

**CASE NO. 10-11739-A**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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GUNDER'S AUTO CENTER,

Plaintiff-Appellant

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

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On Appeal from the United States District  
District Court, Middle District of Florida  
Case No. 8:09-cv-00456-SDM-MAP

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**APPELLEE'S ANSWER BRIEF**

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*Gunder's Auto Center v. State Farm Mutual  
Automobile Insurance Company*

Appeal No. 10-11739-A

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, Appellee provides the following list of persons who have an interest in the outcome of this appeal. In addition, Appellee State Farm Mutual Automobile Insurance Company's Corporate Disclosure Statement of related entities as defined by Rule 26.1-1 are listed herein (none of which are publicly traded and none of which have a stock ticker symbol):

A. Brent Geohagan, P.A.

Bogges, Rhonda B., attorney

Butler Pappas Weihmuller Katz Craig, LLP, law firm

Curry, Charles B., Judge of the Tenth Judicial Circuit in and for Polk County,  
Florida

Day, Stephen E., attorney

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Geohagan, A. Brent, attorney

Grimm, Reed W., attorney

Gunder, Ray, related party

Gunder's Auto Center, party

Insurance Placement Services, Inc., related party

McMann, Mark D., attorney

Merryday, Steven D., U.S. District Court Judge

Oglesby Reinsurance Ltd, related party

Pizzo, Mark A., U.S. Magistrate Judge

SF Insurance Placement Corporation of Canada, related party

State Farm Annuity and Life Insurance Co., related party

State Farm Bank, F.S.B., related party

State Farm International Life Insurance Co., related party

State Farm County Mutual Insurance Company of Texas, related party

*Gunder's Auto Center v. State Farm Mutual*

*Automobile Insurance Company*

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State Farm Finance Corporation of Canada, related party

State Farm Fire and Casualty Company, related party

State Farm Florida Insurance Company, related party

State Farm Guaranty Insurance Company, related party

State Farm General Insurance Company, related party

State Farm Indemnity Company, related party

State Farm International Services, Inc., related party

State Farm Investment Management Corp., related party

State Farm Investor Services (Canada) Holding Company, related party

State Farm Life and Accident Assurance Company, related party

State Farm Life Insurance Company, related party

State Farm Lloyds, related party

State Farm Lloyds, Inc., related party

State Farm Mutual Automobile Insurance Company, party

State Farm Realty Investment Company, related party

*Gunder's Auto Center v. State Farm Mutual*

*Automobile Insurance Company*

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State Farm VP Management Corp., related party

Taylor, Day, Currie, Boyd & Johnson, law firm

Top Layer Reinsurance, Ltd., related party

Weihmuller, John W., attorney

**STATEMENT REGARDING ORAL ARGUMENT**

Appellee State Farm Mutual Automobile Insurance Company (“State Farm”) contends that this case involves applying well-established principles of law to undisputed facts and, accordingly, oral argument is not necessary for ruling on this matter, unless this Court deems oral argument beneficial.

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**STATEMENT OF THE ISSUES**

1. Whether an insurer's statements to insureds regarding the costs and quality of automobile repairs for which payment will be sought under insurance contracts concern matters of corresponding interest and as such are privileged and do not give rise to a slander claim as a matter of law.

2. Whether an insurer with contractual obligations to pay insureds for certain repair costs of the insureds' vehicles is not a stranger to the insureds' decision to select an automobile repair shop to perform the repairs and, thus, cannot be liable at law for tortiously interfering with the business relationship between the insureds and the automobile repair shop.

**STATEMENT OF THE CASE**

**A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

In addition to the course of proceedings referenced by Appellant Gunder's Auto Center ("Gunder"), State Farm Mutual Automobile Insurance Company ("State Farm") hereby supplements the statement of case with additional actions in the proceeding below:

Specifically, at the time the action was removed to the federal court (DE 1), the state court had already dismissed plaintiff Gunder's first attempt to plead a tortious interference count. (DE 1-9). Thereafter, Gunder's, an automobile repair shop located in Lakeland, Florida, served a First Amended Complaint asserting that it has had an ongoing relationships with individuals in Polk County and insurers, including State Farm. (DE 5 at 2). State Farm is identified as an "automobile insurance provider" to whom "customers or prospective customers" of Gunder's submit "claims." (DE 5 at 5). The First Amended Complaint alleges that State Farm is "steering" its customers away from Gunder's by advising them that State Farm will not pay for certain vehicle repair costs because Gunder's is "overcharging" customers. (DE 5 at 4,6). Specifically, the First Amended Complaint alleges State Farm made false statements to insureds regarding the cost, quality and timeliness of Gunder's repairs. (DE 5 at 4, 6).

Count I for slander alleges that State Farm made false and defamatory statements regarding the “quality of repair work and certain prices” charged by Gunder’s. (DE 5 at 4). Specifically, the First Amended Complaint alleges that three State Farm insureds, Mr. Dave Paige, Mr. Devone(sic) Anderson and Mr. Kyle Fuqua, were recipients of these publications. (DE 5 at 5). Thus, at issue were alleged slanderous statements made by State Farm to these three insureds regarding the repairs of the insured vehicles.

Count II sought to plead a claim for tortious interference with business relationships. (DE 5 at 5). Count II alleged that Gunder’s had a business relationship with customers or prospective customers in which Gunder’s is either paid directly by customers for repairs or paid through their insurance provider. (DE 5 at 5). The First Amended Complaint alleges that such customers and/or prospective customers submitted claims to State Farm, and State Farm intentionally and unjustifiably interfered with Gunder’s relationship by making statements to such insureds, including that “Gunder’s was ‘overcharging’ its customers, and thereafter refusing to pay Gunder’s customers’ rightful insurance claims.”<sup>1</sup> (DE 5 at 6). Specifically, the First Amended

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<sup>1</sup> Count III sought temporary and permanent injunctive relief (DE 5 at 7) and was deemed by the Court to be a motion for preliminary injunction, was held to be procedurally improper, and was denied on the merits. (DE 12 at 6). Count III is not addressed in Appellant’s Initial Brief and, therefore, is not at issue in this appeal.

Complaint alleges that State Farm “steered” three of its insureds, Mr. Dave Paige, Mr. Devone(sic) Anderson and Mr. Kyle Fuqua, away from seeking repairs of their insured vehicles at Gunder’s. (DE 5 at 6).

In response to the First Amended Complaint, State Farm answered the slander count and alleged as an affirmative defense that the alleged publications, if they were made, were privileged as well as truthful and made without malice. (DE 6 at 3). State Farm moved to dismiss Count II (as well as Count III seeking a preliminary injunction). (DE 7). State Farm also moved to strike allegations of paragraphs 7 and 10 of the First Amended Complaint containing arguments and hyperbolic conclusions. (DE 8).

Gunder’s filed a Memorandum in Opposition (DE 9) to State Farm’s Motion to Dismiss Counts II and III. Gunder’s agreed that Florida law provides that a party to a contract cannot be liable for interfering with that contract. (DE 9 at 4). Gunder’s contended that State Farm’s obligation to pay Gunder’s directly or to reimburse insureds for repair work does not make State Farm a party to the relationship as Gunder’s is not required to secure the consent of State Farm to enter into the contract, and State Farm is not the “source of the agreement.” (DE 9 at 5). The memorandum asserted that “State Farm simply pays a portion or, in some cases, the entire amount of Gunder’s bill for the work performed repairing the automobiles.” (DE 9 at 5). Gunder’s did not file a response to State Farm’s Motion to Strike. (Docket)

The Court granted the motion to dismiss the tortious interference claim after assuming all factual allegations of the First Amended Complaint were true. (DE 12 at 2, 4). The Court recognized that a claim for tortious interference under Florida law requires “(1) the existence of a business relationship; (2) knowledge of the relationship on the part of defendant; (3) an intentional and unjustifiable interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of relationship,” and that Florida law requires that the interfering defendant be a stranger to the business relationship. (DE 12 at 3). The Court found that the First Amended Complaint asserted that State Farm interfered only with customers who submitted claims to State Farm. (DE 12 at 4). The Court reasoned that because State Farm “must indemnify the plaintiff’s customer for the repair performed by the plaintiff, State Farm is an interested party in a business relation between the plaintiff and those customers who are State Farm’s insured.” (DE 12 at 4). Accordingly, the Court granted the motion to dismiss Count II. (DE 12 at 4, 6). The dismissal was not with prejudice. (DE 12 at 4, 6).

