all charges for which the Government failed to obtain a conviction, which, in this case, are all charges upon which de Saad was acquitted. Indeed, it is legally irrelevant that de Saad, according to BIV, "dodged" appellate review of the U.S. district court's acquittal order because she remains, to this day, successful on all conspiracy and money laundering charges, the only counts upon which indemnification was awarded. Also, even if by avoiding the risks of appellate review de Saad was not "successful on the merits," she was still "otherwise" successful as she was not convicted on the conspiracy and money laundering charges. Fla. Stat. § 607.0850(3).

It is also legally irrelevant that BIV submitted expert affidavits in support of its motion for reconsideration, and those experts, Mr. Jiménez and Mr. Serino, opined that de Saad was not successful in the criminal proceeding. BIV's experts cannot amend the statute to require that the officer be "wholly successful" or that she "entirely prevail." Indeed, neither expert acknowledged that subsection (3) provides for partial indemnification, and they did ***not*** opine that de Saad was unsuccessful on the conspiracy and money laundering charges for which she was acquitted – the relevant issue here. Rather, Mr. Jiménez opined that "the criminal

case . . . did not result in a success on the merits for de Saad," App. 26 at 3, ¶ 5, and that "the United States prevailed in its case against de Saad. *Id*. at 5, ¶ 11. As for Mr. Serino, he opined that the structuring "conviction . . . was not a success on the merits for de Saad." App. 27 at 3, ¶ 7. Those opinions do not (and cannot), however, change the material facts in this case, that is, de Saad was not convicted, she was, in fact, acquitted on all charges for which indemnification was awarded.

2. The Government Charged Esperanza de Saad with the Money Laundering Offenses Based on Alleged Conduct Committed by Mrs. de Saad in Her Capacity as an Officer of BIV

The Government's May 1998 indictment expressly alleged that de Saad was at all times material "a Vice President at Banco Industrial de Venezuela's agency in Miami, Florida." App. 5 at 1, ¶ 2. Likewise, its subsequent indictments contained the same allegation. *See, e.g.*, App. 6 at 1, ¶ 2 (Second Superseding Indictment). Substantively, the Government's money laundering claims alleged that she had assisted with opening bank accounts at BIV through which over $4 million had been laundered. *Id*. at 9 & 12, ¶¶ 32 & 52-62 (overt acts). *See id.* at 16-17 (substantive counts). Indeed, the Government expressly alleged that:

> . . . ESPERANZA DE SAAD . . . would arrange to open bank accounts at [her] bank[ ] and introduce [Mendoza] to bank employees who would be responsible for handling transactions involving the accounts. These bank employees would accept deposits into the accounts by wire transfer and would issue bank drafts and checks as directed by [Mendoza].

Id. at 4-5. Because this alleged conduct was carried out in de Saad's capacity as an officer of BIV, she was, as a matter of law, a party to the criminal matter "by reason of the fact" that she was an officer of BIV. Fla. Stat. § 607.0850(1).

BIV argues, however, that the "by reason of the fact" element "essentially looks at whether a person is made a party to a proceeding in his or her official capacity for action taken to benefit the corporation, or in the person's individual capacity for action taken to benefit the individual." BIV Br. at 32 n.16. From that unstatutory premise, it relies upon the stipulation settling the Government's civil matter against it (which was entered into between the Government and BIV – and not de Saad – after this indemnification suit was filed, and after BIV had sued BankUnited). *Id.* at 32-33. It also claims that the Government's allegations show that de Saad was charged as an individual, *id*. at 33, that she could not have been charged "by virtue of being an officer since de Saad knew that her conduct was expressly prohibited by BIV," *id*., and that the opinions of its experts also undermined the summary judgment motions. *Id.* at 36.

To satisfy the "by reason of the fact" element, the officer need not have acted to benefit the corporation nor in compliance with corporate policies, and the officer could have acted for her own personal benefit. Also, the corporation itself need not be charged (though, here, the fact that the Government sued BIV further shows that the "by reason of the fact" element is satisfied). Rather, the issue is whether the officer was charged for conduct committed in her capacity as an officer, without regard to the officer's motivation. As the court in *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, *4 (Del. Ch. 2002), explained:

> [A]n officer will not be denied indemnification under Section 145(c) because his conduct was motivated exclusively by personal greed. . . . The right of a "successful" corporate officer to indemnification derives from his status as a corporate officer. If the conduct resulting in the prosecution was done in his capacity as a corporate officer, without regard to what his motivation may have been, then the ensuing prosecution was "by reason of the fact that" he was a corporate officer. (Footnotes omitted).

