IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO. 5D23-1217

PATTY LONG, BY AND THROUGH HER CO-GUARDIANS, SARAH LONG AND DENNIS LONG, AND MATT LONG, BY AND THROUGH HIS ATTORNEY-IN-FACT DENNIS LONG,

Appellants,

v. L.T. Case No. 2020-CA-002431

FAMILY SUPPORT SERVICES OF NORTH FLORIDA, INC.,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Matt, a child, sexually abused his younger sibling, Patty, and then the two of them were placed together in the same foster homes. The person making these placements, the appellee agency, knew or should have known about this sibling-on-sibling abuse, and it violated a Florida regulation by placing the children together. But the trial judge—who repeatedly advocated for the agency during the trial—declined to instruct the jury on that regulation.

The siblings appeal a final judgment entered after a jury trial in favor of that agency, Family Support Services of North Florida, Inc. (FSS). As the lead agency, FSS was responsible for foster care and pre-adoption services under a DCF contract. R.841. By its own admission, FSS "had a duty to [the siblings], while [they were] dependent child[ren], to act reasonably to protect [them] … and to place [them] in homes that FSS[] reasonably believed could meet [their] needs." *See* R.807–08 ¶¶28, 32 (amended answer); *see also* R.841 (FSS's submitted pretrial statement in which it admitted that it had "obligations … to use reasonable care to keep [the siblings] safe and to properly place them in appropriate foster homes)").

Although FSS subcontracted for Daniel Memorial, Inc. (Daniel) to provide foster care and adoption case-management services, it retained responsibility for the *placement services*. *See* R.841–42 (submitted pretrial statement) ("FSS[] contracted with Daniel … to provide foster care and preadoption services … , *while remaining responsible for the central placement unit*." …. FSS … contends that all foster care and pre-adoptive services [*not including placement services*] were performed by Daniel ….") (brackets in the original) (emphasis added)); *see also* T.471:12–16 (preliminary jury instruction) ("[FSS] … contends that *apart from* [*FSS's*] *placement responsibilities*, all foster care and pre-adoptive services were performed by [Daniel]….")(emphasis added); T.556:2–3, 557:11 (FSS's opening statement) ("[FSS] decided not to contract out the placement piece."); ("[FSS] kept the placement piece in-house").

Despite FSS's admissions that it had duties to safely place the siblings, the trial court erroneously refused to instruct the jury on FSS's placement duties imposed by Florida regulations. *Infra* Argument § I, at 38–55. We first recite the laws governing those duties.

a. Statutes and regulations governing child placement

Foster care and related services are provided by private, community-based agencies—known as "lead agencies"—under contracts with DCF. *See* §§ 409.986(1)(a), (3)(d), 409.996(1), Fla. Stat.[1] A lead agency, like FSS, may engage subcontractors, like Daniel, to deliver services required under its contract with DCF. *See id.* § 409.988(1)(j), Fla. Stat. A "lead agency is not liable in tort for the acts or omissions of its subcontractors or the officers, agents, or employees of its subcontractors." *Id.* § 409.993(2)(a). A lead agency, however, "[s]hall comply with … state statutory requirements and *agency rules* in the provision of contractual services." *Id.* § 409.988(1)(j) (emphasis added).

DCF promulgates rules for the provision of foster care and related services. *See id.* §§ 409.145(5), 409.988(2)(e). One DCF administrative rule establishes "placement-matching requirements [that] apply to both initial placements and to any subsequent placements of the child." Fla. Admin. Code R. 65C-28.004(15) (2006);

[1] Unless otherwise indicated, this brief cites the 2016 version of the Florida Statutes; however, the 2014, 2015, and 2016 versions are materially the same.

id. 65C-28.004(13) (2016). Because this rule was amended between the siblings' two placements, two versions of the rule apply in this case—one that took effect on May 4, 2006, and another that took effect on May 8, 2016.

The 2006 and 2016 rules impose multiple obligations on "the person making the placement." *See, e.g.,* Fla. Admin. Code R. 65C-28.004(10)(b), (11)(a)(2) (2006); Fla. Admin. Code. R. 65C-28.004(10)(a)-(b) (2016). As discussed *infra* § e, at 28–32, the trial court at the charge conference determined that FSS was not—and that Daniel alone was—"the person making the placement." That determination was error, as argued *infra* § I.B.1-2, at 40–47. This part of the brief recites the obligations imposed on "the person making the placement"—which the siblings contend included FSS.

The 2006 rule lists obligations for the "placement of children" who are both "victims of sexual abuse" (i.e., Patty) and "alleged juvenile sexual offenders" (i.e., Matt). *See* Fla. Admin. Code R. 65C-28.004(10), (11) (2006) (capitalization altered). For placement of a juvenile sexual offender (i.e., Matt), "the person making the placement" (i.e., FSS) was required to "[e]nsure" that the offender is "*the youngest child placed in the home* unless the placement is a

treatment facility with adequate video monitoring." *Id.* 65C-28.004(11)(a)2 (emphasis added). For the placement of a victim of sexual abuse (i.e., Patty), "the person making the placement" (i.e., FSS) must both "complete[]" and "sign[]" "a written safety plan." *See id.* 65C-28.004(10)(b) ("When placing a child who has been a victim of sexual abuse in out-of-home care, a written safety plan shall be completed by the person making the placement and the out-of-home caregivers, and signed by the same.")[2]

Under the 2006 rule, the "person making the placement" (i.e., FSS) also was required to "gather … information" concerning a juvenile offender (i.e. Matt), including "the child's abuse history; previous assessments or evaluations; support services; forensic/disclosure interviews; placement recommendations, and complete and detailed information regarding the child's own sexual behavior." *Id.* 65C-28.004(11)(a)1. "[T]he person making the placement" (i.e., FSS) was further required to "[p]rovide the caregivers with written detailed and complete information regarding the circumstances surrounding the child's abusive/reactive behavior *so*

[2] The interpretation of this provision was a prominent feature of the charge conference below. *See infra* § e, at 28–32.

that they can avoid any unwitting replication of those circumstances." *Id.* 65C-28.004 (11)(a)3 (emphasis added). These administrative informational requirements put a finer point on a lead agency's statutory obligation to "provide [a] caregiver with all available information necessary to assist the caregiver in determining whether he or she is able to appropriately care for a particular child." § 409.145(2), Fla. Stat.

The 2016 rule retained the requirements for child victims of sex abuse (i.e., Patty). Fla. Admin. Code R. 65C-28.004(9) (2016). Though the rule eliminated the requirements directed at placing "alleged juvenile sexual offenders," it established requirements applying more broadly to "children with behaviors that may result in harm"—a category that still included Matt. *Id.* 65C-28.004(10) (capitalization altered).

For placements of "children with behaviors that may result in harm" (i.e., Matt), the 2016 rule required "the person making the placement" (i.e., FSS) to "implement safeguards to ensure that the needs of the child [(i.e., Matt)] for supervision, treatment and interventions are addressed and that *the safety of other children in the same setting* [i.e., Patty] *is ensured*." *Id.* 65C-28.004(10)(a)

(capitalization altered) (emphasis added). The 2016 rule, just like the 2006 rule, also imposed on "the person making the placement" (i.e., FSS) the obligation to "provide the caregivers with written, detailed, and complete information regarding the circumstances surrounding the child's behavior so that they can avoid any unwitting replication of those circumstances." *Id.* 65C-28.004(10)(b). This information that had be given to caregivers—by "the person making the placement" (i.e., FSS)—"include[d] the dates of all known incidents; the nature of the relationship between the child and victim; the types of behavior exhibited; a brief narrative outlining the event; the types of treatment needed or provided and any current treatment outcomes." *Id.*

b. FSS's contracts

1. DCF contract

Under its DCF contract, FSS was required to "[s]ecure, approve, and review *all* relative and nonrelative *placements* under [FSS's] supervision." R.3914 (emphasis added). FSS also was required to "deliver a comprehensive array of foster care and related services," including: "independent living, emergency shelter, residential group care, foster care, therapeutic foster care, foster care supervision, case management, post-placement supervision, permanent foster care,

[and] family reunification." R.3906. The "related services" included "family support services/prevention, family preservation services, adoption services, and post adoption services." *Id.*

2. Daniel subcontract

Under FSS's subcontract with Daniel, "[a]ll placement moves" were required to be "authorized by FSS[]." R.5487 (¶ (p)). Daniel was required to "work cooperatively with FSS[] and its departments, including the Central Placement Unit," as well as to "comply with all relevant provisions" of FSS's contract with DCF. R.5585. The subcontract also required Daniel to "provide stability in the child's living situations by": (i) "[m]inimizing multiple and unplanned placements," (ii) taking steps to "to minimize or eliminate the risk" of "placement disruption," and (iii) "[s]upporting placement in settings that can be reasonably expected to provide long term rather than interim care." R.5614–15 (¶ 2.i). Daniel's obligations also included "[p]rovid[ing] case management to at-risk children and families in the community," with "case management" defined as "the identification, linkage, coordination and monitoring of all Services for the Child or family." R.5643, 5569.

c. Allegations against FSS

According to the operative complaint, FSS provided foster care services to the siblings, Patty and Matt Long, from May 2014 to September 2016. R.139 (¶¶ 9, 13). In January 2016, FSS placed the siblings together in Diane Brace's foster home.[3] R.141 (¶ 14.l). In September 2016, Patty and Matt were placed together in Sarah and Dennis Long's home as foster children.[4] R.139 (¶¶12–13).

