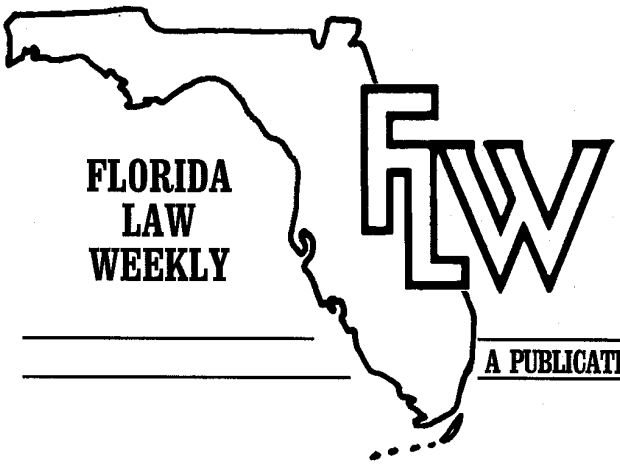
Volume 27, Number 11, March 31, 2020



FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 917-984

Reports of Decisions of:

THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CIVIL PROCEDURE—DEFAULT—CONTRACTS—LIQUIDATED/UNLIQUIDATED DAMAGES. A default judgment entered in a case in which a complaint alleges the precise amount of damages due under the parties' agreement does not automatically "liquidate" damages such that no further inquiry is necessary, even though a defaulting defendant admits to the well-pled allegations of a complaint. A default in this context does not automatically "liquidate" damages such that no further inquiry is necessary.** *BAREKS v. EASTERN METAL COMPANY, LLC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. December 27, 2019. Full Text at Circuit Courts-Original Section, page 956a.*

- **TORTS—DEFAMATION—CYBERSTALKING. A commercial pet retail business brought an action against an opponent alleging defamation and cyberstalking. The court determined that the defendant was entitled to summary judgment on the defamation count, concluding that the plaintiff was a general purpose public figure, the undisputed evidence showed that the defendant believed her statements about the plaintiff's stores, and the plaintiff could not demonstrate that any of the defendant's statements were substantially false. To the extent that the plaintiff's defamation count concerned statements made by the defendant to a county commission, those statements were protected by the privilege to petition the government provided by the First and Fourteenth Amendments and Florida common law. With respect to the claim of cyberstalking, neither posting messages regarding the plaintiff on social media nor conducting internet searches for the plaintiff's name constituted communications "directed at a specific person," within the meaning of section 784.048. Further, the cyberstalking counts were deficient because the plaintiff failed to show that the defendant's communications caused him substantial emotional distress or lacked a legitimate purpose.** *MARQUEZ v. LAZAROW. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. January 10, 2020. Full Text at Circuit Courts-Original Section, page 954b.*

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Bold denotes decision by circuit court in its appellate capacity.

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* * *

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Cite as 27 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Permanent revocation—Fourth conviction for driving under influence—Evidence—Department of Highway Safety and Motor Vehicles was entitled to rely on uncertified out-of-state driving record in permanently revoking license for fourth DUI conviction—No merit to argument that hearing officer departed from essential requirements of law by citing wrong statute in support of license revocation—Petition for writ of certiorari is not proper vehicle for challenging constitutionality of statutes authorizing license revocation—License revocation based on 20-year-old convictions is not barred by statute of limitations, estoppel or laches—Petition for writ of certiorari is denied

KIM ANNETTE BEININGEN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 2018-000059AP-88A. UCN Case No. 522018AP000059XXXXCI. August 8, 2019. Petition for Writ of Certiorari from Decision of Hearing Officer, Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles. Counsel: Leslie M. Sammis, for Petitioner. Christine Utt, General Counsel and Mark L. Mason, Asst. General Counsel, for Respondent.

ORDER AND OPINION

(**PER CURIAM**.) Petitioner, Kim Annette Beiningen, seeks certiorari review of the Department of Highway Safety and Motor Vehicle Hearing Officer's Final Order entered August 29, 2018 which permanently revoked Petitioner's driving privileges for Four or more DUI's (Driving Under the Influence) and the DHSMV Order of Revocation dated August 2, 2018. The Court reviews the underlying Final Order to determine whether Petitioner was afforded due process, whether the hearing officer's decision observed the essential requirements of law and whether competent, substantial evidence supports the hearing officer's decision. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982). For the reasons set for below, the Petition for Writ of Certiorari is denied.

FACTS AND PROCEDURAL HISTORY

Petitioner's driving privileges were suspended by court order for one year following a conviction for DUI in Pinellas County beginning on January 17, 2017. On August 2, 2018, the Department of Highway Safety and Motor Vehicles (Department) sent an Order of Revocation notifying Petitioner that effective January 19, 2017 her driving privileges were permanently revoked in the State of Florida. Petitioner's driving record also reflects that on July 27, 2018, the Department entered a notation on Petitioner's driving record for a permanent revocation for "DHSMV ACTION" for "4 OR MORE DUIS REVOCATION IS A RESULT OF VIOLATION NUMBER 13, 15, 16, 17, 18, 19" Number 13 is the Pinellas County DUI conviction effective January 19, 2017. The other numbers (15-19) refer to DUI convictions, resulting in a disposition of guilty, from the State of Minnesota:

1. Number 15 has an offense date of July 20, 2016 with a disposition date of September 25, 1987.

2. Number 16 has an offense date of March 24, 1988 with a disposition date of May 5, 1988.

3. Number 17 has an offense date of September 6, 1988 with a disposition date of September 16, 1998.

4. Number 18 has an offense date of November 9, 1996 with a disposition date of November 26, 1996.

5. Number 19 has an offense date of July 9, 1996 with a disposition date of November 26 1996.[1]

Petitioner requested a show cause hearing as authorized by Fla.Stat. §322.27(5) (a) which provides "any person whose license is revoked may, by petition, to the department, show cause why his or her license should not be revoked." Petitioner also requested, through a public records request, any and all documents/record to support the Department's action of the permanent revocation. Petitioner received 12 pages from the Department which included the Petitioner's Florida Driving Record and CDL Helpdesk printout related to Petitioner's Minnesota Driving Record. The show cause hearing was held August 27, 2018. Petitioner objected to the Florida Driving Record and CDL Helpdesk printout were not admissible for the following reasons; they were not signed, notarized or certified, the documents were inadmissible hearsay, the documents did not reflect a "guilty" finding, only a "conviction date" and the notations for the out of state convictions were over twenty years old and thus barred by laches, estoppel or statute of limitations. The Hearing Officer overruled all Petitioner's objections. Petitioner's position at the August 27, 2018 hearing was that the hearing was "to show cause why the Department does not have sufficient evidence to uphold the suspension. So this is the driver's opportunity to see what do you have." The hearing officer stated the purpose of the hearing was for the Petitioner "to provide evidence or testimony as to why the record is incorrect. It's not made to invalidate the suspension for this hearing. It's whether you provide sufficient evidence to show that the record is incorrect." The Final Order was entered August 28, 2018 stating:

> "The Department of Highway Safety and Motor Vehicles revoked the driving privilege of Kim Annette Beiningen, effective January 19, 2017, for Four or more DUI's as authorized by section 322.27, F.S.
>
> A hearing was conducted as noticed on August 27, 2018 to afford Petitioner the opportunity to submit evidence to show her driving privileges should not have been revoked.
>
> Upon review of the Department's records and information received at the review, this officer finds, that there is competent substantial evidence to find that the Petitioner's driving privilege was properly revoked by the Department. The Department's Order revoking the Petitioner's driving privilege is affirmed.
>
> Appeal of this order may be initiated by filing a petition for writ of certiorari in the circuit court within 30 calendar days of this order by following the procedure specified in section 322.31, F.S."

STANDARD OF REVIEW

This Court's standard of review for first-tier review of an administrative decision is limited to:

1. Whether due process was accorded
2. Whether the essential requirements of law were observed and
3. Whether the administrative findings and judgment were supported by competent, substantial evidence.

DISCUSSION

Petitioner raised the following issues in her initial brief. Petitioner states the Department departed from the essential requirements because it is not authorized under Fla.Stat. §322.27 to order a permanent revocation for four or more DUI's, the Hearing Officer cited to the incorrect statute in her Final Order, the Department relied upon uncertified records of Petitioner's driving history, Fla.Stat.§322.27 and 322.28(d) are unconstitutional on their face and finally that the actions of the Department are barred by the Statute of Limitation, Equitable Doctrines of Estoppel or Waiver or Laches.

Florida is a member of the Drivers License Compact, which is an agreement among the states providing that a suspension or revocation of a driving privilege in one state will result in a suspension or revocation of a driving privilege in the driver's home state. The Drivers License Compact has been codified in Fla.Stat.§322.44. The statute requires Florida to enter into agreements for the exchange of driver license records with other jurisdictions for the purposes of the

Commercial Driver's License Information System or the National Driver Register. Fla.Stat.§322.65. As such, the Department is authorized to suspend a driving privilege upon conviction for certain offenses in another state. Fla.Stat.§322.27 specifically lists the offenses from another state the Department may consider in revoking a driving privilege.

Petitioner's license was permanently revoked based upon her driving record showing four or more DUI convictions. The Department was authorized to take action on a license without a preliminary hearing upon a showing of its records that the licensee has committed an offense in another state, which, if committed in this state would be grounds for suspension or revocation. Fla.Stat.§322.27. The show cause hearing is authorized by Fla.Stat.§322.27(5)(a) which states that "any person whose license is revoked may, by petition to the department, show cause why his or her license should not be revoked". In the case at bar, Petitioner argues the Department has the burden of showing why the Petitioner's license was revoked. The Department stated the purpose of the hearing "was to provide evidence or testimony as to why the record is incorrect. It's not made to invalidate the suspension for this hearing. It's whether you provide sufficient evidence to show that the record is incorrect."

The Department is able to rely upon the documents furnished by Minnesota as to Petitioner's driving record under the Drivers License Compact. Florida is considered the home state and Minnesota is the reporting state. Article III of the Driver License Compact imposes no duty on the reporting state to submit certified court documents to the one state to prove the veracity of its conviction report. While reports of convictions in abstracts from other states that are not certified or notarized are sometimes challenged by drivers, it is not appropriate for a circuit court to quash orders entered by the Department or require the best evidence of underlying convictions. *Vichich v. DHSMV,* 799 So.2d 1069 (Fla. 2nd DCA 2001) [26 Fla. L. Weekly D2290a]. See also *DHSMV v. Sperberg,* 257 So.2d 560 (Fla. 3rd DCA 2018) [43 Fla. L. Weekly D2318a],"Florida courts have held that a circuit court acting in its appellate capacity on first-tier certiorari review, fails to apply the correct law when the circuit court goes beyond the appropriate standard/scope". *Denson v. State,* 711 So.2d 1225 (Fla. 2nd DCA 1998) [23 Fla. L. Weekly D1216a].

Petitioner asserts the permanent revocation was entered in error as the Hearing Officer cited the incorrect statute in the Final Order and this was an essential departure from the law. The Hearing Officer cited to Fla.Stat.322.27, not Fla.Stat.§322.28. The Department argues that Fla.Stat.322.27(1)(e) provides "if someone commits an offense in another state that would be grounds for suspension or revocation in this state, the Department may take action on the license without preliminary hearing". The Final Order refers to the revocation of Petitioner's driving privileges "for Four or more DUI's

Petitioner contends "the Department only used uncertified records to support any showing of the Petitioner's four or more DUIs which did not provide enough evidentiary support for finding that competent substantial evidence supported Petitioner's drivers license revocation". Petitioner cites to *Sperberg v. Florida Department of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 4a (2018). *Sperberg* was overturned after Petitioner filed the Petition for Writ of Certiorari. *Department of Highway Safety and Motor Vehicles v. Sperberg,* 257 So.2d 560 (Fla. 3rd DCA 2018) [43 Fla. L. Weekly D2318a]. In *Sperberg,* the Department permanently revoked Mr. Sperberg's Florida driving privileges based on records that Mr. Sperbeg had four DUI convictions in the State of Virginia. The Department of Highway Safety and Motor Vehicles attached Mr. Sperberg's uncertified driving transcript which he argued was inadmissible under the best evidence rule. The Circuit Court granted the petition for Writ of Certiorari and the Department appealed. Florida courts have held that a circuit court, acting in its appellate capacity on a first-tier certiorari review, fails to apply the correct law when the circuit court goes beyond the appropriate standard/scope of review. *Miami-Dade County v. Omnipoint Holdings, Inc.* 863 So.2d 195 (Fla. 2003) [28 Fla. L. Weekly S717a]. The 3rd District court cautioned "This Court must exercise caution not to expand certiorari jurisdiction to review the correctness of the circuit court's decision" citing *Futch v. Fla. Dep't Highway Safety & Motor Vehicles,* 189 So.3d, 131, 132 (Fla. 2016) [41 Fla. L. Weekly S150a]. The Department may suspend the license of any person, without preliminary hearing upon a showing of its record or other sufficient evidence that the licensee has committed an offense in another state which, if committed in this state, would be grounds for suspension or revocation. Fla.Stat. 322.27(1) (d). In the case at bar, the Department relied upon the out of state driving record of Petitioner, of which the Petitioner was aware and had been provided pursuant to her public records request to the Department.

Petitioner's third issue is Florida Statute §322.27 and §322.28(d) are unconstitutional on their face as vague, an improper delegation of legislative authorization, a violation of due process, a violation of article I, section 9 and a violation of article II section 3 of the Florida Constitution. Assuming arguendo the Petitioner is correct, a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance. *Miami-Dade County,* 863 So.2d at 199. Petitioner argues that the DHSMV official are left without any standards for guidance. Fla.Stat. §322.27 specifically provides that the department may take action on a license without a preliminary hearing upon a showing of its records that the licensee has committed an offense in another state which, if committed in this state, would be grounds for suspension or revocation. The Department had records from the State of Minnesota reflecting five prior convictions for DUI in Minnesota and it relied upon those records in permanently revoking Petitioner's driving privileges.

Petitioner's final argument is that the revocation based on DUI convictions that occurred, if at all, more than 20 years ago is barred by the Statute of Limitation, or alternatively, the Equitable Doctrines of Estoppel or Waiver or Laches. There is no prescribed time limitation or period in which the Department must take action to suspend or revoke an individual's driving privileges. *Department of Highway Safety and Motor Vehicles v. Hagar,* 581 So.2d 214 (Fla. 5th DCA 1991). Fla. Stat.§322.28(2) (d) provides that the convictions count toward a permanent revocation provided at least one of the convictions for a violation of s. 316.193 or former 316.1931 was for a violation that occurred after 1982. In this case, Petitioner's out of state convictions were all after 1982. Additionally, as noted in *Jennifer Lynn Wallace v. State Department of Highway Safety and Motor Vehicles* (Fla. 12th Jud. Circ. May 8, 2018) referring *to Landes v. Department of Professional Regulation,* 441, So.2d 686 (Fla. 2nd DCA 1983), civil and criminal statutes of limitation are inapplicable to administrative license revocation proceedings absent legislative authority.

Petitioner cites to *Mari Beth Fury v. State Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 421a. (Fla. 13th Jud. Cir. June 14, 2017) in which the circuit court found that a statute of limitation applied to the suspension of a drivers license by fraud. In *Fernando Hincapie Escobar v. Department of Highway Safety and Motor Vehicles,* 2017-CA-008090 (Fla. 13th Cir. Ct., June 15, 2018) [26 Fla. L. Weekly Supp. 346a], the court declined to apply the *Fury* decision, noting that neither *Landes* nor *Sarasota County v. National City Bank of Cleveland, Ohio,* 902 So.2d 233, 234 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D1244b] which cautioned against equating an administrative proceeding with a civil action, where presented to the Fury Court. This Court is mindful of the *Fury* decision and declines to apply it to this case.

CONCLUSION

The Court is not to reweigh the evidence but is to determine only if competent substantial evidence supports the Hearing Officers findings. In reviewing all the evidence of record, the Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's Final Order and the permanent revocation of Petitioner's driving privileges by the Department. The Petition for Writ of Certiorari is denied. (ARNOLD, MUSCARELLA, and MEYER, JJ.)

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[1]The last offenses, number 18 and 19 were separate offenses resulting in convictions entered the same day. Florida law treats the earlier offense date as the earlier conviction for the purposes of enhancing a suspension or revocation period. Fla.Stat.§322.28(2)(a)(2); *Boulineau v. Department of Highway Safety and Motor Vehicles,* 247 So.3d 660 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1141a].

* * *

Criminal law—Judges—Disqualification—Petition for writ of mandamus seeking review of orders denying motions to disqualify judge is dismissed without prejudice—Proper vehicle for review is petition for writ of prohibition, not mandamus, and review of orders of circuit court judge should be filed in district court of appeal, not circuit court

ERIC VINCENT BUCKNER, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-14709-O. December 10, 2019.

ORDER DISMISSING WITHOUT PREJUDICE PETITION FOR WRIT OF MANDAMUS

(TENNIS, J.) **THIS MATTER** came before the Court for consideration of the Petition for Writ of Mandamus, filed on December 6, 2019. The Court finds as follows:

The instant Petition seeks the disqualification of the Honorable Keith F. White, the presiding judge in Case No. 2019-CF-788-A-O, in which Petitioner has been charged with burglary of a structure and other offenses, and in which Petitioner is representing himself. According to the Petition, Petitioner has filed "at least" four motions to disqualify Judge White, but those motions were all "improperly denied."

Under Florida law, the proper procedural vehicle for seeking review of the denial of a motion to disqualify is a petition for writ of prohibition. *See Wal-Mart Stores, Inc. v. Carter*, 768 So. 2d 21, 21-22 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1778d] ("The traditional remedy for interlocutory review of an order denying judicial disqualification is prohibition."). Additionally, since the Petition is seeking review of disqualification orders entered in a Circuit Court case, the Petition should be filed in the next higher reviewing court, not this Court. *See State ex rel. Bettendorf v. Martin County Environmental Control Hearing Bd.*, 564 So. 2d 1227, 1228 (Fla. 4th DCA 1990) (en banc) ("Special writ jurisdiction follows the appellate process."). The proper reviewing Court in the instant case is the Fifth District Court of Appeal.

Accordingly, it is **ORDERED** and **ADJUDGED** that the Petition for Writ of Mandamus is **DISMISSED WITHOUT PREJUDICE** to Petitioner filing a petition for writ of prohibition in the Fifth District Court of Appeal, and that the above-styled case shall be **CLOSED** by the Clerk. (BLACKWELL and CALDERON, JJ., concur.)

* * *

Criminal law—Immunity—Stand Your Ground law—Trial court properly denied motion to dismiss based on Stand Your Ground law immunity after concluding that state had carried its burden of proving by clear and convincing evidence that defendant had not acted in self-defense

ROSE GRAFF, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-12379-O. December 12, 2019. Petition for Writ of Prohibition—Maureen A. Bell, Respondent Judge. Counsel: Robert Wesley, Public Defender and Felipe Franca, Assistant Public Defender, for Petitioner. Aramis D. Ayala, State Attorney and Matthew Kozyra, Assistant State Attorney, for Respondent.

(Before MARQUES, KEST, JORDAN, JJ.)

(PER CURIAM.) Rose Graff petitions this Court for a writ of prohibition challenging the trial court's order denying her motion to dismiss, which was based on the Stand Your Ground law. § 776.032, Fla. Stat. We deny the petition.

The facts of the underlying case involve a physical altercation between a mother—Graff—and her daughter—the victim. Graff asserted that she was entitled to immunity from prosecution under the Stand Your Ground law. The trial court held a hearing, at the conclusion of which it evaluated the testimony and concluded that the State had carried its burden to prove by clear and convincing evidence that Graff had not acted in self-defense and denied her motion to dismiss. *See* § 776.032(4), Fla. Stat. This petition challenging that decision followed. In this proceeding, our standard of review is that "the trial court's findings of fact are 'presumed correct and can be reversed only if they are not supported by competent substantial evidence, while the trial court's legal conclusions are reviewed de novo.' " *State v. Kirkland,* 276 So. 3d 994, 996 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2375a] (quoting *Mobley v. State,* 132 So.3d 1160, 1162 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D64b]). Here, substantial evidence supports the trial court's conclusions. Our review of the record demonstrates that the State indeed proved that nothing substantiated Graff's self-defense claim. At the hearing, both the victim and an independent witness testified that the victim did not precipitate Graff's action in briefly choking her daughter. Indeed, Graff herself could only muster that the victim was yelling at her and that she "accidentally grabbed her by the neck." Ex. C at 49. Accordingly, we agree that the State carried its burden of proof and the motion to dismiss was properly denied.

Therefore, the petition for a writ of certiorari is **DENIED**. (KEST and JORDAN, JJ., concur.)

* * *

Criminal law—Appeals—*Anders* appeal

LUIS JOHAN CARLOS PEYNADO-FATIOL, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2018-AP-7. L.T. Case No. 2017-MM-2809. Appeal from the County Court for Osceola County, Carol E. Draper, Judge. Counsel: Luis Johan Carlos Peynado-Fatiol, pro se, Appellant. Carol Levin Reiss, Office of the State Attorney, Kissimmee, for Appellee.

(Before MURPHY, CALDERON, and STROWBRIDGE, JJ.)

(**PER CURIAM**.) Appellant, Luis Johan Carlos Peynado-Fatiol, appeals his judgment and sentence for the misdemeanor crime of Resisting an Officer without Violence, pursuant to Florida Statute section 843.02 (2014). Appellate counsel filed an *Anders*[1] brief on June 21, 2018. On that same date, Appellate counsel filed a Motion to Withdraw. An Order Granting Motion to Withdraw and Affording Appellant an Opportunity to File a Pro Se Brief was entered on July 9, 2018, wherein Appellant was granted thirty days to file *a pro se* brief. However, to date, Appellant has not done so. The State did not file an answer brief.

Nevertheless, this Court's independent review of the record and pertinent legal authority, pursuant to *Anders v. California,* 386 U.S. 738 (1967) and *In re Anders Briefs,* 581 So. 2d 149 (Fla. 1991), reveals no meritorious point which might support reversal of the conviction and sentence. Notwithstanding such, the Court notes that Appellant's sentence includes a special condition of probation of no early termination, which was not pursuant to a negotiated plea with the State. Though this provision does not warrant reversal, this opinion should not be construed as an endorsement of its

enforceability.

The judgment and sentence below are **AFFIRMED**.

[1]*Anders v. California*, 386 U.S. 738 (1967).

* * *

Criminal law—Prostitution—Jurors—Peremptory challenge—Trial court erred in failing to ask state to provide race-neutral explanations for peremptory strikes of two Hispanic jurors and to ascertain the genuineness of reason given—Hispanics are ethnic group for purposes of *Neil* inquiry—New trial required

LYNETTE MARIA PEREZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2017-AP-13. L.T. Case No. 2016-MM-2854. December 3, 2019. Appeal from the County Court for Osceola County, Carol E. Draper, Judge. Counsel: Sarah Jordan and Brian Johnson, Assistant Public Defender, for Appellant. Carol Levin Reiss, Assistant State Attorney, for Appellee.

(Before CALDERON, STROWBRIDGE, and WEISS, JJ.)

(PER CURIAM.) Appellant was tried and convicted for misdemeanor prostitution. At trial on May 1, 2017, Defense Counsel objected to two peremptory strikes made by the State during the voir dire process. Appellant asserts that that the Trial Court did not adhere to the requirements of the *Neil* inquiry for two challenged jurors. The Trial Court's decision to uphold a peremptory challenge is reviewed for abuse of discretion. *Truehill v. State,* 211 So. 3d 930, 942 (Fla. 2017) [42 Fla. L. Weekly S223a].

The law governing the process for a Neil inquiry is well-defined. Our analysis begins with the initial presumption that peremptory challenges are exercised in a nondiscriminatory manner. *State v. Neil,* 457 So. 2d 481, 486 (Fla. 1984). However, upon objection that a peremptory challenge is being used in a discriminatory manner, the trial court must conduct a *Neil* inquiry. *State v. Johans,* 613 So. 2d 1319, 1322 (Fla. 1993). The *Neil* court provided the guidelines to determine whether a preemptory challenge is used in a discriminatory manner, requiring a party to make a timely objection to the peremptory challenges, demonstrate on the record that the challenged persons are members of a distinct racial group, and that there is a strong likelihood that they have been challenged solely because of their race. *Neil* at 486.

Neil's progeny further clarified and solidified the test. The Supreme Court in *Melbourne v. State,* 679 So. 2d 759, 764 (Fla. 1996) [21 Fla. L. Weekly S358a] detailed the steps necessary for the *Neil* inquiry, holding that a party must first make a timely objection to the other side's use of a peremptory challenge on alleged racial grounds, show that the prospective juror is a member of a distinct racial group, and request that the court ask the striking party its reason for the strike (i.e. conduct a *Neil* inquiry). If these initial requirements are met, the *Melbourne* procedure next requires the trial court to ask the proponent's purpose for the strike, which shifts the burden to the proponent to provide a race neutral reason. *Hayes v. State,* 94 So. 3d 452, 461 (Fla. 2012) [37 Fla. L. Weekly S253a]. Finally, the trial court must ascertain the genuineness of the reason. Compliance with each step is not discretionary, and the proper remedy when the trial court fails to abide by its duty under the *Melbourne* procedure is to reverse and remand for a new trial. *Welch v. State,* 992 So. 2d 206, 212 (Fla. 2008) [33 Fla. L. Weekly S713a].

