No. 129031

In the

Supreme Court of Illinois

CARMEN GALARZA,

Appellee,

v.

DIRECT AUTO INSURANCE COMPANY,

Appellant,

v.

FREDY GUIRACOCHA and CRISTOPHER GUIRACOCHA,
a minor by next best friend FREDY GUIRACOCHA,

Appellees.

On Appeal from the Appellate Court of Illinois,
First Judicial District, Nos. 1-22-0281 (cons. with 1-21-1595).
There Heard on Appeals from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 20 CH 4631 and 21 CH 02447.
The Honorable **David B. Atkins** and **Sophia Hall**, Judges Presiding.

BRIEF OF APPELLEES FREDY GUIRACOCHA and CRISTOPHER GUIRACOCHA

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ISSUE PRESENTED FOR REVIEW

Did the Appellate Court correctly find that an automobile insurance policy that denies uninsured motorist coverage to an insured person who is not occupying an insured automobile at the time of the injury violates Illinois public policy as expressed in 215 ILCS 5/143a(1) and case law?

STATUTE INVOLVED

The following provision of Article IX of the Illinois Insurance Code is applicable to this case:

> **Section 143a. Uninsured and hit and run motor vehicle coverage.**
>
> (1) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle that is designed for use on public highways and that is either required to be registered in this State or is principally garaged in this State shall be renewed, delivered, or issued for delivery in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Section 7-203 of the Illinois Vehicle Code1 for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.
>
> 215 ILCS 5/143a(1).

STATEMENT OF FACTS

Cristopher Guiracocha ("Cristopher"), 14 years old, lived with his father, Fredy Guiracocha ("Fredy"), in Chicago. C 129. On September 24, 2020, Cristopher was riding his bicycle northbound on Kimball Avenue, approaching Montrose Avenue. C 130. As he proceeded through the intersection on a green light, an unidentified automobile traveling northbound on Kimball Avenue attempted a left turn to proceed eastbound on Montrose

Avenue. C 130. The vehicle stuck Cristopher and his bicycle and then fled the scene. C 130. As a result of the collision with the hit-and-run motorist, Cristopher sustained injuries which required immediate medical treatment. C 130.

At the time of the collision, Fredy was the owner of, and a named insured under, an automobile insurance policy issued by Direct Auto Insurance Company ("Direct Auto"). C 28. The policy provided for uninsured motorist coverage of $25,000 per person and $50,000 per accident. C 28. Cristopher, as Fredy's resident relative, filed an uninsured motorist claim with Direct Auto under Fredy's policy. Direct Auto denied the claim, stating that there was no coverage because Cristopher was not occupying an "insured vehicle," as defined by the policy, at the time of the incident. C 158.

Cristopher filed for arbitration with the American Arbitration Association on May 5, 2021. C 160-164. Direct Auto filed an action for declaratory judgment in the Cook County Circuit Court on May 19, 2021. C 140-141. On May 20, 2021, Direct Auto moved to stay the arbitration (C 165-170) and the trial court granted a stay on June 9, 2021. C 171.

Direct Auto filed a motion for summary judgment in the declaratory action, arguing that the court should enforce the policy as written. C 178-185. Specifically, Direct Auto took the position that, because Cristopher was riding a bicycle at the time of the accident, he was a pedestrian under Illinois law and therefore not entitled to uninsured motorist coverage under the terms of the policy, which limits uninsured motorist coverage to insureds occupying an insured automobile at the time of the accident. C 140-141.

The trial court granted summary judgment in favor of Direct Auto on January 12, 2020. C 209. Fredy and Cristopher took a timely appeal to the First District Appellate Court. C 210-213. The Appellate Court issued its opinion on September 30, 2022, reversing

the circuit court's grant of summary judgment in favor of Direct Auto and remanding to the circuit court. *Galarza v. Direct Auto Ins. Co.*, 2022 IL App (1st) 211595 (2022). Direct Auto filed a petition for leave to appeal to this Court and the Court allowed the petition on January 25, 2023.

ARGUMENT

I. DENYING UNINSURED MOTORIST COVERAGE TO AN INSURED WHO IS NOT OCCUPYING AN INSURED AUTOMOBILE VIOLATES ILLINOIS PUBLIC POLICY

The Appellate Court correctly found that Direct Auto cannot deny uninsured motorist coverage to Cristopher. First, Cristopher is unquestionably an insured under the Direct Auto policy. Second, the limitation in the policy that an insured is entitled to uninsured motorist coverage only while occupying an insured automobile violates Illinois public policy. Finally, Direct Auto's proposed distinctions between pedestrians, bicyclists, and passengers do not alter the analysis or render its uninsured motorist provision enforceable.