When FSS placed Matt and Patty together in Sarah and Dennis's home, it allegedly knew or should have known that:

- Matt had attempted to have sex with Patty multiple times;
- Matt had sexually abused his younger male cousin multiple times; and
- Matt had attempted to have sex with his mother.

R.139–40 (¶ 14.d-e).

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[3] The complaint did not name Ms. Brace, but her identity was established at trial. *Infra* § d.2, at 12-13.

[4] These names are pseudonyms to protect identities, as the actual names have been redacted from the record. For the sake of clarity and brevity, this brief often uses the Longs' first names—Patty and Matt, the siblings, and Sarah and Dennis, the married couple. The initials of their pseudonyms (P.L.; M.L.; S.L; D.L.) correspond to their actual names in the non-public trial transcript.

FSS also allegedly failed to fully disclose to Sarah and Dennis the siblings' emotional, behavioral, developmental, and mental health conditions—as well as Matt's history of sexual aggression—in violation of several regulations, including Fla. Admin. Code R. 65C-28.004. R.141–42, 144 (¶¶ 15, 22). Had these facts been fully disclosed, Sarah and Dennis allegedly would not have accepted the siblings into their home together. R.142 (¶ 17). In addition, when the siblings were placed in the first foster home (Ms. Brace's home), FSS allegedly failed to implement a sexual safety plan for Patty, and it allegedly reduced safety precautions for Matt without input from a qualified professional. R.141 (¶ 14.l). Finally, FSS allegedly should not have placed the two siblings together given Matt's "history of sexual[ly] acting out" towards Patty and other children. R.146–47 (¶¶28.i, 32.i).

d. Evidence at trial

1. <u>The siblings' pre-foster care history</u>

Kelly Kugler was a licensed mental health counselor who worked with the siblings while they resided at a youth ranch between 2014 and 2016. T.641:9–15, 643:11–18. She attested that both siblings suffered from mental and behavioral health problems, with

Matt having a history of inappropriate sexual behavior. *See* T.645:23–646:7, 651:22–657:16. Patty and Matt were unable to take care of their personal hygiene, and they did not know how to tie their shoes at the respective ages of 10 and 12. T.645:23–25.

In March 2015, Patty reported sexual abuse by Matt, and DCF investigated. T.657:17–658:9. Concerns about Matt's behavior spurred the creation of a safety plan, which prohibited the siblings from sharing a room and being alone together. T.658:17–660:9. Despite the safety plan, there was a subsequent report of sexual abuse by Matt—this time on his cousin. T.661:11–18. Matt did not progress on his sexual issues in therapy, and Patty's behavior deteriorated after the reports of Matt's conduct. T.664:9–666:20. Ms. Kugler thus recommended that Patty be transferred to a higher level of care in a therapeutic foster home, and that Matt stay at the youth ranch. T.680:19–25, 690:8–21.

In a written report dated September 25, 2015, Ms. Kugler expressed concern that if Matt was removed from the youth ranch, he would "revert to his previous behavioral issues," and would make Patty "the target of his anger and aggression." R.4470; *see* T.684:7–686:16. Ms. Kugler concluded that removing Matt "would be

detrimental to the progress he has made in regardas to his own mental and behavioral needs." R.4473. Nevertheless, both siblings were subsequently transferred to the "regular" foster home of Ms. Brace. T.682:4–9, 691:1–692:3. Ms. Kugler was never asked for her opinion about the move. T.689:25–690:7.

A child protective investigator, Diamond Jones, testified that she investigated the March 2015 report of sexual abuse of Patty by Matt. T.725:8–19. Patty accused Matt of trying to touch and have sex with her. T.743:5–9. Matt denied the accusation. T.743:17–19. Another child protective investigator, Alyssa Antone, testified that she investigated the March 2015 report that Matt sexually abused his male cousin. T.755:19–757:8. The cousin reported to her that Matt inappropriately touched him on five occasions. T.779:3–9.

2. The testimony of the first foster parent (Ms. Brace)

Ms. Brace testified that Patty was placed in her home as a foster child in September 2015. T.910:22–25. A few months later during the Christmas season, Matt had a temporary stay at Ms. Brace's home. T.913:20–914:8. Neither FSS nor Daniel informed Ms. Brace that a safety plan was in place, or that special precautions were needed when Matt was visiting. T.914:15–24.

Matt was placed as a foster child in Ms. Brace's home in January 2016. T.915:15–916:3. Ms. Brace did not receive a safety plan until the day Matt arrived, and no one had previously relayed the safety plan's contents to her—including the sexual abuse reports. T.916:1–11. She emailed FSS and Daniel that she was "extremely upset" to learn of the reports so abruptly. T.918:3–919:11; *see* R. 4407.

Ms. Brace enrolled Patty and Matt in FSS's mentoring program. T.927:16–928:9. Sarah and Dennis were appointed as Patty's and Matt's mentors, respectively. *Id.* The safety plan for the siblings was modified in May 2016, and Ms. Brace began leaving them alone together—reportedly with a therapist's approval. T.993:10–994:1. Ms. Brace did not perceive any danger between the siblings, and she did not observe or hear about any incidents of sexual abuse. T.974:3–8, 990:6–14. However, she had no way of monitoring what happened in her home while she was away, T.994:14–20, and she did not have video cameras in her home, T.969:19–24.

3. The siblings' testimony

Patty testified that she lived with Matt and her birth parents at a Salvation Army shelter before living at the youth ranch. T.882:12–

15. Matt sexually harassed her at the shelter. T.884:8–9. After living at the youth ranch, she was placed in Ms. Brace's foster home, where Matt later joined her. T.886:3–7, 887:17–19. Matt physically and sexually abused her in Ms. Brace's home. T.888:2–3. This abuse continued after Sarah and Dennis adopted the siblings in December 2016. T.891:16–24; *see* R. 4241–42 (adoption judgment).

Matt testified that he abused his mother and Patty when they lived in the shelter. T. 1679:1–5. His abuse of Patty was sexual and physical, T.1679:18–22, and that abuse continued when he and Patty lived in Sarah and Dennis's home. T.1685:24–1686:5. According to Matt, Patty initiated some of the sexual abuse. T.1686:9–12.

4. The "How to Proceed" note

During Matt's testimony, the siblings sought to introduce a note found under Matt's pillow in Sarah and Dennis's home after the adoption. *See* T.1691:17–1692:15. The court sustained FSS's relevancy objection, and then asked the siblings to explain the note's relevance. T.1692:17–1693:24. After hearing counsel's argument, the court still sustained the objection, but it also said, "we're going to talk about it more at the break." T.1693:25–1696:7.

Later, the siblings' counsel argued the note was relevant to Matt's damages—specifically, his mental condition following his placement in Sarah and Dennis's home. T.1747:6–1748:10. The court opined that the creation of the note was a "subsequent unrelated event[]," to which the siblings' counsel replied that causality was for the jury to decide. T.1749:1–22, 1750:1–6. The court then examined the note, consisting of a checklist labeled "How to Proceed." The checklist boxes—all crossed through—read, "death or suicide;" "raped by ugliest girl who's still hot;" "sex with my choice of girl;" "all the hottest girls give me money to have sex with them;" "all the prettiest girls rape me;" and "all the pretty girls want me to rape them." T.1751:5–24; *see* R.4713.

The siblings' counsel also argued that: (i) the note was relevant to psychological expert testimony that Matt's past influenced his present mental condition, and (ii) it could be introduced through Sarah's and Dennis's testimonies. T.1752:6–15, 1759:10–24; *see infra* § d.8.ii., at 27–28 (Dr. Dikel's testimony). In response, FSS's counsel argued that in addition to being irrelevant, the note was "more prejudicial than it is probative." T.1764:21–24. The court agreed, and it excluded the note. *See* T.1764:25–1765:11.

5. The siblings' psychological evaluations

In May 2015 (seven months before the siblings were jointly placed in Ms. Brace's home), a clinical psychologist, Dr. Larry Neidigh, evaluated both siblings. T.1017:1–11, 1019:18–20, 1021:9–13. He concluded that Patty was having "conflicts over sexual issues." T.1018:18–1019:13. Dr. Neidigh performed a psychosexual evaluation of Matt because "[t]here had been lots of accusations" that he had "engag[ed] in some inappropriate sexual behaviors," and thus "there were concerns about his safety around other children." T.1021:9–16, 1022:21-23. Dr. Neighdigh recommended that Matt "not have any unsupervised contact with potential victims." T.1023:5–9.