The Court also granted State Farm’s Motion to Strike paragraph 7 and 10 of the First Amended Complaint (DE 12 at 6), and determined that Count III seeking injunctive relief was procedurally improper, denying the relief on the merits, and denying the motion to dismiss Count III as moot. (DE 12 at 5). Gunder’s does not

address the ruling as to Count III or the Order Granting the Motion to Strike in its Initial Brief.

Thereafter, Gunder's filed its Request for Reconsideration and Motion to Set Aside/Amend Order granting the Motion to Dismiss Count II of the First Amended First Amended Complaint, arguing that State Farm was not a party to the relationships at issue (DE 14 at 8) and had interfered by the "improper method" of "slander." (DE 14 at 3, 6-7). State Farm filed a Memorandum of Law in Opposition, contending the request for reconsideration was untimely (DE 16 at 2,3) and did not present grounds warranting reconsideration. (DE 16 at 4-6). State Farm also argued that the legal principle that a claim for tortious interference with a business relationship may only exist against a stranger to the business relationship is a different concept than qualified privilege (DE 16 at 7-9), and that improper means was not asserted by pleading an independent tort. (DE 16 at 9).

The Court denied the Motion for Reconsideration, noting that the allegations upon which the motion was based had been stricken from the First Amended Complaint after Gunder's failed to object to State Farm's motion to strike those allegations. (DE 17 at 1). In addition, the Court held that Gunder's had failed to raise the argument that State Farm used improper means in interfering with the business relation in its original response and, thus, such an argument did not justify reconsideration. (DE 17 at 1).

After discovery, State Farm filed a dispositive Motion for Summary Judgment as to Count II for slander, asserting as a matter of law that State Farm had no liability for the claim asserted. (DE 49). State Farm contended record evidence established that no genuine issue as to any material fact existed as to the privileged nature of the alleged defamatory comments ((DE 49 at 1) and that:

[e]ven assuming that Plaintiff is able to present evidence supporting the allegations asserted by it, no actionable claim exists as the alleged statements, even if made, are privileged.<sup>2</sup> Specifically, State Farm as an insurer may make statements to insureds regarding repairs to the vehicles which will be submitted to State Farm for reimbursement, a subject on which both the speaker and recipient have a common interest, even if such statements arguably defame a third party. (DE 49 at 1 & 2).

State Farm also contended that Gunder's could not meet its burden of establishing through evidence that the primary motivation of the various speakers was express malice so as to defeat the privileged nature of the comments at issue. (DE 49 at 6-8, 17-20). Instead the comments served the common interest of State Farm and its insureds. (DE 49 at 18-19). In support of its Motion, State Farm filed Gunder's Interrogatory Answers and Rule 26 Disclosures, unsworn statements produced by Gunder's (DE 50), and the deposition transcript of a Gunder's principal, Ray Gunder, as well as Exhibits 1-5 and 28 to that deposition. (DE 51 at 1- 3).

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<sup>2</sup> While noting the issues did not need to be addressed by the Court, State Farm contended the statements were either not made, not defamatory, and/or not true. (DE 49 at 2, n.1).

In response, Gunder's filed a Memorandum in Opposition (DE 56), and a Notice of Refiling Exhibits/Exhibits List in Support of Plaintiff's Memorandum of Law in Opposition to Defendant's Dispositive Motion for Summary Judgment, which attached deposition transcripts, affidavits, as well as unsworn statements. (DE 62). Gunder's First Amended Complaint had asserted that slanderous statements were made by State Farm as to three insureds: Dave Paige, Devone(sic) Anderson and Kyle Fuqua (DE 5 at 5, 6). In opposition to the Motion for Summary Judgment, Gunder's submitted a notarized statement, "declaration/affidavit," by Mr. Devon Anderson (DE 62 - 5)<sup>3</sup>, but did not submit affidavits or notarized statements by Mr. Paige and Mr. Fuqua. (DE 62 at 1-2). Mr. Anderson averred that a representative of State Farm, his insurer, in relation to his vehicle's collision claim, advised that "Gunder's was overcharging rates that were prevailing in that area" and recommended another repair shop. (DE 62-5 at 1). Gunder also submitted formulaic notarized statements from fourteen other individuals who sought payment of vehicle repair costs by State Farm (none of which were referenced in the First Amended Complaint) in which the insureds delineated statements made by State Farm employees, many of whom were not identified, relating

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<sup>3</sup> The affidavits/declarations filed by Gunder's do not expressly state that they are being given under oath or under penalty of perjury, although they are notarized. (DE 62-4 through 62-28).

to the selection of Gunder's, and the timing and costs of repairs to be reimbursed by State Farm. (DE 62-6 through 62-19). Some recipients of these alleged slanderous comments had their cars repaired by Gunder's, and others did not. (DE 62-5 through 62-19).

In support of its contention that State Farm should pay insureds for repair costs that Gunder's deems reasonable, and that State Farm's statements concerning Gunder's pricing and repairs were false, Gunder's submitted an affidavit of Mr. Ray Gunder expressing Gunder's disagreement with State Farm's willingness to pay for certain repairs and determination of prevailing competitive price for paint materials. (DE 62-4 at 2, 7-9). Ray Gunder complained about State Farm's refusal to allow Gunder's to view the pricing information submitted by Gunder's competitors to State Farm (DE 62-4 at 10) and complained about State Farm not paying insureds for certain repair costs charged by Gunder's (paint and material calculators, air conditioning repairs and the "denib/color, sand and buff" painting process) when it had paid other insureds what Gunder's contends are similar costs. (DE 62-4 at 7-8). Ray Gunder stated that the alleged defamatory comments were false. (DE 62-4 at 4, 8). Gunder's also submitted formulaic "affidavits/declarations" of other repair shops relating to their opinions as to the reasonableness of paint material calculators and "denib/color, sand and buff" costs and whether State Farm had ever paid for the cost of such repairs. (DE 62-23 through

62-28). Gunder's also filed depositions of various State Farm employees as to the Select Service Program, State Farm's determination of prevailing competitive price, and communications with repair shops and insureds. (DE 62-21, DE 62-22, DE 62-29, DE 62-30, DE 62-31, DE 62-33, DE 62-34, DE 62-35).

Thereafter, the Court heard argument of counsel as to the Motion for Summary Judgment. (DE 67; DE 70). The transcript of this hearing was not ordered by Gunder's (DE 77). As set forth in the Order Granting Summary Judgment, at such hearing, Plaintiff's counsel advised that "each alleged defamatory statement (1) was published to a State Farm insured and (2) concerned only the quality and costs of the plaintiff's repairs." (DE 71 at 3 n.1). On the date of the hearing, March 24, 2010, Plaintiff moved for leave to amend/correct the First Amended Complaint. (DE 69). As set forth by the Court's Order, Plaintiff's counsel stated at the March 24, 2010, hearing that Gunder's was requesting leave to amend "'out of abundance of caution' in order to specify by name additional recipients of State Farm's alleged defamatory remarks." (DE 71 at 7 n.2).<sup>4</sup> As noted by the Court, Plaintiff's counsel "confirmed that each additional recipient is a State Farm insured and that the proposed amendment affects no change to the qualified privilege analysis." (DE 71 at 7 n.2).

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<sup>4</sup> State Farm had contended that the only comments at issue were those made in the three publications pled in the First Amended Complaint. (DE 49 at 4 and 5).

After hearing arguments of counsel and reviewing the evidence, motion and memoranda submitted, the Court granted State Farm's Motion for Summary Judgment, denied the Motion to Amend as moot,<sup>5</sup> and terminated other pending motions. (DE 71 at 7).<sup>6</sup> The Court acknowledged Gunder's contention that the statements were false and that "State Farm routinely pays claims from other repair shops with rates similar to or greater than the rates charged by the plaintiff." (DE 71 at 2-3, 6). The Court recognized, however, that even false statements can still be deemed privileged under Florida precedent, citing Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984):

A communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation. (DE 71 at 3).

The Court determined that, because the parties agreed that "State Farm published each allegedly defamatory statement to a State Farm insured in response to the insured's request for benefits under an insurance policy," and "each statement concerns the quality, timeliness, or value of the plaintiff's automobile repairs," the statements

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<sup>5</sup> Gunder's Initial Brief does not present argument as to the ruling on the motion to amend/correct.