Likewise, in *Merritt-Chapman*, the corporation claimed a defendant acted as an individual, outside of the scope of his employment, and not as a corporate employee. The court rejected that claim:

> MCS contends that the indictment was not related to the area of Kosow's employment or agency, and he was therefore not "made a party . . . by reason of the fact that" he was an employee or agent of MCS. The conspiracy count charged that the stock repurchase plan "would operate as a fraud and deceit upon the stockholders of [MCS]" in violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5. The charge was based upon failure to disclose inside information. ***Kosow participated in the plan, shared the inside information, and was prosecuted because of his employment or agency relationship with MCS. He is therefore entitled to indemnification.***

321 A.2d at 142 (emphasis supplied).[24]

[24] While BIV does not mention it, case law distinguishes between alleged conduct carried out by the defendant in her capacity as an officer (such as in de Saad's case) and compensation disputes between the officer and her corporation. The former falls squarely within the "by reason of the fact" element, while other cases hold that the latter do not. *See, e.g., Weaver v. Zenimax Media, Inc.*, 2004 WL 243163 (Del. Ch. 2004) (officer entitled to indemnification on the claim that he breached his fiduciary duties to the corporation by failing to properly perform his job responsibilities, but officer not entitled to indemnification on the separate claim that he had taken more vacation time than allotted and had improperly received reimbursement from the corporation for personal rather than work-related travel). *See also id*. at *3-*5 (citing cases and explaining the distinction). Likewise, the decision in *Souder v. Rite Aid Corp.*, 911 A.2d 506 (Pa. Super. Ct.

Here, the face of all the Government's money laundering indictments establish that de Saad was charged for alleged conduct committed in her capacity as an officer of BIV. The stipulation between the Government and BIV, entered years after de Saad was made a party to the criminal matter, does not (and cannot) change that fact, nor does even address it. Further, the stipulation is not proper summary judgment evidence. As de Saad is not a party to the stipulation, it is inadmissible hearsay, Fla. Stat. § 90.802; it was also generated in the course of litigation, is part of a compromise and settlement rather than a finding by a court, and it is offered, in essence, to prove de Saad's liability. *Id*. § 90.408.

Likewise, the allegations relied upon by BIV in the money laundering indictments do not change the fact that the Government indicted de Saad for alleged conduct committed in her capacity as an officer of BIV. Certainly, the Government alleged that de Saad received a fee from the money laundering scheme, but that allegation reflects de Saad's supposed motivation for participating in the conspiracy. It does not show that the Government charged her for conduct unrelated to her role as an officer at BIV.

2006), which BIV relies upon at page 32, note 16 of its brief, is based on this same distinction and, thus, fails to support BIV's premise that the "by reason of the fact" standard is not satisfied where the officer is alleged to have acted to benefit herself. *See id*. at 512. Further, in *Stifel Financial Corp. v. Cochran*, 809 A.2d 555 (Del. 2002), upon which BIV also relies, the court affirmed the trial court's decision ***in favor of the officer*** on his indemnification claim for expenses incurred in the defense of a criminal prosecution, while also affirming the trial court's decision against the officer for expenses incurred in an arbitration on employment claims following the corporation's termination of the officer. *Id.* at 556 & 562.

For these same reasons, the opinions of BIV's experts also do not create a genuine issue of material fact. Mr. Jiménez opines that de Saad's guilty plea shows that she received an improper personal benefit. App. 25 at ¶ 10. Similarly, Mr. Serino opines that de Saad was charged with a money structuring offense that did not have to be committed by a bank officer. App. 26 at ¶ 8. However, neither opinion addresses the relevant legal issue, that is, was de Saad made a party to the criminal matter for alleged conduct committed in her capacity as a BIV officer. As the Government's indictments show that she was so charged, the trial court properly granted, and the Third District properly affirmed, summary judgment.[25]