6. Testimony of FSS's employees

i. Ms. Anan (FSS's placement supervisor)

Jennifer Anan, the child placement supervisor for FSS from 2015 to 2017 (T.1122:12–14), testified that her responsibilities included overseeing FSS's placement specialists and "the day-to-day functions of placing children at home foster care." T.1123:7–13. When a child was referred to it, FSS's central placement unit would "evaluate the child, assess the child's needs, speak to case managers

and relevant parties, and then would make placement matches into one of [FSS's] foster homes or group homes." T.1123:20–1124:4. Ms. Anan described the placement unit as "a centralized way to ensure that children are safely placed in the most appropriate home." T.1125:17–19.

Ms. Anan identified FSS as a licensed child placing agency. T.1125:24–1126:25. When FSS received a placement request, it would assign a placement specialist, and this specialist would contact the child's case manager and other relevant parties to hold a multi-disciplinary team staffing. T.1129:15–1130:1. At this meeting, the placement specialist would "get all the information needed about the child and the behaviors and the situation that led to the request for a placement change." T.1130:2–6. Afterward, the placement specialist "would begin looking for the best matched foster home or group home." T.1130:10–12.

As part of the matching process, the placement unit would share a child's information—including sexual abuse history and any safety plans—with a potential caregiver. T.1135:4–12. Safety plans would be prepared by the case manager, and then sent to FSS for review. T.1138:5–20. If a placement specialist at FSS knew of a

recommendation for a child, FSS would ensure the recommendation was included in the child's safety plan. T.1139:8–14.

FSS would continually track the safety plans on sexual abuse victims and aggressors to ensure that the plans followed each child to any new foster care placement. T.1139:25–1140:13. The purpose of this tracking was "to ensure the safety and appropriateness of the placement in the home," and "to make sure [FSS wasn't] putting any child in a situation that might lead to them being part of a sexual abuse incident." T.1142:10–16. Ms. Anan agreed that it was her responsibility to place children in safe settings, and to comply with the statutes and rules governing placement—including Rule 65C-28.004. T.1143:23–1144:18, 1151:8–15.

Ms. Anan worked to find placements for the siblings. T.1159:17–23. FSS's notes indicate that when Patty was placed in Ms. Brace's home, Ms. Anan requested a safety plan from the case manager. T.1198:14–16; *see* R.3808. Ms. Anan conceded that FSS had a continuing obligation to follow up with case management until the completion of a safety plan. T.1202:23–1203:3. She agreed that even where a placement move was requested by case management,

FSS's placement unit still had a responsibility to ensure that the placement was safe and appropriate. T.1209:16–23.

Emails between FSS and Daniel staff indicate that placement specialist Christopher Pomar was assigned to handle Matt's placement in Ms. Brace's home. T.1216:2–4; *see* R.3811–12. In one email, Mr. Pomar stated that a staffing was necessary if the agency planned to place Matt together with Patty. T. 1217:12–17; R.3812. FSS's database contained a note referencing a staffing that had occurred. T.1218:18–1219:1; R.3811.

When Ms. Anan received Ms. Brace's email expressing anger over the fact that no one had communicated Matt's sexual conduct history to her, Ms. Anan chided the placement staff: "Seriously? We had an entire placement staffing with Daniel Memorial about this and with safety contract management." T.1232:15–19; R.4480–81. Ms. Anan testified that the information about Matt "should have been relayed to [Ms. Brace] by the placement specialist as a backup to make sure that she was informed from both the case manager and the placement specialist that [Matt] was coming on a safety contract." T.1232:20–1233:9.

After Matt's placement in Ms. Brace's home, FSS received a request to change his safety plan so he could attend a camp. T.1236:13–16. Ms. Anan received an email from a Daniel supervisor, asking if Daniel and FSS staff members could update the safety plan "as a team" without a therapist's recommendation. T.1240:2–24; R.4485. Ms. Anan provided Rule 65C-28.004 to the Daniel supervisor and said she would seek to clarify whether the agency could change the safety plan without a therapist's recommendation. T.1242:18–25; R.4482, 4496–99. In the email, the 2006 rule provisions about safety plans, placement of child sex abuse victims, and placement of juvenile sexual offenders were highlighted. T.1244:1–10; R.4498–99. Ms. Anan agreed that when the siblings were placed in Ms. Brace's home, FSS was required to ensure that the safety plans complied with the applicable rules. T.1246:4–11.

When asked about her involvement with the subsequent placement of the siblings in Sarah and Dennis's foster home, Ms. Anan testified that the move was done by Daniel without the knowledge of FSS's placement unit. T.1246:12–1247:3. However, she explained that FSS was "needed on the back end to make sure we did our due diligence with [Sarah and Dennis]." T.1246:23–1247:5. That

due diligence included notifying Sarah and Dennis of the safety plans and the children's behaviors and inappropriate sexual behavior. T.1247:7–23. Ms. Anan would have expected both the case manager and the FSS placement team—particularly, Mr. Pomar, the assigned FSS placement specialist—to provide this information to Sarah and Dennis. T.1252:10–24.

Ms. Anan agreed that the placement of the siblings in Sarah and Dennis's home required FSS's approval. T.1254:4–10. But, according to Ms. Anan: "FSS didn't make the placement. The case management agency [i.e., Daniel] already did." T.1254:16–17. Nevertheless, Ms. Anan agreed that "it would have been [FSS's] responsibility to go back and make sure that everything was followed." T.1254:17–19. Moreover, once FSS became aware of the placement, Ms. Anan agreed that FSS was obligated "to make sure that the placement complied with the applicable rules and procedures." T.1254:21–1255:1. Ms. Anan also testified that Mr. Pomar, the assigned placement specialist, "was instructed to ensure that [Sarah and Dennis] had all of the history about the children's behaviors, especially regarding the reason they were on safety plans and the past history." T.1260:5–8.

Ms. Anan testified that when Rule 65C-28.004 was updated, the term "safety plan" was replaced with "child placement agreement." T.1302:23–1303:1. In reviewing child placement agreements, FSS would not "fact-check everything," but FSS would make sure that the agreements were not internally contradictory. T.1312:14–1313:8. However, in response to a juror question, Ms. Anan testified that if FSS learned of an improper placement, "we would have had a huge staffing." T.1327:15–25. FSS would then inquire into the circumstances of the placement and determine whether it posed a safety risk. T.1328:10–15.

ii. Mr. Pomar (FSS's placement specialist)

Christopher Pomar, a placement specialist in FSS's central placement unit between 2015 and 2016 (T.1335:14–17, 1337:12–15, 1338:1–4), testified that his role was to find appropriate foster homes for dependent children. T.1337:16–21. He agreed that he had a responsibility to safely place each child and to comply with the applicable administrative rules. T.1340:8–11, 1342:18–21, 1363:12–18. His responsibilities included participating in staffings for the purpose of "find[ing] out if there's any additional information [that]

we need to know so we can provide that to the foster parents that were reaching out to place the child." T.1338:18–1339:3.

Mr. Pomar was assigned to place Matt in Ms. Brace's home. T.1343:4–10. He requested a staffing on this placement because a safety plan existed between Matt and Patty. T.1345:1–4. Mr. Pomar recalled speaking with Ms. Brace and placing Matt in her home. T.1351:4–10, 1352:8–19. Mr. Pomar's notes indicate that after FSS was informed of the siblings' move to Sarah and Dennis's home, he contacted Ms. Brace and confirmed that she agreed with the move. T.1361:2–11; R.3815. In an email to FSS and Daniel staff, Mr. Pomar asked if the children's therapist had any recommendation for the existing safety plan. T.1362:24–1363:7; R.3815. Mr. Pomar agreed that he had an obligation to follow up "to get an answer to that question" and that he had a responsibility to ensure the placement complied with the applicable administrative rules. T.1363:8–24.

7. Testimony of Dennis and Sarah

i. Dennis

Dennis testified that Patty went to live elsewhere for therapy after he and Sarah learned in July 2017 of Matt's sexual abuse of

Patty in the couple's home.[5] T.1777:18–23. In the summer of 2018, Sarah found a concerning note under Matt's pillow, which led to a psychosexual evaluation of Matt. T.1778:12–1779:2. Afterwards, Sarah and Dennis were informed that Matt could not be left alone with children. T.1779:1–5. Arrangements were made for Matt to live in a therapeutic setting outside of Sarah and Dennis's home. T.1778:12–16, 1779:16–21. Patty returned to Sarah and Dennis's home in January 2022, but Matt never returned to live in their home. T.1780:13–16, 1980:13–19.

