IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01744

MARSHALL COUNTY BOARD OF SUPERVISORS **APPELLANT**

v.

STEVE LACROIX **APPELLEE**

APPELLEE'S BRIEF

DATE OF JUDGMENT: OCTOBER 1, 2008

TRIAL JUDGE: SPECIAL CHANCELLOR, HON. GLENN ALDERSON

COURT FROM WHICH APPEALED: MARSHALL COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: KENT SMITH
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ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

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v.

STEVE LACROIX **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that, in addition to those listed in the brief of Appellee LaCroix, the following persons have an interest in the outcome of this case:

1. Honorable Glenn Alderson
   Chancery Court Judge
   P.O. Box 70
   Oxford, MS 38655

2. Kent Smith
   P.O. Drawer 849
   Holly Springs, MS 38635

3. Justin Cluck
   P.O. Drawer 849
   Holly Springs, MS 38635

4. Steve LaCroix
   384 River Ridge Circle
   Byhalia, MS 38611

/s/
Steve LaCroix (Pro Se)

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STATEMENT OF THE CASE and UNDISPUTED FACTS

¶ 1. On or about February 1, 2008 [1] a trial was held in Marshall County Chancery Court, Special Chancellor John Hatcher [2] presiding, to hear inter alia several claims filed by LaCroix for violations of the Mississippi Public Records Act by Petitioners and other County Employees. (R. 17-23)(Transcript Pg. 11, 10-29, Pg. 12, 6-13) Among the public records requested by LaCroix, which were denied by Petitioners and its employees, was a request to inspect and/or copy records known as "Mississippi State Tax Commission Motor Vehicle Title/Registration Sys County Pre-Renewal Registration Edit County: Marshall", which are utilized by the Board of Supervisors to instruct the County Tax Assessor to impose a tag and property lien for unpaid ad valorem taxes imposed for garbage collections. (R, Exhibit no. 1 to 17-23)

¶ 2. On Feb. 20, 2008 following the Hatcher trial, the Chancellor entered judgment in favor of LaCroix and ordered Defendants to make the records requested available to LaCroix for inspection and/or copying which included the Tag renewal records governed by the DPPA. (R. 18, 5)

¶ 3. Rather than permit inspection as ordered by the Hatcher Court, Petitioners filed a Motion for Protective Order (R. 25-26) seeking to have the records declared exempt from the Public Records Act pursuant to M.C.A. §27-3-33 and M.C.A. §25-61-9. A hearing was scheduled for Mar. 14, 2008 before Chancellor Hatcher to hear inter alia, Petitioners Motion for Protective Order.

¶ 4. On Feb. 14, 2008, Petitioners filed a separate action regarding the same issues in Chancery Court, Chancellor Glenn Alderson presiding, seeking Declaratory Judgment which is the case at bar. The Petitioner's Declaratory Judgment only asked the Court to "consider the records request submitted by Mr. LaCroix and the applicable law regarding the production of such documents and enter its judgment declaring the rights and obligations of the parties regarding the records request." (R.13, Pg. 4, ¶ 10). In conclusion, Petitioners asked no more of the Court than a "Declaratory Judgment governing the production of the records, if proper for

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[1] See 2008-CP-00477-COA, Steve Lacroix v. Marshall County Board of Supervisors

[2] Chancellor Glenn Alderson recused himself because the Chancery Clerk of Marshall County was a party to that action

production." (R.13, Pg. 4, conclusion)

¶ 5. On March 14, 2008, following an in camera inspection of the records by Chancellor Hatcher on Petitioner's Motion for Protective Order, Chancellor Hatcher ruled that the records were not exempt from the Public Records Act and that a court action met one of the exceptions enumerated in the DPPA. He ordered the records to be made available for inspection and/or copying to LaCroix under the "litigation exception" of the DPPA. [3] Petitioners did not file any motions to vacate or to reconsider the Judgment of the Hatcher Court, pursuant to Rule 59 and/or Rule 60 of the Mississippi Rules of Civil Procedure.

¶ 6. On June 27, 2008, at the Alderson trial, [4] Petitioners made no objections to LaCroix's argument and/or assertions or objected to any ruling of the trial court. Nor did Petitioners file any motions to vacate or to reconsider the Judgment of the Alderson Court, pursuant to Rule 59 and/or Rule 60 of the Mississippi Rules of Civil Procedure. (See Transcript) New York Life Ins. Co. v. Brown, 84 F.3d 137, 143 n.4 (5th Cir. 1996) (argument first made in motion to vacate judgment preserved on appeal); Whittaker Corp. v. Execuair Corp., 953 F.2d 515 (9th Cir. 1992) (argument first made in motion for reconsideration preserved on appeal).

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[3] See 2008-CP-00477-COA, Steve Lacroix v. Marshall County Board of Supervisors

[4] Pursuant to the provisions of the DPPA LaCroix voluntarily agreed in the Hatcher Court not to release the information. (T. Pg. 11, 25-29)

SUMMARY OF ARGUMENT

¶ 7. Even on de novo review, a party may not raise new legal arguments. See, e.g. Johnson v. Sawyer, 120 F.3d 1307, 1316 (5th Cir.1997) ("Although we can affirm judgment on grounds not relied upon by the district court, those grounds must at least have been proposed or asserted in that court by the movant"); FDIC v. Laguarta, 939 F.2d 1231, 1240 (5th Cir.1991) (refusing to affirm summary judgment on grounds "neither raised below ... nor even raised sua sponte by the district court")

¶ 8. Petitioners had ample opportunity to present the issues being presented for the first time on appeal to the Chancery court but did not. Petitioners failed to make any argument presented on appeal to the court below. As such Petitioner's issues and argument are waived and barred from appellate review. United States v. Stavros, 597 F.2d 108, 111 (7th Cir. 1979); United States v. Kopel, 552 F.2d 1265, 1274 (7th Cir.), cert. denied sub nom. Kopel v. United States, 434 U.S. 970, 98 S.Ct. 520, 54 L.Ed.2d 459 (1977); United States v. Jackson, 542 F.2d 403, 409 (7th Cir. 1976) (Issues not raised at the trial level will not be considered unless the trial court has committed plain error.) As a general rule, an appellant cannot assert a new theory for the first time on appeal. This rule is based on fairness and incorporates principles of estoppel and waiver. "[S]hould have been affirmatively raised at some point in the proceedings in the court below and was thus waived by appellant's failure to assert it at the trial". Grogan v. United States, 394 F.2d 287, 289 (5th Cir. 1967) "Plaintiff has now had a full opportunity to plead his best case." See Schultea v. Wood, 27 F.3d 1112, 1118 (5th Cir.1994), rehearing en banc granted (Aug. 26, 1994), affirmed in part and remanded in part by, 47 F.3d 1427 (5th Cir.1995) (en banc).