<sup>6</sup> Specifically, State Farm had moved to strike the declarations/affidavits of Devon Anderson and Michael Esposito filed by Gunder's as being inconsistent with those affiants' deposition testimony. (DE 65, DE 68, DE 71 at 7).

concern “subjects about which the insured and State Farm share a ‘corresponding interest’” and, accordingly, are privileged. (DE 71 at 3 & n.1). The Court also determined that Gunder’s did not “affirmatively” show that the primary motive of State Farm in uttering the comments was one of “express malice” which requires “ill will, hostility, [or] evil intention to defame and injure,” which malice can be “inferred from the language itself” or proven by extrinsic circumstances. (DE 71 at 4, quoting Nodar, 462 So. 2d at 810-12)( DE 71 at 6). The Court acknowledged Gunder’s argument that State Farm began falsely accusing Gunder’s of overcharging customers after admonishing Gunder’s for attempting to set prices (DE 71 at 6), but reasoned that the statements, even if considered false, do not “inherently demonstrate express malice”(DE 71 at 6) as the statements “only concern the matter of common interest between State Farm and the insured– the quality and value of the plaintiff’s work.” (DE 71 at 6). Furthermore the Court found that Gunder’s did not provide “extrinsic evidence of express malice,” or evidence that the “primary motive” of the statements was to “harm the plaintiff rather than to further State Farm and the insured’s mutual interest in securing timely, quality repairs to the insured’s automobile.” (DE 71 at 6). The motion for summary judgment was granted (DE 71 at 6). Thereafter, Judgment was entered in State Farm’s favor. (DE 72).

As identified in Plaintiff/Appellant Gunder's Initial Brief, the only issues to be addressed by this Court are the Court's Order Dismissing Count II for Tortious Interference (DE 12) and the Court's Final Summary Judgment in State Farm's favor as to the slander claim (DE 71 & 72).

**B. STATEMENT OF FACTS**

Appellant Gunder's factual presentation to the Court omits key undisputed facts. State Farm therefore submits the following factual summary so that the legal issues can be considered in the proper context.

State Farm is an insurer that issues automobile liability policies under which State Farm agrees to pay for repair of covered damages to an insured vehicle. (DE 5 at 5, DE 9 at 5). The parties acknowledge that the policy contracts between State Farm and the insureds provide that State Farm's obligation to pay repair costs may be calculated by State Farm's determination of "prevailing competitive price," the prices charged by the majority of the repairers in the area where the car is to be repaired, as determined by a confidential survey conducted by State Farm. (DE 45 at 15-18, DE 51-3 at 27, DE 62-22 at 12 - 15, DE 62-29 at 8 - 9,11). Confidential information (DE 62-29 at 13, 15) submitted from various repair shops in an area is used by State Farm to determine the prevailing competitive prices for that market. (DE 62-22 at 13). The "prevailing competitive price" is a defined contract term, and State Farm agrees to

reimburse insureds for reasonable necessary repairs to insured vehicles at the prevailing competitive rate. (DE 62-22 at 12, 62-21 at 9, 10). State Farm's Estimating Team employs estimators who verify damages to the vehicle and write estimates for vehicle repairs. (DE 62-22 at 10, DE 62-29 at 4, DE 62-30 at 3). The Estimating Team has no responsibility regarding payment of claims, and does not adjust or settle claims. (DE 62-29 at 4, 21, DE 62-22 at 23, DE 62-30 at 14). Bob Davis is the Team Manager of the Estimating Team (DE 62-22 at 3) and, among other things, is responsible for collecting surveys used to calculate the prevailing competitive market prices for Polk County. (DE 62-29 at 8). Kurt Neidlinger is his supervisor and the Estimating Section Manager. (DE 26-29 at 5,7).

Certain repair facilities have agreements with State Farm by which they are authorized to prepare estimates, upload them electronically to State Farm, and receive payment directly from State Farm in return for providing customers benefits such as free pick up and delivery, limited lifetime warranties and agreeing to audits and inspections by State Farm. (DE 62-22 at 24-25, 28-29, DE 62-29 at 19). These repair facilities agree to perform the repairs at the costs at which State Farm would agree to reimburse the insureds (DE 51-3 at 27); see also (DE 62-33 at 7, DE 62-22 at 27-28). A similar program was previously called the Service First Program, and the current program is now called the Select Service Program. (DE 62-22 at 32). The agreement

between participating shops and State Farm authorizes State Farm to audit the bills prior to payment and also to identify corrective issues after payment through an audit and inspection process. (DE 62-22 at 28, 29, DE 62-29 at 19, DE 62-27 at 31, DE 62-31 at 3). Program shops must complete repairs by a guaranteed completion date, and if a program shop has an unexplainable reason for delay in repairs, the shop pays the additional rental expense. (DE 62-22 at 32). Because a program shop does not have to wait for a State Farm estimator to come out to prepare the estimate, the estimating process is streamlined, reducing time for customers and loss of use expense. (DE 62-22 at 25, 28).

With a non-program shop, a State Farm estimator is required to go to the field to see the vehicle to prepare the repair estimate according to the prevailing competitive price. (DE 62-22 at 34). Because an estimate for repairs at a non-program shop requires the estimator to view the vehicle, such estimates can take an additional 24 to 48 hours to complete than those estimates prepared and uploaded directed to State Farm by program shops. (DE 62-22 at 30). A non-program shop is not precluded by agreement with State Farm from charging amounts which exceed what State Farm is willing to pay, i.e., the prevailing competitive rate and, thus, may charge a customer for any difference between the prevailing competitive rate and the shop's invoices. (DE 62-22 at 16,18,27)

Gunder's is an automobile repair shop that does not participate in State Farm's Select Service program. Prior to mid to late 2004, Gunder's was in the Select First Program, but State Farm terminated that agreement. (DE 62-4 at 1, 2). According to a principal of Gunder's, Ray Gunder, Gunder's believes that it was terminated from the Service First program due to Ray Gunder "openly" communicating with other auto body price shops to "empower... [the] market area" with "global knowledge" regarding expenses which Mr. Gunder believed should be paid by State Farm (DE 62-4 at 2,3), and concerns by State Farm that he was attempting to set prices. (DE 62-4 at 3).<sup>7</sup> Estimating Team Manager Davis recalled that Gunder's paint and material prices were approximately double the average charged by other repair shops. (DE 62-22 at 43). Estimating Section Manager Neidlinger made the decision to delete Gunder's Auto Center from the program then in place (DE 62-29 at 19), and testified that Gunder's was not competitive for the market, including charging for color sand and buff paint procedures on every vehicle. (DE 62-29 at 21). Gunder's acknowledges that it has disagreed with State Farm's determination of its repair payment obligation under its contract with its insureds. (DE 51-1 at 40, 44, 49-54, 88 - 89, DE 62-4 at 2). Gunder's

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<sup>7</sup> No claim has been asserted by State Farm in this matter in relation to Gunder's admitted activities in relation to other repair shops, and no claim has been asserted by Gunder's attacking State Farm's decision to remove Gunder's from the Select Service Program in 2004, a program governed by an agreement which was terminable at will by either party. (DE 62-22 at 25).

disagrees with both the contractual process of State Farm determining the prevailing competitive price by confidential survey and the determined pricing structure for State Farm repair cost reimbursement. (DE 62-4 at 7-10). Gunder contends that State Farm should pay for “masking jambs and car cover primer” expenses and for “denib/color, sand, and buff” painting procedures for all insured vehicles. (DE 62-4 at 7-8). Mr. Gunder testified that State Farm calculates paint materials in a manner different than Gunder’s and will not accept Gunder’s method of calculating paint materials. (DE 51-1 at 49-54, 88 - 89, DE 62-4 at 7, 8). Since 2008, Gunder’s Auto Center has used a paint material calculator program (DE 62-4 at 7), which calculates material costs based upon a national average unit cost and an automatic 35% mark up. (DE 51-1 at 53-54). Gunder’s contends such pricing should be accepted by State Farm when reimbursing insured’s repair costs. (DE 62-4 at 7, 8). State Farm does not determine paint material costs in the manner sought by Gunder’s (DE 62-22 at 64, DE 62-30 at 15-16), although repair costs generated by such method may have been unknowingly paid. (DE 62-22 at 64)<sup>8</sup> (DE 62-23 at 3). Ray Gunder has brought suit on behalf of two insureds

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<sup>8</sup> In fact, Dale Arndt, on behalf of his repair shop, averred that he does not disclose the use of paint material calculations when providing survey information to State Farm for “fear of the shop being removed/terminated by State Farm” from the Select Service program. (DE 62-25 at 2). An employee of Meisner’s Paint and Body averred that State Farm has advised him that it will not pay for “denib” procedures and that continuing to charge for “marking jambs” and “car cover primer” paint materials could result in dismissal from the “program.” (DE 62-23 at 3).

alleging that State Farm owes the insureds for the additional paint materials charged by Gunder to these insured (DE 62-4 at 5, DE 51-3 at 13-26), and has advised insureds that they will be responsible for paint material costs not paid by State Farm. (DE 51-1 at 40,44).