In this case, Defense Counsel made a timely objection to the State's peremptory strike of Juror Number Six, stated on the record that the juror was Hispanic, and requested that the Trial Court inquire as to the State's race neutral reason for the strike. Defense Counsel met the initial burden, which required the Trial Court to inquire as to a race neutral reason for the strike. Upon request by Defense Counsel, the Trial Court responded, "[b]eing Hispanic is not a race, it's a nationality." However, it is clear that Hispanics are considered an ethnic group for the purposes of a *Neil* inquiry. *State v. Alen,* 616 So. 2d 452, 455 (Fla. 1993). Nonetheless, the State independently proffered a race neutral reason for the strike, indicating that the juror should be stricken because she would require more physical evidence. At this point, the record is devoid of any indication that the Trial Court engaged in a judicial assessment of the genuineness of the reason given for the strike of Juror Number Six, which is grounds for a new trial.[1]

Furthermore, Defense Counsel also met the initial burden with regard to Juror Number Two when he objected to the State's peremptory strike, stated that the juror was Hispanic, and requested that the Trial Court inquire as to what the State's race neutral reason was for the strike. The Trial Court again responded, "Spanish is a nationality, not a race." The Trial Court did not satisfy the second step of the *Melbourne* procedure when it refused to inquire as to a race neutral reason for the State's peremptory strike of Juror Number Two. The Trial Court's failure to make the requisite inquiry warrants a new trial.

Accordingly, we conclude that the Trial Court erred in failing to hold a *Neil* inquiry and not following the *Melbourne* procedure for the two challenged jurors. Because a new trial is granted as to this issue, we do not consider the merits of Appellant's other arguments.

REVERSED AND REMANDED FOR A NEW TRIAL. (STROWBRIDGE and WEISS, JJ., concur.)

[1]When there is no genuineness analysis, Florida courts have consistently held that a new trial is warranted. *Hayes* at 464 (footnote omitted).

* * *

AMERICAN COLONIAL INSURANCE COMPANY, Appellant, v. FLORIDA PAIN AND WELLNESS CENTERS, INC. a/a/o Dennis P. Williams, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018-CV-000004-A-O. L.T. Case No. 2015-SC-12571-O. January 29, 2020. Appeal from the County Court, for Orange County, Eric DuBois, Judge. Counsel: Robert E. Bonner, Meier, Bonner, Muszynski, O'Dell & Harvey, P.A., Longwood, for Appellant. Chad A. Barr, Law Office of Chad A. Barr, P.A., Altamonte Springs; and Timothy A. Patrick (co-counsel), Patrick Law Group, P.A., Tampa, for Appellee.

[Lower court order at 25 Fla. L. Weekly Supp. 815b]

(Before LeBLANC, TENNIS, and WEISS, JJ.)

(**PER CURIAM.**) **AFFIRMED.** Appellant's Motion for Oral Argument, filed on May 22, 2018, is **DENIED.**[1] Appellee's Motion for Award of Appellate Attorney's Fees and Costs, filed on February 22, 2018, is **GRANTED** and the assessment of those fees and costs is **REMANDED** to the trial court. (TENNIS and WEISS, JJ., concur.)

[1]*See* Fla. R. App. P. 9.320.

* * *

Licensing—Driver's license—Early reinstatement— Denial—Consumption of alcohol within five years—No error in denying early reinstatement of driver's license to licensee who admitted to consuming alcohol two months before hearing

WALTER LEE CASON, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Polk County. Case No. 2019AP-000002, Section 30. December 20, 2019. Counsel: James Domineck, Jr., for Petitioner. Mark L. Mason, Assistant General Counsel, for Respondent.

ORDER DENYING THE PETITION FOR WRIT OF CERTIORARI

This matter came before the Court on Petitioner's *Amended Petition for Writ of Certiorari* (hereinafter "Petition"), filed on September 9, 2019. The Petitioner seeks review of the *Final Order Denying Early Reinstatement,* issued on April 5, 2019.

This Court has jurisdiction to review the decision of the hearing

officer of the Department of Highway Safety and Motor Vehicles ("Department") relating to the Petitioner's driver's license reinstatement. *See* Fla. R. App. P. 9.030(c). The standard of review is whether the hearing officer afforded the Petitioner procedural due process, whether the hearing officer departed from the essential requirements of law, and whether the hearing officer's actions are supported by substantial competent evidence. *See Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

The Petition raises the single argument that the hearing officer for the Department erred as a matter of law when he denied early reinstatement of the Petitioner's driving privilege because the Petitioner admitted that he drank a couple of beers two months prior to the hearing. The facts are not in dispute.

The Petitioner argues that the hearing officer should not have required the Petitioner to be alcohol free for the five years immediately prior to the hearing. This argument was not presented to the hearing officer nor was a specific five-year period cited that the hearing officer should have considered alternatively.

More importantly, this Court is duty-bound to consider the established precedent that a petitioner's admission to drinking alcohol within the three months prior to the hearing is a valid basis to deny reinstatement. *See Dep't of Highway Safety and Motor Vehicles v. Walsh,* 204 So.3d 169 (Fla 1st DCA 2016) [41 Fla. L. Weekly D2648b].

Based on the Court's review of the Petition, Appendix, and Response, the Court finds that the hearing officer's decision does not deprive the Petitioner of procedural due process, does not depart from the essential requirements of law, and is supported by substantial competent evidence. Therefore, it is

ORDERED that the Amended Petition for Writ of Certiorari is DENIED.

* * *

Civil procedure—Default—Vacation—Service of process—Defects—Defective return of service—Return of service is defective on its face and default entered based on defective return is invalid where process server attempted to serve process on corporation by service on person other than registered agent but failed to allege in return of service that he first attempted to serve registered agent or that agent was absent

INAOLY AUTO TECH CORP., a Florida corporation, Petitioner, v. LAZARO ROBERTO ROMERO, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-000390-AP-01. L.T. Case No. 2017-005907-SP-26. December 26, 2019. An Appeal from the County Court in and for Miami-Dade County, Lawrence King, Judge. Counsel: Manuel A. Celaya, Paul M. Cowan & Associates, P.A., for Appellant. Tony A. Haber, Law Offices of Tony A. Haber, P.A., for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) We reverse the Default Final Judgment entered below. It's clear that the return of service relied upon by Mr. Romero to obtain the default judgment was defective on its face.

Mr. Romero provided a "SUMMONS/NOTICE TO APPEAR FOR PRETRIAL CONFERENCE DISTRICT COURT" to the Miami Dade Police Department Court Services Bureau to be served on Inaoly Auto Tech Corp. In that form document, Mr. Romero filled in by hand: "DEFENDANT(S) TO BE SERVED AT: ***Registered [sic] Odalys B. Rodriguez***." (emphasis added)

The return of service shows that Deputy Sheriff Robert King served the pretrial notice "BY SERVING A COPY TO ***MARIO RODRIGUEZ BUSINESS AGENT***." (emphasis added) Other than indicating the date, time, and address, the return of service doesn't contain any other information. It's undisputed that Odalys B. Rodriguez was at all pertinent times the only registered agent for Inaoly. Notably, the return contains no information at all regarding any attempt to serve Odalys Rodriguez.

Under the binding authority of *York Communications, Inc. v. Furst Group, Inc,* 724 So. 2d 678 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D231a], when a process server attempts to effect service on a corporation on someone other than the registered agent, the process server must allege in the return of service, "that he first attempted to serve the registered agent or that the agent was absent." Failure to set forth those sworn statements in the return of service renders the service defective on its face. This renders invalid the final default judgment entered based on the defective return.

For these reasons, the trial court should've granted Inaoly's original motions to quash and to set aside the default entered based on the facially defective service. Inaoly was not required to come forward with any affidavits or other sworn proof. There is a patent conflict and inconsistency between the summons prepared by Mr. Romero to be served on "REGISTERED ODALYS B. RODRIGUEZ," and the actual return of service which purports to effect proper service on "MARIO RODRIGUEZ BUSINESS AGENT." Indeed, a "business agent" is not even a recognized term under the law, at least as it relates to service of process on a corporation. Moreover, as noted, there's no explanation in the return of service as to whether the Deputy Sheriff made any attempt to find Odalys Rodriguez to hand her the papers first.

The final default judgment entered is reversed and the case is remanded with directions to quash service and for further proceedings consistent with this opinion.[1] (WALSH AND TRAWICK, JJ., CONCUR.)

[1]As correctly set forth in the reply brief, an involuntary satisfaction of judgment doesn't deprive this court of jurisdiction, nor does it deprive Inaoly of its well-taken appeal. *Great Am. Ins. Co. v. Stolte, Inc.,* 491 So. 2d 352 (Fla. 4th DCA 1986).

* * *

Insurance—Summary judgment—Supporting affidavit was legally insufficient to support summary judgment entered in favor of medical provider where documents attached to affidavit were not sworn or certified copies

STATE FARM MUTUAL INSURANCE COMPANY, Appellant, v. GABLES INSURANCE RECOVERY, INC., a/a/o Gladys Garcia, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2016-000244-AP-01. LT. Case No. 2011-2707-SP-26. December 26, 2019. An Appeal from the County Court in and for Miami-Dade County, Lawrence D. King, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire; and R. Ryan Smith, Kirwan Spellacy & Danner, for Appellant. G. Bart Billbrough, Billbrough & Marks, P.A.; and Adriana de Armas, Gables Insurance Recovery, Inc., for Appellee.

(Before GUZMAN, REBULL, and RUIZ, JJ.)

(PER CURIAM.) We reverse the summary judgment entered below.

In support of its motion for summary judgment, the provider served the affidavit of Dr. Raul Aparicio. Attached to his affidavit were what purported to be "a complete copy of the medical records I reviewed to formulate my opinion regarding the medical treatment at issue." Because this affidavit did not comply with Fla. R. Civ. P. 1.510(e), the trial court erred in entering summary judgment.

That rule provides that:

> Supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. ***Sworn or certified copies of all documents or parts thereof referred to in an affidavit must be attached thereto or served therewith.*** The court may permit ***affidavits to be*** supplemented or ***opposed by depositions***, answers to interrogatories, or by further affidavits.

Fla. R. Civ. P. 1.510(e) (emphasis added).

The provider did not attach or serve sworn or certified copies of the

documents referred to in Dr. Aparicio's affidavit. "A party cannot simply attach unsworn or unauthenticated documents to a motion for summary judgment and satisfy the procedural requirements of Florida Rule of Civil Procedure 1.510(e)." *Gidwani v. Roberts,* 248 So. 3d 203, 208 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a]. As a result, Dr. Aparicio's affidavit was legally insufficient to support the summary judgment entered. On that basis alone, we must reverse the summary judgment entered.

Because the issue might recur on remand (assuming the provider were to attempt to correct the attachment-deficiencies of the affidavit), Dr. Aparicio's later deposition testimony raises—at a minimum—reasonable conflicting inferences as to whether the x-rays ordered were medically necessary and related to the car accident at issue. *See Hayim Real Estate Holdings, LLC v. Action Watercraft Intern. Inc.,* 15 So. 3d 724, 728 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1418a] (reversing summary judgment where the evidence permitted different reasonable inferences).

We need not address the remaining points raised on appeal, as the summary judgment is hereby reversed, and this case is remanded for a trial by the finder of fact. We conditionally grant the insurer's motion for appellate attorney's fees, conditioned on the trial court on remand determining whether it is entitled to fees as a prevailing party in this action and, if so, as to a reasonable amount.

REVERSED AND REMANDED WITH DIRECTIONS. (GUZMAN, REBULL, and RUIZ, JJ., concur.)

* * *

Mortgages—Assignment—Assignee of mortgage received only assignor's right to enforce mortgage

LENOX 16675, LLC, Appellant, v. THE WENDOVER ASSOC. INC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-000357-AP-01. LT. Case No. 2017-00649-CC-23. December 20, 2019. An Appeal from the County Court in and for Miami-Dade County, Spencer Multack, Judge. Counsel: Andrea L. Haber, Galbut, Walters & Associates LLP, for Appellant. David Israel, Israel, Israel & Associates, P.A., for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

ORDER DENYING MOTION FOR REHEARING

[Original Opinion at 27 Fla. L. Weekly Supp. 851a]

(REBULL, J.) Lenox's motion for rehearing is denied.

The motion continues to use the entirely conclusory and unhelpful phrase that an assignee "stands in the shoes of the assignor." Lenox uses this phrase without critically examining exactly what it is that the assignor assigned to the assignee, in the written assignment itself.

In other words, what shoes did the assignor assign to the assignee? In this case, Kondaur Capital assigned to Lenox all of Kondaur's "right, title and interest in and to" the mortgage here involved. The only "shoes" Lenox received were all of Kondaur's property rights ("bundle of sticks," to use the law school analogy) to the mortgage.

This is why Lenox's citation to *LLP Mortg. Ltd. v. Cravero,* 851 So. 2d 897 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1889a] is entirely off point and, indeed, supports this Court's decision. In *Cravero,* the court held that where the federal government, acting through the Small Business Administration, assigns all of its property rights in a mortgage to an entity, the assignee-entity is entitled to the same rights ***to enforce that mortgage***—the federal (as opposed to the state) statute of limitations—that the assignor had. In other words, the assignee stood in the same *enforcement-of-the-mortgage-shoes* as the assignor, the SBA.

Also entirely off point is Lenox's citation to the "safe harbor" provision of section 718.116 of the Florida Statutes. There, by its express terms, the statute applies to a "***first mortgagee or its successors or assignees*** who acquire title to a unit by foreclosure . . . ." (emphasis added) The statute expressly applies to the assignees of a first mortgagee! Here, the only language close to that is in the condo declaration, which by its terms applies to an "assignee of a mortgage originally taken by ***a savings and loan association*** . . . ." Lenox is plainly not an assignee of a savings and loan association.

The motion for rehearing is denied. (TRAWICK AND WALSH, JJ., CONCUR.)

* * *

Criminal law—Driving under influence—Jurors—Challenges—Cause—Prospective juror who opined that police officers are more credible than civilians in DUI cases—Because juror's comments raised reasonable doubt as to ability to be fair, and trial court failed to evaluate the comments, record established manifest error in denial of cause challenge

TREVOR FLOWERS, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-227-AC-01. L.T. Case Nos. A2FJZBP and AlMWSGP. December 31, 2019. An Appeal from County Court in and for Miami-Dade County, Edward Newman, Judge. Counsel: Carlos J. Martinez, Public Defender, and James Odell, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, State Attorney, and Selena Gibson, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

OPINION

(WALSH, J.) On appeal from a conviction for driving under the influence, Appellant Trevor Flowers argues that the trial court erred in denying a cause challenge to a prospective juror who opined that police officers are more credible than civilians in a driving under the influence case. Because the juror's comments raised a reasonable doubt as to his ability to be fair and the trial court failed to evaluate the comments, the record established manifest error in the denial of the cause challenge. We therefore reverse.

In jury selection, Juror Lopez expressed both positive and negative thoughts about police officers. Initially, to the prosecutor, Juror Lopez expressed that he might not be fair and impartial to police officers:

> [PROSECUTOR]: Okay. Mr. Lopez, do you want to go ahead and elaborate on that?
>
> PROSPECTIVE JUROR LOPEZ: A couple months ago my son had a crash and the police officer approached the accident. But at the end of the report, he never reviewed the insurance for the other party. I get the report the same day and I called the insurance and the insurance was expired, but the police never checked that. I can't trust them because they had to verify everything at that moment.
>
> [PROSECUOTR]: Based on that experience, do you feel like you can't be fair and impartial here today and listening to officers coming in and testify (sic)?
>
> THE COURT: is that what you are saying? Are you saying you cannot—you've generalized that you just can't trust officers, or will you be listening and give a fair shake to all the evidence that's presented today?
>
> PROSPECTIVE JUROR LOPEZ: No, everybody is different, but that was my experience.
>
> (T. 55-56)

Later, Juror Lopez told the defense that he would find a police officer's testimony "more credible" in a DUI case:

> [DEFENSE COUNSEL]: Now, let's talk a little about police officers. I know the State went into this a little bit with you about whether you like or dislike a police officer. You are going to hear testimony from police officers in this case and we can all agree that police officers receives (sic) specialized training, correct?
>
> PROSPECTIVE JURORS: Yes.
>
> [DEFENSE COUNSEL]: They go through the Police Academy, they get trained on a lot of different things. They are taught things that non-law enforcements (sic) and civilians like the rest of us are not taught, correct?

PROSPECTIVE JURORS: Correct.

[DEFENSE COUNSEL]: Mr. Lopez, do you think that a police officer's testimony is more credible than someone who is not a police officer?

PROSPECTIVE JUROR LOPEZ: **In DUI cases, I think so because they caught them.**

[DEFENSE COUNSEL]: So you think that in a DUI case that a police officer's testimony is more credible than someone else's because of their training and experience?

PROSPECTIVE JUROR LOPEZ: **If he has evidence**.

THE COURT: This goes to the status. That's the point here. She's testing whether you will give more credibility to a police officer only because he is a police officer. You are supposed to weigh credibility based on the quality of testimony, that's what she's testing on.

PROSEPCTIVE JUROR LOPEZ:—

(T. 101-02) (emphasis added). Juror Lopez did not answer the trial judge's rehabilitating question.

Defense counsel later asked whether it was possible that a police officer could take the stand and lie. Each juror, including Juror Lopez, individually agreed that a police officer could lie. (T. 109)

At the conclusion of jury selection, the defense moved to excuse Juror Lopez for cause on the ground that he "thinks DUI officers are more credible than other people. So I have a reasonable doubt as to his ability to be fair and impartial in a DUI case." (T. 119) The trial judge asked, "State, do you recall it that way?" The State responded, "I don't recall it that way," and the trial judge denied the cause challenge. *Id.*

Defense counsel used a peremptory challenge to remove Juror Lopez, exhausted his remaining peremptory challenges, and requested an additional peremptory challenge to use upon a juror who was empaneled. Because use of an additional peremptory challenge would result in a five-person jury panel, the defense expressly offered to waive the right to a six-juror panel. The prosecutor refused to waive a six-person jury, and the trial court denied the defense's request for an additional peremptory challenge. (T. 123-24). At trial, three law enforcement witnesses, Officer Lee, Officer Cancel and Officer Closius, testified against the Defendant. (T. 127-28)

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *See Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984), *citing Singer v. State,* 109 So. 2d 7 (Fla. 1959). A juror must be excused for cause " 'if any reasonable doubt exists as to whether the juror possesses an impartial state of mind.' " *See Bryant v. State,* 656 So. 2d 426, 428 (Fla.1995) [20 Fla. L. Weekly S164a] (quoting *Hill v. State,* 477 So. 2d 553, 556 (Fla. 1985)).

On appeal, the decision to deny a cause challenge is reviewed for abuse of discretion, will not be overturned absent manifest error, and will be upheld on appeal if there is record support for the ruling. *Busby v. State,* 894 So. 2d 88, 95 (Fla. 2004) [30 Fla. L. Weekly S95a], *citing Fernandez v. State,* 730 So. 2d 277, 281 (Fla. 1999) [24 Fla. L. Weekly S102b]. Courts have "recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." *Taylor v. State,* 638 So. 2d 30, 32 (Fla.1994).

In many decisions spanning decades, Florida's courts of appeal have uniformly held that trial courts should excuse jurors for cause who expresses bias in favor of police officers. *See Duncan v. State,* 588 So. 2d 50 (Fla. 3d DCA 1991) (error to deny cause challenges to jurors who admitted bias in favor of police officers); *Polite v. State,* 754 So. 2d 859 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D905a] (same); *Vega v. State,* 182 So. 3d 848, 850 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D99a] (Courts "routinely have held" that juror who expresses bias in favor of police should be excused for cause); *Rodriguez v. State,* 226 So. 3d 833 at *3 (Fla. 2d DCA May 10, 2017) (unpublished opinion) (same).

Even ambivalent or equivocal statements by jurors expressing the belief that police officers are more credible witnesses may raise a reasonable doubt as to the juror's impartiality requiring a cause challenge. *See Jefferson v. State,* 489 So. 2d 211, 12 (Fla. 3d DCA 1986) (error to deny cause challenge to juror who gave equivocal answers about whether husband's law enforcement career would affect verdict); *Martinez v. State,* 795 So. 2d 279, 282 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2358a] (juror's conflicting statements in voir dire "cast doubt on his ability to evaluate police testimony impartially"); *Salgado v. State,* 829 So. 2d 342, 345 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2343a] (same); *Clemons v. State,* 770 So. 2d 296, 297 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2634a] (same), *Henry v. State,* 756 So. 2d 170, 172 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D804a] (same); *Rimes v. State,* 993 So. 2d 1132, 1134 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2562a] (despite rehabilitation by the trial judge, juror who initially said he would give greater weight to police witness should have been excused for cause).

In contrast, in *Guzman v. State,* 934 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D486a], despite a juror's initial opinion that he would give more credibility to a police officer, the trial court denied a cause challenge, noting that the prospective juror "stressed that he would ultimately base his decision 'upon the evidence presented,' " and understood the importance of juror impartiality. 934 So. 2d at 16-17. In finding no manifest error, the court explained, "the trial judge was in the best position to observe [the juror's] demeanor, assess his candor, and determine whether [he] was impartial." *Id.* at 17.

We must determine whether the record here supports the denial of a cause challenge to Juror Lopez. When Mr. Flowers' lawyer objected to Juror Lopez on the ground that the juror expressed a bias in favor of police witnesses in a DUI case, the trial judge asked, "State, do you recall it that way?" The State responded, "I don't recall it that way," and the motion was denied. Thus, although the trial judge holds a superior vantage point to evaluate a juror's responses, the trial judge here did not interpret the juror's responses; rather, he did not specifically recall them.

Juror Lopez was never rehabilitated. But even if he was, we must evaluate the totality of his responses. In *Rimes v. State,* 993 So. 2d at 1134, although the trial judge attempted to rehabilitate a juror who ultimately agreed to be impartial, the appellate court held that it was error to deny a cause challenge where the totality of the juror's responses evinced bias. *See also Freeman v. State,* 50 So. 3d 1163, 1166 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2748b] (juror's equivocal answers about the credibility of police officers, despite rehabilitation, required removal for cause).

The State contends that Juror Lopez's statements were confusing. Some of his statements indicated an unfavorable opinion of the police, and some of his statements indicated that he would tend to believe the police. Juror Lopez stated that police are more credible on DUI cases "because they caught them" and "if he has evidence." The same juror also opined, "you can't trust" the police, because an officer botched his son's accident report, and finally agreed with the defense that police officers may lie. But the question for us is not whether the juror's responses demonstrated unequivocal bias but rather whether the juror's equivocal responses raised a reasonable doubt as to his impartiality. This issue is especially important in a trial where all witnesses were police officers. We therefore hold that it was manifest error to deny the cause challenge and accordingly, reverse. (TRAWICK, J. CONCURS.)

(REBULL, J. concurring.) I concur in the decision to reverse the

judgment of conviction and sentence. I'm not convinced that the ***totality*** of Juror Lopez's contradictory answers to the questions posed to him throughout the ***entire*** voir dire reflect a "fixed belief"—or even a partiality—that police officers are per se more credible than a witness who is not a law enforcement officer. But I join in the reversal because the trial judge didn't recall Juror Lopez's answers and, therefore, didn't exercise the discretion his superior vantage point gives him to determine for himself—as the trial judge—whether any reasonable doubt exists as to whether Juror Lopez possessed an impartial state of mind.

As an appellate court, we don't engage in a de novo review of the trial court's decision as to whether to grant a challenge for cause. "***The trial court standard*** for granting an excusal for cause is based on reasonable doubt: 'The juror should be excused if there is any reasonable doubt about the juror's ability to render an impartial verdict" *Rodas v. State,* 821 So. 2d 1150, 1153 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1559a] (emphasis added). We don't decide (based only on a cold transcript) whether ***we*** have a reasonable doubt; but instead the question for us is whether the trial judge committed manifest error in his reasonable doubt determination. Because the trial judge in this case made no such reasonable doubt determination at all regarding Juror Lopez, I'm compelled to concur in the decision to reverse the judgment and sentence.

The law is clear on the importance of the trial judge's role in this area:

> A challenge for cause to an individual juror may be made ***only*** on the following grounds:
>
> (10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror ***if he or she declares and the court determines*** that he or she can render an impartial verdict according to the evidence;

§ 913.03, Fla. Stat. (2019) (emphasis added). In this case Juror Lopez did not declare—and the trial judge didn't determine—that he could render an impartial verdict according to the evidence.

The Third District Court of Appeal has plainly laid out the difference in the analysis to be engaged in by the trial judge, and the deference to be accorded to those determinations by an appellate court using the manifest error standard of appellate review:

> It is within the trial court's province to determine whether a challenge for cause should be granted based on a juror's competency, and such a determination will not be disturbed on appeal absent manifest error.
>
> [T]he trial court should evaluate the questions posed to and the answers received from the juror to determine whether the juror's responses are equivocal enough to generate a reasonable doubt as to the juror's fitness to serve.
>
> A trial judge has a unique vantage point from which to evaluate potential juror bias and make observations of the juror's voir dire responses, ***which cannot be discerned by this court's review of a cold appellate record***. Furthermore, ***a trial judge has broad discretion regarding juror competency*** because [t]he trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him.
>
> Again, we emphasize that the trial judge was in the best position to observe Thies' demeanor, assess his candor, and determine whether Thies was impartial.

Guzman v. State, 934 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D486a] (emphasis added).

Because the trial judge in this case didn't use his broad discretion and superior vantage point to make an assessment of Juror Lopez and his ability to render an impartial verdict, I join the decision to reverse the judgment and sentence.

* * *

MARIE DARCISE BUISSERETH, Appellant, v. GUY VELA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-000374 AP-01 (01). L.T. Case No. M17-14911-CC-23. January 13, 2020. An Appeal from the County Court for Miami-Dade County. Alexander S. Bokor, Judge. Counsel: Hegel M. Laurent, for Appellant. Charles H. Groves, for Appellee.

(Before DARYL E. TRAWICK, MIGNA SANCHEZ-LLORENS, and THOMAS J. REBULL, JJ.)

(**PER CURIAM.**) **Affirmed**, in favor of Appellee/Landlord as to possession only, all other claims remain pending before the lower trial court. *First Hanover v. Vazquez,* 848 So. 2d 1188 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1319b] (tenants' cause of action is not lost to them when a court issues a writ of possession, rather they lose only their right to retain possession of the premises by failure to pay the rent to the landlord or into the registry of the court).

Appellee/ Landlord sought costs in addition to possession. The judgment awarding costs shall be stayed pending resolution of Appellant/Tenant's counterclaims. *See Premici v. United Growth Properties, L.P.,* 648 So. 2d 1241 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D228c].