ARGUMENT

"Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them.....Accordingly, we affirm". Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.a., Charles Michel Hartz, No. 06-16158, D. C. Docket No. 03-21759-CV-JEM, 11th Cir. COA, (April 24, 2008)

¶ 9. Petitioner's brief in large part consists of a new argument of the merits of the case and offers no evidence or other authority which might support the issues and arguments presented to this court on appeal. Petitioners attempt to create factual issues by asserting new arguments and assertions that were never put forth prior to appeal are not contained in the record thus are not properly before this court for review. Petitioners offer nothing other than an ad hoc hypothesis created to explain away facts that support the ruling of the trial court. More importantly, Petitioner has not demonstrated that the facts it wishes to seek will actually create a genuine issue of fact material to defeating LaCroix's standing under the 'litigation' and/or 'research' exception of the DPPA. This court's inquiry lies only in the issues, arguments and evidence presented to the trial court.

¶ 10. Defendants are now presenting tenuous arguments different from those previously asserted. Many of the assertions in defendant's Statements Of The Case are not facts at all, but new arguments which were not made below. Findings for the Appellants may not be based upon conjecture and speculation. "The claimant bears the general burden of proof of establishing every essential element of the claim, and it is not sufficient to leave the matter to surmise, conjecture, or speculation." Fought v. Stuart Irby, 523 So. 2d 314, 317 (Miss. 1988); Flinkote Co. v. Jackson, 192 So. 2d 395, 397 (Miss. 1966); Narkeeta, Inc. v. McCoy, 153 So. 2d 798, 800 (Miss. 1963); also see V. Dunn, Mississippi Workers' Compensation, § 265 (3d ed. 1982)

¶ 11. Among other things, Petitioners assert and argue for the first time on appeal that, no evidence or sworn testimony was presented which would warrant disclosure per DPPA (B. Pg 2, ¶ 2);"no reason was given by LaCroix at the time of request to inspect records" (B. pg 3, ¶ 1); "LaCroix never put forward any proof in support of his claim of litigation in federal court,

failed to state the style of the case, what issues it had in common with the records request and made no record of need for the records as evidentiary: (B. Pg 4, ¶ 2); Based 'soley on LaCroix's allegation that he had an action in district court, the chancellor found that none of the information was restricted". (B. Pg 4 ¶ 3),

¶12. The arguments and assertions hereinabove have no merit because they are not genuine issues of material fact. The DPPA and/or the Miss. Public Records Act do not require that evidence be provided or sworn statement be made in order to inspect the subject records pursuant to one of the enumerated exceptions found in 18 U.S.C. § 2721 (4), specifically the litigation exception. The plain and unambiguous language of the DPPA and Public Records Act does not require that LaCroix put forward proof in support of his claim of entitlement to the litigation exception (B. Pg 7 ¶ 2). Nor does the 'litigation exception' of the DPPA require an evidentiary finding by a trial judge before applicability. (B. Pg 7 ¶ 3). The DPPA does not require that the anticipated litigation case style, issues relating to the anticipated litigation or an evidentiary finding are required in order to obtain the records pursuant to the litigation exception. Petitioner's assertion that "based 'soley on LaCroix's allegation that he had an action in district court, the chancellor found that none of the information was restricted", is strictly supposition as the chancellor did not state at any time during the trial that his decision was based "soley on LaCroix's allegation that he had an action in district court.' Furthermore the FDDPA does not state that the requested information must first be classified in any manner. [5] (B. Pg 11, ¶ 2)

¶ 13. in a case on point, the U.S. Supreme Court in Reno v. Condon (98-1464) 528 U.S. 141 (2000) 155 F.3d 453, reversed (on Writ of Certiorari) and recognized that the DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions. The ruling of the Court in Reno did not alter, or cause to be altered legislatively, any language of the DPPA. Congress has had (9) nine years following Reno to amend the DPPA by removing

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[5] In Marx v. Broom, 632 So. 2d, 1318 (Miss. 1994) our supreme court repeated its long-standing rule that "[w]hen the language used by the legislature is plain and unambiguous and where the statute conveys a clear and definite meaning the Court will have no occasion to resort to the rules of statutory interpretation." The court further held that courts cannot restrict or enlarge the meaning of an unambiguous statute.

any of its stated exceptions to disclosure and has not seen fit to do so. If it was the intent of the Supreme Court or Congress to alter the requirements as asserted by Appellants as being required, certainly they would have done so. Thus, it is axiomatic that what Congress intended as exceptions is wholly supported by the clear language of the DPPA.

¶14. In Quarles v. St. Clair, 711 F.2d 691 (5th Cir.1983) the Court stated that a statute should ordinarily be interpreted according to its plain language, unless clear or contrary legislative intention is shown. In Pearl River Valley Water Supply Dist. v. Hinds County, 445 So.2d 1330 (Miss.1984) the Court opined that whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent. See also Isbrandtsen Co. v. Johnson, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952); 'When called upon to apply statutes to specific factual situations, we apply the statues literally according to their plain meaning, and there is no occasion to resort to rules of statutory interpretation where the language used by the legislature is plain, unambiguous and conveys a clear and definite meaning". Chandler v. City of Hackson Civil Serv, 687 So. 2d 142, 144 (1997) Jones v. Mississippi Employment Sec. Comm'n, 648 So. 2d 1138,1142 (Miss. 1995); Marx v. Broom, 632 So. 2d 1315, 1318 (Miss. 1994); City of Natchez v. Sullivan, 612 So. 2d 1087, 1089 (Miss. 1992; Foreman v. Carter, 269 So. 2d 865, 868 (Miss. 1972) Also see Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.a., Charles Michel Hartz, No. 06-16158, D. C. Docket No. 03-21759-CV-JEM, 11th Cir. COA, (April 24, 2008)(appellate review of 'litigation' exception to DPPA) (Thomas' assertion that Hartz did not specify which cases gave rise to the Custom and Practice letters is not a genuine issue of material fact.)