A. Cristopher is an insured under the policy and Direct Auto has waived its argument to the contrary

Direct Auto denied Cristopher's uninsured motorist/hit-and-run claim on the sole basis that he was not occupying an insured vehicle at the time of the accident. C 158. It likewise did not challenge his status as an insured in its motion for summary judgment. *See Galarza*, 2022 IL App (1st) 211595, ¶¶19 and 21. At oral argument in the Appellate Court, "Direct Auto agreed that Cristopher was a named insured because his father was a named insured together with all of the members of his household, but argued that he was not insured for an accident where he sustained injuries when he was struck by a motor vehicle, while riding his bicycle, in a hit and run accident." *Galarza*, 2022 IL App (1st) 211595,

¶61. Before this Court, Direct Auto now changes its position again and argues that Cristopher does not qualify as an insured under the policy. AB 8[1], C 158, and C 178-185.

Direct Auto has waived the argument that Cristopher is not an insured. It is well settled that issues not raised in the trial court are forfeited and cannot be raised for the first time on appeal. *Lewis v. OSF Healthcare System*, 2022 IL App (4th) 220016, ¶60. Moreover, a party may not argue one theory to the trial court and another in the reviewing court. *Morgan v. CUNA Mut. Ins. Soc.*, 242 Ill.App.3d 1027, 1029 (3d Dist. 1993).

Aside from waiver, Direct Auto's new argument also contradicts the provisions of its policy. The Direct Auto insurance policy defines insured under Part II – Uninsured Motorist Coverage as:

> (a) the named insured;
>
> (b) a "relative" as defined under Part 1 of this policy;
>
> (c) any person while lawfully occupying an owned automobile;
>
> (d) any person, with respect to damages he/she is entitled to recover because of bodily injury to which this Part applies when sustained by an insured under (a) or (b) above. C 146.

Under Part I – Liability Coverage, the policy defines relative as:

> A person related to the name insured or his/her spouse by blood, marriage, or adoption and who is a resident of the same household as the name insured or spouse and is either a non-driver or is listed on the Application for this insurance as a driver, provided neither such relative nor his/her spouse owns a private passenger automobile as the time of the loss which is subject to any state's Mandatory Insurance Law. C 143.

Thus, Cristopher meets the requirements of an insured under the policy and Direct Auto cannot deny him uninsured motorist coverage on the basis that he is not an insured

[1] The Brief and Appendix of Appellant Direct Auto Insurance Company is cited by page number as "AB ___."

person. Direct Auto's argument that Cristopher would not be covered under the liability portion of the policy if he caused injuries to others while riding his bike (AB 8) is irrelevant and would require that Part I and Part II of the policy apply simultaneously to all losses.

This, however, is not the correct analysis. Liability provides coverage for drivers who cause injury while operating a vehicle. Direct Auto agrees that if Cristopher caused injuries while driving a vehicle, then he would have liability coverage for his use of an auto. *See* AB 8. This alone establishes that Cristopher is a legal insured under the policy.

As an insured, Cristopher is entitled to uninsured motorist coverage under Part II of the policy because Section 143(a) provides coverage to "insured[s] thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles." 215 ILCS 143a(1). "If a person constitutes an insured for purposes of liability coverage under a policy, the insurance company may not, either directly or indirectly deny uninsured motorist coverage to that person." *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill.2d 391, 403 (2010).

B. The Direct Auto policy requirement that an insured is entitled to uninsured motorist coverage only while occupying an insured automobile violates Illinois public policy

The uninsured motorist section of the policy upon which Direct Auto actually relied to deny coverage states, in pertinent part:

> … we will pay all sums (up to your applicable policy limits) which the named insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of property damage to a vehicle described in the policy and bodily injury, including death resulting there from sustained by the insured provided that the damages were:
>
> (1) caused by accident; and

> (2) while "you" are an occupant in an "insured automobile" as defined herein, and
>
> (3) were as a result of the ownership, maintenance or use of such uninsured motor vehicle. C 94.