* * *

Criminal law—Operating unregistered vehicle—Evidence—Hearsay

DARRELL JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 19-058 AC. L.T. Case No. AB07ISE. December 16, 2019. An appeal from the County Court, Traffic Division of the Eleventh Judicial Circuit in and for Miami-Dade County. Counsel: James Odell, Assistant Public Defender, for Appellant. David B. Harden, Assistant State Attorney, for Appellee.

On December 11, 2019, the State of Florida filed its Notice of Confession of Error. We have conducted our own independent review of the record and transcript of proceedings. The Confession of Error is well-taken. The State's evidence below is indistinguishable from that presented in *Riggins v. State,* 67 So. 3d 244, 247 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2480b]. The trial court should have granted the defendant's motion for judgment of acquittal.[1]

Accordingly, we reverse the Judgment and sentence dated February 28, 2019, and remand with instructions that the defendant be acquitted of the charge of "NO MOTOR VEHICLE REGISTRATION," in violation of section 320.02(1) of the Florida Statutes. (DARYL TRAWICK, LISA WALSH, THOMAS REBULL, JJ.)

[1]We note that in the trial proceedings, the State made no effort to distinguish *Riggins,* and essentially walked the trial judge into error.

* * *

Counties—Code enforcement—Animals—Hearing officer failed to observe essential requirements of law where hearing officer found citations were properly issued to dog owner who failed to register and vaccinate his dog but dismissed citations based on owner's medical issues despite there being no exemption in county code for personal hardship

MIAMI-DADE COUNTY, Appellant, v. GUSTAVO PEREZ, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-363-AP-01. L.T. Case Nos. 2018-I087983, 2018-I087984. January 3, 2020. On Appeal from final decision by Miami-Dade Code Enforcement Hearing Officer. Counsel: Abigail Price-Williams, Miami-Dade County Attorney and Christopher J. Wahl, Assistant County Attorney, for Appellant. Gustavo Perez, in proper person, Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

OPINION

(PER CURIAM.) County Code Enforcement cited Gustavo Perez for violating sections 5-6 and 5-7, Miami-Dade County Code of Ordinances, requiring yearly licensing and vaccination of his dog against rabies. Mr. Perez timely requested an administrative hearing. At his hearing on June 15, 2018, Mr. Perez admitted that he failed to vaccinate and license his dog and that as of the date of the hearing, he still had not vaccinated his dog.

To excuse his violations, Mr. Perez showed the hearing officer his medical records to prove that he was injured in a car accident. Despite admonishing Mr. Perez "to look out for [his] pet," and that medical injuries did not "justify [him] not taking care of [his] dog," the hearing officer said, "based on [his] medical situation," she would dismiss the case, even though she admitted she was "not even sure how [she] can do it." The hearing officer reset the matter for the following Monday, June 18, 2018, and instructed Mr. Perez that if he vaccinated and licensed his dog by that date, the citations would be dismissed.

The matter was not heard until November 14, 2018, five months after the original hearing. At the hearing, Mr. Perez proved that as of June 18, 2018, he had complied with the vaccination and licensing requirements as he was instructed at his prior hearing. The hearing officer dismissed the citations, "based on a medical reason." In her written order, the hearing officer found that the citations were properly issued and that the Department "presented a preponderance of evidence to indicate that the violator(s) is/ are responsible for the subject violation." Her only factual finding in support of dismissing the citations was "[n]o previous compliance due to medical reasons."

"[C]ircuit court review of an administrative agency decision, under Florida Rule of Appellate Procedure 9.030(c)(3), is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Section 5-6(a) of the Miami-Dade County Code of Ordinances (the Code) requires that all dogs be vaccinated yearly for rabies. Section 5-6(d) establishes a violation for failure to vaccinate or re-vaccinate an animal. Sections 5-7(a) and (c) require that all dogs be licensed and re-licensed annually. Section 5-7(e) makes it a violation to fail to license or re-license an animal.

Although the hearing officer found that the citations were properly issued and proven, she dismissed the citations because of the owner's medical issues. Sections 5-6 and 5-7 set forth enumerated exemptions to the vaccination and licensing requirements. Animals are exempt from vaccination when a veterinarian certifies that vaccination would endanger the animal's life or health. § 5-6(a). Greyhounds and animals used for entertainment are also exempt from vaccination and licensing requirements. §§ 5-6(f); 5-7(f). No other exemptions exist in the code.

The hearing officer's dismissal appears to be based on compassion for the owner's personal issues. There is no code exemption for an owner's personal hardship. Therefore, in dismissing the violations for a reason that has no basis in the code or any other law, her decision constitutes a failure to observe the essential requirements of law. We must therefore reverse the order dismissing the citations and remand for an adjudication of the citations and imposition of fines and costs. (TRAWICK, WALSH AND REBULL, JJ. CONCUR.)

* * *

Criminal law—Appeals—*Anders* appeal

CLEON BEST, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000081-AC-01. L.T. Case No. A91Q4AE. January 8, 2020. An appeal conducted pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), from the County Court for Miami-Dade County, Robin Faber, Judge. Counsel: Cleon Best, in proper person. Christine Zahralban, Assistant State Attorney.

(Before TRAWICK, WALSH, AND REBULL, JJ.)

(PER CURIAM.) Under *Anders v. California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493, this Court deferred ruling on a motion of the public defender to withdraw as counsel for Cleon Best. The Court provided Mr. Best with a copy of the public defender's memorandum brief, and allowed him a reasonable specified time within which to raise any points in support of his appeal. Mr. Best has failed to respond, and after full examination of the proceedings, we conclude that the appeal is wholly frivolous. We thus grant the public defender's motion to withdraw.

"*Anders* review requires this Court to conduct 'a full and independent review of the record to discover any arguable issues apparent on the face of the record.' *In re Anders Briefs,* 581 So. 2d 149, 151 (Fla. 1991). This heightened review ensures a fair result despite the lack of a merits brief by appointed counsel. *Towbridge v. State,* 45 So. 3d 484, 487 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1947a]." *Rice v. State,* 44 Fla. L. Weekly D2727a (Fla. 1st DCA Nov. 13, 2019).

Our independent review of the record and transcript of the bench trial in this case revealed no reversible errors. As a result, we affirm the March 11, 2019 judgment for knowingly driving while license suspended, in violation of section subsection 322.34(2) of the Florida Statutes, where the trial court withheld adjudication.

Affirmed.

* * *

Insurance—Personal injury protection—Attorney's fees—Attorney who was discharged by medical provider before suit for PIP benefits was filed may not recover attorney's fees against insurer who ultimately settled suit with provider—Section 627.428 precludes recovery of pre-suit fees, insurer did not act unreasonably so as to justify award of pre-suit fees, and charging lien does not compel insurer to pay pre-suit fees when attorney's work did not produce positive result for provider

MARK J. FELDMAN, P.A. and MARK J. FELDMAN, ESQ., Appellants, v. INFINITY ASSURANCE INSURANCE COMPANY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-46-AP-01. L.T. Case No. 14-8681-SP-25. December 31, 2019. On Appeal from the County Court in and for Miami-Dade County, Linda Diaz, Judge. Counsel: Mark J. Feldman, P.A. and Mark J. Feldman, for Appellant. Law Offices of Deborah N. Perez & Assoc., and Alina Hart, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

OPINION

(WALSH, J.) Appellants Mark J. Feldman, P.A. and Mark J. Feldman, Esq. (Collectively "Feldman") appeal the trial court's order striking a charging and retaining lien and denying entitlement to attorney's fees. Feldman, who was discharged by his client before any lawsuit was filed, argues that Appellee, Infinity Assurance Insurance Company ("Infinity"), should pay his pre-suit attorney's fees, pursuant to Section 627.428, Florida Statutes. Feldman also complains that the trial judge improperly denied him the right to conduct discovery on the amount of his fees.

On December 6, 2013, Feldman sent a demand letter to Infinity on behalf of his client, Apple Medical Center, for personal injury protection (PIP) benefits. Two months later, Apple Medical Center discharged Feldman and hired a new lawyer. After he was fired, Feldman filed a charging and retaining lien to secure payment of his pre-suit attorney's fees. Successor counsel mailed his own pre-suit demand letter to Infinity, and later, filed a complaint for breach of contract. Two years later, the parties settled.

Feldman then moved for payment of his pre-suit attorney's fees and served voluminous discovery on the amount fees. The trial court

struck his charging lien, denied his entitlement to fees and denied him the right to conduct discovery.

The standard of review of an order determining entitlement to attorney's fees under Section 627.428, Florida Statutes is de novo. *Do v. GEICO General Ins. Co.,* 137 So. 3d 1039 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D455b]. The standard of review of an order denying discovery is abuse of discretion. *Gold, Vann & White, P.A. v. DeBerry By and Through DeBerry,* 639 So. 2d 47 (Fla. 4th DCA 1994).

Feldman may not recover his attorneys fees against the insurer for pre-suit work because (1) the plain language of Section 627.428, Florida Statutes, precludes recovery for pre-suit attorneys' fees, (2) the insurer did not act unreasonably to justify awarding pre-suit fees and (3) a charging lien does not compel an insurer to pay pre-suit attorney's fees where the attorney's work did not produce a positive result for his client. Regarding his claim that he was entitled to conduct discovery on the amount of fees, Feldman was not a party to any lawsuit[1] and was therefore not entitled to engage in discovery on the amount of fees.

No Entitlement to Fees Under Plain Language of Section 627.428, Florida Statutes

Section 627.428, Florida Statutes, shifts the burden of paying attorney's fees to the insurer when an insured receives a judgment, decree or succeeds on appeal against the insurer. In such case, the trial or appellate court "shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney **prosecuting the suit in which the recovery is had**." (emphasis added) Feldman's claim to entitlement to his pre-suit fees turns upon the meaning of this provision.

Recently, the Supreme Court of Florida clearly explained how to interpret the meaning of a statute:

> A court's determination of the meaning of a statute begins with the language of the statute. *Lopez v. Hall,* 233 So. 3d 451, 453 (Fla. 2018) [43 Fla. L. Weekly S11a] (citing *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984)). If that language is clear, the statute is given its plain meaning, and the court does not "look behind the statute's plain language for legislative intent or resort to rules of statutory construction." *City of Parker v. State,* 992 So. 2d 171, 176 (Fla. 2008) [33 Fla. L. Weekly S671a] (quoting *Daniels v. Fla. Dep't of Health,* 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a]).

Lieupo v. Simon's Trucking, Inc., 2019 WL 6904130 (Fla. Dec. 19, 2019) [44 Fla. L. Weekly S298a].

Feldman's work submitting a demand letter—a demand which was never used to form the basis for a suit—does not fall within the plain language of this phrase. The phrase "prosecuting the suit in which the recovery is had" includes three separate elements: "prosecuting," "the suit" and "in which the recovery is had." Feldman was never "prosecuting" because he was fired. He certainly did not prosecute "the suit" because he never filed a suit. And he was not the lawyer who prosecuted the suit "in which the recovery was had"—successor counsel was. The plain language of the phrase "prosecuting the suit in which the recovery is had" therefore excludes payment for submitting unsuccessful, pre-suit demand letters.

Two federal judges construing the plain language of Section 627.428 concluded that all legal work done prior to drafting and filing the complaint is not compensable. In *Kearney v. Auto-Owners Ins. Co.,* 2010 WL 3119380 at *8 (M.D. Fla. Aug. 4, 2010), the court opined,

> [T]he word "prosecute" also limits fees to work on a lawsuit. "Prosecute" means "to commence and carry out a legal action." [Blacks' Law Dictionary 1237 (7th ed.1999)] The term specifically excludes pre-suit work. As the U.S. District Court for the Southern District of Florida found: "The narrow sense of the statute's use of the phrase 'prosecuting the suit' should only include those fees incurred after the Plaintiff's formal initiation of their litigation and no pre-suit activities."

(quoting *Dunworth v. Tower Hill Preferred Ins. Co.,* 2006 WL 889424 (S.D. Fla. Feb. 14, 2006) (Unpublished decision)) In *Dunworth,* another federal judge fractionally reduced the total amount of attorney's fees sought, excluding fees for "time either not permitted, e.g., pre-suit activities, or not related . . . ." *Id.* at *3.

Because Feldman was not the lawyer who "prosecuted the suit in which the recovery was had," his claim for fees was properly stricken.

Feldman Failed to Establish the Insurer's Unreasonable Conduct to Justify Payment of Pre-Suit Fees

This Court must abide by the holding in *U.S. Fidelity and Guar. Co. v. Rosado,* 606 So. 2d 628, 629 (Fla. 3d DCA 1992), that entitlement to fees hinges upon "a determination whether the pre-suit work, particularly those legal services rendered prior to providing the insurer with proof of claims, was necessitated by the insurer's unreasonable conduct."[2] Feldman did not claim in his motion for fees that the insurer did anything unreasonable; he simply argued that he filed a demand letter, that the claimant ultimately prevailed and therefore, he was entitled to fee-shifting compensation for preparing and mailing his demand letter. But Infinity's failure to pay a claim set forth in a demand letter is conduct common to every insurance company named in every PIP lawsuit. If this is Feldman's theory, every insurer named in every PIP lawsuit would be liable for pre-suit work, surely not what the Court in *Rosado* meant by an insurer's "unreasonable conduct."

In *United Automobile Insurance Company v. Affiliated Health Centers, Inc., a/a/o Jacqueline Olivas,* 22 Fla. L. Weekly Supp. 687a (Fla. 11th Jud. Cir. Jan. 16, 2015), in the context of a prevailing party issue, another panel discussed the meaning of an insurer's "unreasonable conduct" which would entitle prevailing plaintiff's counsel to pre-suit fees. The court concluded that failing to pay a claim until the demand letter was filed is not "unreasonable conduct" which would justify pre-suit fees, even though there was no doubt the attorney had done the work. In *Apple Medical Ctr. v. Progressive Select Ins. Co.*, 25 Fla. L. Weekly Supp. 748a (Fla. 11th Jud. Cir., Aug. 27, 2015), a trial judge rejected a similar Feldman pre-suit fee claim, explaining under *Rosado* and the plain language of 627.428, pre-suit fees were not compensable. Likewise, here, Infinity's failure to pay Feldman prior to or after his demand letter, standing alone, does not establish the kind of unreasonable conduct which should result in the penalty of payment of pre-suit fees.

Feldman Failed to Satisfy Prerequisite for Charging Lien

Additionally, Feldman failed to satisfy the prerequisites of a charging lien in order to recover his fees. Feldman argues that he has satisfied the elements of a charging lien: "(1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice." *Daniel Mones. P.A. v. Smith,* 486 So. 2d 559, 561 (Fla. 1986). However, Feldman failed to establish that he obtained a positive result for his former client.

The Third District Court of Appeal explained in *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.,* 517 So. 2d 88, 91 (Fla. 3d DCA 1987), "[i]t is not enough . . . . to support the imposition of a charging lien that an attorney has provided his services; **the services must, in addition, produce a positive judgment or settlement for the client,** since the lien will attach only to the tangible fruits of the services." (emphasis added) *See also Walia v. Hodgson Russ LLP ,* 28 So. 3d 987, 989 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D552a] (where litigation has not yet produced a positive judgment, charging lien is not established).

Feldman did nothing to "produce a positive judgment or settlement for the client." Feldman's demand letter was not used in the lawsuit. Successor counsel mailed a new demand letter and filed the complaint which led to the settlement. Feldman's demand letter thus served no part in producing the positive judgment in this case.

We also reject Feldman's claim that he should have been entitled to conduct discovery on the amount of his fee. The rules of civil procedure do not provide for a non-party to serve discovery. Feldman was correctly denied the right to intervene as a party. He was therefore not permitted to engage in discovery. *See* Rule 1.280(b)(1), Fla. R. Civ. P. Moreover, because Feldman was not entitled to attorney's fees for his pre-suit work, his right to discovery on this matter is moot.

Accordingly, we AFFIRM. (TRAWICK and REBULL, JJ., concur.)

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[1]The trial court denied his motion to intervene as a party plaintiff, and that order was affirmed on December 4, 2018 in a separate appeal in 2016-355-AP-01.

[2]The *Rosado* opinion cites *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So. 2d 217 (Fla.1983), at 219 n. 2. However, the court in *Wollard* did not address entitlement to pre-suit fees under a fee-shifting statute.

* * *

MARK J. FELDMAN, P.A., Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000221-AP-01. L.T. Case No. 2014-12232-CC-25 (04). January 3, 2020. An Appeal from the County Court in and for Miami-Dade County, Carlos Guzman, Judge. Counsel: Mark J. Feldman, for Appellants. Kirwan, Spellacy, Danner, Watkins & Brownstein, P.A.; Birnbaum, Lippman & Gregoire, PLLC; and Nancy Gregoire, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(PER CURIAM.) This Court recently decided *Feldman v. Infinity Assurance Insurance Company,* Case Number 2019-46-AP-01 (Dec. 31, 2019) [27 Fla. L. Weekly Supp. 925b], affirming on the identical issues raised in this appeal. Therefore, this Court summarily affirms on the authority of Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated."). (TRAWICK, WALSH, and REBULL, JJ., concur.)

* * *

MARK J. FELDMAN, P.A. and MARK J. FELDMAN, ESQ., Appellants, v. MGA INS. CO., INC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000176-AP-01. L.T. Case No. 2014-8087-SP-25. January 3, 2020. An Appeal from the County Court in and for Miami-Dade County, Linda Diaz, Judge. Counsel: Mark J. Feldman, for Appellants. Conroy Simberg and Diane H. Tutt, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(PER CURIAM.) This Court recently decided *Feldman v. Infinity Assurance Insurance Company,* Case Number 2019-46-AP-01 (Dec. 31, 2019) 27 Fla. L. Weekly Supp. 925b], affirming on the identical issues raised in this appeal. Therefore, this Court summarily affirms on the authority of Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated."). (TRAWICK, WALSH, and REBULL, JJ., concur.)

* * *

Municipal corporations—Zoning—Conditional use—Business owner of property located across street from property for which conditional use was approved by city design review board does not have standing to seek judicial review of order merely because city code afforded business owner standing before the board—Business owner who has not alleged any special injury or any other injury does not have standing to seek judicial review—Alleged procedural errors that are not fundamental do not confer standing—Even if business owner had standing, it abandoned challenge to city commission order affirming board's order by failing to challenge commission's order in certiorari petition—No merit to claim that approval of application for design review departed from essential requirements of law because application failed to identify all applicants and one of property owners failed to appear in review proceedings where affidavits attached to application identified all applicants, and interests of nonappearing owner were represented by owner who did appear—Decision is supported by competent substantial evidence

BEACH TOWING SERVICES, INC., Petitioner, v. SUNSET LAND ASSOCIATES, LLC, and THE CITY OF MIAMI BEACH, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 19-213-AP-01. L.T. Case No. 17-0198. January 16, 2020. On a Petition for Writ of Certiorari seeking to quash an Order of the City of Miami Beach's Design Review Board (File Number 17-198). Counsel: Kent Harrison Robbins, Law Offices of Kent Harrison Robbins, P.A., for Petitioner. Jeffrey S. Bass, Kathrine R. Maxwell and Alannah Shubrick, Shubin & Bass, P.A., for Sunset Land Associates, LLC, Respondent. Raul J. Aguila, Aleksandr Boksner, and Faroat Andasheva, City Attorney's Office, City of Miami Beach, Respondent.

(Before WALSH, TRAWICK and REBULL, JJ.)

(TRAWICK, J.) Petitioner, Beach Towing Services, Inc. ("Beach Towing"), seeks to quash a December 7, 2018 Order of the Design Review Board (the "DRB") of the City of Miami Beach (the "City"), which approved an Application by Sunset Land Associates, LLC ("Sunset") and which the City Commission unanimously affirmed (the "Commission's Order").

On October 10, 2017, Sunset filed a Land Use Board Hearing Application (the "Application") requesting Conditional Use approval for a five-story mixed use project containing both residential and commercial uses (the "Project"). The Project was to be developed on 0.77 acres located at 1733, 1743, 1747, and 1759 Purdy Avenue, and 1724, 1738, and 1752 Bay Road, Miami Beach, Florida (the "Subject Properties"). Sunset is the owner of three of the Subject Properties, while SH is the owner of five of these Subject Properties. Beach Towing is the lease holder and licensed business owner of a property located at 1349 Dade Boulevard, Miami Beach, Florida, which is across the street from the proposed Project. The DRB heard the Application and rendered the Final Order. This petition followed.

STANDING

"The issue of standing is a threshold inquiry which must be made at the outset of the case before addressing [the merits]." *Ferreiro v. Philadelphia Indem. Ins. Co.,* 928 So. 2d 374, 376 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D719a]. "A plaintiff must demonstrate the existence of an actual controversy between the plaintiff and the defendant in which plaintiff has a sufficient stake or cognizable interest which would be affected by the outcome of the litigation in order to satisfy the requirements of standing." *Matheson v. Miami-Dade Cty.,* 258 So. 3d 516, 519 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2293a] (citing *Warren Tech., Inc. v. Carrier Corp.,* 937 So. 2d 1141, 1142 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2166b]).

Beach Towing claimed standing below based upon; 1) holding a long-term lease and being a licensed business owner of a property located within 375 feet of the subject Property, and 2) based upon its appearance through counsel before the DRB. While this may be sufficient to confer standing before the DRB under the City Code, neither is sufficient to confer standing upon Beach Towing to seek judicial review. "The fact that a person may have the requisite standing to appear as a party before an agency at a de novo proceeding does not mean that the party automatically has standing to appeal." *Martin County Conservation Alliance v. Martin County,* 73 So. 3d 856, 861 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2416a] (citation

omitted).

Beach Towing fails to point to a "special injury" or any other injury in its Petition which would be sufficient to confer standing before this Court. *See Liebman v. City of Miami,* 279 So. 3d 747, 751 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1836a] ("special injury" necessary to confer standing). The Florida Supreme Court has stated that:

> There are three requirements that constitute the "irreducible constitutional minimum" for standing. (citation omitted) First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." (citation omitted) Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." (citation omitted) Third, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

State v. J.P., 907 So. 2d 1101, 1113 n. 4 (Fla. 2004) [29 Fla. L. Weekly S691a]. Beach Towing failed to meet any of these requirements. The errors alleged in the City forms did not materially impair nor effect the DRB's approval of the Application or the Commission's subsequent affirmation of the DRB's decision on appeal.

Additionally, "[w]hen the alleged error is procedural, as in this case, the petitioner must demonstrate that the error is fundamental error. Non-fundamental errors of procedure cannot be the subject of a proceeding for writ of certiorari . . . ." *Gulf Cities Gas Corp. v. Cihak,* 201 So. 2d 250, 251 (Fla. 2d DCA 1967). The crux of Beach Towing's argument is that SH purportedly was not an Applicant. At no time did Beach Towing's counsel maintain that Beach Towing was prevented from fully preparing and presenting its objections at hearings, or that Beach Towing was prejudiced in any other manner due to this purported omission.

We find that Beach Towing lacks standing to challenge either the Order of the DRB or the subsequent order of the Commission.

ABANDONMENT OF CHALLENGE TO CITY COMMISSION ORDER

Even if SH had standing to challenge the DRB and Commission orders, a party abandons any issue that was not raised in the initial petition. *Hall v. State,* 823 So. 2d 757, 763 (Fla. 2002) [27 Fla. L. Weekly S627a]; *J.A.B. Enter. v. Gibbons,* 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992). Beach Towing failed to challenge the City Commission's Order in its petition. Instead, it presented arguments that only addressed the original DRB Order. They are therefore precluded from making argument regarding the Commission's order now.[1]

ANALYSIS OF THE PETITION'S SUBSTANTIVE ARGUMENTS

Certiorari review by this Court typically requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and, (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

With regard to due process, "[a] quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Additionally, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.* The City provided notice by publication, mail and posting. Miami Beach Code of Ordinances section 118-8, which sets forth the City's notice requirements for quasi-judicial public hearings, does not require that the Applicant be identified in the notice. It only requires "a description of the request, and the date, start time of the meeting, and location of the hearing." Code section 118-8(a). Beach Towing was afforded procedural due process having received proper notice and an opportunity to be heard by the DRB.

Further, the essential requirements of the law were observed. Beach Towing argues that SH was not an Applicant as required by the DRB By-Laws and Rules of Order ("DRB By-Laws") Section 3 (Board to Hear Only Bona Fide Cases) even though it is a title owner of five of the eight Subject Properties. Beach Towing claims that because Sunset, the title owner of the other three properties, was the only Applicant, the Application was not *bona fide.* Beach Towing's argument is without merit.

The City of Miami Beach Design Review Board, By-Laws and Rules of Order provide in Article 11, Section 3 that: "The Board may hear only those applications for design review ***brought*** by the legal title owner of record of the subject property . . . ." (emphasis added). There is abundant evidence in the record that this Application was "brought" by the legal title owners of the Property.

SH was identified in the Application and the Application included "OWNER AFFIDAVITS" that were executed on behalf of both Sunset and SH. The third page of each Affidavit was an "APPLICANT AFFIDAVIT" affirming that Sunset and SH were each an Applicant. The City Attorney concluded the same. Indeed, even Beach Towing itself argued that SH was an Applicant during the initial hearing before the DRB.[2] Their change of position punctuates the deficiency of their argument.

Beach Towing further claims that SH was an indispensable party to the DRB proceedings. "An indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action." *Fla. Dep't of Revenue v. Cummings,* 930 So. 2d 604, 607 (Fla. 2006) [31 Fla. L. Weekly S275c]. SH was provided with an opportunity to appear before the DRB and chose not to do so. However, SH shares a common interest in the Project with Sunset, who successfully represented SH's position in the proceedings below. If SH was in fact an indispensable party, SH's position was considered by the DRB prior to issuing its order.

Finally, as to competent substantial evidence, Beach Towing does not argue that the DRB's order lacks such support. It would be difficult for them to credibly do so. The record includes but was not limited to the professional staff report with recommendations and renderings of the project. Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Service Commission,* 380 So. 2d 1028, 1031 (Fla. 1980). As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metropolitan Dade County Bd. of County Com'rs,* 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a]. We find that the Order issued by the DRB was supported by competent substantial evidence.