FSS's placement employees (Ms. Anan and Mr. Pomar) never notified Dennis of the history between Matt and Patty. T.1783:15–22. A week after the siblings were placed in his home as foster children, Dennis signed a safety contract based on representations from a Daniel staff member that the contract was "just a formality," and that the "allegations" concerning the children were made by people who "didn't like the children." T.1784:15–22, 1789:15–1790:7; *see* R.4275–80 (safety plan).

[5] While Dennis could not recall the date he learned of the abuse, ample evidence existed that he would have learned of the abuse in July 2017. *E.g.,* T. 1686:13–25, 1825:3–1827:25

Based on these representations, Dennis "didn't believe that there [were] any current concerns for the children acting out so I signed it." T.1790:3–7. Dennis did receive in September 2016 "red folders" containing the children's history. T.1795:16–25. He "skimmed through them, but not exhaustively." T.1795:25–1796:1. Dennis instead "relied on the opinions of the professionals involved to let [him] know if there's anything that [he] should know." T.1796:23–25.

ii. Sarah

Sarah testified that FSS failed to tell her about safety concerns during the discussions on the siblings' transition her and Dennis's home. T.1813:21–25. Before she signed the safety contract, a Daniel staff member convinced her that the children had a "crazy" aunt who "wanted to say anything she could to get the kids out of her home." T.1816:12–1817:8. She also recalled relying on language in the contract stating there were "no current concerns" regarding the children. T.1817:8–11; *see* R.4275.

She reviewed the "red folders" containing reports about the children. T.1880:1–5. One report indicated "sexual concerns" as to Patty, T.2028:9–15, and another mentioned that Matt "reportedly …

may have sexually touched a cousin." T.2038:24–2039:6. But Sarah wrote in the margin that this report "was never confirmed" based in part on information from Ms. Brace. T.2039:3–8. FSS failed to explain the child placement agreements or the reports to her. T.2055:8–11.

According to an internal FSS email which was read to the jury, Sarah called FSS in July 2017 to report inappropriate sexual activity between Patty and Matt in her home. T.1826:25–1828:11. Both siblings later confirmed the incident. T.1940:19–1941:3. Patty "continued to deteriorate quite a bit" after the incident came to light. T.1941:15–16. Sarah also testified about the troubling note that she found under Matt's pillow. T.1971:17–24. Had Sarah been told that it was not in the siblings' best interests to be placed together, she would not have fostered or adopted them. T.2001:21–2002:4.

8. Expert witness testimony

i. Mr. Pennypacker's testimony

Stephen Pennypacker previously served for eight years as CEO of another lead agency. T.2699:11–22. He testified, via a video deposition offered by the siblings, about the administrative rules governing child placement. *See* T.1110–1119. He agreed that Rule 65C-28.004 required a qualified clinical professional's input if a

safety plan was to be modified. T.1112:2–10. He also agreed that a lead agency has a duty to safely place children when matching them with foster parents. T.1112:11–1113-20.

FSS also called Mr. Pennypacker as a live witness in its case in chief. *See* T.2698–2708. He testified that foster home placement was the duty of a lead agency, "[t]ogether with case management." T.2703:18–2704:3.

ii. Dr. Dikel's testimony

Dr. Thomas Dikel, the siblings' forensic and developmental psychology expert (T.1384:24–1385:7), testified that Patty was harmed by Matt's inappropriate sexual conduct, and that she suffered from posttraumatic stress disorder (PTSD) and other psychological issues. T.1394:9–12, 1398:6–9, 1422:1–23. The "fear" and "terror" she suffered—including a "revulsion" to ever being with a male—were linked to Matt's conduct. T.1426:23–1427:5.

As for Matt, Dr. Dikel testified that he also suffered from PTSD, and that he was negatively affected by the guilt of his past behavior. T.1429:3–1431:7. Moreover, Matt was "at risk for both being victimized, and the potential is there for victimization of others." T.1430:8–12.

Dr. Dikel further testified that the PTSD from which both siblings suffered was affected by the past events in their lives, including the events occurring in the 18-month period when they were in foster care. T.1455:14–1456:5. These events were "contributory" to the siblings' current psychological conditions, for which future services and treatment would be necessary. T. 1569:21–1570:5; *see* T.1427:10–1428:19, 1431:8–1433:4.

e. The trial court's reasoning for rejecting the siblings' requested 401.9 instruction[6]

Following the direct examination of FSS's placement supervisor (Ms. Anan), the trial court noted that Rule 65C-28.004 was included in a joint exhibit. *See* T.1260:19–1261:5; *see also* R.4206–15 (joint exhibit 4 containing the 2006 and 2016 rules). The court then remarked, "I can't let that statute [*sic*] go to the jury and not give them 401.9." T.1261:7–8 (referring to Fla. Std. Jury Instr. (Civil) 401.9). The siblings' counsel then requested that the 401.9 instruction be given "[b]ased on the evidence." T.1261:9–12; *accord* T.1262:9–11. Later, at the charge conference, the siblings' counsel

[6] The portions of the record cited in this section "e" are in appellants' appendix.

requested that the jury be instructed on both the 2006 and 2016 versions of the regulation, and she handed the court copies of both versions. T.2791:24–2792:22; *see* R.933 (proposed instruction).[7]

The trial court's reasoning at the charge conference centered on who was "the person making the placement." T.2792:23–24; *see generally* T.2792:23–2799:22. This phrase is found in both the 2006 and 2016 rules. *See* Fla. Admin. Code R. 65C-28.004(10)(b) (2006) ("When placing a child who has been a victim of sexual abuse …, a written safety plan shall be completed by *the person making the placement* and the out-of-home caregivers, and signed by the same.") (emphasis added); *id.* 65C-28.004(11)(a)2. (2006) ("When … plac[ing] a child who is an alleged juvenile sexual offender …, *the person making the placement* shall … [e]nsure the child is the youngest child placed in the home unless the placement is a treatment facility with

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[7] The proposed instruction required the court to read or paraphrase the regulations and then instruct the jury:

> Violation of [Rule 65C-28.004] is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that [FSS] violated [this regulation], you may consider that fact, together with the other facts and circumstances, in deciding whether [FSS] was negligent.

R.933; *see* Fla. Std. Jury Instr. (Civil) 401.9.

adequate video monitoring.") (emphasis added); Fla. Admin. Code. R. 65C-28.004(10)(a) (2016) (When … plac[ing] a child who is known to have any behaviors that may result in harm, *the person making the placement* shall implement safeguards to ensure that the needs of the child for supervision, treatment, and interventions are addressed and that the safety of other children in the same setting is ensured.") (emphasis added); *id.* 65C-28.004(10)(b) (2016) ("*The person making the placement* shall provide the caregivers with written, detailed, and complete information regarding the circumstances surrounding the child's behavior so that they can avoid any unwitting replication of those circumstances.") (emphasis added).

Despite FSS's admission in its answer that it had a duty protect the siblings and to reasonably place them (R.807–08 ¶¶28, 32), FSS argued at the charge conference that there was "no evidence" that FSS, as a "lead agency," was "required to follow 65C-28.00[4]." T.2790:18–20. In response, the siblings' counsel argued that "the person making the placement" included members of FSS's placement unit. T.2793:2–7. The court, however, was skeptical of this argument; it queried: "Isn't Daniel making the placement? Daniel made the placement." T.2793:20–22.

In response to the court's question, the siblings' counsel argued: "[B]oth [FSS and Daniel are] making the placement …. [T]hey both have an obligation to comply with the statute [*sic*]. This is titled 'Placement Matching.' [FSS] operated the placement unit. [FSS's] witnesses have testified that they were required to comply with this…." T.2793:23–2794:4; *accord* T.2797:2–5.

FSS's counsel, however, contended that the 2006 and 2016 rules applied only to Daniel as the case manager. T.2794:13–2795:10. The court agreed, based on its interpretation of the phrase "the person making the placement" as used in subsection (10)(b) of the 2006 rule—without considering the other provisions in the 2016 and 2006 rules that use this same phrase. *See* T.2798:2–23.

The court interpreted subsection (10)(b) of the 2006 rule to "say[] [that] the person who signs the safety plan is the out-of-home caregivers and the person who made the written plan, who made the placement." T.2798:5–8. The court then elicited from both counsel the fact that Daniel alone—and not FSS—signed the written safety plans. *See* T.2798:9–17. Thus, the court reasoned, "clearly the person making the placement in 10(b) is, as applied to these facts, Daniel." T. 2798:21–23.

Finally, when the siblings' counsel reiterated that the evidence supported the instruction, the court responded: "It's not really an evidentiary question …. I'm not giving 401.9." T.2799:15–22.

f. The trial court's advocacy for FSS[8]

The trial court, Judge Dearing, advocated for FSS primarily in two ways.