¶15. Petitioners carried the burden at both the Hatcher and Alderson Chancery Court trials of proving their entitlement to an exception under the Mississippi Public Records Act and the Federal Drivers Privacy Protection Act and failed to meet that burden. Frazier v. Pioneer Americas LLC, 455 F.3d 542 (5th Cir.2006); Evans v. Walter Indus., Inc., 449 F.3d 1159; Hart v. FedEx Ground Package System Inc., 457 F.3d 675 (7th Cir.2006)(burden of proving an exception falls on person seeking exemption); See Capital Newpapers Div. v. Burns, 496 N.E.2d 665, 667 (N.Y. 1986) Mississippi Department of Wildlife v. Mississippi Wildlife Enforcement Officers' Association, 740 So. 2d 925 (Miss. 1999) (stating that exemptions are to

be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within an exemption)

¶16. "The touchstone for determining the burden of proof under a statutory cause of action is the statute itself." Schaffer v. Weast, 546 U.S. 49, 56, 126 S.Ct. 528, 534, 163 L.Ed. 2d 387 (2005). "When a statute is silent as to who bears the burden of proof, we resort to "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." Id. "[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. [Petitioner] was not in a position to be passive; it was incumbent upon him to come forward with some evidence showing that the litigation clause did not apply, which he failed to do." Id.

¶17. It is well established that legal arguments may be waived if not properly preserved. In particular, a claim not presented in the trial court ordinarily cannot be raised for the first time on appeal. Singleton v. Wulff, 428 U.S. 106, 121 (1976) it is evident that appeal is not a trial and is not intended to give Petitioners a second opportunity to reargue the facts of its case.

This issue is barred as not supported by the record and not raised at trial. A trial court cannot be put in error on a matter which was not put to him for decision. Crenshaw v. State, 520 So. 2d 131, 134 (Miss. 1988); Howard v. State, 507 So. 2d 58, 63 (Miss. 1987) Quoting Taylor v. State of Mississippi, NO. 98-KA-00292-COA, ¶13 (Miss. 1999)

¶18. As indicated by the record, the argument in the Chancery Court was predicated entirely on the question of whether the subject records were to be made available to LaCroix pursuant to the Public Records Act (R. 13) Now Petitioners make a wholly new argument and assert new and additional issues that were not presented and preserved below. Petitioner's arguments are based on opinion and speculation, not supported by law or the record. None of Petitioner's arguments have merit because Petitioners arguments are conclusory and unsupported by fact and/or authority.

¶19. There is, however, an exception to the 'raise or waive' rule. It has been recognized that an exception to this general rule where an issue raised for the first time on appeal may be heard if it is a purely legal one and if consideration is necessary to avoid a miscarriage of justice. Langhoff Props., LLC v. BP Prods. N. Am., Inc., 519 F.3d 256, 261 n.12 (5th Cir. 2008). Although Petitioner's new argument might be considered a purely legal issue, Petitioners wholly fail to state any evidence or otherwise assert or argue how overturning the trial court's ruling would result in a miscarriage of justice necessitating a departure from the 'raise or waive' rule. Woodmen Life Insurance Society v. JRY, et al., No. 08-30405, (5th Cir., Mar. 23, 2009)

¶20. Petitioner's argument is specious. By selecting certain sections and phrases from the DPPA [6] and trial transcript, Appellants seek to avoid the obvious meaning of the DPPA and the intent of the trial judge. Most importantly, Petitioner's Petition for Declaratory Judgment wholly failed to seek judicial review and/or interpretation of the DPPA and/or make any judicial determination about its exceptions. Petitioners only sought the courts consideration of the records request submitted by LaCroix and the applicable law regarding production of such documents. (R. 13) Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") Boggs v. West, 99-7003, (U.S. COA for Fed Cir., 1999) "we will not consider this argument in the first instance [the] argument concerning the interpretation of [DPPA or [Public Records Act] was not raised below."

¶21. The Chancery Court was not asked by Petitioners to review any of the issues now being presented on appeal. As a general rule, an appellate court will not hear on appeal issues that were not clearly raised in the proceedings below. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); Braun, Inc. v. Dynamics Corp. of Am., 975 F.2d 815, 821 (Fed. Cir. 1992). This rule ensures that "parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision made there of issues upon which they have had no opportunity to introduce evidence."

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[6] Federal Drivers Privacy Protection Act of 1994

Hormel v. Helvering, 312 U.S. 552, 556 (1941)

¶22. Further, Petitioners failed to show how the trial court erred based upon the issues and argument it presented below. The trial court did precisely what Petitioners asked the court to do. Petitioners asked the trial court in it's Petition "that the Court consider the records request submitted by Mr. LaCroix and the applicable law regarding the production of such documents." (R. 13). And at trial, Petitioners asked the court for "some guidance from the Court, " (T. Pg 3, 8-9) Petitioners asked the court to "tell us what to do and to do it, so that we can follow the law." (T. Pg 10, 10-11). "In the absence of meaningful argument and citation of authority, this Court generally will not consider the assignment of error." Id. at 430. See also Stidham v. State, 750 So.2d 1238 (Miss. 2000) (the appellant has a duty to show by plausible argument with supporting authorities how the lower court erred) Rush v. State, 749 So.2d 1024, 1026 (Miss. 1999)(appellate court did not address six issues raised on appeal where appellant did not discuss or cite authority); Sumrall v. State, 758 So.2d 1091, 1094.

¶23. In the case sub judice, Petitioners only make a cursory argument without either citing to specific instances in the record of any error made by the court or abuse of discretion by the trial court. See Randolph v. State of Mississippi, 1999-KA-02119-SCT (2002) (this Court finds that because there is no meaningful argument on this issue for appellate review, the issue is considered waived.)