An insurance policy is a contract, the terms of which must comport with the statutory requirements in effect when the policy is issued. *Thounsavath v. State Farm Mut. Auto. Ins. Co.*, 2018 IL 122558, ¶30, *citing Schultz*, 237 Ill. 2d at 408. Insurers have no right to depart from valid statutory requirements in their policies. *Id.* It is well established that "clear and unambiguous" insurance policy terms must be enforced as written, unless doing so would violate public policy. *Thounsavath*, 2018 IL 122558 at ¶20. "[A]n insurance contract 'will not be invalidated unless it is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy of Illinois or unless the agreement is manifestly injurious to the public welfare.'" *Goldstein v. Grinell Select Ins. Co.*, 2016 IL App (1st) 140317, ¶16, *quoting Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55 (2011). Where coverage is mandated by the state's financial responsibility law, "a provision in an insurance policy that conflicts with the law will be deemed void. The statute will continue to control." *Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 129 (2005).

Here, Direct Auto's attempt to limit uninsured motorist coverage to insureds who occupy an insured automobile at the time of the accident (C 94) violates Illinois public policy, as expressed in the Illinois Insurance Code and the decisions of this Court and the Appellate Court. The First District Appellate Court correctly reversed the grant of summary judgment in favor of Direct Auto because the insurance policy provision in question

violates §143(a) of the Illinois Insurance Code and is therefore unenforceable as against public policy. *See Galarza*, 2022 IL App (1st) 211595, ¶1.

To begin, §143a(1) of the Illinois Insurance Code states, in pertinent part, as follows:

> No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle that is designed for use on public highways . . . shall be renewed, delivered, or issued for delivery in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Section 7-203 of the Illinois Vehicle Code for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury sickness, or disease, including death, resulting therefrom. 215 ILCS 5/143a(1).

The statutory language reflects a legislative intent "to provide extensive uninsured-motorist protection for those who are 'insureds' under an automobile liability policy." *Heritage Ins. Co. of Am. v. Phelan*, 59 Ill. 2d 389, 395 (1974).

The public policy behind uninsured motorist coverage is to place the insured in the same position had the at-fault party carried requisite liability insurance mandated by law. *Thounsavath*, 2018 IL 122558, ¶25. "The statutory coverage is mandatory, and it may not be whittled away by an unduly restrictive definition." *Id.* at ¶ 33. With the enactment of §143a(1), the legislature intended "that the uninsured motorist coverage would protect an insured generally against injuries caused by motorists who are uninsured, and by hit-and-run motorists, and that this would complement the liability coverage." *Bruno v. State Farm Mut. Auto. Ins. Co.*, 220 Ill. App. 3d 641, 646 (1st Dist. 1991).

The Appellate Court's ruling in this case is consistent with decisions of this Court and the Appellate Court that have addressed policy limitations on uninsured motorist coverage. In *Squire v. Economy Fire & Cas. Co.*, this Court addressed an automobile

insurance policy and endorsement that limited coverage to "bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile." *Squire v. Economy Fire & Casualty Co*., 69 Ill. 2d 167, 171 (1977).

The *Squire* Court first noted that the "language of [§143a(1)] is plain and unambiguous in mandating that each policy must contain the specified coverage." *Squire*, 69 Ill. 2d at 176, *citing Glidden v. Farmers Auto. Ins. Ass'n*, 57 Ill. 2d 330, 335 (1974). The Court held that "[i]nsofar as the exclusion contained in the policy at bar would make coverage dependent upon the insured not being in a vehicle unlisted in the policy, that exclusion violates section 143a" and was unenforceable. *Squire*, 69 Ill. 2d at 179. The Court therefore invalidated the exclusion, thus allowing an injured pedestrian to recover under the uninsured motorist coverage provisions in both the primary policy and the endorsement.

Direct Auto seeks to distinguish *Squire* based on the Court's statement that "it is well settled that section 143a requires coverage of insured persons regardless of the motor vehicle the uninsured motorist is driving, and regardless of the vehicle in which the insured person is located when injured." AB 9, *citing Squire*, 69 Ill. 2d at 179. Direct Auto focuses on the phrase "regardless of the vehicle in which the insured person is located when injured" to argue that *Squire* required that the injured party seeking uninsured motorist coverage must be the occupant of a vehicle, not a bicycle rider or pedestrian. *See* AB 9. But Direct Auto's attempted distinction based on an isolated phrase fails because the injured plaintiff in *Squire* was, in fact, a pedestrian. *Squire*, 69 Ill. 2d at 171.

The Appellate Court's decision in this case is also consistent with the Second District Appellate Court's recent decision in *Direct Auto Ins. Co., v. Merx*, 2020 IL App (2d) 190050. The *Merx* court found the identical insurance provision at issue in this case to be unenforceable as against public policy.