II. THE CIRCUIT COURT PROPERLY AWARDED DAMAGES FOR MANDATORY INDEMNIFICATION

Neither in the Third District nor in this Court does BIV raise any specific issue with respect to the damages awarded Joseph Beeler, P.A. for unpaid legal fees and costs. It has, therefore, waived all grounds for contesting that award. *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (per curiam) (finding a waiver of points on appeal based upon the "failure to fully brief and argue" them).[26]

[25] Finally, again seeking to claim again that the standard of conduct under subsection (1) applies here, BIV cites the decision in *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572 (Del. Ch. 2006). BIV Br. at 34 n.17. Yet, as we have shown, the good faith standard only applies to permissive indemnification by a corporation. Indeed, the issue in *Majkowski* was whether the officer was entitled to advancement of expenses by agreement. *See* 913 A.2d at 575.

[26] For this same reason, BIV has waived all grounds for contesting the trial court's partial grant of summary judgment on its counterclaims. Also, to the extent that the trial court denied summary judgment on those counterclaims, Joseph Beeler, P.A. cross-appealed, though the Third District did not have occasion to address that cross-appeal because it otherwise affirmed. App. 36 at 9 n.6. Thus, if

With respect to de Saad, however, BIV argues that the trial court should not have awarded damages for expenses related to her criminal bond. BIV Br. at 48. BIV also argues that the court's award was intended to punish it for having refused to indemnify de Saad from the beginning of the criminal matter, which BIV claims that it could not have done because her conduct did not meet the standard of conduct required for permissive indemnification under subsection (1). *Id.* at 46-47.[27] As BIV seeks reversal of the trial court's Final Judgment in its entirety, *id.* at 50, including the award in favor of Joseph Beeler. P.A., we address these points.

The indemnification statute does not limit "expenses" to counsel fees or costs. Rather, it defines "expenses" without limitation and to "include[ ] counsel fees, including those for appeal." Fla. Stat. § 607.0850(11)(b). Thus, under subsection (3), the issue is whether the expenses associated with securing de Saad's release on bond were reasonable expenses incurred in connection with her successful defense of the conspiracy and money laundering charges.

The record shows that competent, substantial evidence supports the trial court's verdict that these expenses were properly subject to indemnification. For example, both Mr. Beeler and Mr. Josefsberg testified that it was important to the

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this Court reverses any part of the Third District's decision (which it should not do), then it should remand to the Third District to permit that court to address the limited issue raised by the law firm's cross-appeal in the first instance.

[27] Thus, BIV finally acknowledges on page 46 of its brief that the standard of conduct under subsection (1) applies to permissive indemnification, and not to mandatory indemnification. Even then, however, BIV fails to accurately quote subsection (3), omitting the phrase "[t]o the extent that" and word "therein," statutory language showing that subsection (3) does not require complete success.

defense to have the defendant released on bond prior to trial, *see, e.g.*, May 2, 2007 Trial Tr. at 760-61 (App. 33), testimony that Judge Scola credited in his verdict. App. 9 at 69. The court also stated, "most importantly, if De Saad had been in custody for the 18 months between her arrest and ultimate exoneration, that time of lost freedom can never be recovered. ***In effect, she would have served an 18 month prison sentence, even though she was innocent.***" *Id*. (emphasis supplied).

Further, the court's verdict was not intended to punish BIV. It stated that "[o]ne cannot criticize BIV for the business decision it made" when it refused to advance funds for de Saad's defense. *Id.* at 72. However, the court explained that BIV's decision increased the expenses incurred. *See id*. ("Had BIV come forward and paid the $1.5 million bond on her behalf, not only would there have been no damages, but BIV would have received interest on its posting of the bond.").

BIV is again mistaken about the indemnification statute. A corporation may advance funds even if it is later determined that the officer does not meet the standard of conduct for permissive indemnification. *See* Fla. Stat. § 607.0850(6).[28]

[28] Finally, while unnecessary to the determination of this issue given subsection (6), BIV's argument is based upon the false assumption that de Saad did not meet the standard of conduct for permissive indemnification. The trial court never made any such finding – and it did not have to because the requirements for mandatory indemnification had been fully met. Also, having heard a two-week trial, the circuit court's observation that de Saad was innocent of the money laundering charges – as with the U.S. district court's determination acquitting Mrs. de Saad after a five-week trial – demonstrates that she would have been entitled to permissive indemnification had BIV chosen to stand by its officer.