¶24. For an issue to be "properly preserved" in the trial court, the issue needs to be presented to the trial court for consideration. For another thing, the issue needs to be raised at the appropriate time or times in the trial court. All the arguments Petitioners are making for the first time on appeal could have, and should have, been made to the Chancery Courts below. Calvary Holdings, Inc. v. Chandler, 948 F.2d 59, 64 (1st Cir. 1991); Blum v. Stenson, 465 U.S. 886, 892 n.5 (1984) Petitioners failure to make timely objection to matters raised in argument below will waive any issue on appeal with respect thereto in the absence of plain error. United States v. Ramos, 42 MJ 392, 397 (1995)

¶25. The so called "raise-or-waive" rule is a central precept of appellate litigation in the United States. Petitioners failed to preserve in the court below the issues and arguments presented for the first time on appeal. Petitioner's issues and arguments asserted on appeal

are procedurally barred as Petitioners offer no authority for its argument. Arguments advanced on appeal must "contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record on. See Mississippi Rules of Appellate Procedure 28(a)(6). Failure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred. See Read v. Sonat Offshore Drilling, Inc., 515 So.2d at 921. As such, this particular argument is procedurally barred. Birrages v. Ill. Cent. R.R., 950 So. 2d 188, 194 (¶14) (Miss. Ct. App. 2006) (citations omitted) Petitioners offer no authority in support of its arguments, nor is there new argument contained in the record. Petitioners on appeal do not cite with authority any exceptional reason why this court should consider a new argument and legal theory presented for the first time on appeal and consider this issue as no "miscarriage of justice" will result Sys., Inc. v. Hurston Enters., 566 F.2d 1039, 1041 (5th Cir.1978).

> **It is the duty of the appellant to provide this Court with authority to support his arguments on appeal. Hoops v. State, 681 So. 2d 526 (Miss. 1996). "This Court has repeatedly held that failure to cite any authority may be treated as a procedural bar, and it is under no obligation to consider the assignment."**

Weaver v. State, No. 95-KA-01034-SCT, 1997 WL 703057, at *4 (Miss. 1997) (citing McClain v. State, 625 So. 2d 774, 781 (Miss. 1993)) quoting Gray v. State of Mississippi, No. 96-DP-00241-SCT, ¶180, (Miss. 1998)

¶26. "To preserve an argument, a party 'must press, not merely intimate, an argument." Kelly v. Foti, 77 F.3d 819, 823 (5th Cir. 1996). An argument cannot be raised in a 'perfunctory and underdeveloped' manner. Kensington Rock Island L.P. v. American Eagle Historic Partners, 921 F.2d 122, 124-25 (7th Cir. 1990)...."the touchstone is whether the party sufficiently apprised the trial court of the argument it is pressing on appeal, so that the trial court had an opportunity to rule on it." See Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992); id. Kensington, 921 F.2d at 125 n.1. This stems from a policy of respecting the trial court's function as well as fairness to the parties. A vague reference to an argument, without any legal reasoning, will be deemed waived. See Kensington, id. Similarly, merely citing a statute, case or other authority, without expressly articulating the argument that flows

from those authorities, is inadequate if the argument was not considered by the trial court. See, e.g., Peck v. Lan-sing School Dist., 148 F.3d 619, 626 (6th Cir. 1998).

¶27. Supporting their argument of issues with reasons and authorities is part of an appellant's burden on appeal. Pate v. State, 419 So.2d 1324, 1325-26 (Miss.1982). See Petitioners citation of A.L.R., Deborah F. Buckman, B. Pg 9, ¶1....as stated above, failure to expressly articulate their argument which flows from the cases sited in the A.L.R. says nothing in support of Petitioner's assertions and suppositions. An American Law Review is strictly an analysis of a subject of law by an attorney and is not authority but may be used merely as persuasion. Furthermore, absent the A.L.R. cited by Petitioners, they have not offered one case law citation which supports the assertions and arguments presented on appeal.

¶28. "In the absence of meaningful argument and citation of authority, this Court generally will not consider the assignment of error." Govan v. State, 591 So.2d 430 (Miss.1991) See also Stidham v. State, 750 So.2d 1238 (Miss. 2000) (the appellant has a duty to show by plausible argument with supporting authorities how the lower court erred) Rush v. State, 749 So.2d 1024, 1026 (Miss. 1999)

¶29. "The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal." Chassiniol v. Bank of Kilmichael, 626 So. 2d 127, 133-34 (Miss. 1993). See also Seaney v. Seaney, 218 So. 2d 5 (Miss. 1969), A. H. George And Co. v. Louisville & N. R. Co., 88 Miss. 306, 40 So. 486 (1906).

> **"We have made it transparently clear that the raise-or-waive rule can neither be ignored nor brushed aside as 'a pettifogging technicality or a trap for the indolent." Quoting Judge Bruce M. Selya, Senior Federal Judge on the United States Court of Appeals for the First Circuit, Judicial Panel on Multidistrict Litigation and Chief Judge of the United States Foreign Intelligence Surveillance Court of Review.**

¶30. Petitioner's argument is procedurally barred because it was not presented to the lower court and should not be presented for the first time on appeal. Berdin v. State, 648 So. 2d 73, 80 (Miss. 1994); Collins v. State, 594 So. 2d at 80 (Miss.1992), McCray v. State of Mississippi, NO. 95-KP-00686-SCT (1997) Parties must still place objections on the record to

preserve arguments for appeal. Sonford Prods. Corp. v. Freels, 495 So. 2d 468, 473 (Miss. 1986)(party's argument on appeal was not presented to the administrative judge). "The ordinary result of failure to raise an argument in this situation is waiver...because [Petitioners] had both an opportunity and an incentive to raise the argument below". United States v. Carpenter, 320 F.3d 334, 341 n.6 (2d Cir. 2003)

¶31. "Advancing one theory in the trial court and jettisoning it in favor of another (previously unarticulated) theory in the court of appeals is unacceptable." Such a praxis violates a prudential principle firmly embedded in our jurisprudence that in the absence of extraordinary circumstances 'and none exist in this case', that "legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." Teamsters Union v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992). Cases holding to that effect are legion. See, e.g., Vargas-Ruiz v. Golden Arch Dev., Inc., 368 F.3d 1, 3 (1st Cir. 2004); United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir. 1997); United States v. Dietz, 950 F.2d 50, 55 (1st Cir. 1991); Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987); Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

¶32. "The Court has long held that arguments not asserted at the trial level are waived and barred on appeal." Smith v. State, 430 So. 2d 406, 407 (Miss. 1983). Brooks v. State, 209 Miss. 150, 155-56, 46 So. 2d 94, 97 (1950) and its progeny, Whigham v. State, 611 So. 2d 988, 995-96 (Miss. 1992) and Scarbough v. State, 893 So. 2d 265, 271 (¶16) (Miss. Ct. App. 2004). A party waives any argument on appeal that was not raised in the district court. Stokes v. Emerson Elec. Co., 217 F.3d 353, 358 n.19 (5th Cir. 2000); Guillory v. PPG Industries, Inc., 434 F.3d 303, 313 & n.37 (5th Cir. 2005)