First, Judge Dearing repeatedly raised and sustained objections not argued by FSS:

- The court called a sidebar conference to question the siblings' counsel about relevance and the qualification of a witness to give opinion testimony, though FSS had objected based on hearsay. T.932:16–933:20.
- The court called a sidebar conference to question the siblings' counsel about a witness's qualification to give opinion testimony, though FSS had not objected. T.1100:19–1104:5. For more than three transcript pages, FSS's counsel did not say a word, as the court made the evidentiary objection for FSS. T.1101:1–1104:5.

[8] The portions of the trial transcript cited in this section "f" are in appellants' appendix.

- The court called a sidebar conference to question the siblings' counsel as to whether a witness was qualified as an expert, though FSS did not initiate any objection. T.1145:15–1149:2.
- The court called a sidebar conference to *sua sponte* raise authentication and foundation objections, T.1894:25–1901:23, though FSS's objection was based only on relevance, T.1897:22–1898:5.
- FSS objected based on speculation, and the court sustained the objection on speculation *and* foundation grounds. T.906:12–15.
- FSS objected based on lack of predicate and knowledge, and the court sustained the objection on the additional ground that the question called for a legal conclusion. T.938:18–24.
- FSS objected based on relevance, and the court sustained on the additional ground of leading. T.1091:6–8,
- FSS objected based on lack of predicate, but the court sustained because the question was leading. T.1154:4–6
- FSS objected on leading grounds, and the court sustained the objection while also suggesting that the question was asked and answered. After the siblings' counsel rephrased the question,

the court sustained FSS's asked-and-answered objection. T.1320:11–1321:5.

- FSS objected based on relevance, but the court sustained based on speculation. T.1697:6–7.
- Regarding Matt's "How to Proceed" note, FSS lodged an unelaborated "relevance" objection, and during a recess the court *sua sponte* elaborated on the objection by opining that the note was not causally related to Matt's placement in the same home as Patty. T.1692:16–17, 1747:6–1760:4. After nearly 13 transcript pages of back-and-forth argument with the siblings' counsel, the court then asked FSS for its position. T.1760:4. FSS's counsel then repeated substantially the same points raised by the court. *See* T.1760:6–19.
- FSS made a foundation objection, and the court sustained on the additional ground of hearsay. T.2143:25–2144:5.
- FSS made a speculation objection, and the court sustained on the additional ground of asked and answered. T.2575:8–11.
- FSS objected that a question was "[o]utside the scope" and "confusing and unintelligible," and the court sustained on the additional ground of asked and answered. T.2737:24–2738:5.

Second, Judge Dearing *sua sponte* asked whether Judge Gooding—who had presided over Patty's and Matt's dependency cases (*e.g.,* R.4241–42, 4818, 5138)—should be added to the "stupid verdict form" because he may have been a contributing cause to the siblings' harms. *See* T.2269:16–2270:19. Not once in the years of litigation had the parties ever argued that Judge Gooding was a cause of the damages suffered by Patty and Matt. Judge Dearing described her inquiry as "kind of" and "a little" "tongue in cheek." T.2269:20-21, 2270:15–16.

Following the trial, the siblings' counsel learned that when Judge Dearing had been a practicing attorney, she had represented Judge Gooding before two commissions and a court. R.5796, 5974–75, 6417. The siblings thus sought a new trial, moved to disqualify Judge Dearing, and argued that Judge Dearing should have disclosed her prior representation of Judge Gooding. R.5796–97, 6413–23. Judge Dearing denied these requests. *See* R. 6424–26, 6362–75.

The siblings now appeal the final judgment. R.6442–87.

SUMMARY OF ARGUMENT

"A party is entitled to have the jury instructed on the theory of its case when the evidence supports that theory." *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 517 (Fla. 2015). The siblings requested a 401.9 instruction on the 2006 and 2016 versions of Rule 65C-28.004. The trial court decided that rule did not apply because, in its judgment, "the person making the placement [was] … Daniel." T.2798:21–23. This legal determination was reversible error.

The trial court misinterpreted the phrase "the person making the placement" to mean the person who signed the safety plan. But signing the safety plan was an *obligation* of—not a *definition* for—"the person making the placement" under a single provision of just the 2006 rule. Read properly, the *person making* the placement is the one with the authority and responsibility to place the child—even if that person breached its regulatory obligation by failing to sign the safety plan.

The evidence was sufficient (and overwhelming) that FSS was the person with the authority and responsibility to place the siblings. FSS repeatedly admitted this fact, including in its answer. FSS's contracts and its own employees' testimony also established this fact.

The evidence also was sufficient (and overwhelming) that FSS violated Rule 65C-28.004. For example, the 2006 rule explicitly prohibited FSS from placing Matt in the same setting as Patty unless it was "a treatment facility with adequate video monitoring." Fla. Admin. Code R. 65C-28.004(11)(a)2. (2006). The first placement home, governed by the 2006 rule, unquestionably did not satisfy this requirement.

On top of its instructional error, the trial court, Judge Dearing, erred by failing to act like a neutral, impartial judge. Instead, she acted as FSS's advocate by *sua sponte* raising objections and arguments to benefit FSS. The siblings thus did not receive a fair trial, and their due processes rights were violated. On remand, this Court should instruct that a new judge must be assigned.

Finally, the trial court abused its discretion by excluding Matt's "How to Proceed" note. The court improperly interjected its own personal opinions of causation. The note was highly probative of Matt's mental condition and damages, and that probative value was not substantially outweighed by any unfair prejudice.

ARGUMENT

I. The trial court erred by failing to instruct the jury that a violation of Rule 65C-28.004 is evidence of negligence.

Standard of Review: *De Novo*

"[G]enerally," a trial court's decision to "withhold a jury instruction is reviewed for [an] abuse of discretion." *Morton Roofing, Inc. v. Prather*, 864 So. 2d 64, 68 (Fla. 5th DCA 2003). But this rule has exceptions. When a trial court withholds an instruction based on undisputed facts, its decision is a "legal determination" subject to de novo review. *Khianthalat v. State*, 974 So. 2d 359, 360 (Fla. 2008). Moreover, the interpretations of administrative rules and contracts are subject to de novo review. *See Nikolits v. Haney*, 221 So. 3d 725, 728 (Fla. 4th DCA 2017) (administrative rule); *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1189 (Fla. 2017) (contract). The trial court here withheld the 401.9 instruction because of: (i) the undisputed fact that Daniel alone signed the written safety plan, and (ii) the court's interpretation of Rule 65C-28.004. *See supra* § e, at 28–32. Thus, the standard of review is de novo.

Merits

A trial court reversibly errs when it fails to give a requested jury instruction if: (A) the instruction accurately stated the law, (B) the facts supported giving the instruction, and (C) the instruction was necessary to allow the jury to properly resolve the issues in the case. *Aubin*, 177 So. 3d at 517. All three elements are satisfied here.

A. The siblings' requested 401.9 instruction accurately stated the law.

The trial court and FSS did not argue below that standard instruction 401.9 fails to accurately state the law. Nor could they have argued this.

A trial court must instruct a jury on a written law when a party so requests and there is evidence of negligence in the form of a violation of that law. *Seaboard Coastline R.R. Co. v. Addison*, 502 So. 2d 1241, 1242 (Fla. 1987) ("[A] violation of a traffic ordinance is evidence of negligence, and … when there is evidence of such a violation[,] a requesting party is entitled to have the jury so instructed."). Though *Addison* concerned a traffic law, Florida caselaw has since established that the instruction must be given for the violation of *any* written law, including an administrative

regulation. Note on use 2 to the standard instruction—citing multiple cases—states: "This instruction is to be used for the violation of both traffic and nontraffic regulations, ordinances, or codes where the violation constitutes evidence of negligence …." Fla. Std. Jury Instr. (Civil) 401.9; *see also Conroy v. Briley*, 191 So. 2d 601, 602 (Fla. 1st DCA 1966) (instruction that a violation of an administrative regulation was evidence of negligence).

B. The facts supported giving the siblings' requested 401.9 instruction.

The trial court declined to give the 401.9 instruction because it decided that FSS was not—and that Daniel alone was—"the person making the placement." *Supra* § e, at 28–32. Thus, according to the court, Rule 65C-28.004 did not apply to FSS. *Id.* This decision was premised on the undisputed fact that Daniel alone signed the safety plans. *Id.* The trial court incorrectly interpreted the regulatory text—"the person making the placement." *Infra* § I.B.1, at 41–44. Because of this interpretive error, this Court must do what the trial court failed to do—examine whether there was sufficient evidence to show that FSS: (i) was "the person making the placement" and (ii) violated Rule 65C-28.004. There was such evidence. *Infra* § I.B.2–3, at 44–52.

1. "The person making the placement" is the one with the authority and responsibility to place the child.