Decisions as to payment of claims are made by claim representatives, not estimators. (DE 62-29 at 4). The claim representatives are authorized to look at claims on an individual basis and, thus, a decision by the Estimatics personnel that a repair payment request is unreasonable does not preclude payment. (DE 62-21 at 33 - 34). The final decision as to whether to pay for a certain repair is that of the claim representatives and not Estimatics. (DE 62-21 at 34).

In recognition of the importance of explaining the prevailing competitive price and related issues to its insureds who chose to have their insured vehicles repaired at Gunder's, State Farm directs claims for payment of automobile vehicle repair costs performed by Gunder's to a claim representative in its Complex Property Damage Team. (DE 62-21 at 3, 8, 25-26, DE 62-34 at 12). Unlike other teams, this team assigns claims to a single "more seasoned and experienced" claim representative. (DE 62-34 at 13, DE 62-35 at 7). Such claim representatives are tasked with explaining the Select Service Program to the policyholder. (DE 62-21 at 8). State Farm's goal in assigning Gunder's Auto Center repair claims, as well as other certain types of claims,

to this team is to avoid inconsistent communications, and to be able to easily identify the appropriate claim representative if an issue arises. (DE 62-34 at 12-14, see also DE 62-33 at 6).

State Farm advises its insureds of the option to use a program shop, which shop will not charge the insured for more than State Farm is willing to pay. (DE 62-21 at 9-10, DE 51-3 at 27-28). If the owner chooses to contract with a non-program shop, such as Gunder's Auto Body, it is up to the insured to pay any difference between State Farm's estimate and the amount charged by the non-program shop. (DE 62-21 at 10, 62-22 at 56, 62-33 at 5). For example, State Farm insured, George Wincey, received a letter from Michelle Lowell, claim processor at State Farm, dated March 13, 2008, regarding claim number 59-Z910-785 providing an estimate and payment for estimated damage to his vehicle. The letter stated:

Enclosed is our estimate and payment for estimated damage to your vehicle. If you have not selected a repair facility, we can assist you by identifying Select Service (R) repairers who have agreements with State Farm (R) to provide quality repairs at competitive prices. You have the right to select the repair facility that will repair your vehicle. Only you can authorize repairs to your vehicle.

You are free to select repairers who do not have Select Service agreements with State Farm (R). These repairers may perform quality repairs on your vehicle, but may charge prices other than the prevailing competitive prices determined in your market area. We will assist you by working with these repairers as best we can.

Our payments for estimated damage to your vehicle is (sic) based upon a damage appraisal provided by State Farm. This appraisal is prepared using the prevailing competitive prices charged in your market area. ...

(DE 51-1 at 85-86; 51-3 at 27). Thereafter, a March 28, 2008, letter from former claim representative Mr. Stout of the complex property team to Mr. Wincey discussing the repairs to his insured vehicle (DE 51-3 at 28), advised,

[a]s we discussed, Gunder's Auto Center is charging a higher rate than State Farm is willing to pay. The rate State Farm pays is known as the prevailing competitive rate. Any difference in the price Gunder is charging and the prevailing competitive rate is your responsibility...

Subsequently, Ray Gunder brought suit against State Farm on behalf of Mr. Wincey under a durable power of attorney to recover the unpaid paint materials charged by Gunder's which exceeded the repair costs State Farm was willing to pay. (DE 62-4 at 5, DE 51-1 at 49, 50, DE 51-3 at 13-26). Gunder's contends that the March 28, 2008, letter is an example of the statement that Gunder's is "overcharging customers." (DE 51-1 at 86-87)<sup>9</sup>.

Various insureds averred by formulaic affidavits that State Farm representatives in discussions as to their repair options under the policies made statements to them as to the quality, timing or cost of repairs by Gunder's. (DE 62-5 through 62-19). Some

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<sup>9</sup> However, the First Amended Complaint only alleges slander (DE 5 at 4).

of the insureds decided to have their vehicle repairs performed by Gunder's while others did not. (DE 62-5 through 62-19).

### C. STANDARD OF REVIEW

State Farm agrees with Appellant Gunder's that the standard of review of a summary judgment order, as well as an order dismissing a complaint for failure to state a claim upon which relief may be granted, is *de novo*. See Fanin v. U.S. Dept. of Veteran Affairs, 572 F.3d 868, 871 (11th Cir. 2009) (summary judgment); Brotherhood of Locomotive Engineers v. CSX Transp., 522 F.3d 1190, 1193-94 (11th Cir. 2008) (dismissal order). This Court is to apply the same analysis as that performed by the District Court. See Adams v. Poag, 61 F.3d 1537, 1542 (11th Cir. 1995) (summary judgment); Brotherhood, 522 F.3d at 1193-94. However, the Trial Court's decision to not reconsider a previous ruling, in this case the Order denying Gunder's Motion to Reconsider the Order dismissing tortious interference, is to be reviewed under an abuse of discretion standard. See Lawson v. Singletary, 85 F.3d 502, 507 (11th Cir. 1996) (rule 59(e) motion); Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dept. of Health & Rehab. Serv., 225 F.3d 1208, 1216 (11th Cir. 2000) (motion for reconsideration).

As to the motion for summary judgment, this Court should determine whether the record evidence shows that there is a genuine issue of material fact as to the privileged nature of the defamatory comments. Celotex Corp. v. Catrett, 477 U.S. 317,

322 - 25, 106 S. Ct. 2548, 2552 - 53 (1986). An issue of fact is material if under the applicable substantive law it might affect the case. Hickson Corp. v. Northern Crossarm Co., 357 F.3d 1256, 1259 - 60 (11th Cir. 2004). An issue of fact is only a genuine one if the record could lead a rational trier of fact to find for the non-moving party. Id. at 1260. As movant, State Farm has the burden of identifying for the Court the portions of the records which show the absence of a genuine issue of material fact. Cohen v. United American Bank of Central Florida, 83 F.3d 1347, 1349 (11th Cir. 1996). As to matters for which State Farm has the burden of proof at trial (i.e. existence of qualified privilege), State Farm must affirmatively show the absence of a genuine issue of material fact. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). In response, Gunder's is required to demonstrate specific facts showing a genuine issue for trial through affidavits, depositions, answers to interrogatories and other evidentiary materials. Celotex, 477 U.S. at 323 to 24. As to matters for which Gunder's bears the burden of proof (i.e., express malice), State Farm is not required to negate Gunder's claim but instead must simply show the absence of evidence to support Gunder's case. Fitzpatrick, 2 F.3d at 1116. Gunder's then has the burden of identifying or supplying sufficient evidence in support of such matters. Id. at 1116-7.

In ruling on a motion to dismiss, the Trial Court, as well as this Court, must accept the factual allegations contained in the First Amended Complaint as true and determine whether it contains sufficient factual matter to state a plausible claim. Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 - 56, 127 S. Ct. 1955, 1965 (2007). Courts are not bound to accept as true legal conclusions couched as factual allegations and formalistic recitations of the elements of cause of action will not do. Iqbal, 129 S. Ct. at 1949. “[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” Jackson v. BellSouth Tele., 372 F.3d 1250, 1263 (11th Cir. 2004). Determining whether a complaint states a possible claim for relief is a context specific task that requires a reviewing court to draw on its judicial experience and common sense. Iqbal, 129 S. Ct. at 1950. Where the “well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” the court should find that the plaintiff’s claim is not plausible and dismiss same. Iqbal, 129 S. Ct. at 1950 - 1951.