¶33. "This Court has continuously adhered to the rule that questions will not be decided upon appeal which were not presented to the trial court and that court given an opportunity to rule on them." Colburn v. State, 431 So. 2d, 1113 (Miss. 1983) also see Woodmen Life Insurance Society v. JRY, et al., No. 08-30405, (5th Cir., Mar. 23, 2009)

¶34. "Because [Petitioners] failed to present this argument to the district court, they are barred from making it on appeal." See Stokes v. Emerson Elec. Co., id. ("Arguments not raised in the district court cannot be asserted for the first time on appeal."); Brown v. Ames, 201 F.3d

654, 663 (5th Cir. 2000) ("To avoid being waived, an argument must be raised to such a degree that the trial court may rule on it." (internal quotations omitted) quoting Jane Doe, Individually and as next friend of Julie Doe, a minor Plaintiff V. My Space Inc; News Corporation, No. 07-50345, (5th Cir. 2008), Chamberlain v. United States, 401 F.3d 335, 337 n.7 (5th Cir. 2005).

¶35. Petitioner has wholly failed to make a single citation to the record or transcript showing where they posed any error asserted and any issue and/or argument being made for the first time on appeal.

> **"Those submitting blanket allegations in the hope that the Court will pour through the record until we find reversible error will be sorely disappointed. As for supporting authority, citing entire sections of the Mississippi Digest or complete chapters of ALR as references without citing particular cases contained therein does nothing to clarify the issues before the Court and will not be tolerated, much less condoned."** Taylor v. State of Mississippi, NO. 98-KA-00371-COA, ¶33 (Miss. 2000)

ORDER RECUSING CHANCELLOR GLENN ALDERSON

¶36. On October 29, 2008 Chancellor Glenn Alderson, 18th Chancery Court District filed an Order with the Mississippi Supreme Court recusing himself and other judges in the same district from the case at bar. The reason cited by the Chancellor was "The Chancery Clerk of Marshall County has become a party in this action." On November 12, 2008 Chief Justice James Smith signed his Order recusing all of the 18th Chancery District Chancellors pursuant to Miss. Code Ann. Section 9-1-105.

¶37. Chancellor Alderson's Order of recusal is problematic because it is extremely prejudicial to LaCroix. Alderson's statement that the Chancery Clerk "has become a party to this action" is misleading because the Chancery Clerk as Clerk of the Board of Supervisors, is now, and always has been a party in the case at bar and was a party in the Hatcher Court action as well.

¶38. The Chancery Clerk of Marshall County, as Chancellor Alderson is aware, is statutorily mandated as the clerk of the Board of Supervisors. In the first Chancery cause, Hatcher presiding, Chancellor Alderson recused himself before hearing the case for the same reason he now cites in his Order submitted to this court, thus leading to the appointment of Special Chancellor Hatcher to preside over the case. (see 2007-AP-01691)

¶39. When Petitioners Marshall County Board of Supervisors, whose clerk is the Chancery Clerk of Marshall County, filed it's Petition for Declaratory Judgment which is the subject of the case at bar, Chancellor Alderson had the opportunity to do so but did not, recuse himself from presiding over the trial, with the Chancery Clerk of Marshall County present at the trial. Chancellor Alderson did in fact make a determination of facts and enter a judgment against the Board of Supervisors, which arguably includes its clerk, the Chancery Clerk of Marshall County.

¶40. No facts, and/or circumstances have changed since the trial in the case at bar. No additional parties have been added to the case. The parties to the case at bar were named when the action was filed by the Board of Supervisors and are now, still, the same parties which raises the question of how if Chancellor Alderson saw fit to recuse himself in the first case filed by LaCroix which was heard by Special Chancellor Hatcher, he should also have

recused himself in the case at bar prior to hearing facts and evidence and entering a judgment.

¶41. It is an undisputed fact that the issues and arguments presented to the Hatcher Court and the Alderson court did arise from the same nucleus of operative facts, ie., LaCroix's public records request to inspect Mississippi Tag Report records pursuant to the Public Records Act. Petitioners have now had two days in two courts before two judges to plead their case and have failed on each occasion. Now, after more than two years from LaCroix's first public records request, Petitioners now stand to have this court remand their case so that yet a third court and a third judge will hear their arguments and decide the facts.

¶42. Petitioners presented the issue at bar to special Chancellor John Hatcher on March 14, 2008 and a second time to Chancellor Glenn Alderson on September 25, 2008. Petitioners have had not one, but two, days in court regarding the same issue being presented on appeal. To remand this case and permit Petitioners to present its case to yet a third Chancellor would be an egregious injustice to LaCroix. LaCroix has painstakingly prevailed in two courts before two judges and now is facing Petitioners receiving yet a third day in court regarding identical issues which stemmed from the same nucleus of operative facts for a third opportunity for a ruling in their favor. See Marshall County, Mississippi v. Steve LaCroix, 2008-AP-1828 (Miss.); Steve LaCroix v. Marshall County Board of Supervisors, 2008-CP-00477-COA (Miss.)

CONCLUSION

¶43. Appellants have had their day in court on two occasions. Appellants in addition to offering no authority for any argument contained in its appeal also failed to offer any authority or enter any evidence in the lower court thus, the Chancellor's decision must be upheld unless it is found to be contrary to the weight of the evidence or unless it is manifestly wrong. By not presenting its argument in the lower court, this Court should not and must not consider a new argument that directly conflicts with the legal theories presented below. The Petitioners failed to object to and/or challenge the Chancellor's decision in the lower court, Petitioners thereby deprived the Chancery Court any opportunity to reconsider Petitioner's position.

¶44. This Court must find that Petitioner's failure to object to or seek reconsideration from the trial court renders Petitioner's arguments on appeal barred as waived below. It is presumed that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court which they have wholly failed to do. The arguments presented in Appellant's Brief attempt to present §2725 (3) and (4) as requirements under the DPPA when, in fact, Sections (3) and (4) are simply definitions of words used in §2721, 2722, 2723 and 2724. This is disingenuous at best. Since Petitioners failed to provide the trial court with an opportunity to consider its argument submitted on appeal, Petitioner's arguments are waived and must be barred from appellate review.

¶45. In the unlikely event that this case is remanded for further hearing on the merits, LaCroix requests that in light of Chancellor Alderson's recusal, Special Chancellor John Hatcher again be assigned to hear the case.