This Court must adhere to the supremacy-of-the-text principle when interpreting an administrative regulation. *See Lakeview Loan Servicing, LLC v. Walcott-Barr*, 307 So. 3d 705, 709 (Fla. 4th DCA 2020) (Kuntz, J.) ("Administrative rules must be interpreted according to their plain language whenever possible.") (quoting *Smith v. Sylvester*, 82 So. 3d 1159, 1161 (Fla. 1st DCA 2012)); *see also* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51 (2012) (supremacy-of-the-text principles apply "all types of legal instruments," including "regulations").

The phrase "the person making the placement" is undefined by rule or statute. Yet, one word in the phrase—"placement"—is defined by rule as "the supervised placement of a child in a setting outside the child's own home." Fla. Admin. Code R. 65C-30.001 (2006 & 2016). Thus, when considered in context, the phrase bears a technical, specialized meaning. *See* Scalia and Garner, *supra* § 6, at 69–77 (discussing whether words should be interpreted in their ordinary sense or their technical, specialized meaning); *Crews v. Fla. Pub. Emps. Council 79, AFSCME*, 113 So. 3d 1063, 1069 (Fla. 1st DCA

2013) (listing Florida cases noting that "context" may indicate a term has a "technical" or "legal" meaning).

Who is the *person making* "the supervised placement of a child in a setting outside the child's own home?" The trial court decided it was the person who signed the safety plan (Daniel). T.2798:2–8. But the administrative rules do not define "the person making the placement" as the person who *signs* the safety plan. Rather, under the 2006 rule, signing the safety plan is an *obligation* of—not a *definition* for—"the person making the placement." *See* Fla. Admin. Code R. 65C-28.004(10)(b) (2006). The trial court nonetheless concluded that because FSS did not perform this obligation, it was not "the person making the placement." T.2798:2–23; T.2799:20–21.

The trial court's reasoning was erroneous—and nonsensical. A party's capacity does not depend on whether it has complied with obligations imposed on it by the law. For example, suppose a regulation required a general contractor to hire only subcontractors who are licensed, and further suppose a general contractor instead hires only unlicensed subcontractors. Could the general contractor deny his capacity as a general contractor simply because he did not perform an obligation, imposed by the law, to hire only licensed

subcontractors? Of course not. This nonsensical reasoning, however, is akin to the reasoning that the trial court used to conclude that FSS was not "the person making the placement." Because FSS did not sign the safety plan—which the 2006 rule obligated the person making the placement to do—the trial court reasoned that FSS (like the general contractor in our hypothetical) could not be "the person making the placement."

The interpretation of the phrase depends not on who did or did not sign the safety plan, but rather on the words *the person making* the placement. *Making* and its cognate *make* have many different meanings depending on the context in which they are used. *Cf.* Scalia and Garner, *supra* § 6, at 70 ("[T]he more common the term …, the more meanings it will bear."); *id.* (noting the word *run* had more than 800 meanings). But when *making* or its cognates are used in a legal context and in conjunction with a person or entity, it refers to the person with the authority and responsibility to act.

For example, a law*maker* is "[a]n elected official *responsible* for making laws." *Lawmaker*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). A lawmaker is the person with the authority to make law; it is not the person who publishes or compiles the laws

pursuant to the lawmaker's authority. Similarly, in the family law context, the word *making* is often used to signify which parent or person has authority to decide certain matters for a child. *See, e.g., McFatter v. McFatter*, 193 So. 3d 1100, 1101–04 (Fla. 1st DCA 2016). As another example, the persons who *make* a contract are those with the legal authority to enter into the contract, and such persons would include not only the individual agents who actually sign the contract but also the principals who authorized the making of the contract.

Finally, the trial court's interpretive error was compounded by the fact that the signature requirement was *not* in the 2016 rule. Thus, the court's rationale could not apply to the September 2016 placement in Sarah and Dennis's home, which was governed by the 2016 rule (not the 2006 rule on which the trial court relied).

2. Sufficient evidence exists that FSS had the authority and responsibility to place the children and thus was "the person making the placement."

The trial court never examined whether there was sufficient evidence showing that FSS was "the person making the placement." Instead, at the charge conference, the court said its decision to not give the 401.9 instruction was "not really an evidentiary question." T.2799:15–22. Had the trial court examined the evidence, it would

have found sufficient (if not overwhelming) evidence that FSS was the person with the authority and responsibility for placing the siblings and thus was "the person making the placement."

Start with FSS's own admissions. In its answer, FSS admitted that it "had a duty to [the siblings] … to act reasonably to protect [the siblings] … and to place [them] in homes that FSS[] reasonably believed could meet [their] needs." R.807–08 ¶¶28, 32. FSS was bound by this admission. *See Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("[A]dmissions contained in the pleadings as between the parties themselves are accepted as facts without the necessity of supporting evidence."); *City of Deland v. Miller*, 608 So. 2d 121, 122 (Fla. 5th DCA 1992) (same); *Vann v. Hobbs*, 197 So. 2d 43, 45 (Fla. 2d DCA 1967) (a litigant is "bound" by admissions in its answer).

What's more, FSS admitted:

- in a pretrial statement that it was "obligat[ed] to use reasonable care to keep [the siblings] safe and to properly place them in appropriate foster homes," R.841;
- in an agreed jury instruction, that "*apart from* [*FSS's*] *placement responsibilities*, all foster care and pre-adoptive services were performed by [Daniel] …," T.471:12–16 (emphasis added);

- in its opening statement, that it "decided not to contract out the placement piece," and that it "kept the placement piece in-house." T.556:2–3, 557:11.

Look next at FSS's own contracts. Under its DCF contract, FSS was required to "deliver Placement Services" to children. R.3906, 3914. The subcontract with Daniel did not delegate FSS's placement duties; rather, it required Daniel to "work *cooperatively* with [FSS] and its departments, *including the Central Placement Unit*." R.5585 (emphasis added). Crucially, "*[a]ll* placement moves" were required to be "authorized by FSS[]." R.5487 (emphasis added). Moreover, the subcontract provided that "[c]hildren in relative, family Foster Care and group care placements will be provided a level of appropriate care *by FSS*[] identifying the necessary levels of support and supervision required to be performed by the caregiver, clinical service team and FSC." R.5615 (emphasis added).

Then consider the testimony of FSS's employees. Ms. Anan, supervisor of FSS's central placement unit, testified that FSS was a licensed child placement agency, and that it was her unit's responsibility to "make placement matches into … foster homes." T.1123:20–1124:4, T.1125:24–1126:25. She also testified that: (i) she

had a responsibility to safely place the children, T.1143:23–1144:18, 1151:8–15, and (ii) the placement in Sarah and Dennis's home required FSS's approval and its "due diligence" to ensure the propriety of the placement. T.1246:23–1247:20, 1254:4–20.

Mr. Pomar, FSS's placement specialist, testified that he would find appropriate foster homes for children. T.1337:16–21. He recalled "making that placement" of Matt in Ms. Brace's home. T.1351:4–10, 1352:8–19. He also testified that he had a responsibility to ensure that the placement in Sarah and Dennis's home complied with the administrative rules. T.1363:8–24.

Finally, a former lead agency head testified that a lead agency performs foster home placement tasks "[t]ogether with case management." T.2703:18–2704:3.

3. Sufficient evidence exists that FSS violated both the 2006 and 2016 versions of Rule 65C-28.004.

The trial court also never examined whether there was sufficient evidence showing that FSS violated Rule 65C-28.004. *See* T.2799:15–22 ("It's not really an evidentiary question."). Had the trial court examined the evidence, it would have found sufficient (if not overwhelming) evidence that FSS violated the rule.

Two placements of the siblings were at issue in this case: (i) the January 2016 placement in Ms. Brace's home, and (ii) the September 2016 placement in Sarah and Dennis's home. T.915:15–916:3, 1800:22–1801:5. The former was governed by the 2006 rule, and the latter by the 2016 rule.

The 2006 rule mandated that "[w]hen it is necessary to place a child who is an alleged juvenile sexual offender and is exhibiting or has exhibited sexually inappropriate behaviors, or who is sexually reactive, the person making the placement shall … [e]nsure that the child is the youngest child placed in the home unless the placement is a treatment facility with adequate video monitoring." Fla. Admin. Code R. 65C-28.004(11)(a)2. (2006). FSS violated this rule by placing Matt together with his younger sister Patty in Ms. Brace's home; Mr. Pomar specifically testified to "making that placement." T.1351:4–10, 1352:8–19. Moreover, Ms. Brace testified that she did not have video cameras in her home, so the rule's exception is inapplicable. T.969:19–24.