For the reasons herein discussed, the Petition for Writ of Certiorari is hereby DENIED.[3] (WALSH and REBULL, JJ. concur.)

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[1]If in fact Beach Towing had intended to challenge the City Commission order, they failed to provide a sufficient record of the administrative proceedings before the Commission for appellate review. "An appellate court cannot reverse a decision in the absence of a sufficient record" *Kass Shuler, P.A. v. Barchard,* 120 So. 3d 165, 168 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1807d].

[2]The DRB held an initial hearing on November 6, 2018. However, due to a procedural issue not relevant to this petition, the DRB continued that hearing to December 4, 2018. The DRB entered its order on December 7, 2018.

[3]The Court has considered each of the other arguments raised by Petitioner. However, our findings render a determination of these issues unnecessary.

* * *

Municipal corporations—Zoning—Conditional use—Jurisdiction—Appeals—Claim that planning board lacked jurisdiction over request for a conditional use approval because code required that jurisdiction would not attach until board had a written certificate of the city attorney stating that the subject matter of the request was proper and did not constitute a variance of city's land development regulations, and the certificate before the planning board was issued by a deputy city attorney who had purportedly been recused—Jurisdictional issue which was not raised below and which requires factual determination is not properly before appellate court—Purported error was not fundamental , as city staff report confirmed that application did not require variance—Further, city attorney ratified deputy's allegedly unauthorized certification

BEACH TOWING SERVICES, INC., Petitioner, v. SUNSET LAND ASSOCIATES, LLC, SH OWNER, LLC, and THE CITY OF MIAMI BEACH, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 19-012-AP-01. L.T. Case Nos. (Planning Board File Numbers) PB 17-0168 a/k/a PB 18-0168. January 16, 2020. On a Petition for Writ of Certiorari seeking to quash an Order of the City of Miami Beach's Planning Board (File Number 17-0168). Counsel: Rafael E. Andrade, Law Offices of Rafael E. Andrade, P.A., for Petitioner. Jeffrey S. Bass and Ian E. DeMello, Shubin & Bass, P.A., for Sunset Land Associates, LLC and SH Owner, LLC, Respondents. Raul J. Aguila, Aleksandr Boksner, and Faroat Andasheva, City Attorney's Office, for City of Miami Beach, Respondent.

(Before WALSH, TRAWICK and REBULL, JJ.)

(TRAWICK, J.) Petitioner, Beach Towing Services, Inc. ("Beach Towing"), seeks to quash a December 14, 2018 Order of the Planning Board (the "Planning Board") of the City of Miami Beach (the "City"), which approved an Application by Sunset Land Associates, LLC ("Sunset") and SH Owner, LLC ("SH") (together the "Applicants"), requesting Conditional Land Use Permits in Planning Board File Number 18-0168 (the "Final Order").

On October 10, 2017, Sunset filed a Land Use Board Hearing Application (the "Application") requesting Conditional Use approval for a five-story mixed use project containing both residential and commercial uses (the "Project"). The Project was to be developed on 0.77 acres located at 1733, 1743, 1747, and 1759 Purdy Avenue, and 1724, 1738, and 1752 Bay Road, Miami Beach, Florida (the "Subject Properties"). Sunset is the owner of three of the Subject Properties, while SH is the owner of five of these Subject Properties. Beach Towing is the lease holder and licensed business owner of a property located at 1349 Dade Boulevard, Miami Beach, Florida 33139, which is across the street from the proposed Project. The Planning Board heard the Application and rendered the Final Order. This petition followed.

Certiorari review by this Court typically requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and, (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). Beach Towing only raises the issue of whether the essential requirements of the law were observed.

Section 118-52(b) (Meetings and procedures) of the City of Miami Beach Code of Ordinances (the "Code") provides that:

> Requests. All requests shall be submitted to the city attorney for a determination whether the request is properly such, and does not constitute a variance of these land development regulations. ***The jurisdiction of the planning board shall not attach unless and until the board has before it a written certificate of the city attorney that the subject matter of the request is properly before the board.*** The separate written recommendations of the planning director shall be before the board prior to its consideration of any matter before it. (emphasis added).

Beach Towing alleges that the City Attorney required the recusal of a Deputy City Attorney prior to that Deputy issuing the required certification that the subject Application did not require a variance from land development regulations (the "Certificate"). Based upon the Deputy City Attorney's purported recusal, Beach Towing contends that the Planning Board's Order was void *ab initio* and thus the Board lacked jurisdiction to consider the Application. However, Beach Towing failed to properly provide this Court with a record basis to support its claim that a recusal occurred.

"As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Ass'n v. Robbins,* 914 So. 2d 925, 928 (Fla. 2005) [30 Fla. L. Weekly S763a]; *see Robins v. Colombo,* 253 So. 3d 94, 97 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1821a]. Beach Towing never raised its recusal/jurisdictional argument below. Nevertheless, an exception exists where the issue for the appellate court's consideration is one of the lower tribunal's subject matter jurisdiction. *See City of Miami v. Cosgrove,* 516 So. 2d 1125, 1128 (Fla. 3d DCA 1987); *see also Department of Revenue v. Vanamburg,* 174 So. 3d 640, 642 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2177c] ("Lack of subject matter jurisdiction may be raised for the first time on appeal.").

"[A]n unpreserved jurisdictional issue is properly before the appellate court ***only if the issue does not require a factual determination***." P. Padovano, *Florida Civil Practice* § 8.8 FN 3 (2020 ed.) (emphasis added); *see Florida Auto. Dealers Industry Ben. Trust v. Small,* 592 So. 2d 1179, 1184 (Fla. 1st DCA 1992) (appellate review is only possible when resolution of the issue does not require factual determinations).

Here, the issue of whether a recusal occurred requires a factual determination by the Court as this issue was not raised or part of the record below. In an attempt to resolve this factual issue, Beach Towing improperly attached an email string to its Reply Brief. However, where documents that are not part of the record are attached to an appellate brief, they will not be considered by the appellate court. *See Pedroni v. Pedroni,* 788 So. 2d 1138, 1139 n. 1 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1717a]. "[I]t is a basic tenet of the appellate process that an appeal is based only on evidence presented to the lower tribunal." *Hughes v. Enterprise Leasing Company,* 831 So. 2d 1240-41 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2656a]; *(citation omitted).* "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." *Altchiler v. Dep't Prof'l Regulation,* 442 So. 2d 349, 350 (Fla. 1st DCA 1983)

Further, when an error is unpreserved, the alleged error must constitute a fundamental error in order to be reversible. *Doty v. State,* 170 So. 3d 731, 743 (Fla. 2015) [40 Fla. L. Weekly S442a]. A fundamental error is "one that 'reaches down into the validity of the trial itself' and 'could not have been obtained without the assistance of the alleged error.' " *Id.* at 743 (citations omitted); *See Saka v. Saka,* 831 So. 2d 709, 711 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2335a] (citing *Sanford v. Rubin,* 237 So. 2d 134, 137 (Fla. 1970) ("Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action."). The City's Professional Staff's Report confirmed that the Application did not require a variance and thus the Application was properly before the Planning Board. Accordingly, the alleged error does not reach down to the validity of the proceeding itself.

Even if we were to consider the attachments to Beach Towing's brief, the result would be the same. The assistant city attorney who issued the certification at issue was acting on behalf of the city attorney. Assuming she lacked the authority to issue that certification because of some purported recusal, the attachments reflect that the city attorney plainly ratified her putatively unauthorized actions. "[A]

principal may subsequently ratify its agent's act, even if originally unauthorized, and such ratification relates back and supplies the original authority." *See Juega ex rel. Estate of Davidson v. Davidson,* 8 So. 3d 488, 490 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D917b] (internal quotations and citation omitted).

As the essential requirements of law were observed, the Petition for Writ of Certiorari is hereby DENIED. (WALSH and REBULL, JJ., concur.)

* * *

Municipal corporations—Zoning—Waivers—Setbacks—Issue of zoning administrator's authority to approve waiver of waterfront setback for high-rise condominium and hotel project is moot where developer abandoned waiver at hearing before zoning appeals board—Resolution of board accurately memorializes commitments and agreements made by developer at hearing, including agreement to redesign project to conform with requirements of city charter and code for waterfront setbacks

THE RIVERFRONT MASTER ASSOCIATION, INC., and MINT CONDOMINIUM ASSOCIATION, INC. Appellant, v. CITY OF MIAMI, FLORIDA a political subdivision of the State of Florida, and BRICKVIEW 3114 LLC, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000092-AP-01. L.T. Case No. 2018-0098. January 14, 2020. On Petition for Writ of Certiorari from the City of Miami, Planning, Zoning, and Appeals Board, Enactment No. PZAB-R-19-004. Counsel: Paul C. Savage, Rasco, Klock, Perez & Nieto, P.L., for Petitioners. Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, PLLC, for Respondent Brickview 3114 LLC. Victoria Mendez, City Attorney, and Kerri L. McNulty, Sr. Appellate Counsel, for Respondent City of Miami.

(Before TRAWICK, WALSH, AND REBULL, JJ.)

(REBULL, J.) The River Front Master Association and the Mint Condominium Association petition this court for a writ of certiorari to quash a Resolution[1] of the City of Miami Planning, Zoning and Appeals Board. We dismiss a portion of the petition as moot. Because we also find that the PZAB's Resolution doesn't depart from the essential requirements of law, we deny the petition as to the remaining arguments.

Factual Background and Procedural History

The parties' submissions reflect that Brickview owns the property located at 39-55 and 95 SW Miami Avenue Road in the City of Miami. Brickview has proposed a 58-story mixed use condominium and hotel project known as the "Edge" (the "Project") on the Property. The Property abuts the Miami River, and is located on its south side, next to the Miami Avenue Bridge. The Property is located 217 feet across the river from three existing residential high rises represented by the Petitioners: the Mint, the Ivy, and the Wind (collectively the "Riverfront Project"). In addition to the three existing residential high rises, Petitioner, Riverfront Master Association, represents the interests of three undeveloped lots within the Riverfront Project, which will eventually be developed into additional high rise condominiums.

In connection with the planning and design of the Project, Brickview applied to the "Director of Zoning/Zoning Administrator" for certain waivers from applicable city code provisions.[2] The Zoning Administrator issued a Final Decision (File No. 2018-0098) approving the waivers, with conditions. The waiver which is the main focus of the petition relates to setbacks for waterfront property. The Final Decision reads as follows with regard to the waterfront setbacks:

> The subject proposal has been reviewed for the following Administrative Permits:
>
> • Waiver, pursuant to **Article 3, Section 3.3.3(c)**, Where an existing lot of record is located adjacent to a Thoroughfare in a manner that creates an irregular Frontage such that the side or rear yards cannot be determined as with a regular lot, to allow the Zoning Administrator to determine the yard and setback for the lot, as fits the circumstances of the case.
>
> In reviewing this application the following findings have been made:
>
> **FINDINGS**:
>
> • It is found that the Waterfront setback of 13.2' is 25% of the average Lot depth of 52.76', pursuant to Article 3, Section 3.11(a)(1), which states that where the depth of the Lot is less than two hundred feet (200'), the Setback must be a minimum of twenty-five percent (25%) of the Lot depth.
>
> • It is found that the Waterfront side setback is approximately seventy-four (74') feet, more than the required sixty-nine (69') feet or twenty-five percent (25%) of the water frontage of the average lot width of 276'; to allow View Corridors open from ground to sky and to allow public access to the waterfront, pursuant to Article 3, Section 3.11(a)(2).
>
> • It is found that the Lot is located adjacent to SW Miami Avenue Road in a manner that creates an irregular Frontage, such that the side setbacks cannot be determined as with a regular Lot. Therefore, pursuant to Article 3, Section 3.3.3(c), the Zoning Administrator has determined the side setbacks for the Lot to be zero feet (0'), by Waiver, with ten feet (10') provided on the south-east side, and 53'-5" provided on the south-west side for the Height of the Building.

River Front and Mint appealed the Zoning Administrator's Final Decision to the City of Miami Planning, Zoning and Appeals Board. Part of the basis for the appeal was that the Final Decision violated the City Charter and the City Code as it relates to waterfront setback standards.

The City of Miami's governing document—its Charter—expressly speaks to the heightened scrutiny given to proposals to build on the City's waterfront:

> (ii) In order to preserve the city's natural scenic beauty, to guarantee open spaces, and to protect the waterfront, anything in this Charter or the ordinances of the city to the contrary notwithstanding, neither the city nor any of its agencies shall issue building permits for any surface parking or enclosed structures located on Biscayne Bay or the Miami River from its mouth to the N.W. 5th Street Bridge,
>
> (A) which are not set back at least 50 feet from the seawall (where the depth of the lot is less than 200 feet, the setback shall be at least 25 percent of the lot depth), and
>
> (B) which do not have average side yards equal in aggregate to at least 25 percent of the water frontage of each lot based on average lot width.
>
> (iii) The above setback and side-yard requirements ***may be modified by the city commission*** after design and site-plan review and public hearing ***only if the city commission determines*** that the modifications requested provide public benefits such as direct public access, public walkways, plaza dedications, covered parking up to the floodplain level, or comparable benefits which promote a better urban environment and public advantages, or which preserve natural features.

Section 3(mm)(ii) and (iii), The City of Miami Charter (emphasis added).[3]

Thus, the Charter itself imposes certain setback and side-yard requirements for structures to be built on the waterfront. And it is ***only*** the Miami City Commission which may modify those requirements, provided it makes the determinations set forth in the Charter that the modifications provide the public benefits set forth therein.

At the hearing before the PZAB, the City—which had earlier supported the waterfront setback waiver—acknowledged that it shouldn't have been approved by the Zoning Administrator. As a result, at the PZAB hearing Brickview essentially abandoned that waiver ("We have agreed not to request the Waiver for the Waterfront Setback), and instead pledged to comply with the applicable Charter and code provisions in that regard. The PZAB ultimately voted (in less

than clear oral motions) to reject the appeal of the Final Decision, thus allowing the Final Decision to stand. The City memorialized the PZAB's action in the Resolution which the petitioners are now asking us to quash.

Discussion

1. The Waterfront Setback Waiver Issue is Moot.

We dismiss that portion of the petition related to the waterfront setback issue as moot. "Mootness can be raised by the appellate court on its own motion." *Montgomery v. Dep't of Health & Rehab. Services,* 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). "Mootness occurs in two basic situations: [W]hen the issues presented are no longer 'live' or [when] the parties lack a legally cognizable interest in the outcome." *See id.* at 1016 (internal quotations and citations omitted). "It is the function of a judicial tribunal to decide ***actual controversies*** by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue." *See id.* at 1016-17.

The issue presented as to the waterfront side setback waiver is no longer "live." There is NOT an actual controversy. Brickview has unambiguously indicated that it will not use the waiver from applicable code provisions for the side setbacks. Instead, at the hearing before the PZAB, Brickview clearly indicated that it will comply with the Charter and code provisions regarding the required side setbacks for waterfront property:

> And despite that fact, I will tell you that it is an impact to the project, but ***we're willing to accept it.*** It will require that we reduce—-or increase our setback slightly on the Southeast corner of the property. And ***that will resolve two issues*** that Mr. Martos [on behalf of River Front] has raised today, which is the waterfront setback, and the side setback from the bridge.
>
> * * *
>
> ***We have agreed not to request the Waiver for the Waterfront Setback. So I'm not going to talk about that issue***, but I will talk about the zero front setback.
>
> * * *
>
> We know we have to make changes to the plan anyway as a result of the waterfront setback issue.
>
> * * *
>
> For the record, we're prepared to comply with the waterfront setback requirement. I said it, and I'll say it again, and our client is going to do that. It's a six foot deviation along the street frontage. It's not a big deal, and we're going to do it.
>
> * * *
>
> I want the Board to understand that we mean what we say.
>
> * * *
>
> I don't think that's what this appeal was about, but ***we'll do it.***

(Tr. of PZAB of Jan. 30, 2019 at 53, 58, 85, 138-39)(emphasis added).

Both before and after the PZAB's vote on whether to grant the appeal and reverse the decision of the Zoning Administrator regarding the waiver of waterfront setback requirements, Brickview unequivocally pledged that it was no longer going to use the waiver. It was going to design, plan and build in compliance with the code. At that point, there was nothing for the PZAB to reverse as to that waiver, because Brickview wasn't going to use it. It's more than reasonable to assume that, when the PZAB voted on whether or not to reverse the Zoning Administrator's Final Decision, it did so knowing that waterfront setback waiver was no longer a "live" or "actual" controversy, as Brickview had essentially conceded that the petitioners were correct, and it would not avail itself of the waiver.[4]

As a result, we dismiss the petition as moot, as it relates to the waterfront setback issue.

2. The PZAB Resolution Accurately Memorializes What Happened at the Meeting.

The Petitioners argue that the lower tribunal's determination must be quashed because they contend that the written Resolution doesn't accurately memorialize the action taken by the PZAB. Although the transcript of the proceedings before the PZAB is very far from a model of clarity, the Resolution accurately memorializes what transpired at the hearing. Even assuming the petition were not moot as to the waterfront setback waiver, we deny the Petition on this point.

Before the PZAB took its final vote regarding the appeal of the Final Decision, Brickview made it abundantly clear to the Board (as we've noted in the transcript excerpts above) that it was no longer going to attempt to avail itself of the waiver from charter and code requirements as it relates to waterfront setbacks. It was instead going to redesign its project to comply with those requirements. Thus, as we've already noted above in our discussion of mootness, it's reasonable to assume that when the Board voted, it no longer considered the waterfront setback waiver to be an issue.

Unfortunately, the PZAB voted on the appeal of the Final Decision as a whole; in other words, despite the fact that the Decision granted multiple different waivers as to various matters unrelated to waterfront setbacks (such as, for example, minimum parking space requirements), the Board voted on the appeal of the Decision as a whole.

Board Member Gersten made a motion to "uphold the appeal." The assistant city attorney in attendance characterized the motion as one to "grant the appeal of all the Waivers," and to "grant the appeal in whole, which denies all the waivers." The Board members voted as follows:

Yes	No
1. Garvaglia	1. Althabe
2. Gersten	2. Dominguez
3. Parrish	3. Vadillo
4. Torrens	4. Zeigler
	5. Collins

Thus, the PZAB voted to reject the entire appeal of the Decision.

After that vote, River Front's lawyer addressed the Board: "There were commitments and agreements made here, and ***I want a clear record of those agreements that are still standing.*** The agreement, you will recall, was that the applicant, the developer . . . ." In response, Board Member Collins (who had voted to reject the appeal entirely), inquired as to whether it would be possible to reverse or remove the waiver related to waterfront setbacks, since everyone agreed it wouldn't be used and shouldn't have been granted.

The assistant city attorney told member Collins: "Someone from the prevailing side would have to make a motion to reconsider, and it would have to pass by a super majority—I'm sorry—a majority vote, and then you would have to—someone would have to make a new motion."[5] Board Member Collins then made a motion to reconsider the earlier vote, which rejected the entire appeal. The Board voted as follows on the motion to reconsider:

Yes	No
1. Collins	1. Althabe
2. Gersten	2. Dominguez
3. Parrish	3. Vadillo
4. Torrens	4. Zeigler
	5. Garavaglia

As a result, Mr. Collins—who had earlier voted to reject the appeal in its entirety—voted in support of his motion in an effort to carve out the waterfront setback waiver. Mr. Garavaglia on the other hand—who had voted to reverse all of the waivers in their entirety—voted against the motion for reconsideration. In sum, we had four votes to

reverse the waivers in their entirety (Garavaglia, Gersten, Torrens, Parrish), and member Collins clearly agreed that the waterfront setback waiver should be reversed. Thus, a majority of the PZAB agreed that the waterfront setback waiver should be reversed.

After the motion for reconsideration failed, River Front's lawyer once again addressed the PZAB:

> Through the Chair, if I may, I can't stress this point enough. You have a commitment from the applicant, you have a commitment from the staff, you have an appeal on our behalf saying that the Waterfront Charter requirement have been violated, and you're walking away granting this. I think that's not the intent of any of the Board members.
>
> ***All I'm respectfully requesting is that it be clear for the record that that one waterfront setback requirement is not satisfied.***

River Front's lawyer got what he wanted. He wanted a clear record that Brickview's agreements and commitments were still standing. He also wanted it to be clear that the waterfront setback requirement "is not satisfied." The PZAB Resolution prepared by the City and signed by the Planning Department Director provides in pertinent part as follows:

> WHEREAS, the Appellant claimed the approval violates waterfront standards of the City's Charter and Miami 21, Section 3.11;
>
> WHEREAS, the Applicant and Appellant during the hearing of this appeal mutually agreed that, ***notwithstanding the approval*** of the Setback Waiver by the City's Zoning Administrator, ***the project*** approved pursuant to Waiver No. 2018-0098 ***will be redesigned to provide side setbacks that*** each individually have a consistent width from the street Frontage to the Miami River and, that in the aggregate, ***comply with Miami 21 and Section 3(mm)(ii) of the City Charter***;
>
> NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING, ZONING AND APPEALS BOARD OF THE CITY OF MIAMI, FLORIDA:
>
> Section 1. ***The recitals and findings contained in the Preamble to this Resolution are adopted by reference and incorporated as if fully set forth in this Section.***
>
> Section 2. The appeal of Waiver No. 2018-0098 is denied.
>
> Section 3. Waiver No. 2018-0098 is upheld subject to the redesign of the project approved by Waiver No. 2018-0098 related to the Setback Waiver as mutually agreed by the Applicant and Appellant before the PZAB.

(emphasis added).

The Resolution accurately memorializes the "commitments and agreements" made by Brickview. It also resolves that the waivers were upheld, subject to Brickview redesigning the project to conform with (satisfy) the applicable charter and code requirements related to waterfront setbacks. As a result, we reject the argument that the Resolution does not accurately reflect what transpired at the hearing and, more importantly, that it doesn't accurately reflect the intent of a majority of the Board.

Conclusion

We reject without further extended comment the additional arguments made in the petition. The City's determination that the PZAB's approval of the project would "cure" the open code violation for an unpermitted sales office on the Property, was support by competent substantial evidence, and by a fair reading of what it means for an approval to "cure" a violation. Also, the waiver Final Decision mandated that the plans be changed (from 11%) to comply with the 10% reduction allowed by the waiver. There is no error.

We dismiss the petition as moot as it relates to the waterfront setback waiver abandoned by Brickview. Because the lower tribunal otherwise accorded the petitioners due process, applied the correct law, and issued a decision supported by competent substantial evidence, we deny the Petition. (TRAWICK AND WALSH, JJ., concur.)

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[1]The resolution's "Enactment Number" is PZAB-R-19-004, with an "Execution Date" of 3/6/2019.

[2]"The Waiver permits specified minor deviations from the Miami 21 Code, as provided in the various articles of this Code and as consistent with the guiding principles of this Code. Waivers are intended to relieve practical difficulties in complying with the strict requirements of this Code. Waivers are not intended to relieve specific cases of financial hardship, nor to allow circumventing of the intent of this Code. A Waiver may not be granted if it conflicts with the City Code or the Florida Building Code." Article 7, Section 7.1.2.5 of the Miami 21 Code.

[3]The Miami 21 Code has a Waterfront Standards provisions consistent with the Charter:

3.11 WATERFRONT STANDARDS

In addition to the Miami City Charter requirements, the following Setback, walkways and Waterfront standards shall apply to all Waterfront properties within the City, except as modifications to these standards for all Waterfront properties may be approved by the City Commission pursuant to the procedures established in the City Charter.

a. Waterfront Setbacks

1. For properties fronting a Waterway, the Setback shall be a minimum of fifty (50) feet measured from the mean high water line provided along any Waterfront, except where the depth of the Lot is less than two-hundred (200) feet the Setback shall be a minimum of twenty-five percent (25%) of the Lot depth . . . .

2. For properties fronting a Waterbody, the Setback shall be a minimum of twenty-five (25) feet measured from the mean high water line provided along any Waterfront, except for the following:

1. Where the depth of the Lot is less than one-hundred (100) feet, the Setback shall be a minimum of twenty-five percent (25%) of the Lot depth; and

2. For T3, T4-R, Dl, D2, and D3 Transect Zones, a minimum Setback of twenty (20) feet shall be provided, except where the depth of the Lot is less than eighty (80) feet, the Setback shall be a minimum of twenty-five percent (25%) of the Lot depth.

3. Side Setbacks shall be equal in aggregate to at least twenty-five percent (25%) of the water frontage of each Lot based on average Lot Width, to allow View Corridors open from ground to sky and to allow public access to the Waterfront . . . .

[4]From our review of the transcript, we note that the assistant city attorney assigned to provide guidance to the PZAB on legal and procedural issues (and presumably to help make clear what its intentions were with respect to the appeal), was not particularly helpful in that regard; including the failure to point out that the appeal as to that issue was now moot.

[5]We note that it would've been a lot cleaner for the Board to have been simply presented with the option of voting on the reversal of ***only*** the agreed-upon waterfront setback waiver. Which would've amounted to a ratification of the agreement of the parties.

* * *

Counties—Zoning—Variances—County's decision to grant use variance to allow developer to build parking garage on residential-zoned land is not supported by competent substantial evidence of legal hardship that would occur if variance were not granted—Neither historical difficulty in developing derelict property that is subject to patchwork of zoning designations nor developer's threat to build larger project if use variance for garage was not granted constitutes competent substantial evidence that property would be virtually unusable or incapable of yielding reasonable return without use variance

THE CRICKET CLUB CONDOMINIUM INC., a Florida not for profit corporation, KENNETH ROTH, and RICARDO ROSEMBERG and JOCKEY CLUB CONDOMINIUM APARTMENTS, INC., a Florida not for profit corporation, Petitioners, v. MIAMI-DADE COUNTY, a political subdivision of the State of Florida, and APEIRON MIAMI, LLC,[1] a Florida limited liability corporation, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-18-AP-01. L.T. Case Nos. CZAB 7-1-17 and Resolution Number Z-23-18. January 15, 2020. On Petition for Certiorari from the Miami-Dade County Community Zoning Appeals Board 7. Counsel: W. Tucker Gibbs, W. Tucker Gibbs, PA, for Petitioners. Dennis A. Kerbel, Assistant County Attorney, Miami-Dade County Attorney's Office; Augusto Maxwell, Akerman, LLP; Paul C. Savage, Rasco, Klock, Perez & Nieto; and Glen H. Waldman, Waldman Barnett, PL, for Respondents.