¶46. There was no error, plain, clear or obvious by the lower Court, no deviation from any legal rule, the Court did precisely what the Apellants asked at trial and the outcome of the trial was not prejudiced. This Court must not disturb the judgment of the trial court and this Court must uphold that judgment.

Respectfully submitted,

/s/

Steve LaCroix
Appellee pro se

CERTIFICATE OF SERVICE

I, Steve LaCroix, appellee, hereby certify that I have on this day mailed, postage prepaid, a true and correct copy of the Brief of Appellee. Steve LaCroix to the following:

Honorable Glenn Alderson
Chancery Court Judge
P.O. Box 70
Oxford, MS 38655

Kent Smith
P.O. Drawer 849
Holly Springs, MS 38635

Justin Cluck
P.O. Drawer 849
Holly Springs, MS 38635

This 21st day of April, 2009

/s/
Steve LaCroix
Appellee

U.S. Code collection

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In General.— A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725 (3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725 (4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible Uses.— Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321–331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations,

recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or Redisclosure.— An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver Procedures.— A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on Conditions.— No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725 (1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

U.S. Code collection

TITLE 18 > PART I > CHAPTER 123 > § 2722

§ 2722. Additional unlawful acts

(a) Procurement for Unlawful Purpose.— It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721 (b) of this title.

(b) False Representation.— It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

U.S. Code collection

TITLE 18 > PART I > CHAPTER 123 > § 2723

§ 2723. Penalties

(a) Criminal Fine.— A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State Department of Motor Vehicles.— Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

U.S. Code collection

TITLE 18 > PART I > CHAPTER 123 > § 2724

§ 2724. Civil action

(a) Cause of Action.— A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.— The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

U.S. Code collection

TITLE 18 > PART I > CHAPTER 123 > § 2725

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[1]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106–229.

[1] So in original. The period probably should be a semicolon.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
April 24, 2008
THOMAS K. KAHN
CLERK

No. 06-16158

D. C. Docket No. 03-21759-CV-JEM

COLIN THOMAS, on behalf of
himself and all others
similarly situated,

Plaintiff-Appellant,

versus

GEORGE, HARTZ, LUNDEEN, FULMER, JOHNSTONE,
KING, AND STEVENS, P.A.,
CHARLES MICHEL HARTZ,
individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 24, 2008)

Before TJOFLAT, MARCUS and WILSON, Circuit Judges.

25

WILSON, Circuit Judge:

Colin Thomas ("Thomas") appeals the district court's grant of summary judgment against his claim that attorney Charles Michael Hartz and the law firm, George, Hartz, Lundeen, Fulmer, Johnstone, King and Stevens, P.A. (collectively, "Hartz") violated the Driver's Privacy Protection Act ("DPPA") by wrongfully obtaining and using personal information contained in driver's license records. We affirm.

I. BACKGROUND

On March 28, 2002, Hartz purchased from the Florida Department of Highway Safety and Motor Vehicles the registration information of all individuals in Miami-Dade County who registered both new and used motor vehicles from January 1, 2000 through March 31, 2002. On November 15, 2002, Hartz purchased the same information for the period April 1, 2002 through November 15, 2002. In total, Hartz accumulated 284,000 driving records of Florida residents. Since Thomas had purchased and registered a Chevrolet Impala in June 2002, his name and address was included in the information obtained by Hartz. Thomas brought suit under the DPPA seeking: (1) $2,500 in statutory liquidated damages; (2) equitable relief for the destruction of illegally obtained records; and (3) certification of a class of consumers.

II. DISCUSSION

Thomas challenges two orders of the district court: (1) the grant of summary judgment in favor of Hartz; and (2) the denial of Thomas' motion to compel the production of discovery.

A. The District Court's Summary Judgment Order

We review the district court's grant of summary judgment de novo. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 836 (11th Cir. 2006).

The DPPA "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)." *Reno v. Condon*, 528 U.S. 141, 143, 120 S. Ct. 666, 668, 145 L. Ed. 2d 587 (2000). One section of the DPPA prohibits disclosures of personal information by a state's department of motor vehicles and any officer, employee, or contractor thereof, *see* 18 U.S.C. § 2721(a), while a separate section provides a private cause of action against persons who knowingly obtain, disclose, or use personal information from a motor vehicle record, *see* 18 U.S.C. § 2724(a).

Despite these prohibitions, Congress made clear that not all obtainment, disclosure, or use of personal information from motor vehicle records is wrongful. In § 2721(b), the DPPA provides fourteen "permissible uses," one of which allows for the information to be used in connection with "investigation in anticipation of

litigation" (hereafter, "the litigation clause"):

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, *investigation in anticipation of litigation*, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4) (emphasis added).

Hartz asserted below that it obtained and used the vehicle records for the purpose of identifying potential witnesses to testify in lawsuits against automobile dealerships. At summary judgment, the district court held that Thomas failed to raise an issue of material fact as to the inapplicability of the litigation clause and failed to raise sufficient evidence as to any alleged impermissible obtainment or use. Thomas contends that the court: (1) erroneously placed the burden on Thomas to show "a purpose not permitted" under 18 U.S.C. § 2724(a); and (2) improperly weighed the summary judgment evidence. As set forth below, neither of these arguments has merit.

1. Burden of Proof Under 18 U.S.C. § 2724(a)

Thomas asserts that the litigation clause in § 2721(b)(4) constitutes an affirmative defense for which the defendant carries the burden of proof. Whether the "permissible uses" listed in § 2721(b) constitute affirmative defenses for which defendants carry the burden of proof is a matter of first impression for this circuit

and has not been addressed by our sister circuits.

The touchstone for determining the burden of proof under a statutory cause of action is the statute itself. *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, 534, 163 L. Ed. 2d 387 (2005). When a statute is silent as to who bears the burden of proof, we resort to "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id.*

The ordinary default rule, however, "admits of exceptions." *Id.* at 57, 126 S. Ct. at 534. One such exception is that "certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions." *Id.*; *accord Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S. Ct. 822, 827, 92 L. Ed. 1196 (1948) ("[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof . . . .") (internal footnote omitted).

Another exception is that courts will "not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Schaffer*, 546 U.S. at 60, 126 S. Ct. at 536 (internal quotation marks omitted). This exception, however, "is far from being universal, and has many qualifications

upon its application." *Id.* (internal quotation marks omitted).