The 2006 rule also required the "person making the placement" to "gather … placement recommendations." Fla. Admin. Code R. 65C-28.004(11)(a)1 (2006). It mandated that Ms. Brace be given "detailed

and complete information"—including "treatment outcomes"—about the circumstances of Matt's sexually abusive behavior to "avoid any unwitting replication of those circumstances." Fla. Admin. Code R. 65C-28.004(11)(a)3. (2006).

Ms. Kugler, the children's therapist at the youth ranch, testified that she was not asked for her input concerning the children's transfer from the youth ranch. Ms. Kugler had found that Matt failed to make progress in therapy regarding his sexual issues, T.664:9–11, and she opined that Matt's removal from the youth ranch would cause him to "revert to his previous behavioral issues"—including the issues with Patty. R.4470. Without Ms. Kugler's input concerning Matt's "treatment outcomes," the information relayed to Ms. Brace was incomplete. *See* Fla. Admin. Code R. 65C-28.004(11)(a)3. (2006).

Also concerning Matt's placement in Ms. Brace's home, the 2006 rule required "the person making the placement" to "outline a written safety plan" "[*i*]*n partnership with the caregiver*." Fla. Admin. Code 65C-28.004(11)(a)5. (2006) (emphasis added). But the caregiver, Ms. Brace, testified that she was not made aware of any safety plan for Matt until the day he moved into her home, and her email to FSS and Daniel staff indicates that she was unaware of

Matt's sexual abuse history before she received that safety plan. *See* T.916:1–11; R.4407. This evidence demonstrates that Matt's safety plan was *not* prepared in partnership with Ms. Brace.

Regarding the placement of Matt in Dennis and Sarah's home—governed by the 2016 rule—"the person making the placement" was required to "implement safeguards to ensure that the needs of [Matt] for supervision, treatment and interventions are addressed *and that the safety of other children in the same setting* [i.e., Patty] *is ensured*." Fla. Admin. Code R. 65C-28.004(10)(a) (2016) (emphasis added). The child placement agreements for Dennis and Sarah's home contained only a single safety precaution: that the children have their own rooms. *See* R.4270–71, 4276–77, 4282–83. On this point, the agreements contradict themselves by referring to the precaution as a "require[ment]" on one page and a "suggest[ion]" on another—despite Ms. Anan's testimony that FSS staff were required to ensure the child placement agreements were not internally contradictory. *See id.*; T.1312:14–1313:8.

The "person making the placement" was also required to give Dennis and Sarah "detailed" and "complete" information concerning the circumstances of Matt's sexually abusive behavior. Fla. Admin.

Code R. 65C-28.004(10)(b) (2016). The purpose of providing this information—as in the 2006 rule—was to "avoid any unwitting replication" of those circumstances. Fla. Admin. Code R. 65C-28.004(10)(b).

Mr. Pomar never followed up with placement staff to find out whether there were any therapist recommendations for the siblings' safety plans. *See* T.1362:24–1363:7; R.3815. Dennis and Sarah testified that no one from FSS discussed the siblings' abuse history with them. *See* T.1783:15–22, 2055:8–11. Moreover, the "progress toward permanency" notes prepared by Daniel and FSS at the September 2016 staffing were the exact same notes as those prepared at the May 2016 staffing—suggesting that the requested therapist recommendation was not obtained before the placement in the Dennis and Sarah's home was completed. *Compare* R.5695, *with* R.5682. The agreements informed Sarah and Dennis that there were "no current concerns for [Matt] acting out sexually and no observable harm to [Patty] at this time." R.4269, 4275, 4281. But given the evidence of the lack of due diligence, communication, and documentation by FSS staff, the jury reasonably could have found this statement to be based on incomplete information.

In sum, a sufficient evidentiary foundation existed for the trial court to instruct the jury on both the 2006 and 2016 versions of Rule 65C-28.004.

C. The requested 401.9 instruction was necessary to allow the jury to properly resolve all issues in the case.

The theory of the siblings' case is that FSS breached its duty to safely place them. Both the 2006 and 2016 versions of Rule 65C-28.004 contained requirements to ensure that children were safely placed. There was sufficient (if not overwhelming) evidence that FSS had a responsibility to comply with these provisions, and that it failed in that responsibility. *See supra* § I.B.2–3, at 44–52. Therefore, the siblings "had a right to have the jury informed of that responsibility." *Beeman v. Cosmides*, 825 So. 2d 511, 513 (Fla. 3d DCA 2002) (holding that trial court's refusal to read or paraphrase traffic statute was reversible error where the plaintiff bicyclist alleged his injury was caused by the defendant driver's negligence, and there was evidence that the defendant driver violated the statute).

In *Estate of Wallace v. Fisher*, 567 So. 2d 505 (Fla. 5th DCA 1990), this Court reversed the denial of a new trial where the trial court had refused to instruct the jury on two traffic statutes. *Id.* at

509–10. The defendant requested that the jury be instructed on comparative negligence based on the plaintiff's violation of the speeding and careless driving statutes. *Id.* at 509. However, the trial court concluded that there was no evidence that the plaintiff violated those statutes. *Id.* at 509–10. After reviewing the record, this Court found otherwise, and held that the issues of whether the statutes were violated and whether the violations contributed to the accident "should have been left to the jury to decide." *Id.* at 510. Likewise, here, whether FSS violated Rule 65C-28.004 and whether that violation contributed to the siblings' damages should have been left to the jury.

The failure to give the 401.9 instruction was not harmless error. FSS's counsel capitalized on the error in closing by arguing—in reference to Rule 65C-28.004—that "[o]nly the judge instructs you about the law … [the siblings' counsel] doesn't instruct you about the law." T.2935:6–10. FSS's counsel also argued that "there's no rule, statute, anything that says particular kids have to be placed at particular places." T.2936:25–2937:2. Yet, the 2006 rule expressly required that an alleged juvenile sex offender be the youngest child placed in a home—unless the home is a "treatment facility with

adequate video monitoring." Fla. Admin. Code R. 65C-28.004(11)(a)2. (2006). FSS's placement of Matt with Patty in Ms. Brace's home plainly violated this provision. *See supra* § I.B.3., at 48.

The jury also may have been confused because it was instructed that FSS, as a lead agency, was not liable for Daniel's acts and omissions. See T.2847:15–19. While this was an accurate statement of the law, *see* § 409.993(2)(a), Fla. Stat., the giving of this instruction combined with the omission of the siblings' requested 401.9 instruction could have misled the jury into believing that FSS had no legal responsibility to safely place the siblings. This possibility is heightened by FSS's closing argument, which directed the jury's attention to the "very specific" and "important" instruction on section 409.993(2)(a), and later referred to the lack of an instruction on Rule 65C-28.004. *See* T.2915:17–2916:19, 2935:6–10.

In *Araj v. Renfro ex rel. Jones*, 260 So. 3d 1121, 1122–23 (Fla. 5th DCA 2018), this Court held that a trial court's failure to give a requested instruction was not harmless because, like here, the party benefitting from the error was able to capitalize on that error in its closing argument. *Jones* involved an accident in which the plaintiff was riding a scooter. *Id.* at 1122. The defense requested that the jury

be instructed on a statute prohibiting such vehicles from being driven on highways. *Id.* In closing, the plaintiff's counsel argued that the plaintiff "was entitled to be [on the highway] like any other motorist." *Id.* at 1123. Although the jury allocated 25 percent of the fault to the plaintiff, this Court held that the failure to give the instruction was not harmless because the jury's allocation of fault could have been different if the jury had been properly instructed. *Id.*

Here, the jury found that FSS was not at fault. Had the jury been properly instructed that a violation of Rule 65C-28.004 is evidence of negligence by FSS, the jury may have made a different finding. Accordingly, this Court should reverse and remand for a new trial with a direction that the 401.9 instruction be given.

II. The trial court violated the siblings' due process rights by departing from its role as a neutral arbiter.

Standard of Review: *De Novo*

Whether a trial court has violated a party's due process rights is reviewed de novo. *Dobson v. U.S. Bank Nat'l Ass'n*, 217 So. 3d 1173, 1174 (Fla. 5th DCA 2017).

Merits

"[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Davis v. Parks*, 194 So. 613, 615 (Fla. 1939). Thus, a court "is not authorized to raise a legal issue *sua sponte* and errs when ruling on the basis of an argument never raised by [a party]." *U.S. Bank Nat'l Ass'n v. Bell*, 355 So. 3d 980, 983 (Fla. 5th DCA 2023); *see also Bank of N.Y. Mellon v. Barber*, 295 So. 3d 1223, 1225 (Fla. 1st DCA 2020) (a court "is not authorized to become a party's advocate and raise a legal issue sua sponte.")). Rather, "[t]he trial court's role is to *adjudicate* the case by ruling on the issues raised *by* the parties, not to *litigate* the case by raising issues *for* the parties." *Marocco v. Brabec*, 299 So. 3d 416, 420 (Fla. 1st DCA 2019).