(Before TRAWICK, WALSH, and REBULL, JJ.)

(WALSH, J.) The Jockey Club, a gated development east of Biscayne Boulevard and Northeast 111th Street, was developed and built over 53 years ago as a condominium, restaurant, marina, pro-shop and club. Petitioners, neighbors who reside both in the existing Jockey Club and its adjacent property, the Cricket Club ("Cricket Club"),

object to Miami-Dade County resolutions approving non-use and use variances granted to Respondent Apeiron Miami, LLC (Developer) to develop property located within the Jockey Club.

Over the last 20 years, the Jockey Club has degraded from a formerly vibrant community club, marina and condominium to a dilapidated, run-down facility and an unusable marina. The County Planning Division described the Jockey Club as a " 'dead spot' off limits to the neighboring" community. Because of the difficulties inherent in abiding by a patchwork of varied zoning designations, past attempts to develop the property failed. To circumvent these difficulties, the Developer applied to the County and obtained non-use and use variances to build a 120-unit residential property and a 90-room hotel within four varied-height buildings, a separate parking garage and signage.

Petitioners make three arguments to quash these variances. First, they complain that the zoning board improperly granted non-use variances. Second, they complain that that their vested rights as neighbors to the development would be infringed. Finally, they argue that no competent substantial evidence in the record supported the decision to grant a use variance to build a parking garage.

At oral argument, the Petitioners abandoned their challenges to the non-use variances and their vested rights arguments. In view of these concessions and after reviewing the evidence presented below, we conclude that the decisions by the Community Zoning Appeals Board, the Development Impact Committee, and the County Commission below approving the non-use variances and overruling the assertion of vested rights were supported by substantial, competent evidence. We therefore deny the petition on those grounds. However, we agree that there was no competent substantial evidence to support the County's approval of the use variance granted to build a parking garage on residential-zoned land.

Municipal approval of a use variance is quasi-judicial and subject to certiorari review. *Park of Commerce Assoc. v. Delray Beach,* 636 So. 2d 12, 15 (Fla. 1994); *Skraggs v. Key West,* 312 So. 2d 549, 551-552 (Fla. 3d DCA 1975); *Broward County v. G.B.V. International, Ltd.,* 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S389a]. We apply a three-part standard of review: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *Board of County Comm'rs of Brevard County v. Snyder,* 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

The Petitioners argue that the decision to grant a use variance was not supported by competent, substantial evidence. Our review on this issue is limited. We do not reweigh evidence, but rather determine whether there was competent substantial evidence to support the decision of the lower tribunal:

> The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau v. Metro. Dade County Bd. of County Com'rs, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County,* 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987) ("Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives.").

Section 33-311(A)(4)(a) of the Miami-Dade County Code sets forth the requirements to obtain a use variance:

> Use variances from other than airport regulations. Upon appeal or direct application in specific cases to hear and grant applications for use variances from the terms of the zoning regulations as will not be contrary to the public interest, where owing to special conditions, **a literal enforcement of the provisions thereof will result in unnecessary hardship**, and so the spirit of the regulations shall be observed and substantial justice done; provided, that the use variance will be in harmony with the general purpose and intent of the regulation, and that the same is the minimum use variance that will permit the reasonable use of the premises; and further provided, no variance from any airport zoning regulation shall be granted under this subsection; provided, however, no use variance shall be granted permitting a BU or IU use in any residential, AU or GU District, unless the premises immediately abuts a BU or IU District. A "use variance" is a variance which permits a use of land other than which is prescribed by the zoning regulations and shall include a change in permitted density. (emphasis added)

The County granted this use variance in a residential zone (RU-4) to build a parking garage to serve a condominium and hotel. "Florida courts have held that a legal hardship will be found to exist only in those cases where the **property is virtually unusable or incapable of yielding a reasonable return** when used pursuant to the applicable zoning regulations." *Maturo v. City of Coral Gables,* 619 So. 2d 455, 456 (Fla. 3d DCA 1993) (emphasis added). *See also Metropolitan Dade County v. Betancourt,* 559 So. 2d 1237, 1239 (Fla. 3d DCA 1990) ("Where land is zoned for residential use, deprivation of all beneficial use is proved only when it is established by competent evidence that the land cannot be used for any of the purposes permitted in such district"); *Bernard v. Town Council of Palm Beach,* 569 So. 2d 853 (Fla. 4th DCA 1990) (to justify a use variance, applicant must demonstrate "unique hardship," that " 'renders it virtually impossible to use the land for the purpose for which it is zoned.' ") (quoting *Town of Indialantic v. Nance,* 485 So. 2d 1318, 1320 (Fla. 5th DCA 1986)).

In granting the use variance, the County and Developer relied upon (1) the historical difficulty in developing the Jockey Club property given the patchwork of zoning designations, (2) Apeiron's mock-up presentation of a much larger development it could build if its requested variances were not adopted, and (3) the Planning Division staff analysis.[2] Neither the historical difficulty developing the Jockey Club nor Apeiron's threat to build a larger project, without more, constitutes competent substantial evidence that the property would be "virtually unusable" or "incapable of yielding a reasonable return" without the use variance. In fact, the Developer acknowledged that it could build a smaller or different garage.

Additionally, nothing in the planning staff analysis supports the conclusion that the property would be unusable or incapable of a reasonable return without the use variance. There was no evidence at all demonstrating the financial constraints of the property as presently zoned. Instead, staff acknowledged difficulties in developing on the site and the odd location of the BU-2 portion, not suitable for placement of the garage. Staff further opined that rezoning the entire property to build the garage would be inconsistent with the rest of the property, and ultimately decided, "a hotel and residential uses are the only viable opportunity to develop the site."

In the absence of competent substantial evidence of legal hardship to justify an agency's approval of a use variance, a circuit court is compelled to quash the agency decision. In *Herrera v. City of Miami,* 600 So. 2d 561 (Fla. 3d DCA 1992), the Third District Court of

Appeal quashed a use variance granted in the absence of evidence that the land would otherwise be virtually unusable or would not yield a reasonable return without the variance. The Third District has consistently quashed variances granted by municipalities in the absence of this heightened showing. *See Fine v. City of Coral Gables,* 958 So. 2d 433, 434 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1155a] (circuit court properly quashed decision to grant a use variance where applicant failed to demonstrate any legally cognizable hardship); *Auerbach v. City of Miami,* 929 So. 2d 693, 694 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1432a] (same); *Maturo v. City of Coral Gables,* 619 So. 2d 455 (Fla. 3d DCA 1993) (same); *Hemisphere Equity Realty Co. v. Key Biscayne Prop. Taxpayers Ass'n,* 369 So. 2d 996, 1001 (Fla. 3d DCA 1979) (same). We conclude that the Developer failed to present evidence to establish that without the variance, it was virtually impossible to use the land or that the subject property was unusable or incapable of yielding a reasonable return.

All parties conceded at oral argument that a decision quashing the use variance would not be preclusive—that on remand, the Respondent Apeiron Miami, LLC should be permitted the opportunity to present competent substantial evidence to the Community Zoning Appeals Board demonstrating the required showing of hardship for the requested use variance.[3]

Therefore, we grant Petitioner Cricket Club's petition in part and quash the County's approval of the use variance. In all other respects, the petition is denied. This matter is remanded with directions to permit the developer to present evidence in support of the use variances.

Certiorari granted in part, denied in part. (TRAWICK and REBULL, JJ., concur.)

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[1]The Petitioner misspelled the name of the Respondent as "Aperion Miami, LLC." The Respondent's correct name is "Apeiron Miami, LLC" and the project is entitled, "Apeiron at Jockey Club." We have directed the clerk to correct the spelling in the docket.

[2]The staff analysis is contained at Appendix Tab F to the Petition for Writ of Certiorari.

[3]The Petitioners as well as the Respondents Apeiron Miami LLC and Miami-Dade County conceded that on remand, Apeiron will not be forced to apply anew and redesign the plans. The County will therefore not force Respondent Apeiron to apply anew and redesign the plans, unless Apeiron is unable to establish legal hardship.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Summary judgment—Trial court erred in rejecting affidavit of insurer filed in opposition to medical provider's motion for summary judgment on issue of reasonableness of charges on basis that affidavit referred to Medicare and workers' compensation fee schedules and HMO and PPO rates—Affidavit that was not conclusory, indicated source of affiant's knowledge, contained evidence pertinent to statutory reasonableness factors, and was supported by exhibits was legally sufficient—Motion for summary judgment should have been denied

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI-DADE COUNTY MRI, CORP., a/a/o Beisy Munoz, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-170 AP 01. L.T. Case No. 12-14168 SP 23 (01). December 31, 2019. On Appeal from the County Court for Miami-Dade County. Myriam Lehr, Judge. Counsel: Michael J. Neimand, House Counsel, United Automobile Insurance Company, for Appellant. Kenneth J. Dorchak of Buchalter, Hoffman & Dorchak, P.A., and Chad A. Barr and Heather M. Kolinsky, Law Office of Chad A. Barr, P.A., for Appellee.

(Before SCOTT M. BERNSTEIN, DARYL E. TRAWICK, and CARLOS LOPEZ, JJ.)

(TRAWICK, J.) The Appellant, United Automobile Insurance Company ("Insurer"), appeals the Final Summary Judgment entered in favor of Appellee, Miami-Dade County MRI, Corp. ("Provider"), as the assignee of Beisy Munoz ("Insured") in a suit to collect Personal Injury Protection ("PIP") benefits. This appeal seeks review of the trial court's order granting Final Summary Judgment in favor of the Provider where the parties filed conflicting affidavits regarding the reasonableness of the amount charged for X-rays. Here, the amount charged for X-rays was approximately $3,148.77.

The standard of review applicable to summary judgment is *de novo,* and requires the appellate court to view the evidence in the light most favorable to the non-moving party. *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. To analyze summary judgment properly, the appellate court must determine: (1) whether there is a genuine issue of material fact, and (2) whether the trial court applied the correct rule of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130-31 (Fla. 2000) [25 Fla. L. Weekly S390a]. It is well established that summary judgment should only be granted if the moving party demonstrates conclusively that no genuine issues exist as to any material fact, with all reasonable inferences drawn in favor of the opposing party. *Moore v. Morris,* 475 So. 2d 666, 668 (Fla. 1985).

Summary Judgment cannot be granted "if the evidence is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues." *Albelo v. S. Bell,* 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2165a]. If the record reflects the existence of any issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper and must be denied. *Milgram v. Allstate Ins. Co., Inc.,* 731 So. 2d 134, 135 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1069a]. In ruling on a motion for summary judgment, it is well-established that the court may neither adjudge the credibility of the witnesses nor weigh the evidence. *Hernandez v. United Auto. Ins. Co., Inc.,* 730 So. 2d 344, 345 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D646a].

In a lawsuit seeking benefits under the PIP statute, reasonableness, like necessity and relatedness, is an essential element of a plaintiff's case and is decided by factfinders on a case by case basis, depending on the specific evidence introduced at trial and the arguments of counsel. *Derius v. Allstate Indem. Co.,* 723 So. 2d 271, 274 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

Section 627.736(5)(a)(1), Florida Statutes (2009-2012), provides the following guidance to determine whether a charge for treatment is reasonable:

> "[w]ith respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, **consideration *may,*** be given to evidence of **usual and customary charges and payments accepted by the provider involved in the dispute,** and ***reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages,*** and ***other information relevant to the reasonableness of the reimbursement*** for the service, treatment, or supply."

(Emphasis added).

The issue in dispute here is the trial court's summary judgment decision on the issue of reasonableness of the Provider's bill. In support of Provider's Motion for Summary Judgment, Provider filed an affidavit of its billing manager Llina Milian which generally stated that the charges were reasonable because the amounts charged were its usual and customary charges for which it has received reimbursement from PIP insurers without reduction. In opposition to the Provider's motion for summary judgment, the Insurer filed the affidavit of its litigation adjuster and corporate representative, John A. O'Hara III (Adjuster) which challenges the reasonableness of the charges. Specifically, the issue before this Appellate Court is whether Mr. O'Hara's affidavit, along with other documents filed by the parties, proved the existence of genuine issues of material fact

regarding the reasonableness of the Provider's bill (as determined according to the PIP statute), and whether the trial court applied the correct rule of law in making its decision.

In addition to the affidavit referenced above, the Insurer also filed the following documents in opposition to the motion for summary judgment: 1) The Deposition Transcript of John O'Hara, 2) CMS.gov search results for Physician Fee Schedules pertaining to the subject CPT codes and Miami locality showing a price range substantially lower than what was billed in the subject case. 3) The Florida Worker's Compensation Health Care Provider Reimbursement Manual also showing a price range substantially lower than what was charged in the subject bill, 4) a memorandum of law in opposition to summary judgment, and 5) the insurance policy. The memorandum of law contained several legal and factual arguments. Among them, it averred that the average health insurance reimbursements are at approximately 140% of Medicare and that from discovery, it learned that the Provider has received and willingly accepted reimbursements as low as $22.85 from HMO and PPO insurers and reimbursements from some PIP insurers (including USAA and Ocean Harbor) at 80% of 200% of the Medicare Part B fee schedules.

The Insurer clearly submitted evidence concerning the following factors that may be considered by the trier of fact in the determination of reasonableness pursuant to the PIP statute, section 627.736(5)(a)(1) Florida Statutes (2009-2012): reimbursement levels in the community and federal and state medical fee schedules applicable to automobile and other insurance coverage. The affidavit of its adjuster compared the amounts billed by the Provider with the range of reimbursement levels in the community and pertinent fee schedules including Medicare and Worker's Compensation charts which were incorporated into and attached to her affidavit as exhibits.

Pursuant to Section 627.736(5)(a)(1) of the PIP statute, which, as noted, allows consideration of "various federal and state medical fee schedules *applicable* to automobile and other insurance coverages" (emphasis added), we find that when determining the reasonableness of a particular charge, the trier of fact may consider evidence pertaining to Medicare and Worker's Compensation fee schedules. Medicare Part B Fee Schedules are fee schedules clearly applicable to automobile insurance coverage because they are incorporated into the PIP insurance statute and form a statutory basis upon which various PIP claims must be paid.[1] Thus, Medicare Fee Schedules may be considered by the trier of fact to determine the reasonableness of a provider's bill. Accordingly, it was error for the trial court to find that Medicare fee schedules cannot be utilized in a reasonableness determination. *See, e.g., United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp., a/a/o Miguel Garcia Pagan,* Case No. 17-264 AP (Fla. 11th Cir. Ct. Sept. 23, 2019) [27 Fla. L. Weekly Supp. 677a]; *United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp., a/a/o Tania Barrios,* Case No. 15-431 AP (Fla. 11th Cir. Ct. Mar. 5, 2019) [27 Fla. L. Weekly Supp. 7a]; *United Auto. Ins. Co. v. Miami Dade Cty. MRI Corp, a/a/o Ana Rojas,* 26 Fla. L. Weekly Supp. 865b (Fla. 11th Cir. Ct. Jan. 8, 2019); *State Farm Mut. Auto. Ins. Co. v. Gables Ins. Recovery, Inc. a/a/o Luis A. Aispur,* 26 Fla. L. Weekly Supp. 709a (Fla. 11th Cir. Ct Oct. 30, 2018); *State Farm Mut. Auto. Ins. Co. v. Roberto Rivera-Morales, M.D., a/a/o Syed Ullah,* 26 Fla. L. Weekly Supp. 469a (Fla. 11th Cir. Ct. June 20, 2018). We find that the Medicare fee schedules and other fee schedules submitted by the Insurer are relevant to the consideration of reasonableness under the 627.736(5)(a)(1) methodology, and that O'Hara's affidavit should not be rejected for referring to them. Accordingly, we find that the trial court improperly rejected the adjuster's affidavit on that basis.

Furthermore, the trial court found that negotiated contract rates, including HMO and PPO rates, are not relevant to determine the reasonableness of a medical bill. However, section 627.736(5)(a) allows the consideration of "information relevant to the reasonableness of the reimbursement," to determine whether a charge is reasonable. *See Ullah,* 26 Fla. L. Weekly Supp. 469a. We find that evidence regarding HMO, PPO, and other such negotiated contract rates are relevant to the reasonableness determination and such evidence constitutes a statutory element that may be considered to determine the reasonableness of a medical bill in a PIP case. *See Shands Jacksonville Medical Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.,* 213 So. 3d 372, 376 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1447a] (in a dispute about a different subsection of the PIP statue, stating that discovery about "negotiated reimbursement rates," which was sought by the insurer in order to determine if the amounts billed by a provider were reasonable, were not the type of documents allowed under the applicable subsection, but "may very well be relevant and discoverable in the context of litigation over the issue of reasonableness of charges instituted pursuant to subsection (5)(a) . . . ."); *see also Hialeah Med. Assocs., Inc. a/a/o Coto v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 868b (Fla. 11th Cir. Ct. May 2, 2014) ("insurers can consider charges derived from public sector programs and managed care plans, in addition to the customary billed-charges of private providers.").

When determining whether expert testimony is admissible, a court "must not conflate" the question of admissibility with the weight of the proffered testimony. *Rosenfeld v. Oceania Cruises, Inc.,* 654 F. 3d 1190, 1193 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C366a]. It is not the court's role to "make ultimate conclusions as to the persuasiveness of the proffered evidence." *Id.* Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking the substance of expert testimony." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 596 (1993). Accordingly, by rejecting the use of HMO and PPO rates, the trial court may have improperly weighed the evidence in ruling on the motion for summary judgment.

In making its summary judgment decision below, and in consideration of the Insurer's constitutional challenge against the *Daubert* admissibility standard for expert opinion evidence, the trial court did not ultimately apply *Daubert* to reject O'Hara's affidavit. Rather, the trial court considered the context of the affidavit, while making an erroneous legal determination that the affidavit was legally insufficient and conclusory. The standard for reviewing affidavits for the purpose of summary judgment was discussed in the *Joseph* opinion issued from this Court last year:

> Affidavits submitted in support of, or in opposition to, summary judgment must follow the requirements of Florida Rule of Civil Procedure 1.510(e), which provides:
>
> > [s]upporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in an affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.
>
> "[G]eneral statements in an affidavit which are framed in terms only of conclusions of law do not satisfy a movant's burden of proving the nonexistence of a genuine material fact issue." *Heitmeyer v. Sasser,* 664 So. 2d 358, 360 (Fla. 4th DCA 1995) [21 Fla. L. Weekly D39a] (citing *Seinfeld v. Commercial Bank & Trust Co.,* 405 So. 2d 1039 (Fla. 3d DCA 1981)). However, the evidence offered "need not be in the exact form, or cover all the preliminaries, predicates, and details which would be required of a witness, particularly an expert witness, if he were on the stand at trial." *One West Bank,* 173 So. 3d at 1013-14

[*One West Bank, FSB v. Jasinski,* 173 So. 3d 1009 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1389a]] (quoting *Holl v. Talcott,* 191 So. 2d 40, 45 (Fla. 1966)).

State Farm Mut. Auto. Ins. Co. v. Roberto Rivera-Morales, M.D., a/a/o Joseph, 26 Fla. L. Weekly Supp. 454a (Fla. 11th Cir. Ct. July 17, 2018).

In applying this standard to the affidavit under consideration in the instant case, we find that the claims adjuster's affidavit is legally sufficient. The O'Hara affidavit complies with the requirements of Rule 1.510(e) of the Florida Rules of Civil Procedure. O'Hara's affidavit is not conclusory because his affidavit indicates the source of his knowledge and contains supporting facts and reasoning. *See Ramsey v. Home Depot U.S.A., Inc.,* 124 So. 3d 415, 418 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2245a]. The affidavit contains evidence pertinent to the statutory factors that may be considered in the determination of reasonableness. The affidavit was also supported by exhibits consisting of documents and data that may be considered by the trier of fact to determine the reasonableness of the Provider's bill.

Upon a thorough review of the record and the subject affidavit, we find that the claims adjuster, John O'Hara III, is qualified to address the topic of reasonableness. We find that his affidavit is legally sufficient, is not conclusory, and is not invalidated by his prior deposition testimony. We find that his references to Medicare, Worker's Compensation, HMO, and PPO reimbursement rates are relevant to the issue of reasonableness, pursuant to section 627.736(5)(a)(1), Florida Statutes (2009-2012), and do not invalidate his affidavit.

The trial court found that the claims adjuster's affidavit conflicted with his previously tendered deposition where he admitted that he had not reviewed particular documentation relevant to the reasonableness of the Provider's bill. However, the affidavit was filed approximately a year or more after the deposition was taken, and thus it is reasonably possible that the adjuster reviewed the subject discovery documents subsequent to the deposition, but prior to his affidavit. This alleged contradictory testimony is not sufficient to preclude his entire affidavit/testimony, especially where the court must view the evidence in the light most favorable to the non-moving party. In comparison, a review of the Provider's witness affidavit and depositions also present some inconsistencies and discrepancies. It is suggested that such inconsistencies go to the weight of the evidence and the credibility of the witnesses.

Moreover, each party's affidavit contained conclusory statements and self-serving legal conclusions. Despite this, each affidavit also alleged relevant facts to be considered in the determination of reasonableness pursuant to the PIP statute. These conflicting affidavits indicate the existence of a genuine issue of material fact that must be determined by the trier of fact with regard to the reasonableness of the provider's bill.

In reviewing the evidence and the motion for summary judgment *de novo* and in the light most favorable to the *nonmoving* party, we find that the Provider's Motion for Summary Judgment should have been denied. We further find that John O'Hara III's affidavit, along with other evidence in the record, create a genuine issue of material fact regarding the reasonableness issue. At the very least, it is sufficient to suggest the possible existence of a genuine issue of material fact by providing the "iota" or "scintilla" of evidence necessary to withstand summary judgment.[2] Accordingly, this case is REVERSED and REMANDED for proceedings consistent with this opinion.

MOTIONS FOR APPELLATE ATTORNEY'S FEES

Both parties moved for appellate attorney's fees and costs pursuant to Florida Appellate Procedure Rule 9.400, which authorizes the prevailing party on appeal to recover these expenses. The statutory basis for Appellant/Insurer's motion is section 768.79, Florida Statutes, while Appellee/Provider relies on section 627.428(1). Given the above holding, Appellee's motion is ***DENIED*** and Appellant's conditionally ***GRANTED*** pending a favorable outcome at trial on remand.

REVERSED AND **REMANDED** FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; APPELLANT'S MOTIONS FOR ATTORNEY FEES **CONDITIONALLY GRANTED**; APPELLEE'S MOTIONS FOR SAME **DENIED**. (BERNSTEIN J., concurs. LOPEZ, J., dissents, with written opinion.)

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[1]Black's Law Dictionary defines "applicable," in part, as "[c]apable of being applied . . . ." Black's Law Dictionary (10th ed. 2010) at 120. Since the Medicare Fee schedules are capable of being applied to determine reasonableness and are incorporated into the PIP statute, it then logically follows that Medicare fee schedules are applicable to PIP coverage.

[2]*Ortega v. Citizens Property Ins. Corp.,* 257 So. 3d 1171, 1172 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2427b] (citing *Carnes v. Fender,* 936 So. 2d 11, 14 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1383a]).

(LOPEZ, J., dissenting) The standard of review regarding the admission or rejection of evidence is that of abuse of discretion. *Bunin v. Matrixx Initiative, Inc.,* 197 So.2d 1109 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1308a]; *State Farm Mutual Automobile Insurance Company v. CC Chiropractic, LLC,* 245 So. 3d 755 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D583a]. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable man would take view adopted by trial court; however, if reasonable men could differ as to propriety of action taken by trial court, then it cannot be said that trial court abused its discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) In the proceedings below the Appellee argued and the Court agreed that the affidavit of John O'Hara was devoid of admissible facts and was conclusory and did not constitute admissible evidence. I agree with the trial court.

The record before the trial revealed Mr. O'Hara and the other adjusters for the Appellant do not make reasonableness determinations on a case by case basis but instead are required to follow a company directive to reduce all medical charges to 200% of Medicare Part B did not provide sufficient training and experience to qualify her as an expert witness on reasonableness. Furthermore, the record reveals that he was not a part of the process of formulating such company policy. Simply following a company directive does not equate to providing a foundation for expert witness opinion.

The trial court properly found that Mr. O'Hara's affidavit conflicted with his prior deposition testimony wherein he admitted that he had not personally reviewed any documentation regarding payments from other third-party payors and wherein he admitted that has was not even familiar with the medical services (CPT codes) that were billed in this matter. The majority speculates that perhaps between the time of the deposition and the execution of the affidavit that Mr. O'Hara had reviewed additional documents. However, this fact is nowhere to be found in the record. To the extent of any conflict in the testimony it was incumbent upon the Defendant, not this court, to find an explanation for the discrepancy in the opinion. See *Ellison v. Anderson*, 74 So. 2d 680 (Fla. 1954).

The Appellee has provided the court with numerous opinions of other panels of this Court affirming summary judgment where the Appellant filed an affidavit from one its adjusters. In *United Automobile Insurance Company v. Miami Dade County MRI, Corp., (a/a/o Erlin Duran);* Case No. 16-450 AP (Fla. 11th Jud. Cir., March 22, 2019) [27 Fla. L. Weekly Supp. 221a]. In the *Duran* matter the Court held that the trial court properly found that the adjuster was unqualified as an expert or lay witness, and her affidavit did not raise an issue

of material fact such that it would preclude summary judgment.