III. BIV HAS WAIVED ANY ARGUMENT THAT IT IS NOT GOVERNED BY FLORIDA'S INDEMNIFICATION STATUTE AND, IN ANY EVENT, BIV AGREED THAT FLORIDA LAW GOVERNED ITS RELATIONSHIP WITH MRS. DE SAAD, TO THE EXCLUSION OF THE LAWS OF ALL OTHER STATES AND COUNTRIES

Over seven years ago, the Third District held that BIV Miami was governed by Florida's indemnification statute. *De Saad f/u/b/o Joseph Beeler, P.A. v. Banco Industrial de Venezuela, C.A.*, 843 So. 2d 953 (Fla. 3d DCA 2003). Following that decision, BIV Miami chose not to seek review in this Court, failing, for instance, to move for certification. Instead, that appeal concluded and the Third District issued its mandate. R. V:783-789.

Upon remand, BIV Miami never again raised the "internal affairs" doctrine or section 607.1505(3). In fact, in the trial court, it never raised ***at all*** the "internal affairs" doctrine or section 607.1505(3), whether before or after the Third District's 2003 decision. Moreover, in the instant appeal, BIV Miami never claimed in the Third District that it was not governed by Florida's indemnification statute, much less did it raise the "internal affairs" doctrine or section 607.1505(3). Thus, having failed to raise the issue in the trial court and in the instant appeal, BIV has twice waived the issue for review by this Court. *See, e.g., Sunset Harbour Condo. Assoc. v. Robbins,* 914 So. 2d 925, 928 (Fla. 2005); *Mack v. State,* 823 So. 2d 746, 749 n.4 (Fla. 2002); *D.C.W. v. Florida,* 445 So. 2d 333, 335 (Fla. 1984). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

In essence, BIV Miami is asking that this Court extend by seven years the thirty-day period to seek discretionary review of the Third District's 2003 decision. *See* Fla. R. App. P. 9.120(b). That is improper. Indeed, even in the instant appeal,

BIV Miami did not pursue discretionary review in this Court based on its so-called "threshold issue," though it now suggests (albeit mistakenly), that the Third District's 2003 decision conflicts with the decision in *Chatlos Foundation, Inc. v. D'Arata*, 882 So. 2d 1021 (Fla. 5th DCA 2004). *See* BIV Br. at 48. *Cf. Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005) (noting that this Court has the discretion to address only those "issues ***properly*** raised") (emphasis added).[29]

Furthermore, BIV Miami's litigation tactics have prejudiced the rights of Joseph Beeler, P.A. The law firm moved in January 2002 to intervene in this case. However, BIV Miami led the trial court into error and that motion was denied. Then, while the issue of the law firm's right to intervene was pending on appeal, the trial court heard and decided BIV Miami's motion for judgment on the pleading. Therefore, by engineering an erroneous decision on the law firm's motion to intervene, BIV Miami denied Joseph Beeler, P.A. the right to be heard on its motion for judgment on the pleadings.

On appeal from that decision, the law firm moved to intervene in the Third District, arguing, among other things, the fundamental unfairness resulting from

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[29] BIV Miami has cited no authority that would permit it to take successive appeals and raise in this appeal an issue decided seven years ago by the Third District. In fact, had BIV Miami wished a decision by this Court on its "threshold issue," it should have done the following: (1) Sought discretionary review in this Court within 30 days following the Third District's 2003 decision; (2) preserved the issue on remand to the trial court, asking that the court not apply the law of the case doctrine; (3) raised the issue in the Third District in this appeal, asking that the Third District also not apply the law of the case doctrine; and (4) then sought discretionary review in this Court of the issue in this appeal, assuming that a basis would have thus existed from the Third District's 2009 decision that is now under review. *Cf. Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1256-58 (Fla. 2006).

BIV Miami causing the circuit court to decide its motion while the law firm's appeal was pending. The Third District did not, however, have a need to reach that argument because it determined that the motion was moot in light of its decision. 843 So. 2d at 955 n.2. Thereafter, as we have explained, BIV Miami did not seek review in this Court and never raised again or preserved its "threshold issue," thus abandoning and waiving the issue on the instant appeal.