This Court has held that "[a] trial judge's failure to remain neutral during a proceeding is a due process violation that *requires reversal*." *Dep't of Child. and Families v. J.J.*, 368 So. 3d 1017, 1024 (Fla. 5th DCA 2023) (emphasis added). In *J.J.*, a dependency case, DCF's witnesses testified against the father at the adjudicatory hearing, but the trial court *sua sponte* decided to reopen the hearing to take additional testimony from the father. *Id.* At the reconvened

hearing, the trial court conducted the father's direct examination and rested his case for him. *Id.* This Court found that "the trial judge's collective actions of reopening the evidence and actively participating in the reconvened hearing gave the appearance of partiality in favor of [the father], which violated DCF's due process rights." *Id.* Accordingly, this Court reversed and remanded for a new hearing in front of a different judge. *Id.*

Here, Judge Dearing—like the trial judge in *J.J.*—departed from her role as a neutral arbiter on numerous occasions, either by raising objections and arguments not raised by FSS, or by sustaining FSS's objections on grounds not argued by FSS. *Supra* § f, at 32–35. "Whether intentional or not," Judge Dearing's collective actions gave an "appearance of partiality" that benefitted FSS. *See Lyles v. State*, 742 So. 2d 842, 843 (Fla. 2d DCA 1999) (court deprives a party of due process by raising and ruling on issues *sua sponte*).

While a few isolated instances of such conduct may be excusable, the sheer "frequency of the sua sponte interruptions" and interjections in FSS's favor—at least fourteen—deprived the siblings of "a fair trial." *See Poe v. State*, 746 So. 2d 1211, 1214 (Fla. 5th DCA 1999) (granting new trial where court's repeated interruptions of

defense counsel gave the appearance of partiality in the State's favor); *see also Keane v. State*, 357 So. 2d 457, 458 (Fla. 4th DCA 1978) (granting new trial based on the trial court's "numerous gratuitous comments and interjections"). Judge Dearing's advocacy for FSS may have colored—and likely did color—the jury's view of the siblings' claims and contributed to the verdict in FSS's favor.

Judge Dearing also *sua sponte* raised whether Judge Gooding—who presided over the dependency case and adoption—was a contributing cause to the siblings' harms. Judge Dearing remarked to FSS that "[t]here's lots of intervening causes that … you could argue. One, I guess, is that Judge Gooding approved the adoption." T.2260:25–2261:4. Then, Judge Dearing asked if Judge Gooding was going to be on the "stupid" verdict form. T.2269:16–2270:14.

Against the backdrop of Judge Dearing's advocacy for FSS, her unsolicited raising of the Judge Gooding issue casts doubts on her impartiality. This doubt was compounded by the discovery that she had represented Judge Gooding when she was an advocate. *See* R.5796. Regardless of whether Judge Dearing intended her commentary to be "tongue in cheek," *see* T.2270:15–16, she was required to "studiously avoid the *appearance*" of favoring FSS by

refraining from giving unsolicited advice. *See Fla. Power & Light Co. v. Velez*, 365 So. 3d 1194, 1198 (Fla. 3d DCA 2023) (emphasis added) (finding that trial judge "crossed the line from neutral arbiter to active participant in the adversarial process" by *sua sponte* "drift[ing] into an irrelevant discourse on damages in which he proposed his own damages model").

Because the siblings were deprived of their due process right to a neutral judge, this Court should reverse and remand for a new trial to be held before a different judge.

III. The trial court abused its discretion by excluding Matt's "How to Proceed" note from the evidence.

Standard of Review: Abuse of Discretion

Evidentiary rulings are reviewed for abuse of discretion; however, "that discretion is limited by the rules of evidence." *Helton v. Bank of Am., N.A.*, 187 So. 3d 245, 247 (Fla. 5th DCA 2016).

Merits

The trial court abused its discretion when it found that the "How to Proceed" note was irrelevant and more prejudicial than probative. Evidence is relevant if it "tend[s] to prove or disprove a material fact." § 90.401, Fla. Stat. (2022). "All relevant evidence is admissible,

except as provided by law." § 90.402, Fla. Stat. (2022). Moreover, "where relevant evidence is not unfairly prejudicial the trial court has no discretion or authority to exclude it." *Taylor v. Culver*, 178 So. 3d 550, 551 (Fla. 1st DCA 2015) (citing *Special v. W. Boca Med. Ctr.*, 160 So.3d 1251, 1259 (Fla. 2014)).

The trial court agreed with the siblings' counsel that Matt's mental condition was at issue. T.1748:3–5. After all, the siblings' placement together aggravated their sexual abuse history and damaged them by negatively impacting their mental conditions.

Nevertheless, the court—without any argument from FSS beyond an unelaborated "relevance" objection—advocated that Matt's post-adoption creation of the note was a "subsequent unrelated event[]." T.1749:16–18. After reading the note, the court—again, without any input from FSS—remarked that there was "no testimony" that the reason Matt wrote the note was related to FSS. T.1752:1–5. The court noted the fact that 15 months had passed between Matt's adoption and the note's creation—again without FSS having made that argument. T.1755:1–14.

The trial court thus improperly excluded the note because it "inject[ed] [its] personal opinions on causation into the case." *Cf.*

Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, Inc., 153 So. 3d 384, 389 (Fla. 3d DCA 2014) (granting writ of prohibition where trial judge made numerous unsolicited comments attacking the defendant's theory of causation). The trial court also ignored or overlooked evidence. For instance, it ignored or overlooked the testimony of the siblings' developmental and forensic psychology expert, Dr. Dikel, who opined that the events that occurred when Matt was in foster care contributed to his post-adoption psychological condition. *See* T. 1455:14–1456:5, 1569:21–1570:5. Moreover, the court ignored or overlooked the evidence that Matt's sexually deviant behavior—a proclivity known to FSS—continued unabated for as long as he was allowed to live with his sister. *See* T.888:2–3, 891:16–24, 1685:24–1686:5, 1826:25–1828:11, 1940:19–1941:3. Based on this evidence, the jury reasonably could have found that the note was causally related to the two joint placements of Patty and Matt.

The trial court's stated reason for excluding the note—that it was a "subsequent unrelated event"—failed to appreciate that the siblings were not required to prove that their joint placement was the *sole* cause of their damaged mental conditions. The standard

concurring cause jury instruction—which was given in this case—states that, to be a legal cause of damage, the alleged negligence "need not be the only cause." R.5725 (quoting Fla. Std. Jury Instr. (Civil) 401.12). The siblings could prove legal cause by showing that the joint placement "operate[d] in combination with the act of another, some natural cause, or some other cause," so long as the joint placement "contribute[d] substantially to producing" the damage to the siblings' mental condition. R.5725 (quoting Fla. Std. Jury Instr. (Civil) 401.12); *see also Hart v. Stern*, 824 So. 2d 927, 931 (Fla. 5th DCA 2002) (concurring cause standard instruction "accurately states the law").

The trial court also misapprehended that evidence may not be excluded merely because its prejudice exceeds its probative value. Rather, to be excluded, the evidence's probative value must be "*substantially* outweighed by the danger of *unfair* prejudice." § 90.403, Fla. Stat. (2022) (emphasis added). Relevant evidence is always "inherently prejudicial," but "it is only unfair prejudice, substantially outweighing probative value" that "permits [the] exclusion of relevant matters." *Veach v. State*, 254 So. 3d 624 (Fla. 1st DCA 2018).

The note was highly probative of Matt's mental condition. Courts regularly admit similar evidence to prove a person's mental state, which is not capable of direct proof. *See, e.g.*, *Nelson v. Seaboard Coast Line R. Co.*, 398 So. 2d 980, 982 (Fla. 1st DCA 1981) (suicide note admissible to prove the decedent's state of mind); *Wolfe v. State*, 34 So. 3d 227, 232–33 (Fla. 4th DCA 2010) (murder victim's letter admissible to prove his state of mind).

Because Matt's "How to Proceed" note was highly probative of a material issue in this case—that is, Matt's damaged mental condition as caused by the joint placements—and that probative value was not substantially outweighed by unfair prejudice, the trial court abused its discretion by excluding the note. This Court should remand for a new trial and instruct that the note be admitted into evidence.

CONCLUSION

This Court should reverse and remand for a new trial, direct the chief judge of the circuit court to assign a new trial judge, and direct the trial court to conduct the new trial in accordance with the legal principles argued herein. Specifically, this Court should direct the trial court to give a 401.9 instruction, to abstain from making *sua sponte* objections and advocating on behalf of FSS, and to admit the "How to Proceed" note.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this document complies with the word-count limit of Florida Rule of Appellate Procedure 9.210(a)(2)(B) because it contains 12,239 words, not including words excluded under rule 9.045(e). This document also complies with the line spacing, type size, and typeface requirements of rule 9.045(b).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed with the Clerk of Court on October 25, 2023, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record:

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