In that case, Merx was injured while a passenger in a vehicle operated by Motley. *Id.* at ¶3. Motley was both an uninsured motorist and at-fault for the accident. *Id.* Merx filed a claim for uninsured motorist coverage under her personal automobile insurance policy with Direct Auto. *Id.* Direct Auto sought declaratory judgment, arguing that there was no uninsured-motorist coverage for the accident because, at the time of the accident, Merx was not occupying an "insured automobile" as that term is defined in the policy. *Id.* at ¶4. The exclusionary language in the *Merx* policy is identical to the language in Fredy's policy. Specifically, the *Merx* policy states: "we will pay all sums . . . provided the damages were: (1) caused by accident; and (2) while 'you' are an occupant in an 'insured automobile' as defined herein . . ." *Id.* at ¶4.

The *Merx* court held that "conditioning uninsured-motorist coverage on the insured being "an occupant in an 'insured automobile,'" as it relates to Merx and the June 18, 2015, accident, would violate public policy and conflict with our supreme court's interpretation of section 143a of the Insurance Code." Id. at ¶31. The court further observed: "Because Merx unquestionably constituted an 'insured' at the time of the . . . accident, uninsured-motorist coverage extends to her under the policy's liability provisions." *Id.* at ¶ 42. "To deny uninsured motorist coverage to Merx simply because she did not occupy her insured automobile at the time of the accident . . . would contravene public policy and the legislative purpose behind section 143a of the Insurance Code by foreclosing her from

being placed in substantially the same position she would have occupied had she been injured in an automobile accident where the party at fault carried the legal minimum amount of liability coverage." *Id.* The holding in *Merx* thus "supports the inclusive coverage sought by the Guiracochas in the instant case." *Galarza*, 2022 IL App (1st) 211595, ¶51.

Direct Auto seeks to distinguish *Merx* on two bases. First, it asserts that Cristopher was not an insured person under the policy. AB 7. Second, it states that the *Merx* court "limited its holding to occupying a vehicle." AB 7. Both are inaccurate.

First, as set forth in Section A above, Cristopher is an insured under the Direct Auto policy because he is Fredy's minor son and lived with him at the time of the accident.

Second, Direct Auto is mistaken when it argues that the *Merx* holding is limited to "to occupying a vehicle." AB 7. In fact, the holding more broadly states that "conditioning uninsured-motorist coverage on the insured being "an occupant in an 'insured automobile'" . . . would violate public policy and conflict with our supreme court's interpretation of section 143a of the Insurance Code." *Id.* at ¶31.

Doxtater v. State Farm Mut. Auto. Ins. Co., 8 Ill. App. 3d 547 (1st Dist. 1972), is another Appellate Court decision holding that an insurance policy that restricts coverage to injuries caused by an uninsured motorist while the insured is occupying an owned motor vehicle conflicts with §143a of the Illinois Insurance Code. In *Doxater,* the plaintiff, an insured under the policy, was operating a motorcycle he did not own when he was struck by an uninsured motorist. *Id.* at 549. State Farm denied coverage on the ground that Exclusion (b) of the uninsured motorist policy provision was applicable to the claim. *Id.* Exclusion (b) states that the insurance does not apply:

> To bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or any resident of the same household, if such vehicle is not an owned motor vehicle:

Id. at 548. The plaintiff argued that "Section 143a of the Illinois Insurance Code requires that uninsured motor vehicle coverage be provided for all 'insureds' under an automobile policy, without qualification as to the location of the insured at the time of injury." *Id.* at 550. The court agreed, finding that this Court would interpret Section 143a of the Insurance Code as a "direction to insurance companies to provide uninsured motor vehicle coverage for 'insureds' regardless of whether, at the time of injury, the insureds occupied, or operated vehicles declared in the subject policy." *Id.* at 552. The court further noted that '"the intent of the legislature was that the uninsured motorist coverage would protect an insured generally against injuries caused by motorists who are uninsured, and by hit-and-run motorists, and that this would complement the liability coverage.'" *Id., quoting Barnes v. Powell*, 49 Ill. 2d 449, 454 (1971).

C. The distinctions that Direct Auto attempts to draw between pedestrians, bicyclists, and passengers are not required under §143a or relevant to the analysis of this case

The language of §143(a) is clear and unambiguous and requires uninsured motorist coverage for "insured[s] thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles." 215 ILCS 5/143a(1). The statute does not permit limitations that the insured must be driving at the time of the accident, or must be a passenger in an insured vehicle.