Likewise in *United Automobile Insurance Company v. Miami Dade County MRI, Corp., (a/a/o Barbara Harrell);* Case No. 15-279 AP (Fla. 11th Jud. Cir., September 26, 2018), a panel of this circuit affirmed summary judgment on reasonableness and held that the testimony of the adjuster that 200% of Medicare is reasonable did not create an issue of fact. See also *United Automobile Insurance Company v. Miami Dade County MRI, Corp., (a/a/o Jawanda James);* Case No. 17-26 AP (Fla. 11th Jud. Cir., April 26, 2019) [27 Fla. L. Weekly Supp. 223a];—affirming summary judgment on reasonableness finding no abuse of discretion in striking affidavit of Dr. Dauer, M.D. filed in opposition to Plaintiff's motion for summary judgment as to reasonableness; and *United Automobile Insurance Company v. Miami Dade County MRI, Corp., Inc. (a/a/o Julio Reyes)*; Case No. 17-25 AP (Fla. 11th Jud. Cir., April 26, 2019) [27 Fla. L. Weekly Supp. 225b];—affirming summary judgment on reasonableness finding no abuse of discretion in striking the affidavit of Dr. Dauer, M.D. filed in opposition to Plaintiff's motion for summary judgment as to reasonableness; *United Automobile Insurance Company v. Miami Dade County MRI, Corp., M.D. (a/a/o Barbara Perez)*; Case No. 17-27 AP (Fla. 11th Jud. Cir., April 26, 2019) [27 Fla. L. Weekly Supp. 225a];—affirming summary judgment on reasonableness finding no abuse of discretion in striking affidavit of Dr. Dauer, M.D. filed in opposition to Plaintiff's motion for summary judgment as to reasonableness; *United Automobile Insurance Company v. Miami Dade County MRI, Corp., M.D. (a/a/o Joseph Dames),* Case No. 17-148 AP (Fla. 11th Jud. Cir., May 24, 2019);—affirming summary judgment on reasonableness finding no abuse of discretion in striking affidavit of Dr. Dauer, M.D. filed in opposition to Plaintiff's motion for summary judgment as to reasonableness.

Given the many rulings filed by the Appellee from other trial courts and other appellate panels in this Circuit affirming summary judgment on the issue of reasonableness including, as noted above, one opinion finding that the Defendant's very same witness at issue in this case was unqualified as either an expert or lay witness, and other instances where trial courts have excluded similar affidavits as being conclusory and otherwise inadmissible, it cannot be said that the trial court abused its discretion in excluding the affidavit of John O'Hara. See *State Farm Mutual Automobile Insurance Company v. Pembroke Pines MRI, Inc.,* 171 So.3d 814 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1879a].

The majority writes that the trial court improperly weighed the evidence and that because the posture of the case was at the summary judgment stage that all disputed issues of fact were to be resolved against the Appellee. However, the decision to admit or exclude evidence does not equate to the weighing of evidence and by its opinion that majority is applying a too restrictive standard upon the trial's court ability to exclude expert witness evidence.

In its opinion adopting *Daubert* the Florida Supreme Court cited to the case of *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, (1997) wherein the United States Supreme Court stated that:

> Alleged fact that grant of summary judgment on basis of inadmissibility of expert scientific testimony was "outcome determinative" as to products liability action did not compel finding that it should have been subjected to a more searching standard of review than "abuse of discretion" standard . . . while "disputed issues of fact are resolved against the moving party[,] . . . the question of admissibility of expert testimony is not such an issue.

Given that the trial court applied the correct evidentiary standard and given the presumption of correctness which is to be afforded to the trial court's rulings regarding evidence, together with the reasons stated above, this Court cannot find that the trial court abused its discretion.

Lastly, even upon de novo review I would affirm. The affidavit of John O'Hara offers nothing but conclusory statements and it does little more than create a paper issue by comparing the Plaintiff's charges to the lowest payors in the community while ignoring the undisputed evidence in the record of higher charges and reimbursements including reimbursements made by the Appellant. A party may not defeat a motion for summary judgment by raising purely paper issues where the pleadings and evidentiary matters before the trial court show that defenses are without substance in fact or law. *Reflex, N.V. v. UMET Trust,* 336 So. 2d 473 (Fla. 3d DCA 1976).

In the matter of *United Automobile Insurance Company v. Miami Dade County MRI, Corp., Inc., (a/a/o Erlin Duran)*; Case No. 15-279 AP (Fla. 11th Jud. Cir., September 26, 2018) [27 Fla. L. Weekly Supp. 221a], Milian, Hirsch, Silber, JJ., cited above, the Court found that the mere existence of Medicare and HMO and PPO rates that are lower than actual charges in the community does not create an issue of fact as to the reasonableness of a medical provider's charge that exceeds reimbursement rates. The *Duran* Court cited to the Third District Court of Appeal opinion in *Atkins v. Allstate Ins. Co.,* 382 So. 2d 1276 (Fla. 3d DCA 1980) and held that "[t]his distinction is important because it would be unfair to assess medical charges by a comparison of dissimilar insurance and non-insurance charges. Local circuit appellate decisions have held that Medicare, HMO and PPO lower rates are not relevant as to the issue of reasonableness of charges. *Virtual Imaging Svcs. Inc. v. State Farm Mut. Ins. Co.,* 23 Fla. L. Weekly Supp. 515a (Fla. 11th Cir. Ct. 2015); *Hialeah Medical Inc. v. United Auto Ins. Co.,* 21 Fla. L. Weekly Supp. 487b (Fla. 11th Cir. Ct. 2013)."

The trial court correctly reasoned that the purpose of the Florida No-Fault law which was to guarantee "swift and virtually automatic" payment of out of pocket medical expenses. *Gov't Employees Ins. Co. v. Gonzalez,* 512 So. 2d 269 (Fla. 3d DCA 1987). The Florida Supreme Court has stated that any impediment to the right of the insured to recover in a 'swift and virtually automatic' way has the potential for interfering with the PIP scheme's goal of being a reasonable alternative to common law tort principles. *Nunez v. Geico Gen. Ins. Co.,* 117 So. 3d 388 (Fla. 2013) [38 Fla. L. Weekly S440a]. Allowing an insurance company to withhold even a portion of payment of a medical bill based simply upon a comparison to the lowest payment amounts that can be found in the medical community to the exclusion of the any other higher reimbursements which support payment of the full charge to assert that anything above such amount is unreasonable subverts the very purpose of No-Fault law.

The majority's interpretation of the role of the Medicare fee schedules is in violation of the Supreme Court's decision in *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.,* 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. In its opinion the Florida Supreme Court made it clear that the addition of the permissive payment limitations in Section 627.736(5)(a)(2)(f), Fla. Stat., by way of the 2008 amendments to the Florida No-Fault law did not act as a limitation or measure of the reasonableness of a medical charge but instead represents a payment limitation that an insurer may apply regardless of the reasonableness of a given charge. *Virtual* 141 So.3d at 156.

The *Virtual* Court drew this distinction from the fact that the prior version No Fault Act contained fee schedule language which expressly limited what an MRI provider could *charge* to a multiple of 200% of Medicare. The Court then stated:

> In contrast to this MRI-specific language, the Legislature did not state in the 2008 amendments that a provider's charge "shall not exceed" a certain allowable amount of the Medicare fee schedules. Instead, the Legislature specifically used the word "may" to reference an insurer's ability to *limit reimbursement.*

Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc., 141 So. 3d 147, 157 (Fla. 2013) [38 Fla. L. Weekly S517a]. The Court then further held that such may only be applied with where the insurer has expressly elected to apply such payment limitation. *Virtual,* 141 So. 3d at 160. It is undisputed that the Appellant did make such express election in its policy.

At its core the majority opinion is based upon the concept that upon the Defendant's presentation of lower reimbursements rates the court must draw an inference that charges above those lower rates are potentially unreasonable thereby creating a judicially created rebuttable presumption that only the lowest reimbursements rates are per se reasonable. Such inference would perhaps be reasonable if the evidence revealed that there are no reimbursements rates consistent with the Appellee's charge, but such is not the evidence in this case.

I disagree with the recent rulings cited by the Appellant and the majority from other panels of this court reversing summary judgments on the reasonableness of charges. Collectively these 11 Circuit Court opinions have had the effect of placing a chilling effect upon the trial court's function on ruling on matters concerning the admission or exclusion of opinion evidence. Such restriction on the trial court's discretion stands in direct conflict with the adoption of the *Daubert* standard the purpose of which was to empower trial courts to exclude previously admissible opinion testimony.

A review of the prevailing decisions from other the circuit courts reveals that this Circuit stands virtually alone in reversing summary judgments based upon the type of evidence offered by the Appellant to defeat summary judgment. As noted by Judge Renatha Francis in the *James* case cited above, the Appellant itself has openly admitted that this circuit is the only circuit where its appeals the granting of summary judgment on the issue of the reasonableness of charges.

For these reasons I would affirm the final judgment under review.

* * *

Traffic infractions—Red light camera violations—Due process—Question of whether appellant was denied due process by her failure to receive notice of final hearing on red light camera violation is moot where defense was legally insufficient on its face—Affidavit identifying vehicle as being in care, custody or control of "mechanic shop" at time of violation is insufficient to establish defense that someone else was driving appellant's vehicle at time of violation—Statute requires designation of another human being as being in control of vehicle

EMELDA O. ALEMAN, Appellant, v. CITY OF OPA-LOCKA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-320-AP-01. L.T. Case No. 1551800033970. January 15, 2020. An Appeal from a Final Administrative Order of the City of Opa-Locka Intersection Safety Program. Counsel: Emelda Aleman, Pro se Appellant. Burnadette Norris-Weeks, Bumadette Norris-Weeks, P.A. for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) We affirm the Final Administrative Order upholding the red light camera violation. Ms. Aleman contends on appeal that she failed to receive the notice of final hearing in this case, despite the fact that she received every other paper from the City delivered in the same way, and to the same address. We affirm because even assuming Ms. Aleman failed to receive the notice, such failure is moot as Ms. Aleman's defense to the violation was legally insufficient on its face.

Ms. Aleman tried to avail herself of the defense that someone else was driving her car when it received the red light violation. The statute provides that:

> (d) 1. ***The owner of the motor vehicle*** involved in the violation ***is responsible*** and liable for paying the uniform traffic citation issued for a violation of s. 316.074(1) or s. 316.075(1)(c) 1. when the driver failed to stop at a traffic signal, ***unless*** the owner can establish that:
>
> c. The motor vehicle was, at the time of the violation, in the care, custody, or control of another person;
>
> 2. In order to establish such facts, the owner of the motor vehicle shall, within 30 days after the date of issuance of the traffic citation, furnish to the appropriate governmental entity an affidavit setting forth detailed information supporting an exemption as provided in this paragraph.
>
> a. An affidavit supporting an exemption under sub-subparagraph 1.c. ***must include*** the ***name, address, date of birth,*** and, if known, the driver license number of the person who leased, rented, or otherwise had care, custody, or control of the motor vehicle at the time of the alleged violation.
>
> 3. Upon receipt of an affidavit, the person designated as having care, custody, or control of the motor vehicle at the time of the violation may be issued a notice of violation pursuant to paragraph (b) for a violation of s. 316.074(1) or s. 316.075(1)(c) 1. when the driver failed to stop at a traffic signal.
>
> 4. Paragraphs (b) and (c) apply to the person identified on the affidavit, except that the notification under sub-subparagraph (b)1.a. must be sent to the person identified on the affidavit within 30 days after receipt of an affidavit.

§ 316.0083(1)(d), Fla. Stat. (2019)(emphasis added).

Ms. Aleman submitted the following affidavit to the City:

City of Opa-locka
Traffic Safety Camera Program
780 Fisherman Street, 4th Floor
Opa-locka, FL 33054

DECLARATION/AFFIDAVIT

Document Number: 1551800033970 Date Created: 1/1/0001 12:00:00 AM

II. Affidavit

I, Emelda O Aleman, having been sworn, hereby depose and say as follows:

1. I have received a notice (the "Notice") informing me that a motor vehicle registered in my name was observed violating Florida Statutes 66 316.074 (1) and 316.075 (1)(c)1 by failing to obey a properly red traffic signal. The Notice bears the following 13 digit number: _____.

2. Under Florida Statute § 316.0083(1)(d), I am exempt from the payment of the civil penalty described in the UTC because (check all that apply):

___ At the time of the violation described in the Notice, my vehicle passed through the intersection in order to yield the right-of-way to an emergency vehicle.

___ At the time of the violation described in the Notice, my vehicle passed through the intersection as a part of a funeral procession.

___ At the time of the violation described in the Notice, my vehicle passed through the intersection at the direction of a law enforcement officer.

X At the time of the violation described in the Notice, the vehicle was in the care, custody, or control of another person. That person's name, address, driver license number and date of birth are:

Name: Mechanic Shop
Address: 2620 Ali Baba Ave
City, State, Zip: Opa-locka FL 33054
Date of Birth: [redacted]
Phone Number: 305 3328454/3394679

___ I do not know the driver's license number of this person.

Driver's License Number: _____

1551800033970

In violation of the mandatory plain language of the statute, Ms. Aleman did not set forth the name and date of birth of the person who she claimed had control of her vehicle at the time of the violation. Her writing "Mechanic Shop" is simply legally insufficient. The plain language of the statute contemplates designating another human being as being in control of the vehicle, so that the municipality can issue ***that*** person a notice of violation. Barring that, Ms. Aleman—as the owner of the motor vehicle involved in the violation—"is responsible and liable for paying the uniform traffic citation . . . ." § 316.0083(1)(d)1., Fla. Stat. (2019).[1]

For these reasons, we affirm. (WALSH, J., concurs.)

[1]It occurs to us that—as between Ms. Aleman and the City of Opa-Locka—Ms. Aleman was in a much better position to find out from her own mechanic shop the name and date of birth of the person she claims was driving her car when it received a red light violation.

(TRAWICK, J. concurring.) I am in agreement with the result here as I believe it is compelled by the plain language of the statute. I write to ask the Legislature to consider a revision to the statute to address a

potential inequity raised by this statute's enforcement. Aleman contends that her vehicle was in the custody of a mechanic shop at the time the ear was driven through the red-light traffic signal. Since the statute provides no practical recourse when a vehicle is in the hands of a bailee, Aleman will be required to pay for a violation that she may not be responsible for. It is foreseeable that this situation will occur again and again with others similarly situated.

I pose this example. The owner of a vehicle leaves her car with a valet while going in to eat at a restaurant. While the owner is enjoying her meal, one of the valet drivers takes the vehicle on a joy ride and makes a right turn through a red-light traffic signal without stopping and subsequently returns to the restaurant. Oblivious to what has occurred, the owner later returns to the valet and retrieves her car. It is not until several weeks later that she receives a traffic citation thanks to the valet driver's actions. Given the passage of time, it is unlikely that the owner would have retained the valet parking ticket. When she goes back to the restaurant, what are the chances that anyone will know of, or own up to knowing, who took the owner's vehicle out of the valet parking area on the evening in question? Remote at best.

§ 316.0083(1)(d) requires an affidavit from the driver that must include the name, address, date of birth, and if known the driver license number of the person who had custody of the vehicle at the time of the violation. In the circumstance that I have posed, practically speaking, the owner would not be able to provide this information. This would be unfair to her and others, such as Aleman, whose vehicles are in the hands of third parties at the time of the violation and who would be unable to obtain the required information. In the interest of fairness, I suggest that a revision of the statute to take into account this type of circumstance is appropriate.

* * *

Licensing—Driver's license—Suspension—Hearing—Failure of subpoenaed witness to appear—Stopping officer—Due process violation resulted when subpoenaed officer failed to appear for formal review hearing, licensee obtained court order compelling officer's attendance, and officer nonetheless failed to appear at two subsequent hearings—Licensee was not required to pursue contempt determination against officer in order to preserve his procedural due process rights—License suspension is quashed

ALBERT STEWART, JR., Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-7025. Division E. November 7, 2019. Counsel: Mustafa Ameen, The Law Office of Ameen and Shafii, LLC, Tampa, for Petitioner. Samuel Frazer, Assistant General Counsel, Christie S. Utt, General Counsel, Jacksonville, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(GREGORY P. HOLDER, J.) THIS MATTER is before the Court on Petition for Writ of Certiorari filed July 3, 2019, and supplemental appendix filed July 26, 2019. Having reviewed the petition, response, and appendices, the court determines that the officer's failure to appear at multiple scheduled hearings, despite Petitioner's attempts to enforce the officer's attendance as provided in §322.2615(6)(c), Florida Statutes, including obtaining a court order compelling the officer to appear, deprived Petitioner of his due process rights. Accordingly, the order suspending Petitioner's driving privileges must be quashed.

On January 26, 2019, Petitioner was arrested for driving under the influence pursuant to §316.193. He complied with the arresting officer's request to take a breath test, resulting in a six-month license suspension. In accordance with §322.2615(3), Petitioner requested a formal review of the suspension. A formal hearing was held April 8, 2019. The arresting officer Gregory Barlaug, Tampa Police Department, appeared for the hearing. The stopping officer, Gregory Damon, did not appear, despite being under a valid subpoena to do so. His absence was unexcused. As a result of Officer Damon's failure to appear, the hearing was continued.

On April 19, 2019, the hearing officer notified Officer Damon that the hearing would be held May 2, 2019. Although Officer Damon told the hearing officer he could not attend, the hearing officer denied his excuse because of his previous unexcused failure to appear. Rule 15A-6.015(c), Florida Administrative Code. On April 29, 2019, pursuant to §322.2615(6)(c), Petitioner filed a Petition to Seek Enforcement of the Subpoena in the Hillsborough County Court. Judge Gutman granted the petition and ordered Officer Damon to appear at the next formal review hearing. Officer Damon failed to appear at the May 2nd hearing. Although he was still under a subpoena and his request for a continuance of the May 2nd hearing had been denied, Officer Damon did not yet have notice that the court had ordered his appearance. Accordingly, the hearing was continued a second time to allow Petitioner to notify Officer Damon of the court order compelling his appearance at the suspension review hearing.

The order was personally served at the Tampa Police Department. The officer servicing the front desk signed that the order was received. In addition, Officer Damon communicated directly to the hearing officer his intent to appear at the next hearing, then scheduled for May 23, 2019. Despite the court order and his personal assurance, however, Officer Damon again failed to appear at the hearing. At this point, Petitioner moved to invalidate the suspension based on Officer Damon's failure to appear in disobedience of a court order. The hearing officer reserved ruling. At the last hearing, held May 31, 2019, Petitioner renewed the motion to invalidate the suspension. By order rendered June 3, 2019, the hearing officer denied the motion to invalidate the suspension, acknowledging Officer Damon's failure to appear, but relying on the fact that sufficient competent, substantial evidence existed to uphold the suspension.

On review, this Court must determine whether Petitioner was afforded due process, whether the hearing officer observed the essential requirements of law, and whether competent, substantial evidence supports the suspension. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982). The burden is on the State to establish the validity of the license suspension. *Dep't of Highway Safety & Motor Vehicles v. Colling,* 178 So. 3d 2, 3 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]. If there is a denial of procedural due process, a circuit court may grant relief. *Dep't of Highway Safety & Motor Vehicles v. Pitts,* 815 So. 2d 738, 744 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D999b]. Because the court determines that Petitioner did not receive the required due process, it is unnecessary to address the other factors.

Due process is defined as notice and a meaningful opportunity to be heard. *Dep't of Highway Safety & Motor Vehicles v. Corcoran,* 133 So.3d 616, 620 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D507a]. A driver may request either an informal or formal review of the license suspension. §322.2615(1)(b)(3), Fla. Stat. An *informal* review consists of an examination by a hearing officer of the materials submitted by law enforcement and by the person whose license was suspended. The presence of witnesses is not required. §322.2615(2)(b)4. In contrast, a formal review consists of the right to question witnesses and to present evidence. *Lee v. Dep't of Highway Safety & Motor Vehicles,* 4 So.3d 754, 756-57 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D520a] §322.2615(6)(b), Fla. Stat.; Rule 15A-6.013(5), Fla. Admin. Code. The legitimacy of a driver's license suspension begins with the traffic stop, which in this case was effected by Officer Damon. Petitioner has the right to establish the validity of the stop by questioning the stopping officer. Here, Petitioner was, through no fault of his own, not afforded that opportunity.

As the Department correctly states, under §322.2615 (11), there is a distinction between the failure of an *arresting* officer to appear as

opposed to that of any other witness. A single unexcused failure of an arresting officer to appear pursuant to a valid subpoena is grounds for invalidation under the statute. *Id.* This Court has previously invalidated a suspension under these circumstances. *Ramonika Simmons v. Dep't of Highway Safety & Motor Vehicles,* 23 Fla. L. Weekly Supp. 692a (Fla. 13th Jud. Cir. 2015). The statute further provides that the failure of any other subpoenaed witness to appear at the formal review hearing is *not* grounds to invalidate a license suspension. §322.2615(6)(c); *Simmons,* 23 Fla. L. Weekly Supp. 629a. Section 322.2615(6)(c), has been deemed to require a licensee desiring to question any witness other than the arresting officer who fails to appear at a formal review hearing to affirmatively seek enforcement. *Patricia Garcia v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 457a (Fla. 11th Jud. Cir. 2018). The statute provides an enforcement mechanism, which Petitioner used, that involves obtaining a court order to secure a witness's appearance. Despite being subject to a court order to appear, Officer Damon never appeared for a hearing before the hearing officer rendered a decision in the matter.

In support of its contention that the suspension should be upheld, the Department relies on *McKenney v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 1030a (Fla. 13th Jud. Cir. 2011), *cert. denied,* 75 So. 3d 1259 (Fla. 2d DCA 2011). In *McKenney,* another division of this Court determined that the petitioner was not denied due process because of a witness's absence where the petitioner failed to seek judicial enforcement of a properly issued subpoena. In this case, however, and in contrast to *McKenney,* Petitioner obtained the necessary court order compelling Officer Damon's appearance.

The Department further argues that Petitioner did not fulfill *all* the statutory enforcement requirements because he did not pursue contempt proceedings against the officer, specifically a contempt order. The Court disagrees that Petitioner must pursue a contempt determination to preserve his procedural due process rights. With regard to a witness's failure to appear, and enforcement of a subpoena, §322.2615(6)(c) says:

> c) The failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension. If a witness fails to appear, a party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides or by filing a motion for enforcement in any criminal court case resulting from the driving or actual physical control of a motor vehicle that gave rise to the suspension under this section. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged.

The statute does not mandate specifically that either Petitioner or the Department seek a contempt ruling. It is worth mentioning that Officer Damon did not challenge the subpoena.

The conclusion that Petitioner need not seek a contempt finding is also consistent with the Department's rule on this issue. With regard to a properly subpoenaed witness's failure to appear, administrative rule 15A-6.015 (2), says

> (2) . . .a properly subpoenaed witness who fails to appear at a scheduled hearing may submit to the hearing officer a written statement showing just cause for such failure to appear within two (2) days of the hearing.
>
> (a) For the purpose of this rule, just cause shall mean extraordinary circumstances beyond the control of. . .the witness which prevent that person from attending the hearing.
>
> (b) If just cause is shown, the hearing shall be continued and notice given.
>
> (c) *No hearing shall be continued for a second failure to appear.*
>
> (d) Notification to the department of a witness's nonappearance with just cause prior to the start of a scheduled formal review shall not be deemed a failure to appear.

(Emphasis added.)

That the rule prohibits further continuances for a witness's failure to appear is consistent with this court's conclusion that Petitioner was not required to seek further enforcement through a contempt finding. Officer Damon's absences were unexcused; he did not show just cause for his failures to appear. The hearing officer properly excused only the absence attributable to possible lack of notice that the court issued an order compelling Officer Damon's attendance. The rule's proviso against continuances for failure of a witness to appear cannot inure to the detriment of a driver unless the nonappearance is attributable to the driver. Moreover, the statute's instruction that a witness's failure to appear is not grounds to invalidate the suspension assumes the nonappearance occurs *before* a driver attempts to enforce a subpoena. To hold otherwise effectively deprives him of the process he is due in a formal review.

It is therefore ORDERED that the petition is GRANTED and the decision below is QUASHED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

* * *

Mandamus—Landlord-tenant—Posting of writ of possession—Petition for writ of mandamus is granted compelling sheriff to charge statutory $90 fee for posting writ of possession on premises irrespective of number of tenants listed in writ rather than charging $90 fee plus additional $40 fee for each person or business listed in writ

PETER W. YORE, Petitioner, v. HILLSBOROUGH COUNTY SHERIFF, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-5413, Division I. November 20, 2019. Counsel: Peter W. Yore, Odessa, Pro se. Oliver F. Lindemann, Tampa, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

(PAUL L. HUEY, J.) This cause is before the Court on Petitioner Peter Yore's Petition for Writ of Mandamus filed May 23, 2019. The Hillsborough County Sheriff responded belatedly on July 16, 2019. The Court accepts the late response. Petitioner filed a reply and, thereafter, the court held oral argument. The Court has reviewed the briefs, appendices, applicable law and considered points made in oral argument. Being fully advised of the issue and the law, the Court determines that the petition should be granted.

Mandamus is the recognized remedy to require a public official to discharge his or her duty. *Dante v. Ryan,* 979 So. 2d 1122, 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D981b]. Mandamus will lie only to enforce a clear legal right. *Fla. League of Cities v. Smith,* 607 So. 2d 397, 400-401 (Fla. 1992). Petitioner Peter Yore asks this Court to compel the Hillsborough County Sheriff to comply with §30.231, Florida Statutes, which sets forth the fees sheriffs of this State shall charge for services rendered through their offices. Petitioner is a landlord who, from time to time, is tasked with evicting tenants, which requires the service of writs of possession. Serving writs of possession is a service sheriffs are authorized to provide under §30.15(1)(b). A schedule of fixed, nonrefundable fees for services sheriffs provide is set forth in §30.231.

Petitioner asserts that §30.231(1)(a-b) provides a fixed fee of $90 for serving a writ of possession regardless of the number of persons officially or unofficially residing on the property. Petitioner adds, and the Sheriff concedes, that the Hillsborough County Sheriff charges an additional $40 fee for *each* person or business listed on the writ of possession, despite serving only one writ by posting it conspicuously on the property to be restored to the landlord.