## SUMMARY OF ARGUMENT

The alleged defamatory statements made by State Farm claim representatives, which Gunder's admits were published to State Farm insureds and concerned only the quality and cost of the Plaintiff's repairs (DE 71 at 3, n.1), are privileged. Because the circumstances upon which the alleged defamatory comments were published were not in dispute, the issue is one of law. Abraham v. Baldwin, 52 Fla. 151, 157, 42 So. 591, 592 (Fla. 1906); Nodar v. Galbreath, 462 So. 2d 803, 810 (Fla. 1984). Where the alleged defamatory communication is made between parties with corresponding interest in the subject matter, the communication is conditionally privileged, even if the statement is otherwise actionable. Nodar, 462 So. 2d at 809; Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401, 404 (Fla. 2d DCA 2000). The qualified privilege applies to the alleged statements by State Farm claim representatives to individuals seeking benefits under the insurance contract about an issue in which they have a common interest- the prompt and full payment of the repairs to the insureds' vehicles.

Gunder's did not rebut the presumption of good faith as to such statements through affirmative evidence that the primary intent of the speakers was one of express malice, or to injure Gunder's. See Nodar, 462 So. 2d at 812. Gunder's disagreement with the veracity of the alleged statements does not establish express malice by the various speakers as a matter of law. Id. at 810-812. Any communications to insureds

regarding the cost or quality of vehicle repairs by Gunder's, even if inaccurate, relate to the speaker and the insured's common interest in such repairs and do not indicate a primary intent by the speaker to injure Gunder's. The statements are therefore privileged and non-actionable.

The Trial Court also properly dismissed the claim for tortious interference. The First Amended Complaint alleged that State Farm had a potential financial interest in how the relationship of Gunder's Auto Center and their insureds was conducted in that State Farm was paying and reimbursing insureds for repair costs incurred at Gunder's under the policies. Palm Beach County Health Care Dist. v. Prof. Medical Educ., Inc., 13 So. 3d 1090, 1095 (Fla. 4th DCA 2009) (DE 5 at 5,6). As State Farm was not a stranger to the relationship between Gunder's and the insureds as to such repairs, it is not liable for interference as a matter of law. Id. at 1094. Furthermore, the Trial Court did not abuse its discretion in not reconsidering its ruling based upon an untimely asserted argument as to pleading of improper means. This Court should also not consider the argument. In any event, no improper means were alleged. The Complaint alleged that the comments were made to insureds when they submitted claims. (DE 5 at 5). The Trial Court's Judgment should be affirmed.

## ARGUMENT

### **I. STATE FARM’S STATEMENTS TO INSUREDS REGARDING THE QUALITY AND COSTS OF AUTOMOBILE REPAIRS FOR WHICH PAYMENT WILL BE SOUGHT UNDER THE INSURANCE CONTRACTS CONCERN MATTERS OF CORRESPONDING INTEREST AND AS SUCH ARE PRIVILEGED AS A MATTER OF LAW**

#### **A. State Farm Established That the Alleged Defamatory Statements Were Published Between Parties of Corresponding Interest as to the Subject Matter and Accordingly Were Conditionally Privileged**

The first issue before this Court is whether the undisputed material facts establish that the alleged slanderous statements were privileged as a matter of Florida law. The instant action is a diversity case sounding in Florida law and, thus, Florida substantive law applies to the Plaintiff’s claim. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938). The claim was one for slander. (DE 5 at 4). Gunder’s asserts that State Farm representatives made false and slanderous statements to insureds (DE 5 at 4) regarding “quality of repair work and certain prices Gunder’s charges for certain repairs and/or materials.” (DE 5 at 4). Specifically, at issue are alleged defamatory statements made by State Farm, (1) published to its insureds and (2) concerning only the quality and cost of the plaintiff’s repairs.” (DE 71 at 3 n.1) (DE 50-2 at 1 & 2; 50-3 at 1; 50-4 at 1& 2 (identifying claim numbers)). To establish defamation the plaintiff must prove the defendant published a false statement of fact, that the statement was

communicated to a third party,<sup>10</sup> and that plaintiff suffered injury<sup>11</sup> as a result of the publication. Valencia v. Citibank Int'l, 728 So. 2d 330, 330 (Fla. 3d DCA 1999). In its answer, State Farm asserted as an affirmative defense, that to the extent the publications were made, such publications were privileged. (DE 6 at 3). At issue is the Court's ruling that the statements at issue are privileged and do not give rise to a defamation claim as a matter of law. (DE 71 at 6).

Contrary to Gunder's argument in its Initial Brief, State Farm does not need to establish the absence of express malice to be entitled to summary judgment. Instead, State Farm met its burden by showing through the undisputed material facts that the allegedly slanderous comments concerned matters of corresponding interest between itself and the insureds. See Fitzpatrick, 2 F.3d at 1115. As stated by the Florida Supreme Court in Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984) (citing Restatement (Second) of Torts, § 593):

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<sup>10</sup> Because the First Amended Complaint only identified three publications, State Farm contended that the defamation claims were limited to such publications. (DE 49 at 4, 5). The Court did not rule on this argument since Gunder's acknowledged that all additional recipients were State Farm insureds and, thus, such publications would also be privileged. (DE 71 at 7).

<sup>11</sup> To the extent that the publications were made to recipients who obtained repairs of their vehicles at Gunder's, State Farm also contended that the Plaintiff did not suffer damages as required for a slander claim to exist. (DE 49 at 12).

One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.

State Farm must establish that the statements at issue were published upon an occasion that makes it conditionally privileged. See American Airlines, Inc. v. Geddes, 960 So. 2d 830, 833 (Fla. 3d DCA 2007); Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984) (inquiring whether statement “made upon a conditionally privileged occasion.”); Randolph v. Beer, 695 So. 2d 401, 403 (Fla. 5th DCA 1997); Boehm v. American Bankers Ins. Group, Inc., 557 So. 2d 91, 93 (Fla. 3d DCA 1990). A privileged occasion exists where the communications are made for “bona fide commercial purposes where the interest to be protected is the recipient’s, and in business matters where both parties have a corresponding interest in the matter.” John Hancock Mutual Life Ins. Co. v. Zalay, 581 So. 2d 178, 179 (Fla. 2d DCA 1991). As stated by the Florida Supreme Court, where communications were:

made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, [such communication] is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation.

Nodar, 462 So. 2d at 809; see also White v. School Board of Hillsborough County, 2008 WL 227990, \* 6 (M.D. Fla. 2008), aff’d, 2009 WL 174944, \*4 (11th Cir. 2009) (non-published). Whether the slanderous words uttered are a privileged communication

depends upon the circumstances upon which they were uttered. Abraham, 52 Fla. at 155, 42 So. at 592. Where the circumstances surrounding a defamatory communication are undisputed or are so clear as to be unquestionable, the Court is to decide whether the occasion upon which it is spoken is privileged. Abraham, 52 Fla. at 156, 42 So. at 592, Nodar, 462 So. 2d at 810; Cape Publications, Inc. v. Reakes, 840 So. 2d 277, 280 (Fla. 5th DCA 2003). The “mode, manner or purpose of the communication would go to the question of abuse or forfeiture of the privilege, not to the question of existence of the privilege.” Zalay, 581 So. 2d at 180.

In the instant case State Farm met its burden in establishing that the undisputed facts establish that the circumstances of the alleged publications were privileged. The parties do not dispute that the alleged defamatory statements were made by State Farm representatives to individuals who submitted claims to State Farm seeking reimbursement for vehicle repair costs, concerning the quality and prices of an automobile repair facility being considered for such repairs. (DE 71 at 3, 7, DE 50-2 at 182, 50-3 at 1, 50-4 at 1 & 2). As a matter of law, both State Farm and its insureds have a common shared interest in the quality and price of vehicle repair costs when such resulting expenses will be charged to the insureds and submitted to State Farm for reimbursement under insurance policies. The publications concern repairs to insured’s vehicles for which reimbursement would be sought from State Farm pursuant to the

insurance contracts. (DE 62-2 at 1,2, DE 62-5 through 62-19). In all of these statements, State Farm was acting as an insurer and was communicating with a party seeking benefits under the insurance contract about an issue in which they have a common interest-the prompt and full payment of the repairs, and as such the publications are conditionally privileged. See, e.g., Ex Parte Blue Cross & Blue Shield of Alabama, 773 So. 2d 475, 479 (Ala. 2000) (letters by Blue Cross to its insureds, patients of the plaintiff, regarding denial of bill charged by plaintiff not actionable); Guzhagin v. State Farm Mutual Auto. Ins. Co., 566 F. Supp. 2d 962, 968 (D. Minn. 2008)(letters by no-fault insurer to insureds and attorney regarding plaintiff/physician's failure to substantiate the right to payment shielded by the qualified privilege); see also Turner v. Welliver, 411 N.W. 2d 298, 307-08 (Neb. 1987). State Farm has an obligation to promptly and efficiently process claims submitted to it and to communicate with its insureds regarding the same.