While there have been some circumstances where the Supreme Court has placed the burden of persuasion over an entire claim on the defendant at the outset of a proceeding, *see id.* at 57, 126 S. Ct. at 534-35 (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)), such instances "are extremely rare." *Id.*, 126 S. Ct. at 535.

In examining the statute, we first turn to the DPPA's provision for a civil cause of action:

> A person[1] who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C.A. § 2724(a).

In a straightforward fashion, section 2724(a) sets forth three elements giving rise to liability, i.e., that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted. The plain meaning of the third factor is that it is only satisfied if shown that obtainment, disclosure, or use was not for a purpose enumerated under § 2721(b). Section 2721(b) provides in full:

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[1] The DPPA defines "person" as "an individual, organization or entity, but does not include a State or agency thereof." 18 U.S.C. § 2725(2).

(b) Permissible uses.--Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only--

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

18 U.S.C. § 2721.

In reading § 2724(a) and § 2721(b) together, we conclude that the DPPA is silent on which party carries the burden of proof and, as such, the burden is properly upon the plaintiff. Thomas argues that the permissible uses listed in

§ 2721(b) function as statutory exceptions and, therefore, the defendants should carry the burden of proof to secure entitlement of such exceptions.

We disagree. The DPPA plainly sets forth three elements giving rise to liability, the third of which is whether the subject act was *"for a purpose not permitted."* 18 U.S.C. § 2724(a) (emphasis added). The emphasized language does not frame the § 2721(b) enumerations as exceptions to a general norm. That is, Congress could have said, for example: "A person who knowingly obtains, discloses, or uses personal information, from a motor vehicle record, *shall be liable to the individual to whom the information pertains, except as provided in 18 U.S.C. § 2721(b).*" But Congress did not so draft § 2724(a), and if we read it as such, we place the burden of proving a § 2721(b) enumeration upon the defendant when Congress has not instructed us to do so. Just as we will not write words into a statute to provide a different, or more preferable meaning, *see, e.g., Badaracco v. Comm'r of Internal Revenue,* 464 U.S. 386, 398, 104 S. Ct. 756, 764, 78 L. Ed. 2d 549 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."), so, too, will we not alter statutory structure and language for the purpose of triggering application of a rule of construction. *See Dorelien v. U.S. Att'y Gen.*, 317 F.3d 1314, 1321 (11th Cir. 2003) (en banc) ("Our role is not to second-guess Congress's drafting choices.

Rather, our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them." (internal quotation marks and alterations omitted)).

Congress is adept at drafting general norms that provide for exceptions, and frequently does so; indeed, it did just this with the DPPA in § 2721(a).[2] In both subparts of § 2721(a), Congress explicitly excepted the § 2724(b) enumerations:

> **(a) In general.**--A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
> **(1)** personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, *except as provided in subsection (b) of this section*; or
> **(2)** highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, *except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9)*: *Provided,* That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

18 U.S.C. § 2724(a) (emphasis added).

Section 2721(a) plainly sets up the enumerations in § 2721(b) as exceptions, whereas § 2724(a) plainly does not. We do not believe that this difference in

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[2] Unlike § 2724(a)'s private cause of action, § 2721(a) is directed at state motor vehicle departments and officers, employees, and contractors thereof—not private individuals—and prohibits only disclosures—not obtainment and use.

language is meaningless. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).[3]

Thomas also argues that the burden to show "for a purpose not permitted" should be allocated to defendants because the factual presence of any one permissible purpose in § 2721(b) is "peculiarly within the knowledge" of the defendant. *Schaffer*, 546 U.S. at 60, 126 S. Ct. at 536 (internal quotation marks omitted). From the outset, we recognize that the Supreme Court is cautious in its application of this rule. *Id.* (stating that the "'rule is far from being universal and has many qualifications upon its application.'" (quoting *Greanleaf's Lessee v. Birth*, 6 Pet. 302, 312, 8 L. Ed. 406 (1832); citing 2 J. Strong, McCormick on Evidence § 337, p. 413 (5th ed. 1999) ("Very often one must plead and prove matters as to which his adversary has superior access to the proof.")). We have previously applied this rule where a plaintiff would be unreasonably required "to

[3] We note that placing the burden upon the defendant to show the third element would essentially relegate the motion to dismiss stage to something less than a speed bump in § 2724(a) actions. Plaintiffs could survive a Fed. R. Civ. P. 12(b)(6) challenge upon the bare allegation of a defendant's mere obtainment of information from a vehicle record.

speculate whether defendants intend to assert [a statutory defense] and could result in unfair surprise at trial." *Jackson v. Seaboard Coast Line R. R.*, 678 F.2d 992, 1013 (11th Cir. 1982). In this instance, we are unconvinced that facts giving rise the § 2721(b) enumerations are so peculiarly within the knowledge of the defendant as to cause a shifting of the burden of proof.

Many of the § 2721(b) enumerations are tied to a particular occupation or organization and its corresponding lawful need for the information. *See* 18 U.S.C. § 2721(b)(1) (government agency); § 2721(b)(4) (legal investigation, service, proceedings, and enforcement); § 2721(b)(5) (researchers); § 2721(b)(6) (insurance); § 2721(b)(7) (towed or impounded vehicle); § 2721(b)(8) (private investigative agency or security service); § 2721(b)(10) (private toll transportation facilities). Other § 2721(b) enumerations point to a particularized purpose. *See* 18 U.S.C. § 2721 (b)(2) (safety, theft, emissions, product alteration, performance monitoring, parts and dealers, research, updating of records); § 2721(b)(3) (verification of individual's submission of information); § 2721(b)(9) (employer verification of employee's information); § 2721(b)(14) (state authorized use related to operation of vehicle or public safety). Finally, the remaining three enumerations only apply when the plaintiff has provided consent. *See* 18 U.S.C. § 2721(b)(11)-(13).

Thus, for example, if a plaintiff names a law firm (as here) or an insurance agency as the defendant, there is a high probability that subsection (b)(4) is at issue in the former and (b)(6) in the latter. Similarly, if a plaintiff is a recipient of a mass marketing letter, it is no secret that (b)(12) is at issue, which allows for bulk distribution of solicitations only if express consent is obtained. Upon close examination of § 2721(b), we conclude that plaintiffs will not typically be left in the dark as to which § 2721(b) enumeration, if any, will be asserted as applicable by the defendant. We are confident that proper use of discovery tools, such as interrogatories, requests for admissions, and depositions, will reveal which enumerations may apply and where a plaintiff must accordingly aim its argument.