Section 30.231(1)(a-b), Florida Statutes, says:

Sheriffs' fees for service of summons, subpoenas, and executions.— (1) The sheriffs of all counties of the state in civil cases shall charge fixed, nonrefundable fees for service of process, according to the following schedule:

(a) All summons or writs except executions: $40 for each summons or writ to be served.

(b) All writs except executions requiring a levy or seizure of property: $50 in addition to the $40 fee as stated in paragraph (a).

The Sheriff responds that the charges are consistent with Florida Rule of Civil Procedure 1.070(c).[1] Rule 1.070(c) relates to the service of writs of process (or summonses) on multiple defendants. At the point in a proceeding that the writ of possession is issued, all defendants will have already been served with *process* under Rule 1.070. Simply, Rule 1.070(c) is inapplicable here. The execution of writs of possession is addressed in Rule 1.580, *not* Rule 1.070. Rule 1.580 defines the writ of possession as the direction to the sheriff to deliver possession of real property as directed in a final judgment of the court.

Upon rendition of a judgment for possession by a court, the Clerk issues the writ commanding the sheriff to put the landlord in possession after 24 hours' notice posted conspicuously on the premises. *See* §83.62(1), Florida Statutes. *See also* Rule 1.580. The writ, which names all parties to the proceeding, states "You are commanded to remove all persons from the following described property in Hillsborough County, Florida: (Address of property) and to put Plaintiff of the above action in possession of it." *See* Form 1.915, Florida Rules of Civil Procedure. It does not contemplate separate service upon individuals. Under §30.231(1)(a), the sheriff shall charge $40 each for the service of summonses or writs, except executions. Under §30.231(1)(b) the sheriff shall charge $50 each for the service of writs, except executions requiring a levy or seizure of property, in addition to the $40 fee referenced in subparagraph (a). Based on the foregoing, the statutorily authorized charge for serving a writ of possession, regardless of the number of tenants named therein, is $90. The number of defendants named in the writ does not affect the statutory amount the sheriff shall charge for posting it on the property.

As Petitioner is without any legal remedy to compel the Sheriff's compliance with §30.231, and the Sheriff's compliance therewith is a clear legal right to which Petitioner is entitled, it is therefore ORDERED that the petition for writ of mandamus is GRANTED. The Hillsborough County Sheriff is hereby directed to comply with the statute as directed herein and charge no more than the statutory rate of $90 for each writ of possession posted.

[1]Respondent cited the rule as 1.070(2), which does not exist. Rule 1.070(c) addresses the relevant subject matter.

* * *

ANGELA DEBOSE, Petitioner, v. ELIZABETH G. RICE, JUDGE In her official capacity, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 19-CA-11407, Division D. November 12, 2019. Counsel: Angela W. DeBose, Tampa, Pro se..

ORDER DIRECTING CLERK TO TRANSFER PETITION FOR WRIT OF MANDAMUS TO THE SECOND DISTRICT COURT OF APPEAL

(EMILY A. PEACOCK, J.) THIS MATTER is before the Court on Petitioner's "Petition for Writ of Mandamus" mailed filed November 6, 2019. The petition seeks a writ of mandamus to compel the disclosure of judicial records purported to be public. Having reviewed the petition, the court determines that it lacks jurisdiction to review the petition. *See* Florida of Judicial Administration 2.420(l)(1).

It is therefore ORDERED that the Clerk of Court shall close the above-captioned civil case number and TRANSFER the Petition for Writ of Mandamus and any other filings in the above-captioned civil case number to the Second District Court of Appeal.

* * *

Municipal corporations—Code enforcement—Where city code prohibiting parking commercial equipment in residential zones defines "commercial equipment" as equipment designed or used for commercial purposes, magistrate correctly found that trailer designed for transporting lawn equipment violated ordinance irrespective of fact that trailer was only for owner's personal use—Equal protection—Where trailer owner challenged unconstitutional application of ordinance before magistrate, but magistrate believed issue could not be determined in administrative proceeding, appellate court will treat issue as if magistrate denied challenge—Trailer owner failed to prove claim of discriminatory enforcement based on sexual orientation where he did not provide sufficiently specific evidence of uncited violations, code enforcement officer did not meet owner's domestic partner until second investigation of property, and competent substantial evidence supported finding of code violation

ANTHONY GREEN, Appellant, v. CITY OF TAMPA, FLORIDA (Code Enforcement), Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 18-CA-7999, Division X. L.T. Case No. COD-18-0000536. October 29, 2019. On review of a final order of the Code Enforcement Special Magistrate for the City of Tampa. Counsel: Felix Montanez, The Law Office of Felix G. Montanez, P.A., Tampa, for Appellant. Robin Horton Silverman, Assistant City Attorney and Gina K. Grimes, City Attorney, Tampa, for Appellee.

APPELLATE OPINION

(BATTLES, J.) This case is before the court to review a decision of the Code Enforcement Special Magistrate, hereinafter "magistrate," for the City of Tampa. In the underlying case, Appellant Anthony Green was cited for parking a trailer outside his residence at 4732 W. Oklahoma Avenue in violation of City Code Section 27-283.11(b). Appellant challenges the finding of violation on several grounds. Cited for parking commercial equipment in a residential zone, Appellant first argues that the subject trailer did not violate the code because the equipment—a trailer—was not used for commercial purposes. He also contends that the City violated his right to equal protection by selectively enforcing the code. Having reviewed the record, the briefs, and applicable law, the court determines that Appellant may seek review of the constitutional issue in this forum. Having considered Appellant's constitutional argument, however, the court determines that he has not shown the City violated his rights. In addition, because the trailer parked at his residence meets the definition of "commercial equipment" under the code, the magistrate's decision must be affirmed.

In this appeal, the court reviews the magistrate's order to determine whether Appellant received due process, whether it observes the essential requirements of law, and whether competent, substantial evidence supports the decision. *Lee County v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). Procedural due process includes fair notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth'ty,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. The record shows that Appellant's property was the subject of a code inspection on January 18, 2018. Appellant was provided with specific notice of the violation on February 22, 2018, which advised him that commercial equipment is not allowed in residential zoning under the code's sections 27-283.11(b)(parking) and 27-156 (zoning districts). The notice directed him to remove the trailer or place it in a fully enclosed structure by March 15, 2018. When Appellant failed to do so, the case was set for hearing, of which Appellant received timely notice. The record, which includes a transcript of the proceeding, shows that Appellant appeared through counsel and participated in the proceeding, presenting evidence and legal argument to the magistrate.

Accordingly, a want of due process does not form the basis for reversal of the magistrate's decision.

Turning our attention to the essential requirements of law, Appellant argues that the trailer that is the subject of the complaint is not commercial equipment because it was not *used* for commercial purposes. He also contends the city violated his constitutional right to equal protection in that it selectively enforced the code against him while leaving a number of violations in the area uncited. He claims the code enforcement officer that cited him was biased because of his sexual orientation.[1]

With regard to parking commercial vehicles in residential areas of the city, the Code's section 27.283.11(b) says:

> *Commercial equipment in residential districts.* The parking of commercial equipment in any residential district is prohibited. This requirement shall not be interpreted to prohibit commercial vehicles from loading and unloading in any residential district and shall not prevent temporary parking of vehicles on a lot as accessory to a lawful commercial use of the same residential lot or require such vehicles to be garaged. Parking is, however, permitted within any entirely enclosed structure which meets the regulatory requirements for the applicable zoning district.

Section 27-43 of the City Code defines "commercial equipment" as

> "Vehicles, machinery, materials or furnishings owned, used, or *designed* and/*or* intended *for commercial purposes,* except that a personal vehicle (car, one-ton pickup truck or van) used by an individual for transportation to and from home and job sites will not be considered commercial equipment, regardless of any commercial names, insignias or markings advertised on the vehicle."

(Emphasis added.) As defined, commercial equipment includes that which is designed, or intended, or used for commercial purposes. Section 27-283.11(b) prohibits parking commercial equipment in a residential district. Responding to Appellant's contention that the trailer was for his personal, not commercial use, the magistrate explained that under the ordinance it is the trailer's *design* for commercial use, not necessarily its actual use, which places it under the ordinance's definition of commercial equipment. The magistrate observed that Appellant's stated use of the trailer—transporting lawn equipment between his home and his mother's—is identical to the use for which commercial lawn services employ the same equipment. The magistrate's decision applies the correct law.

Appellant further argues the ordinance should not be enforced against him because the City unconstitutionally targeted him for enforcement based on his sexual orientation. He adds that the City left other similar violations of the same ordinance unenforced. The City responds that Appellant did not raise the issue in the administrative proceeding; therefore the issue has not been preserved for appellate review. The court disagrees. Although Appellant did not make a significant substantive argument concerning the constitutional issue to the magistrate, the record shows that Appellant both proffered evidence of similarly situated properties that he contended were not enforced and also raised the issue before the hearing in a letter his attorney wrote to city staff. It also appears that both the magistrate and Appellant's counsel believed this issue could not be determined in the administrative proceeding.[2] But when a constitutional challenge relates to the unconstitutional application or enforcement of rules and ordinances, administrative remedies must be exhausted. *Key Haven Associated Enters., Inc. v. Bd. Of Trustees of Internal Imp. Trust Fund,* 427 So. 2d 153, 158 (Fla. 1982) ([appellate] court is the proper forum to determine whether agency has applied a facially constitutional [ordinance] in a manner that deprives an aggrieved party of his constitutional rights). Because the constitutional issue was raised as to the application of the ordinance, and the magistrate would not consider it, the court will treat the matter as though the magistrate denied Appellant's challenge. The issue is, therefore, appropriate for appellate review. *Holiday Isle Resort & Marina Associates v. Monroe County,* 582 So. 2d 721, 721 (Fla. 3d DCA 1991) (appeal under §162.11, Fla. Stat. was proper forum to raise both facial and as applied constitutional challenges to code enforcement procedure).

To support his contention that the City improperly targeted his property for enforcement, Appellant cites *Scarbrough v. Morgan Cty. Bd. of Educ.,* 470 F.3d 250 (6th Cir. 2006). Under *Scarbrough,* to establish this claim, Appellant must show that his status is constitutionally protected, that adverse action was taken against him, and that there is a causal connection between the two. *Id.* at 255. As a general rule, zoning decisions will not usually be found to implicate constitutional guarantees. *Campbell v. Rainbow City, Ala.,* 434 F. 3d 1306, 1313 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C171a]. But the Equal Protection requires government entities to treat similarly situated people alike. *Id.* Where one person claims to have been treated differently from others who are similarly situated, however, some specificity is required. *Id.* at 1314.

In this appeal, apart from making unsubstantiated statements that he was targeted for enforcement because of his sexual orientation, Appellant has not provided the required specificity. The evidence he offered of the bias against him, specifically photographs alleged to depict uncited or unenforced violations, does not support his constitutional claim where the evidence fails to identify the location and zoning of the properties, and further fails to conclusively show that the City has taken no enforcement action against the properties or their owners. For those properties to be considered similarly situated, a plaintiff must make a specific showing that the two properties are "prima facie identical in all relevant respects." *Scopellitti v. City of Tampa,* 677 F. App'x 503, 508 (11th Cir. 2017), *citing Campbell* at 1315. In addition, by Appellant's admission, the code enforcement officer did not meet Appellant's domestic partner until the officer arrived a *second* time to investigate the matter.[3] To the extent this encounter forms the basis for Appellant's contention that the code enforcement officer was biased, it is at odds with Appellant's argument that he was targeted on improper grounds because the property was already being investigated.

Finally, competent, substantial evidence supports the code violation. The violation was photographed by the officer. The photographs show the trailer parked on the property next to the home. A copy of the trailer's registration reflects Appellant's ownership. Other record evidence shows the trailer as being one designed for commercial use. Business records show that the trailer is registered to the address given for Appellant's business "Evictions Plus, Inc."[4]

It is therefore ORDERED that the judgment below is AFFIRMED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature. (BATTLES, TESCHE ARKIN, PEACOCK, JJ.)

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[1]In pre-hearing correspondence to code enforcement, Appellant asserted the code enforcement officer discriminated against him on the basis of his sexual orientation *or* his ethnicity. He appears to have abandoned any constitutional claim based on his ethnicity in this appeal.

[2]Although some of the argument on this matter could not be clearly transcribed, Appellant's counsel intended to put evidence in the record for appellate review, and indicated that an unidentifiable matter could not be considered administratively. The magistrate acquiesced to this conclusion. Under the circumstances, this court considers the issue to have been preserved for appellate review.

[3]In his initial brief, Appellant asserts that Code Enforcement Officer Nicolle Sequeira first inspected the property November 24, 2017, and that no action was immediately taken as a result of that visit. The record of these proceedings begins with a January, 2018, inspection, at which time the same officer "confronted Appellant's 'domestic partner' of 17 years." In the absence of any facts to the contrary, this timeline suggests that the violation was targeted for inspection before the officer could make any assumptions regarding Appellant's sexual orientation.

[4]This is not intended to suggest that the equipment was, in fact, used commercially,

but rather to reinforce that Appellant is the owner where the equipment was parked in front of Appellant's residence but was not registered to that address.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing officer—Departure from neutrality—No error in denying motion to recuse hearing officer on ground that her supervisors conducted seminar for law enforcement on how to uphold license suspensions where hearing officer did not attend seminar and nothing in record indicates that the hearing officer acted in a biased or partial manner—Competent substantial evidence does not support finding that licensee refused breath test where documentary evidence indicates that licensee refused test, breath test technician testified that she administered test, and hearing officer's attempt to rehabilitate technician did not resolve conflict—Petition for writ of certiorari is granted

ROBERT JAMES KENNEDY, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-7715, Division F. December 31, 2019.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(RICHARD A. NIELSEN, J.) Petitioner Robert James Kennedy seeks review of the final order of a hearing officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered June 24, 2019. The order affirmed the suspension of Petitioner's driving privileges based on his alleged refusal to submit to a breathalyzer test after he was arrested on suspicion of driving under the influence. Having reviewed the briefs and appendices, the court determines that because conflicting evidence presented is insufficient to uphold the administrative suspension of Petitioner's driving privileges, the order must be quashed.

Petitioner was arrested April 3, 2019, for driving under the influence of alcohol. Shortly before the arrest, Det. Chandler of the Jacksonville Sheriff's Office was leaving his own residence when he heard a screeching sound and the sound of a vehicle coming down the road. The vehicle, which appeared to have been involved in a crash, attempted to turn around and drove up onto a curb. Det. Chandler initiated a traffic stop, identified himself as a law enforcement officer, took Petitioner's keys, and asked Petitioner to exit the vehicle. He observed among other indicators of alcohol consumption that Petitioner had an odor of alcohol about him and that he was dazed and unsteady on his feet. About 20 minutes later, Officer Merrow, who had been dispatched to a traffic crash, made contact with Det. Chandler and Petitioner. Based on his observations, along with his training and experience, Officer Merrow stated that he believed Petitioner was impaired, and, based on this conclusion, called for a DUI investigator. Meanwhile, a community service officer conducted a crash investigation. About 30 minutes later Officer Moeller arrived to conduct the DUI investigation. Officer Moeller transported Petitioner to the Duval County Jail. There, Officer Gonzalez requested a breath test. Her notes indicate that Petitioner refused the test.

Petitioner requested a formal review of his license suspension. The two-part hearing began May 3, and concluded June 13, 2019. Before the final review, however, Petitioner filed a motion to recuse the hearing officer conducting the hearing based on documents that show the Bureau of Administrative Review actively works with law enforcement to prevent license suspensions from being invalidated. Specifically, the Bureau invited law enforcement interested in upholding license suspensions, with an invitation to improve upon an already very high 90-percent license suspension rate, to a how-to seminar. Petitioner contends that the hearing officer in this case did not participate in this "training" but the same hearing officer is subordinate to the officials who conducted it. Petitioner believes that this employer-employee relationship compromises the hearing officer's neutrality and goes against the very nature of a fair and impartial process. This, in turn, effectively denies license holders' due process rights to a neutral hearing in general, and Petitioner's specifically. The hearing officer denied Petitioner's motion to recuse. Petitioner contends that this forms a basis for this court to quash the order below. The court disagrees that the denial of Petitioner's motion to recuse, by itself, is a basis to set aside the order upholding his license suspension. Nothing in the record demonstrates that the hearing officer acted in biased or partial manner. Moreover, by Petitioner's own admission, the hearing officer did not participate in the seminar in question.

Petitioner also contends that a conflict in the evidence renders the evidence incompetent such that it cannot support the order upholding his suspension. At the formal review hearing breath technician Officer Gonzalez appeared and testified. When asked whether she had administered a breath test to the Petitioner Officer Gonzalez said, specifically, "you said did I do a breath test? . . . Yes, sir." This testimony conflicted with documentation that indicated Petitioner had refused a breath test. In an apparent effort to resolve this conflict, the hearing officer, in follow up questioning, directed Officer Gonzalez's attention to the documents in the record. He asked Officer Gonzalez whether the documentation was true and correct to the best of her knowledge. She said "yes." It should be noted that Officer Gonzalez testified telephonically, so it is unknown whether she had the same documentation before her as did the hearing officer, or even whether she had *any* of her documentation with her. Despite Petitioner's contention that the hearing officer's attempt at rehabilitation did not resolve the conflict in the evidence regarding Petitioner's alleged refusal, the hearing officer denied Petitioner's motion to invalidate the license suspension. A final order upholding the administrative suspension of Petitioner's driver's license was issued June 24, 2019. This timely petition followed.

The Department has the burden to prove the elements necessary to uphold the suspension by a preponderance of the evidence. §322.2615(7), Fla. Stat. Petitioner argues that Officer Gonzalez's testimony creates a conflict in the evidence that was the State's burden to reconcile. *Dep't of Highway Safety and Motor Vehicles v. Colling,* 178 So. 3d 3, 4 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]. Petitioner suggests that the evidence is consistent with an attempt on Petitioner's part to recant his refusal.

The Department responds that Officer Gonzalez's testimony neither established an intent for Petitioner to recant his refusal nor created an irreconcilable conflict in the evidence. The Department reminds the court that it may not reweigh evidence when reviewing the administrative decision, citing *Dep't of Highway Safety and Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). The Department further asserts that it is the hearing officer's responsibility to resolve conflicts in the evidence, citing *Dep't of Highway Safety and Motor Vehicles v. Satter,* 643 So. 2d 692, 695 (Fla. 5th DCA 1994), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

The court agrees with the Department that nothing in the evidence suggests any intent or attempt on Petitioner's part to recant his alleged refusal. The court disagrees with the Department that there is no conflict in the evidence or that the conflict has been resolved, however. The documentary evidence indicates that Petitioner refused the breath test. In contrast, Officer Gonzalez's testimony indicates that she performed a breath test. The hearing officer's attempt at rehabilitation did not clearly resolve the conflict. The court does not impermissibly reweigh evidence when concluding competent, substantial evidence does not support hearing officer's finding. *Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *Colling,* 178

So. 3d 3, at 4 (conclusion amounting to nothing more than a flip of the coin insufficient to uphold suspension). The evidence gives equal support for two conflicting inferences. *Id.* Such evidence, being inconsistent, is not substantial. *Id.* Because competent, substantial evidence does not support the order upholding Petitioner's administrative license suspension, it will be quashed. It is therefore unnecessary to address Petitioner's remaining issue.

IT IS THEREFORE ORDERED that the Petition is GRANTED and the order upholding the administrative suspension of Petitioner's driving privilege is QUASHED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

* * *

Landlord-tenant—Eviction—Default—Failure to deposit rent into court registry—No error in entry of eviction judgment and writ of possession without conducting hearing on motion to determine rent where tenant waived all defenses to eviction action by failing to deposit any of disputed rent into court registry

ALFRED BARR, Appellant, v. BEAZER PREOWNED HOMES II, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 19-CA-1598, Division X. L.T. Case No. 19-CC-02351. December 20, 2019. Counsel: Alfred Barr, Pro se, Appellant. Jean M. Henne, Jean M. Henne, P.A., Winter Haven, for Appellee.

APPELLATE OPINION

This case is before the court to review an eviction judgment and writ of possession entered in favor of landlord Beazer Homes against tenant/Appellant Alfred Barr. Mr. Barr challenges the court's authority to enter the judgment and writ without having conducted a hearing on his motion to determine rent. He also challenges the validity of service of process. Where service was effected by posting in accordance with the law, Mr. Barr has shown no error on this issue. With regard to the court's entry of judgment without a hearing on the motion to determine rent, there is likewise no error shown. Although Mr. Barr timely moved for an order determining rent, because he did not deposit any of the disputed rent or any rent accruing during the course of proceedings into the court's registry, he waived his defenses, and the landlord was entitled to an immediate judgment under the law.

The statute is clear:

> 83.60(2) In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment,[1] . . . the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court *and the rent that accrues during the pendency of the proceeding*, when due. . . . *Failure of the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid into the registry within 5 days*, excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to *an immediate default judgment* for removal of the tenant with a writ of possession to issue *without further notice or hearing thereon*. . . . (Emphasis added).

First Hanover v. Vazquez, 848 So.2d 1188, 1190 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1319b] (tenants in actions for possession for nonpayment of rent are obligated to pay rent as a condition to remaining in possession irrespective of their defenses and counterclaims); *K.D. Lewis Enterprises Corp. v. Smith,* 445 So.2d 1032, 1035 (Fla. 5th DCA 1984)(even if there is a dispute as to the amount of rent due, rent must be paid for tenant to remain in possession of premises).

The judgment below is AFFIRMED. It is FURTHER ORDERED that Appellee's motion for appellate attorney's fees is GRANTED. This matter is REMANDED to the county court for a hearing on the amount of fees. (PEACOCK, THOMAS, TESCHE ARKIN, JJ.)

[1]In addition to improper service, Mr. Barr alleged payment of August, 2018, rent only. Although Beazer's complaint alleged nonpayment of rent for the months August 2018-January 2019, the amended complaint removed the claim for August, 2018, rent from the claim.

* * *

Appeals—Appeal is premature where final, appealable order has not been rendered and pending bankruptcy action has been filed by appellant

GWENDOLYN L. ALOWOLODU, Appellant, v. MID-AMERICA APARTMENT COMMUNITIES, INC., Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 19-CA-12729. Division X. L.T. Case No. 19-CC-60552. December 20, 2019. Counsel: Gwendolyn Alowolodu, Brandon, Pro se, Appellant. Charles V. Barrett, III, Charles V. Barrett, P.A., Tampa, for Appellee.

(Per Curiam.)

ORDER DISMISSING PREMATURE APPEAL

(ARKIN, Judge.) It has come to the Court's attention that a final appealable order has not been rendered in the proceeding below. Moreover, it appears bankruptcy has been filed by Appellant. Accordingly, this Court lacks jurisdiction to consider an appeal at this time. It is therefore

ORDERED that the appeal, being premature, is DISMISSED. Appellant may file a new appeal, if necessary, when a final judgment is rendered in the case or within 30 days of the expiration of the bankruptcy stay, whichever is later. *AmMed Surgical Equipment, LLC v. Professional Medical Billing Specialists, LLC,* 162 So.3d 209, 211-12 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D352a]; *Gardner v. Bank of New York Mellon,* 192 So. 3d 51 (Fla. 2d DCA 2015).

* * *

Criminal law—Sentencing—Restitution—Trial court lacked jurisdiction to set amount of restitution after defendant's probation ended, notwithstanding fact that delay in setting restitution was caused by loss of trial court's jurisdiction during pendency of defendant's appeal of her conviction and sentence

ASHLEY YEAGERFISCHER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 502018AP000085AXXXMB. L.T. Case No. 502014MM012688AXXXNB. January 8, 2020. Appeal from the County Court in and for Palm Beach County, Judge Mark Eissy. Counsel: Claire V. Madill, Office of the Public Defender, West Palm Beach, for Appellant. Samantha Bowen, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, Ashley Lynn Yeagerfischer, was adjudicated guilty of one count of Battery and sentenced to twelve months' probation. Although restitution was a condition of Appellant's probation, because Appellant appealed her underlying conviction and sentence before the restitution hearing, the amount of restitution was not determined until after Appellant's appeal was resolved. By that point in time, Appellant had completed her probation. Appellant now appeals the restitution order, arguing that the trial court lacked jurisdiction to set the amount of restitution after her probation ended. We agree.

"Questions of subject matter jurisdiction are reviewed de novo." *Stanek-Cousins v. State,* 912 So. 2d 43, 48 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2060a]. A restitution order must be imposed at sentencing or within sixty days thereafter. *State v. Sanderson,* 625 So. 2d 471, 473 (Fla. 1993). If the restitution order is timely entered, a court may reserve jurisdiction to determine the amount of restitution beyond the sixty day period. *Id.* Thus, a trial court may properly set the actual amount of restitution years after the date of sentencing if it reserves and maintains jurisdiction. *White v. State,* 190 So. 3d 99, 101 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D775a]. However, a trial court loses jurisdiction to set the amount of restitution, even if it timely entered an order reserving jurisdiction, once a defendant's probation has ended. *Montes v. State,* 723 So. 2d 881, 882 (Fla. 3d DCA 1998)

[24 Fla. L. Weekly D15a]; *see also State v. Maddex,* 159 So. 3d 267, 270-71 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D577a] (holding that when defendant's eighteen-month probation sentence ended its natural life, the trial court was divested of its jurisdiction over probationer).

Based on this clear precedent, we hold that the court lacked jurisdiction to set the amount of restitution after Appellant's probation ended. Although Appellant did not raise this issue at the restitution hearing below, the court's lack of jurisdiction created a fundamental error and, therefore, we are compelled to reverse. *See J.D. v. State,* 849 So. 2d 458, 460 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1633a]. Neither section 960.292(2), Florida Statutes—which allows a trial court to retain jurisdiction "for the sole purpose of entering civil restitution liens" based on set restitution amounts—nor section 775.089(3), Florida Statutes—which allows a trial court that has ordered restitution for a misdemeanor offense to retain jurisdiction "for the purpose of enforcing the restitution order for any period, not to exceed 5 years"—alter this conclusion as both statutes contemplate the restitution being set before the defendant completes his or her sentence. *See Nickerson v. State,* 178 So. 3d 538, 538-39 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2493a] (court had jurisdiction to enter civil restitution lien order under section 960.292 after defendant was released from supervision when restitution was set before supervision ended); *McClintock v. State,* 995 So. 2d 1147, 1149 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2779a] (holding that section 775.089(3) pertains to a period of time wherein the trial court can enforce the payment of a restitution order, not a period for entry of an original restitution order).