In the instant case, as recognized by the Trial Court,

State Farm published each allegedly defamatory statement to a State Farm insured in response to the insured's request for benefits under the insurance policy. Each statement concerns the quality, timeliness, or value of the automobile repairs- subjects about which the insured and State Farm share a "corresponding interest." (DE 71 at 3).

Both insurer and insured have an interest in obtaining repairs from a repair shop where the repair costs charged were consistent with the insurer's estimate, such that the insured is not exposed to additional charges, and both have an interest in obtaining repairs in a timely manner such that the claim is promptly investigated and paid. See, e.g., § 626.9541(1)(I), Fla. Stat. Because the asserted defamatory statements were made by one having an interest in the subject matter (State Farm's claim representatives) to persons having a corresponding interest or duty (repair of such insured vehicle) such statements are conditionally privileged. In fact, Gunder's does not attack this determination in its Initial Brief - instead just arguing that material issues of fact exist as to whether the communications were in "good faith" and were made with "express malice." (Initial Brief, p. 14, 15-24).

Because the occasion of each alleged publication is privileged, whether the comments were slanderous or true does not affect the analysis. See Demby v. English, 667 So. 2d 350, 353 (Fla. 1st DCA 1995) (the publication may be qualifiedly privileged even if untrue); Jarzynka v. St. Thomas University School of Law, 310 F. Supp. 2d 1256, 1268 n.5 (S.D. Fla. 2004). Thus, whether Gunder's charges more than the prevailing competitive price, whether Gunder's performs repairs not authorized by State Farm estimates, whether Gunder's repairs take longer, whether State Farm warranties Gunder's repairs, or whether State Farm has "issues" with Gunder's are

NOT the issue.<sup>12</sup> Whether the asserted defamatory statements were true or defamatory does not affect the qualified privilege analysis.

The qualified or conditional privilege also applies even when the alleged defamatory statement otherwise constitutes defamation *per se*, causing the presumption of malice to vanish. Shaw v. R. J. Reynolds Tobacco Co., 818 F. Supp. 1539, 1542 (M.D. Fla. 1993); Abraham v. Baldwin, 52 Fla. at 155, 42 So. at 592. Once State Farm established that the communications concerned a matter of common interest between the speaker and recipient, a presumption of “good faith” arose as a matter of law. Nodar, 462 So. 2d at 810.

**B. Gunder’s Did Not Establish That the Primary Motive of the Various Speakers Was to Injure Gunder’s as Opposed to Advising the Insureds**

Florida law is clear that it was Gunder’s, not State Farm, that has the burden of proof to submit evidence showing an issue of material fact as to whether the speakers acted with express malice. Once the defendant has met its initial burden to show that the occasion of publication was privileged, a legal presumption of “good faith” arises and “cloaks” the statement which plaintiff must rebut with evidence of express malice. Nodar, 462 So. 2d at 810; Thomas, 761 So. 2d at 404. Therefore, while Gunder’s is

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<sup>12</sup> Thus, Gunder’s argument that “[n]one of the comments on the part of State Farm set forth above are true, and, in fact are false” (Initial Brief, p. 11) does not affect the privilege analysis.

correct that Florida courts reference “good faith” as an element of a qualified privilege, such element is therefore met by this legal presumption of good faith. Nodar, 462 So. 2d at 809-10; Thomas, 761 So. 2d at 404. The burden then shifts to the plaintiff, in this case Gunder’s, to “affirmatively and expressly” show express malice or malice in fact by the publisher. Coogler v. Rhodes, 38 Fla. 240, 249, 21 So. 109,112 (1897); Boehm, 557 So. 2d at 93; Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006). Gunder’s did not meet that burden through an evidentiary showing. Fitzpatrick, 2 F.3d at 1115.

In order to prove express malice, Gunder must show through evidence that the “primary” motive for the statement was an intent to injure the plaintiff. Thomas, 761 So. 2d at 404; Border, 418 F. Supp. 2d at 1348; see also, Nodar, 462 So. 2d at 811. Express malice (or malice in fact) requires that the plaintiff show that the actual speaker used his privileged position to gratify his or her malevolence and, if the communication is privileged because of a “proper interest to be protected, and the defamer is motivated by a desire to protect that interest, he does not forfeit the privilege merely because he also in fact feels hostility or ill will towards the plaintiff.” Nodar, 462 So. 2d at 811.<sup>13</sup>

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<sup>13</sup>Express malice is not equivalent to “actual malice” in which the issue is whether the speaker acted in disregard of whether the statements were false or whether the speaker knew the statements to be false. See Zalay, 581 So. 2d at 180; Nodar, 402 So. 2d at 806.

“Only if the Plaintiff demonstrates the primary motivation for the *statements uttered* was express malice, is the privilege overcome.” Boehm, 557 So. 2d at 94 (emphasis in original). Express malice is a “very high standard for a plaintiff to meet.” Shaw, 818 F. Supp. at 1542. Express malice may be “inferred from the language itself, or may be proven by extrinsic circumstances. While the malice may be inferred from the communication, it is not inferable from the mere fact that the statements are untrue.” Nodar, 462 So. 2d at 810, citing Coogler, 38 Fla. at 249, 21 So. 2d at 112. Courts may determine whether evidence of express malice exists as a matter of law. Border Collie, 418 F. Supp. 2d at 1348 (plaintiffs failed to meet burden of express malice by record evidence); Boehm, 557 So. 2d at 94, 97 (where speaker did not seek out the recipient as to the publication no express malice shown); Cape Publications, Inc. v. Reakes, 840 So. 2d 277, 281 (Fla. 5th DCA 2003); Bush v. Raytheon, 2010 WL 1427611, \* 4 (11th Cir. April 12, 2010) (non-published ) (plaintiff’s evidence does not show express malice).

Gunder’s did not provide evidence that the primary purpose of the various speakers of the asserted defamatory comments was to harm Gunder’s and not to protect the insureds from exposure to additional expenses or to protect State Farm from any issues resulting therein. As stated by the District Court, Gunder’s offered “no evidence

(other than the alleged falsity of the records) from which a juror could infer malice,” and offered no “evidence of express malice.” (DE 71 at 6).

Gunder’s does not argue that the Trial Court’s determination that the statements did not themselves infer malice was in error. (Initial Brief, p. 14, 17-18). Instead Gunder’s contends that issues of material fact exist as to “reasonable inferences” of express malice due to “extrinsic” “circumstantial” evidence. (Initial Brief, p. 14, 16-18). According to Gunder’s, a series of events beginning in 2004, indicated a “plan or course of conduct motivated by spite, ill will, or other bad motives.” (Initial Brief, p. 17). Gunder’s asserts, without express record citations, that evidence of such plan consists of Gunder’s disagreement with State Farm as to its determination of “prevailing competitive prices” and compensable repairs under its contract, and its suspicions that such prices are not accurately calculated by State Farm and are not consistently applied as to payment decisions by State Farm. (Initial Brief, p. 18-22). In other words, Gunder’s contends that it was not “overcharging” and that State Farm’s determination as to what it will reimburse insureds for repairs performed at Gunder’s does not accurately reflect the “prevailing competitive price,” as it should be properly determined by State Farm under its contract. Gunder’s summarized its argument by stating that “[t]he defamatory comments regarding Gunder’s overcharging or charging over the prevailing competitive market rate do not serve State Farm or State Farm’s

insureds or claimants, since State Farm, via Bob Davis, has otherwise indicated through its defamatory comments that Gunder's overcharges or charges over the prevailing competitive market rate with regard to the same procedures and pricing for which State Farm via Bob Davis pays other local Polk County auto repair shops. " (Initial Brief, p. 23, 24) (emphasis omitted). Leaving aside the fact that Mr. Gunder testified that Gunder's calculates paint materials costs in a different manner than State Farm (DE 62-4 at 2, 7-8) (DE 51-1 at 53-54), and that State Farm insureds have been charged by Gunder's for repair charges which are not being paid by State Farm (DE 62-4 at 5, DE 51-3 at 13 - 26, DE 51-1 at 40, 44), Gunder's argument focuses on the accuracy of the statements being made. The alleged falsity of the alleged statements as a matter of law does not establish express malice. See Nodar, 462 So. 2d at 810 (malice is not inferable by the mere fact that the statements are untrue). Thus, even if Mr. Davis himself had made any of the statements at issue express malice would not have been shown.