In the end, where Congress does not squarely address the question, where the statute's structure and language do not suggest a shift of the burden to the defendant (through use of statutory exceptions, for example), and where plaintiffs are not peculiarly at a disadvantage in the discovery of necessary facts, we will not shift the burden or proof, or any element thereof, to the defendant.

2. Whether the District Court Improperly Weighed the Summary Judgment Evidence

Upon Hartz's motion for summary judgment, the district court recognized the evidence showing that obtainment of the information was for the purpose of

Hartz's investigation in anticipation of litigation. (D.E. 336 at 9.) Specifically, in his affidavit, Charles Michael Hartz averred that he requested the information because the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade practice claim under Florida law. (D.E. 30 at Appx. B, ¶ 5.) Thomas does not contend that this was a meritless or even mistaken view of the law at the time.[4] The court next recognized that the deposition testimony submitted by Hartz showed that the information was used to send one-thousand "Custom and Practice" letters, which aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by dealerships. (D.E. 336 at 9.) In this vein, a copy of the Custom and Practice letter was produced in discovery as well as the number of individuals to whom Hartz had sent the letters.

In response to this evidence, Thomas made three claims: (1) Hartz did not identify the names of specific cases giving rise to the Custom and Practice letters;

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[4] Specifically, Hartz contends that the case, *Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 785 So. 2d 564 (Fla. 4th DCA 2001), required plaintiffs bringing claims under the Florida Deceptive and Unfair Trade Practices Act to demonstrate that the defendant had a custom and practice of engaging in deceptive acts against individuals other than the subject plaintiff. It bears mentioning that the Florida Supreme Court reversed *PNR* on March 13, 2003, well after Hartz had obtained the vehicle records. *See PNR, Inc. v. Beacon Prop. Mngmt.*, 842 So. 2d 773 (Fla. 2003).

Third, Thomas attempted to argue that Hartz's use of the information was not for a litigation purpose, but rather for the purpose of sending Thomas a marketing letter. Thomas did not produce such a letter and, at deposition, Thomas testified that he was "less than fifty-percent" or "fifty-percent" certain that he actually received a letter:

> Q: How sure are you that you received the letter from the Hartz company?
> A: I would say less than 50 percent. 50 percent, somewhere around there. You could flip a coin probably would be about right.

(D.E. 336 at 13.)

Further, Thomas attested that if he did receive a letter, he received it in June of 2000. *Id.* Hartz pointed out that such a letter, if received, could not be relevant to this case as it was undisputed that it did not request the information from the department of motor vehicles until 2002. *Id.* The district court correctly determined that this evidence was insufficient to raise a genuine issue of material fact. *See Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004) ("A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment."). On the basis of the evidence before the district court, we find no error in the decision to grant summary judgment.[5]

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[5] Thomas also argues that a particular excerpt from Hartz's deposition indicates a "second ulterior motive" for obtaining the vehicle records; i.e., they were obtained for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation—as opposed to currently

B. The District Court's Denial of the Motion to Compel

In his First Request for Production, Thomas requested "all letters sent by [Hartz] to residents of Miami-Dade County offering to review documents . . . received in connection [with] the purchase or lease of a new vehicle." (D.E. 49 at 10.) Thomas asserts that this request covered Hartz's Custom and Practice Letters. Hartz objected on grounds of overbreadth, relevance, retaliation, work product, and attorney-client privilege. Upon Thomas' Motion to Compel, the district court declined to order the production of all one-thousand Custom and Practice Letters. (D.E. 164 at 3.) At the hearing on the motion, it became clear that a copy of one of the Custom and Practice letters was already in discovery (D.E. 173 at 49, 61), and counsel for Hartz provided a copy of that letter to both counsel for Thomas and the court. (*Id.*) Because the Custom and Practice letters related to the obtainment of witnesses in ongoing lawsuits against automobile dealerships, the district court expressed concern that the letters were covered by the work product privilege. *See* Fed. R. Civ. P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation

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pending cases. Our review of the record reveals that Thomas did not raise this particular argument below and, as such, the argument is waived. *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998). Nonetheless, the argument is without merit. The litigation clause refers to investigation *in anticipation* of litigation. Thus, even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause.

of litigation or for trial by or for another party . . . ."). Specifically, the district court stated: "a letter [sent] out to someone who is involved in the lawsuit saying, 'we are looking for witnesses who were . . . defrauded by this car dealership because I'm representing Joe Smith,' that might be work product." (D.E. 173 at 61.)[6] Counsel for Thomas then stated: "I agree with that" and proceeded to address a different matter. (*Id.* at 61-62.) The issue was not revisited prior to the court's ultimate denial of Thomas' motion to compel the Custom and Practice letters.

Our standard of review is abuse of discretion. *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984) (per curiam). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004).

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[6] Three copies of the Custom and Practice Letter in the record follow this general form stated by the district court. (D.E. 269 at Ex. D, Bates 640, 885, 1095.) That is, the letters' prefatory re: line provides the title of the related case and the introductory sentence states that the law firm "represents [name of plaintiff] in the above captioned matter and we are presently conducting the legal discovery process." *Id.* The letters go on to state the general allegations against the dealership and further explain that since the recipient purchased or leased a vehicle from the dealership at the same time as the plaintiff, the law firm would appreciate the opportunity to speak with the recipient "so as to further establish evidence of the custom and practice used at [the] dealership." *Id.* At the hearing, the court read out-loud the introductory line of the letter to emphasize the point that the letters referred to particular cases. (D.E. 173 at 65.)

Thomas argues that any privilege Hartz had in the Custom and Practice letters was waived because Hartz relied on the letters in asserting that the litigation clause applied. Thomas contends that because the letters remained protected, he was prevented from adequately testing whether the litigation clause applied. We decline to address this waiver argument. Thomas did not raise it below in either his Motion to Compel (D.E. 49 at 5-7, 14) or at the hearing (D.E. 173 at 65).[7] Indeed, as set forth above, Thomas' counsel affirmatively agreed with the court's work product reasoning. Thomas cannot now argue that such reasoning was erroneous. *See Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them.").

Accordingly, we affirm.

AFFIRMED.

[7] The argument advanced by Thomas in his Motion to Compel and at the hearing was that Hartz waived the work product privilege by failing to produce a privilege document log. (D.E. 49 at 5-7; D.E. 173 at 65.)