BIV Miami is also wrong on the merits. Its contract with de Saad provided that Florida law governs the contract and employment relationship to the exclusion of the laws of all other states and countries: "This contract shall be governed solely and exclusively by the laws of the State of Florida, specifically those of Dade County, Florida. . . . Therefore, it is agreed that the [laws] of other States and countries shall not be applicable to this Contract or to the Employee/Employer relationship governed hereby." App. 35 at 6; *see* 843 So. 2d at 954 n.1. Florida law, in turns, provided for indemnification of both officers and employees, *see* Fla. Stat. § 607.0850(3). Given that BIV Miami chose Florida law to the exclusion of the laws of the country of its incorporation, it cannot rely upon section 607.1505(3) to escape its indemnification obligation. *Cf. Yates v. Bridge Trading Co.*, 844 S.W.2d at 56, 61-62 (Mo. Ct. App. 1992) (refusing to apply the law of the state of incorporation under the internal affairs doctrine where the stock purchase agreement contained a choice of law provision).[30]

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[30] BIV Miami claims the Third District ignored section 607.1505(3), arguing that this subsection "states that a foreign corporation may not be regulated by Florida as to its organization or internal affairs," Br. at 48. That is not, however, exactly what the statute provides. Rather, section 607.1505(3) states that, "***[t]his***

Indeed, contrary to BIV Miami's argument, *see* BIV Br. at 50, foreign corporations will ***not*** "face a risk of indemnification demands and law suits filed under Florida law any time Florida law is 'friendlier' . . . [,]" because by contract BIV Miami decided to be bound by Florida law. In fact, even following de Saad's indictment, former counsel for BIV Miami stated that she was entitled to be indemnified should she be acquitted on the money laundering charges. April 30, 2007 Trial Tr. at 223 (App. 29). Similarly, the decision in *Chatlos Foundation, Inc.* and the other cases upon which BIV Miami relies are inapposite as they do not involve a choice of law provision in which the corporation agreed that the law of a particular jurisdiction, and not that of its state of incorporation, governed the parties' relationship.[31] Thus, also contrary to BIV Miami's argument, BIV Br. at 47 n.25, its "threshold issue" does not create a split of authority or is of importance to "the thousands of foreign corporations operating in Florida."

Act does not ***authorize*** this state to regulate the organization or internal affairs of a foreign corporation authorized to conduct its affairs in this state." (Emphasis supplied.) Thus, it did not prohibit a foreign corporation from subjecting itself to the laws of Florida. And, of course, the Third District recognized the contractual choice of law provision in its 2003 decision. 843 So. 2d at 954 n.1.

[31] For example, while the decision in *Miller v. U.S. Food Service, Inc.*, 405 F. Supp. 2d 607, 615 (D. Md. 2005), does involve an employment agreement, the plaintiff in that case merely argued that the law of the state in which the employment agreement was formed should apply rather than the state of incorporation given the contract dispute regarding indemnity. The contract did not include a choice of law provision, but instead provided that the defendant employer would indemnify its employee "*to the full extent permitted by law*" without specifying which state's law would govern. *Id.* (internal quotation marks omitted).

CONCLUSION

For all the foregoing reasons, this Court should affirm the Third District's decision. If, however, the Court reverses any part of that decision, then it should remand to Third District with instructions for that court to address the limited issue raised by Joseph Beeler, P.A in its cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief with accompanying appendix was served via Federal Express to counsel for Respondent Esperanza de Saad, William L. Petros, Esq., Petros & Elegant, 4090 Laguna Street, 2nd Floor, Coral Gables, Florida 33146 and Dinah S. Stein, Esq./Shannon Kain, Esq., Hicks & Kneale, P.A., 799 Brickell Plaza, Suite 900, Miami, Florida 33131; and counsel for Petitioners, Carol A. Licko, Esq., Hogan Lovells US, L.L.P., 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131, and Jessica L. Ellsworth, Esq., Hogan Lovells US, L.L.P., Columbia Square, 555 13th Street, N.W., Washington, DC 20004, this 7th day of June, 2010.

By:_____
H. Eugene Lindsey

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), that the foregoing Answer Brief on the Merits complies with the font requirements of the rule; the lettering is Times New Roman 14-point with margins of no less than one inch.

By:_____
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