However, Mr. Davis was not even the speaker, but is alleged to be the "conduit" of information for the speakers. (Initial Brief, p. 8 ). Gunder is therefore contending that a "reasonable inference" exists (Initial Brief, p. 14), that the various speakers each spoke with "express malice" because the comments were "orchestrated" by Mr.

Davis.<sup>14</sup> (Initial Brief, p. 22). Mr. Davis is the Estimatics Team Manager, a team which does not have authority to pay claims or to adjust claims, and Mr. Davis has no supervisory control over the claim representatives. (DE 62-21 at 33-34, DE 62-22 at 23, DE 62-29 at 4, 21). Testimony is undisputed that the claim representatives, not supervised by Mr. Davis, are the individuals with the appropriate authority to make final payment decisions (DE 62-21 at 33-34), and the asserted speakers of the comments at issue. See (DE 62-5 through 62-19). However, even if it assumed that Mr. Davis was the source of information for all claim representatives as to prevailing competitive pricing and what repair costs will be reimbursed, and even if Mr. Davis conveyed false information (that Gunder's was overcharging) to the claim representatives<sup>15</sup> (Initial Brief, p. 20-21), the subsequent conveying of inaccurate information by the claim representatives when advising insureds would not be evidence of express malice by such speakers. Because the speakers would have a basis for the statements, the statements are justified under the circumstances, and the speakers are not acting out of express malice. Boehm, 557 So. 2d at 95 (test is not whether

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<sup>14</sup> Gunder's true complaint is not one of slander but of refusal of State Farm to pay what Gunder's wants it to pay. See, e.g., (Initial Brief, p. 3,4,6,7,8) (DE 62-4 at 2, 7,8)(regarding State Farm's refusal to pay).

<sup>15</sup> State Farm contends that neither assumption is accurate according to record evidence.

statements are based upon undisputed facts, but instead whether justified under the circumstances). No allegation is even made that the claim representatives who spoke with insureds themselves spoke with express malice.

Gunder's did submit the testimony of one of the speakers, former claim representative Mr. Stout, regarding his written statement that "Gunder's Auto Center is charging a higher rate than State Farm is willing to pay" (DE 62-21 at 52) as to insured, Mr. Wincey's claim. While Gunder's contends that this statement was made prior to the estimate being prepared (DE 62-4 at 9,10), Ray Gunder testified that Gunder's charged Mr. Wincey for paint materials using a paint calculator and a 35% mark-up (DE 51-1 at 49-54) and that thereafter, Mr. Gunder, by a durable power of attorney executed by Mr. Wincey, brought suit against State Farm seeking to recover the difference in the price that Gunder's charged Mr. Wincey and the amount paid by State Farm. (DE 51-1 at 49-50, DE 51-3 at 13-26, DE 62-4 at 5). Thus, the testimony establishes that the primary purpose of the statement advising Mr. Wincey that he will be liable for the difference between what Gunder's charged and what State Farm was willing to pay (an accurate warning), was not to injure Gunder's but was to protect Mr. Wincey from personal exposure to charges. See also (DE 62-21 at 8) (Stout informed customers regarding prevailing competitive price at "front end" so they could make "informed" decisions). Statements made by various claim representatives regarding

State Farm's contractual obligation to pay the prevailing competitive price merely advised of State Farm's contractual obligation and reflected the reality that Gunder's Auto Center admittedly charges more than what State Farm is willing to pay as to certain matters. (DE 62-4). Gunder's did not meet the burden of showing by record evidence that the primary motive of the various speakers was to injure Gunder's as opposed to furthering the common interest of State Farm and its insureds.

Gunder's dissatisfaction with State Farm's determination of its repair cost reimbursement obligation under State Farm's contracts with insureds is not the issue. The instant action is not one for breach of contract between the insureds and State Farm as to its determination of prevailing competitive price and reimbursable repairs. At issue are communications to insureds regarding State Farm's reimbursement obligation to the insureds as applied to Gunder's charges. As the Florida Fifth District Court of Appeal noted in Reakes, 840 So. 2d at 281, the "circumstances seem to be exactly those which the privilege was designed to protect." The Trial Court correctly granted summary judgment in State Farm's favor.

**II. GIVEN THE ALLEGATION THAT STATE FARM IS THE INSURER REQUIRED TO REIMBURSE INSUREDS FOR THEIR REPAIR COSTS, STATE FARM CANNOT "TORTIOUSLY INTERFERE" WITH**

**THE REPAIR RELATIONSHIP BETWEEN THE INSUREDS AND GUNDER'S AS A MATTER OF LAW**

By Order dated and filed May 22, 2009 (D.E. 12), the Trial Court granted Defendant State Farm's Motion to Dismiss Count II, Tortious Interference with a Business Relationship. Specifically, the Trial Court, while assuming all allegations in the First Amended Complaint to be true and construed favorably to Gunder's (DE 12 at 2), determined:

Even construed favorably to the plaintiff, the complaint alleges that State Farm "interfered" only with the plaintiff's customers who submitted claims to State Farm. Because State Farm must indemnify the plaintiff's customers for the repair performed by the plaintiff, State Farm is an interested party in the business relation between the plaintiff and those customers who are State Farm's insureds... Accordingly, Count II fails to state a claim for tortious interference. (DE 12 at 4) (citations omitted).

The Court's determination was correct and should be upheld.

A tortious interference claim requires (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." Gossard v. Adia Serv., Inc., 723 So. 2d 182, 184 (Fla. 1998); see Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985). No action lies under the law of Florida where a party essentially interferes with its own undertaking. Ethyl Corp. v. Balter, 386 So. 2d 1220, 1224 (Fla.

3d DCA 1980), review denied, 392 So. 2d 1371 (Fla.), cert. denied, 452 U.S. 955, 101 S. Ct. 3099 (1981); see also Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1294 (11th Cir. 2001); Genet Co. v. Anheuser-Busch, Inc., 498 So. 2d, 683, 684 (Fla. 3d DCA 1986). For interference to be unjustified, the interfering defendant must be a stranger to the business relationship. Genet, 498 So. 2d at 684 (Fla. 3d DCA 1986); Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 386 (Fla. 4th DCA 1999). The tort is designed to protect economic relations from interference by outsiders. Palm Beach County Health Dist. v. Professional Medical Educ., Inc., 13 So. 3d 1090, 1095 (Fla. 4th DCA 2009). Accordingly:

In the case of an interested third-party, the contractual interests that tortious interference is intended to protect *include* the interests of the third-party with respect to the contract. ... An interested third-party accused of tortious interference is essentially “interfering” with its own interests. This is not interference; it is freedom of contract.

Id. A defendant is not a stranger to the business relationship if the defendant has “any beneficial or economic interest in, or control over, that relationship.” Id. at 1094 (citing Nimbus Tech, Inc. v. SunnData Prods., Inc., 484 F.3d 1305, 1309 (11th Cir. 2007)). Thus, contrary to Gunder’s assertion (see Initial Brief, p. 27) the issue is not whether State Farm is a party to the insured’s contract with Gunder’s or whether State Farm’s consent is required. As a matter of law, a defendant is not a stranger to the business relationship if the defendant has a “potential financial interest in how a contract is

performed,” or is a “source of funds to pay for the services” being provided by the Plaintiff. Id. at 1094-95. State Farm is in fact the source of funds for repair costs to the insured’s vehicles for services provided by Gunder’s as pled by the First Amended Complaint. (DE 5 at 2, 3, 5). Any interference is non-actionable.