The language in the Direct Auto policy impermissibly limits the coverage required by state law by purporting to restrict uninsured motorist coverage to an insured who is an "occupant in an insured automobile…" C 94. The policy language does not differentiate

between drivers, passengers, or pedestrians. In the Appellate Court, Direct Auto argued that the policy was always meant to cover drivers and passengers in other vehicles. In *Merx*, however, Direct Auto took a different position, arguing that its policy language, which is identical to the language in this case, excluded Merx from coverage because she was a passenger in another vehicle. *Merx*, 2020 IL App (2d) 190050, ¶12. In its brief before this Court, Direct Auto changes its argument yet again by claiming that a distinction may have to be taken between a bicyclist and a pedestrian. *See* AB 14. Yet Direct Auto also argues that neither is covered because they are not insured for liability while walking or riding a bike. Regardless of the arguments, the outcome here must remain the same. The provision requiring that the insured occupy the covered vehicle was found to be invalid as against public policy by the Second District in *Merx* and the same conclusion should be reached here.

Direct Auto relies on *Rosenberg v. Zurich American Ins. Co.*, 312 Ill. App. 3d 97 (1st Dist., 2000), to argue that Illinois law does not require uninsured policies to cover pedestrians. AB 11-12. The central issue in *Rosenberg*, however, was whether the injured individual was an insured, and not whether a pedestrian can recover uninsured motorist benefits. *Id.* at 105. *Rosenberg* is not analogous to this case because Cristopher is an insured under the policy. The *Merx* court distinguished *Rosenberg*, stating:

> "[*Rosenberg*] hinged on whether the injured party fell within the definition on an "insured" under the polic[y] at issue. This determination was critical to the resolution of the case, because '[n]either the statute nor the case law places any restriction on the right of the parties to an insurance contract to agree on which persons are to be the insureds under an automobile insurance policy."

Merx, 2020 IL App (2d) 190050, ¶41.

Direct Auto also relies on *Stark v. Ill Emcasco Ins. Co*., 373 Ill. App.3d 804 (1st Dist. 2007), to argue that the policy at issue here does not cover pedestrians. In *Stark*, the plaintiff was walking through a parking lot when he was struck by a vehicle covered by a $50,000 policy. *Id.* at 805-806. After settling his claim with the at-fault driver's insurer, the plaintiff attempted to make an underinsured motorist claim under his company's commercial liability auto policy even though Stark was not listed as a named insured under that policy. *Id.* at 806. The only named insured was the corporate entity and the policy stated that it covered only those individuals who were occupying corporation's vehicles. *Id.* at 810. The court held that, because the plaintiff was not a named insured and he was not occupying a covered vehicle, he had no coverage pursuant to the underinsured motorist provision of the company's commercial liability policy. *Id.* at 811.

Stark is distinguishable from the facts here because, similar to *Rosenberg*, the central issue was whether the injured person was an insured under the commercial liability policy. *Id.* at 808. The combination of the plaintiff not being a named insured and not occupying a covered vehicle precluded him from recovering underinsured motorist benefits under his company's commercial liability policy. *Id.* at 811. Here, there is no question that Cristopher was an insured. The fact that he was riding his bicycle and not walking on the sidewalk does not change the analysis under §143(a). Illinois public policy unequivocally requires than an insured -- whether walking, biking, or riding -- is entitled to uninsured motorist coverage if he or she is struck by an uninsured or hit-and-run motorist.

CONCLUSION

The public policy of Illinois is to protect members of the public injured in vehicular accidents. *Safe Auto Ins. Co. v. Fry*, 2015 IL App (1st), ¶11. "It is well established that uninsured-motorist coverage is required so that the policyholder is placed in substantially the same position he or she would occupy if injured or killed in an accident where the party at fault carried the minimum liability coverage required by law." *Merx*, 2020 IL App (2d) 190050 at ¶22. Denying Cristopher uninsured motorist coverage would impermissibly thwart the legislative purpose behind §143a of the Insurance Code by preventing him from being placed in substantially the same position he would have occupied had he been injured in an accident where the at-fault party carried minimum liability coverage required by law. Indeed, Cristopher would be potentially left without any avenue of recovery for his injuries.

The Appellate Court correctly held that the exclusion in the Direct Auto policy requiring an insured to occupy an insured automobile violates §143(a) and is unenforceable as against public policy. The Court should affirm the Appellate Court's decision reversing the circuit court judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

/s/ Jonel Metaj
Jonel Metaj

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CARMEN GALARZA,	)	
	)	
Appellee,	)	
	)	
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Appellant,	)	
v.	)	
	)	
FREDY GUIRACOCHA, et a.,	)	
	)	
Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on May 10, 2023, there was electronically filed and served upon the Clerk of the above court the Brief of Appellees. On May 10, 2023, service of the Brief will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Jonel Metaj
Jonel Metaj

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jonel Metaj
Jonel Metaj