The allegations of the First Amended Complaint, when deemed true, establish that no claim for tortious interference exists as a matter of law as State Farm, a source of funds to pay for the repairs performed by Gunder’s on behalf of its insureds, is not a stranger to the relationship between Gunder’s and insureds. Thus, any interference is justified and does not give rise to a claim. The First Amended Complaint specifically alleges in paragraph 6 that Gunder’s has an “ongoing business relationship” with State Farm (DE 5 at 2), and paragraph 18 alleges that State Farm is an “automobile insurance provider” and that a Gunder’s “customer and/or prospective customer submits a claim to Defendant...” (DE 5 at 5). Gunder’s alleges that it in fact receives payments for services “through the customer’s respective automobile insurance provider. (DE 5 at 5). According to the First Amended Complaint, State Farm is made aware of the business relationship between the potential customer and Gunder’s through the submission of the claim, (DE 5 at 5&6), and State Farm’s alleged interference consists, in part, in “refusing to pay Gunder’s customer’s rightful insurance claims.” (DE 5 at 6). The only customers identified with specificity, Mr. Dave Paige, Mr. Devon

Anderson and Mr. Kyle Fuqua, are pled to be “State Farm insureds.” (DE 5 at 6). Thus, as set forth by the First Amended Complaint, the customers at issue have business relations with both State Farm and Gunder’s, and State Farm is a source of funds to the insureds for repair services performed by Gunder’s on the insured’s vehicle. The customers with whom State Farm allegedly interfered are also State Farm’s insureds who have notified State Farm of their intent to submit repair bills to State Farm pursuant to their contracts with State Farm. The allegations of the First Amended Complaint establish that State Farm, who by contract will be receiving insurance claims based upon service provided by Gunder’s, is an interested party in the business relationship at issue. Accordingly, no claim exists as a matter of law.

In its Motion for Reconsideration directed to the Court’s Order dismissing Count II, Gunder’s contended that the First Amended Complaint pled “improper means,” such that State Farm’s actions taken to “safeguard or promote one’s financial interest and contractual interests” were not privileged. (DE 14 at 4-6). The District Court determined that “the plaintiff failed to raise this argument in response to the motion to dismiss” and also ruled that the allegations relied upon by Gunder’s in support of this argument were stricken after Gunder’s “failed to object to the defendant’s motion to strike.” (DE 17 at 1 & n.1). The Court did not abuse its discretion in refusing to

reconsider its order based upon waived arguments.<sup>16</sup> Lawson, 85 F.3d at 507. Motions for reconsideration are not to be used to present arguments which could have been made at the time of the first decision. Cf. O’Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992) (addressing motions to amend). Such motions are also an “extraordinary remedy,” to be employed sparingly. L.M.P. v. Florida Dept. of Educ., 2008 WL 4218120, \* 2 (S.D. Fla. Sept. 15, 2008) (slip opinion); Williams v. Cruise Ships Catering & Service Int’l, 320 F. Supp. 2d 1347, 1358 (S.D. Fla. 2004). The District Court did not abuse its discretion in denying Gunder’s motion for reconsideration and in determining that Gunder’s did not raise the issues presented therein in a timely manner. (DE 17 at 1). Likewise, this Court should also decline to address this issue for the first time on appeal. See Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1331-32 (11th Cir. 2004); Azar v. National City Bank, 2010 WL 2381049, \*4 (11th Cir. June 15, 2010) (non-published).

If this Court chooses to address the issue, Gunder’s argument also fails on the merits. Gunder’s argument relies on an Eleventh Circuit Court decision, KMS Restaurant Corp. v. Wendy’s Int’l, Inc., 361 F. 3d 1321, 1325 -27 (11th Cir. 2004),

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<sup>16</sup> State Farm also contended that the Motion was untimely under Rule 59 as it was served thirteen business days after the order, see Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994), and that no grounds were asserted for relief under Rule 60. (DE 16 at 2-4).

which dealt with the qualified or limited competition “privilege” that exists where a “third party” to a contract or business relationship interferes to protect its own financial and economic interests. KMS, 361 F. 3d at 1325 (noting that franchiser’s privilege was limited and qualified). A qualified privilege can be lost. See e.g., Ethyl, 386 So. 2d at 1224-25; KMS, 361 F. 3d at 1327. As stated by the Ethyl court, however, this principle of a qualified privilege is “completely separate” from the principle that “a cause of action for interference does not exist against one who is himself a party to the contract allegedly interfered with.” Ethyl, 386 So. 2d at 1224; see also Genet, 498 So. 2d at 684 (analyzing separately the principle of non-actionable tort where defendant is not a stranger to the business relationship and the principle that actions taken to promote own financial and economic interests are qualifiedly privileged). Only if the “interfering” defendant is a “third party” does the qualified privilege come into play. Burger King Corp. v. H&H Restaurants, LLC, 2001 WL 1850888, \*8 (S.D. Fla. Nov. 30, 2001) (slip opinion). Because State Farm is not a stranger or third-party to the relationship between Gunder’s and the insureds but has an interest in such relationship, no cause of action exists.

Furthermore, even if the basis for the dismissal below was a conditional privilege (as opposed to the absence of a cause of action), Gunder’s did not plead the basis for a loss of any such privilege. Gunder’s contended below that it pled improper means

in paragraphs 7 and 10 of the First Amended Complaint alleging “false, slanderous, and tortious comments” (DE 14 at 6, 7), but such allegations were stricken by Order due to Gunder’s failure to object to same. (DE 17 at 1). Gunder’s now contends for the first time that paragraph 19 of the First Amended Complaint alleging false statements to insureds constitutes allegations of improper means sufficient for loss of a conditional privilege. (Initial Brief, p. 32).<sup>17</sup> According to Gunder’s, the statements which themselves constitute the interference constitute the “improper methods.” This argument must be rejected as the First Amended Complaint merely alleged that the statements were made by State Farm to insureds who submit claims, regarding the repair costs to the insured vehicle (DE 5 at 5-6). To the extent Gunder’s is contending that the asserted defamatory nature of the comments were the improper conduct, such defamatory comments are themselves privileged. See Issue I above.

Gunder’s also contends for the first time that any privilege of State Farm to interfere is “divested due to State Farm solely acting upon an ulterior purpose and not otherwise in the best interest of State Farm.” (Initial Brief, p. 25). Gunder states that it “should be provided the opportunity beyond the pleading stage to establish that State Farm acted “solely with ulterior purposes and not in the principal’s best interest.” (Initial Brief, p. 31). However, the First Amended Complaint is devoid of any

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<sup>17</sup> Gunder’s does not argue that the actors acted solely out of malice.

allegation that any interference was solely for ulterior purposes and did not relate to State Farm's financial interest in the amount charged by Gunder's to its insureds for covered vehicle repairs. (DE 5). Compare Salit, 742 So. 2d at 386 (privilege destroyed where employee acted solely with ulterior purposes and not to benefit employer); Rudnick v. Sears, Roebuck, & Co., 358 F. Supp. 2d 1201, 1206-07 (S.D. Fla. 2005) (complaint alleged employee acted with improper motives for personal benefits). Instead, the First Amended Complaint alleged that State Farm is making statements to insureds who submit claims regarding Gunder's prices and repairs and is "refusing to pay Gunder's customers' rightful insurance claims" (DE 5 at 6)- allegations that are contrary to any interference being for ulterior motives. Gunder's argument that the First Amended Complaint pled ulterior and improper means and, therefore, dismissal was improper must be rejected.

**CONCLUSION**

The Final Judgment should be affirmed.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 points.

/s/ Reed W. Grimm

Attorney for Appellee, State Farm Mutual  
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Dated: July 26, 2010.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been served upon A. Brent Geohagan, Esquire, 3001 Bartow Road, Lakeland, Florida 33803 (*appellate counsel for Gunder*), via Federal Express, a third-party commercial carrier for delivery within 3 days, this 26th day of July, 2010. I further certify that the original and six copies of this Brief were forwarded to Thomas K. Kahn, Clerk, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, GA 30303, via Federal Express, a third-party commercial carrier for delivery within 3 days, and a copy of this brief in Adobe Acrobat PDF format has been uploaded to the Court on this same date of service.

/s/ Reed W. Grimm

Attorney