In arriving at this conclusion, we acknowledge the State's argument regarding the effect of Appellant's appeal on the trial court's ability to set restitution. The State is correct that a trial court loses jurisdiction to hold a restitution hearing where a notice of appeal has been filed and, therefore, is also correct that the trial court did not have jurisdiction to deal with the amount of restitution while Appellant's appeal of her judgment and sentence was pending. *See Marro v. State,* 803 So. 2d 906, 906 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D159a]. In cases where the defendant is serving a lengthy sentence, this typically does not present an issue as the defendant will likely still be serving his or her sentence at the conclusion of the appeal and, therefore, the trial court will still have jurisdiction to set restitution. *See, e.g., White,* 190 So. 3d at 101; *Marro,* 803 So. 2d at 906. However, when the defendant is serving a sentence which may be shorter than the appellate process, the court and the State may be faced with a jurisdictional conundrum. As per the Fourth District Court of Appeal, the "better practice" in such a scenario is to request the appellate court to relinquish jurisdiction to allow the trial court to hold a hearing as to the amount of restitution. *Stanek-Cousins,* 912 So. 2d at 48 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2060a].

Accordingly, we **REVERSE** and **REMAND** for the trial court to vacate the restitution order. Based on this holding, the remainder of the issues raised by Appellant are moot. (CARACUZZO, SUSKAUER, and SCHER JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to blood test—Request that licensee who was transported to hospital following accident submit to blood test was not lawful where there was no evidence that breath test or urine test was impossible or impractical—Mere passage of time while licensee underwent medical treatment is not sufficient to establish impossibility or impracticality of breath or urine test

CARA MICHELE SMILEY, Petitioner, v. THE STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Civil Division AY. Case No. 502019CA008960XXXXMB. December 20, 2019. Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Ira D. Karmelin, West Palm Beach, for Petitioner. Mark L. Mason, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks review of an order affirming the suspension of her driver license based on her refusal to submit to a blood test. Petitioner contends that the suspension order is not supported by competent, substantial evidence because one of the legal requirements for requesting a blood test—that a breath or urine test was impossible or impractical when the officer requested that Petitioner submit to a blood draw—was not satisfied. We agree and grant the Petition for Writ of Certiorari.

After being involved in an accident, Petitioner was arrested for driving under the influence. She was then taken to the hospital where medical personnel withdrew blood and urine samples from Petitioner as part of the treatment. The medical tests showed that Petitioner had cocaine in her system. While at the hospital, the arresting officer requested a blood test from Petitioner to check her blood for alcohol or chemical substances. The officer warned Petitioner that refusal to submit to a blood test under the implied consent law would result in the suspension of her driver license. Petitioner refused to submit and her license was suspended. At the request of Petitioner, a hearing officer for the Department of Highway Safety and Motor Vehicles reviewed the suspension and affirmed it.

Section 316.1932, Florida Statutes, known as the implied consent law, addresses driver license suspensions based on refusal to submit to a blood test. A driver is deemed to have given his or her consent to submit to "an approved blood test for the purpose of determining the alcoholic content of the blood" or determining the presence of chemical or controlled substances where 1) there is a reasonable cause to believe that the person was driving while under the influence of alcohol or chemical substances; 2) "the person appears for treatment at a hospital, clinic, or other medical facility;" and 3) "**the administration of a breath or urine test is impractical or impossible**. § 316.1932(1)(c), Fla. Stat. (2019) (emphasis added). Based on the plain language of subsection 316.1932(1)(c), the impracticality of a breath or urine test is a necessary precondition for a driver's implied consent to a blood test. *See State v. Davis,* 264 So. 3d 965, 967 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D450a] [Editor's note: *State, Department of Highway Safety and Motor Vehicles v. Davis*].

The first two preconditions were met here, but the third was not. There is nothing in the record to suggest that the officer requested a breath or a urine test or that a breath or urine test was impractical or impossible before requesting a blood test from Petitioner. DHSMV argues that impracticality of administering a breath or urine test can be inferred from the fact that Petitioner had been in the hospital for two and a half hours at the time of the blood request. However, as this Court held in *Mejia v. Florida Department of Highway Safety & Motor Vehicles,* 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. Nov. 28, 2017), "the mere passage of time is not . . . sufficient to establish impossibility or impracticality of a breath [or urine] test." Something more must be shown, such as "some minimal indication that Petitioner would continue to remain at the hospital." *Id.*

Additionally, the hearing officer's final order made no findings that a breath test or urine test was impractical, nor that the request was lawful—that is, that the impracticality requirement was met before requesting the blood test. The tests performed by the hospital before the officer's blood draw request are irrelevant. The basis for a license suspension due to refusal to submit to a test under the implied consent law is that the test be administered at the request of the officer. *See generally* § 316.1932, Fla. Stat. (2019) (indicating that refusal to a test is aimed at the request of a law enforcement officer). A test performed

by medical personnel for treatment is not a test requested by the officer. Although we agree with DHSMV that highway safety is a vital public interest, the law is the law. Subsection 316.1932(1)(c) clearly addresses the requirements for implied consent to a lawful blood test.

Therefore, we conclude that the suspension of Petitioner's driver license was not supported by competent, substantial evidence that a breath or urine test was impractical or impossible. Accordingly, we **GRANT** the Petition for Writ of Certiorari and **QUASH** the order affirming the Petitioner's license suspension. (KERNER, ROWE and NUTT, JJ., concur.)

* * *

Appeals—Judicial estoppel—Inconsistent litigation positions—Condominium association arguing in one suit that non-binding arbitration was required before litigation, while nonetheless filing parallel court action seeking the same relief

JOHN PATCHEN, Appellant, v. QUADOMAIN I & IV ASSOCIATION, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-000081 (AP). L.T. Case No. COCE16-009625. November 4, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Linda Pratt, Judge. Counsel: Eric C. Edison, Waldman Trigoboff Hildebrandt & Calnan, P.A., Fort Lauderdale, for Appellant. Josef M. Fiala, Vernis & Bowling of Palm Beach, P.A., North Palm Beach, for Appellee.

OPINION

(PER CURIAM.) Appellant, John Patchen ("Patchen"), appeals a Final Judgment entered in favor of Appellee, Quadomain I & IV Association, Inc. ("Quadomain"). Having carefully considered the briefs, the record, and the applicable law, the Final Judgment is hereby **REVERSED** as follows:

In the instant case, on May 6, 2016, Patchen filed a complaint against Quadomain. On August 22, 2016, Patchen filed an amended complaint against Quadomain seeking equitable relief from the Court to enjoin Quadomain from requiring that construction be performed on Patchen's condo balcony or related areas of his unit. On August 30, 2016, Quadomain filed a Motion to Dismiss the Amended Complaint, which the county court entered without prejudice on November 29, 2016. Ultimately, the county court dismissed the action without prejudice for lack of jurisdiction, and for failure of Patchen to first comply with section 718.1255(4)(a), Florida Statutes, requiring non-binding arbitration before litigation.

On November 11, 2017, Quadomain filed a parallel action in the Seventeenth Judicial Circuit against Patchen, seeking injunctive relief. *See Quadomain Condominium Assoc., Inc. v. John Patchen,* No. CACE17-020651. Even a brief reading of this Complaint shows that it contains the same parties and issues as in the instant case.

Judicial Estoppel is an equitable doctrine that prevents litigants from taking inconsistent positions in separate judicial or quasi-judicial proceedings. *See Crawford Residences, LLC v. Banco Popular North America,* 88 So. 3d 1017 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1260d]. Quadomain maintains inconsistent positions between these two actions. Quadomain argues in *this* litigation the need for nonbinding pre-suit arbitration, while at the same time filing an action seeking the same relief in the Seventeenth Judicial Circuit Court. Therefore, the doctrine of Judicial Estoppel is appropriately invoked to preclude any such position in this Appeal.

Accordingly, the Final Judgment in favor of Appellee is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Additionally, Appellee's Motion for Attorney's Fees and Costs is hereby **DENIED**. (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Proper sequence

ADVANCED CHIROPRACTIC AND MEDICAL CENTER, CORP., (a/a/o Nethanel Dumesle), Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-017115 (AP). L.T. Case No. COCE13-012197. November 21, 2019. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Giuseppina Miranda, Judge. Counsel: Robert J. Hauser, Pankauski Hauser PLLC, West Palm Beach, for Appellant. Michael C. Clarke, Kubicki Draper, P.A., Tampa, for Appellee.

[Lower court order at 24 Fla. L. Weekly Supp. 766a]

CORRECTED OPINION UPON CONFESSION OF ERROR

(LEDEE, J.) This Court hereby **GRANTS** Appellant's Motion for Rehearing to Correct Scrivener's Error in November 4, 2019 Opinion, filed November 7, 2019. This Court's Opinion, dated November 4, 2019, is hereby withdrawn and substituted with the following:

Appellant appeals from a final judgment entered in favor of Appellee. Appellant argues the county court improperly applied the deductible to the maximum compensable amount pursuant to the fee schedules under section 627.736(5)(a)1.f, Florida Statutes, rather than Appellant's billed amount. Appellee has filed a Confession of Error in light of the Florida Supreme Court's decision in *Progressive Select Insurance Company v. Florida Hospital Medical Center,* 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a]. Appellee's Confession of Error is hereby **ACCEPTED**. Accordingly, the final judgment entered in favor of Appellee is hereby **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this Opinion. Appellant's Motion for Appellate Attorney's Fees is **GRANTED**, as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellee's Motion for Appellate Attorney's Fees is hereby **DENIED**. (HENNING and SINGHAL, JJ., concur.)

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. OPEN MAGNETIC SCANNING, LTD., a/a/o John Mino, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-012458 (AP). L.T. Case No. COCE13-008601. November 4, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Kathleen McCarthy, Judge. Counsel: Thomas L. Hunker, Cole Scott & Kissane, P.A., Plantation, for Appellant. Joseph R. Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644 (Fla. 1999) [24 Fla. L. Weekly S71a] ("if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."). Appellee's Motion for Attorneys' Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellant's Motion for Appellate Attorneys' Fees is hereby **DENIED**. (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

Landlord-tenant—Eviction—Notice—Default—Abuse of discretion to strike tenant's answer and affirmative defenses without affording tenant leave to amend and to summarily enter default final judgment of removal despite tenant's defense of action

DON KOZICH, Appellant, v. RELIANCE PROGRESSO ASSOCIATES, LTD., d/b/a PROGRESSO POINT APARTMENT COMMUNITY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-001144 (AP). L.T. Case No. COCE15-004735. November 4, 2019. Appeal from the County

Court of the Seventeenth Judicial Circuit, Broward County, Peter B. Skolnik, Judge. Counsel: Don Kozich, Pro se, Fort Lauderdale, Appellant. Michael T. Burke, Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Appellant, Don Kozich ("Kozich") appeals the county court's entry of default final judgment of removal in favor of Reliance Progresso Associates, Ltd. d/b/a Progresso Point Apartment Community ("Reliance") and the county court's order striking Kozich's answer and affirmative defenses. Having carefully reviewed the briefs, the record, and the applicable law, this Court dispenses with oral argument, and finds that the final judgment is hereby **REVERSED** as set forth below.

The county court abused its discretion in striking Kozich's answer and affirmative defenses without affording Kozich leave to amend and summarily entering default final judgment of removal notwithstanding Kozich's defense of the action. *See Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC,* 986 So. 2d 1244, 1259 (Fla. 2008) [33 Fla. L. Weekly S503a] (finding a default improper when a party has filed a responsive pleading or otherwise defended before entry of default). Accordingly, final judgment should be **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion. (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

STAR CASUALTY INSURANCE CO., Appellant, v. HOLLYWOOD INJURY REHABILITATION CENTER, INC., a/a/o Vanessa Garcia, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-021218 (AP). L.T. Case No. COCE 11-026833. October 15, 2019. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Stephen J. Zaccor, Judge. Counsel: Nancy Gregoire, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, for Appellant. Chad A. Barr, Law Office of Chad A. Barr, P.A., Altamonte Springs, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby AFFIRMED. Appellee's Motion for Award of Appellate Attorney's Fees and Costs is hereby GRANTED as to appellate attorney's fees, with the amount to be determined by the county court upon remand, and DENIED as to costs, WITHOUT PREJUDICE to Appellee to file a motion in the county court pursuant to Florida Rule of Appellate Procedure 9.400(a). *See* Fla. R. App. P. 9.400(a) ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

JARRETT POOD, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 16-27AC10A. L.T. Case No. 14-3227TC20A. December 17, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Melinda K. Brown, Judge. Counsel: Lisa S. Lawlor, Office of the Public Defender for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, the record on appeal, and the applicable law, we hereby **AFFIRM** the trial court's order denying Appellant's motion for judgment of acquittal. As such, the judgment and sentence entered in the trial court shall stand. (BAILEY, T., KOLLRA, JR., and WEEKES, JJ., concur.)

* * *

JAMES C. HOWARD, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 17-000037AC10A. L.T. Case No.15-25889MM10A. December 17, 2019. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Judge Robert F. Diaz. Counsel: Joseph W. Gibson, Joseph W. Gibson, P.A., Miami, for Appellant. Nicole Bloom, State Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) **THIS CAUSE** is before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's order denying Appellant's Motion to Suppress. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument, and decides that the trial court's denial of Appellant's Motion to Suppress is AFFIRMED. (KOLLRA, WEEKES, and BAILEY, T., JJ., concur.)

* * *

516, LLC, Appellant, v. C&I GARDEN, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-003565 (AP). L.T. Case No. COCE16-009214. November 4, 2019. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Daniel J. Kanner, Judge. Counsel: Jeffrey J. Molinaro, Fuerst Ittleman David & Joseph, Miami, for Appellant. Eric M. Sodhi, Sodhi Spoont PLLC, Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorneys' Fees and Costs is hereby **GRANTED**, as to appellate fees, with the amount to be determined by the trial court upon remand, and **DENIED**, as to costs, **WITHOUT PREJUDICE** to Appellee to file a motion in the trial court pursuant to Florida Rule of Appellate Procedure 9.400(a). *See* Fla. R. App. P. 9.400 ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

CARLOS MARTINS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18-44AC10A. L.T. Case No. 15-032432MM10A. December 17, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kal Evans, Judge. Counsel: Michael B. Cohen, for Appellant. Nicole Bloom, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, and the applicable law, we hereby **AFFIRM** the trial court's denial of Appellant's motion to suppress. (BAILEY, T., KOLLRA, and WEEKES, JJ., concur.)

* * *

CARL DENNIS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 13-28AC10A. L.T. Case No. 09-7693MM10A. December 17, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Evans. Counsel: Richard L. Rosenbaum, Law Offices of Richard Rosenbaum, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** the Defendant's traffic infractions. We note, however, that the affirmance is without prejudice to Defendant's right to raise his ineffectiveness of trial counsel claims in a postconviction motion. *See* Fla. R. Crim. P. 3.850; *York v. State*, 731 So. 2d 802 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D996a]. (BAILEY, KOLLRA, and WEEKES, JJ., concur.)

* * *

RENA SINGER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 15-82AC10A. L.T. Case No. 14-29051MU10A. December 17, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Jason T. Forman, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant, the Answer Brief of Appellee, and the Reply Brief of Appellant, the record on appeal, and the applicable law, we find no error on the part of the County Court denying Appellant's motion in limine and/or to strike testimony, and Appellant's motion to suppress, dismiss and/or exclude, and therefore AFFIRM the conviction. (KOLLRA, T. BAILEY, and WEEKES, JJ., concur.)

* * *

KEVIN BEACH, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18-48AC10A. L.T. Case No. 17-026185TC10A. October 30, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Ginger Lerner-Wren. Counsel: Lisa S. Lawlor, Office of the Public Defender, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** the Defendant's judgment and sentence. (BAILEY, KOLLRA, and WEEKES, JJ., concur.)

* * *

PHD DEVELOPMENT, LLC, Appellant, v. CHRISTIAN SAGESSE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-006533 (AP). L.T. Case No. COWE16-015366. November 4, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Olga Levine, Judge. Counsel: Eric J. Volz, Fort Lauderdale, for Appellant. Christian Sagesse, Pro Se, North Lauderhill, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the brief, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (HENNING, SINGHAL, and LEDEE, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—No merit to argument that arrest affidavit and refusal affidavit are deficient because arresting officer testified that he was not administered verbal oath when he signed documents where language in documents expressly provide that they were sworn documents—Further, officer swore to veracity of documents under oath at hearing—Actual physical control of vehicle—Because accident report privilege does not apply in administrative license suspension hearings, hearing officer properly considered licensee's statements in crash report as basis for concluding that licensee was driving or in actual physical control of vehicle—Lawfulness of detention and arrest—Officer had reasonable suspicion to detain licensee for DUI investigation where licensee caused accident after coming from bar at 3:30 a.m.; stumbled when he walked; and had bloodshot eyes, slurred speech and odor of alcohol—Officer had probable cause for arrest based on these observations and licensee's poor performance on field sobriety exercises

MICHAEL ROACH, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 18-05-AP. April 10, 2019. Petition for Writ of Certiorari from the Florida Department of Highway Safety and Motor Vehicles, Ronald Ryan, Hearing Officer. Counsel: Stuart I. Hyman, for Petitioner. Mark L. Mason, Assistant General Counsel, for Respondent.

(Before NELSON, MCINTOSH, and RUDISILL, JJ.)

ORDER GRANTING REHEARING

(PER CURIAM.) Respondent filed a Motion for Rehearing of the Writ of Certiorari on March 6, 2019, alleging that this Court overlooked a change in the law regarding section 322.2615(2)(b), Florida Statutes. Respondent argues that as of the statutory amendment in 2006, the accident report privilege contained in section 316.066(4), Florida Statutes, no longer applies in formal administrative hearings and, therefore, this Court's reliance on *State v. Cino,* 931 So. 2d 164, 168 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a], and *Department of Highway Safety and Motor Vehicles v. Perry,* 702 So. 2d 294, 295-96 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2796a], was misplaced.[1] Respondent contends that the hearing officer properly relied upon Petitioner's admissions referenced in the arrest report to conclude that Petitioner was driving or in actual physical control of a motor vehicle.

At the formal review hearing and in the Petition, counsel for Petitioner strenuously argued that the statements made by Petitioner to Eustis Police Officer Sean Hackett—that he was in the drive-thru lane and his foot slipped off the pedal causing him to hit the back of the vehicle in front of him—were protected by the accident report privilege. Petitioner relied upon *Cino* and *Perry.*

Notably, Respondent did not present any of the arguments it now raises in the instant Motion in its response to the Petition. Respondent did not argue that the accident report privilege does not apply in formal administrative hearings, or that Petitioner's reliance on *Cino* and *Perry* was misplaced based upon the 2006 change in the law. Rather, Respondent merely asserted that any argument that information gathered during the crash investigation stage may not be used to form probable cause necessary to arrest a person due to the accident report privilege was misplaced, without explanation, and quoted the relevant statute.

The issue of whether the accident report privilege applies in administrative hearings has never been decided by the Florida Supreme Court or any Florida District Court of Appeal. However, based on the circuit court case cited in Respondent's motion, and other circuit court cases interpreting the statute to mean that the accident report privilege no longer applies in such hearings, this Court will grant rehearing.

Therefore, upon due consideration of the Motion and Petitioner's response, this Court grants rehearing, withdraws its previous Writ of Certiorari, and substitutes the following Order in its stead.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license for driving or being in actual physical control of a motor vehicle while under the influence of alcoholic beverages. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On December 20, 2017, at approximately 3:34 a.m., Eustis Police Officer Sean Hackett was dispatched to a vehicle accident that occurred in a McDonald's drive-thru. He was the initial officer on the scene. When he arrived, he observed Petitioner outside of a vehicle. He never saw Petitioner inside a vehicle. Upon contacting Petitioner, Officer Hackett observed that he had bloodshot eyes and slurred speech, he smelled of alcohol, and he stumbled while walking. Petitioner told Hackett that when he was in the drive-thru lane, his foot slipped off the pedal and he hit the back of the vehicle in front of him. He also told Hackett that he had come from a bar in Tavares before the accident. Hackett spoke with the driver and passenger of the other vehicle, who informed him that they were sitting in the drive-thru lane

when another vehicle hit the rear of their vehicle.

Officer Hackett conducted a DUI investigation and Petitioner completed field sobriety exercises. Hackett did not advise Petitioner that he changed from an accident investigation to a criminal investigation. Although Petitioner successfully completed the finger-to-nose test, he performed poorly on the other tests. Petitioner was placed under arrest for DUI and transported to the Eustis Police Department for booking. Hackett advised Petitioner of his *Miranda* rights after the arrest. His decision to arrest Petitioner for DUI was based on a combination of factors rather than solely on any one particular indicator. Petitioner refused to submit to a breath test, and was subsequently transported to the Lake County Jail. His license was suspended pursuant to section 322.2615, Florida Statutes, as a result of his failure to submit to a breath test. He then sought formal review of the license suspension by the Department of Highway Safety and Motor Vehicles Division of Driver Licenses pursuant to section 322.2615(6), Florida Statutes. A hearing was held on January 23, 2018.

At the hearing, the following documents were submitted into the record: Florida DUI Uniform Traffic Citation; Arrest Affidavit; Officer Report; EPD DUI Packet Checklist; State of Florida Traffic Crash Report; Breath Alcohol Test Affidavit; Affidavit of Refusal to Submit to Breath, Urine, or Blood Test; Prisoner Property Inventory; and a DVD. Officer Hackett appeared telephonically and was sworn in by a notary public. At the start of his testimony, he swore or affirmed that the documents he submitted into the record were true and correct. He testified that he was not administered a verbal oath when he signed those documents.

Counsel for Petitioner moved to invalidate the suspension, arguing that: (1) the documents submitted into the record were inadmissible because they were not properly sworn under oath by Officer Hackett; (2) there was no evidence that Petitioner was driving or in actual physical control of the vehicle, aside from Petitioner's own statements which were inadmissible under the accident report privilege; (3) there was no reasonable suspicion to detain Petitioner to investigate for DUI; (4) there was no probable cause to arrest for DUI based on a totality of the investigation, including the DVD which contradicted Officer Hackett's observations of impairment; and (5) there was no showing that the horizontal gaze nystagmus test was scientifically reliable. The hearing officer granted the motion as to the horizontal gaze nystagmus test, but denied all of the other motions. He found that all elements necessary to sustain the suspension for refusal to submit to a breath test under section 322.2615 were supported by a preponderance of the evidence.

STANDARD OF REVIEW

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a].

ANALYSIS

In a formal review hearing for suspension of a driver's license based upon refusal to submit to a breath, blood, or urine test, the hearing officer's scope of review is limited to the following issues:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2018).

Petitioner argues that there was no competent substantial evidence to support the hearing officer's findings because: (1) Officer Hackett admitted that he was not administered an oath before he signed the documents in the record; (2) there was no evidence that he was driving or in actual physical control of the vehicle, aside from his own statements which were inadmissible under the accident report privilege; (3) there was no reasonable suspicion to detain him longer than necessary to issue a citation or conduct field sobriety exercises where there were no signs of impairment; and (4) there was no probable cause to arrest him for DUI.

(1) Oath

Petitioner argues that there was no competent substantial evidence to support the sustaining of his license suspension in this case because Officer Hackett testified that he signed the reports without being administered an oath and, therefore, the reports were legally insufficient to constitute affidavits under section 322.2615(2)(a), Florida Statutes.

Respondent argues that the arrest affidavit and refusal affidavit were both signed to indicate they were attested to. Respondent also argues that the hearing officer administered an oath to Officer Hackett pursuant to section 322.2615(6)(b) and, therefore, the reports were properly sworn and admitted into the record as affidavits of probable cause.

The Court agrees with Respondent. Before a driver's license belonging to a person who has been arrested for DUI can be suspended, section 322.2615(2) requires the arresting officer to forward to the Department an affidavit stating the grounds for the officer's belief that the person was driving or in actual physical control of a motor vehicle while under the influence, and an affidavit stating that a breath test was requested and the person refused to submit. § 322.2615(2)(a), Fla. Stat. (2018). The failure to furnish the Department with a properly sworn statement of the arresting officer fails to vest the Department with initial jurisdiction to proceed with any administrative action in suspending a person's driver's license. *State v. Johnson,* 553 So. 2d 730, 733 (Fla. 2d DCA 1989).

An affidavit is a "statement in writing under an oath administered by a duly authorized person." *Youngker v. State,* 215 So. 2d 318, 321 (Fla. 4th DCA 1968). "An oath may be undertaken by any unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of a statement and assumes the obligation of an oath." *Id.* "The key to a valid oath is that perjury will lie for its falsity. . . . It is essential to the offense of perjury that the statement considered perjurious was given under an oath actually administered." *Collins v. State,* 465 So. 2d 1266, 1268 (Fla. 2d DCA 1985).

Here, the arrest affidavit is legally sufficient to constitute a valid affidavit. At the top of each page it states, "Before Me, the undersigned authority personally appeared Ofc. S. Hackett E50 who being duly sworn, alleges . . . ," and at the bottom of each page is Officer Hackett's signature. Next to that it states, "Sworn to and subscribed before me this 20 day of December, 2017," followed by the signature of Corporal Fahning. Likewise, the Affidavit of Refusal states, "I, Ofc S. Hackett E50 . . . do swear or affirm that . . . ," followed by Officer Hackett's signature and the signature of another corporal as the attesting officer. The language in these documents expressly provides that the documents were sworn documents. Petitioner does not dispute the validity of the attesting officers' signature, authority, or identity.

Nor does Petitioner provide this Court with any authority that the oath must be *verbally* administered by the attesting officer in addition to the written statement and oath contained within the documents. *See Pearson v. Dep't of Highway Safety & Motor Vehicles*, 11 Fla. L. Weekly Supp. 521a (Fla. 9th Cir. Ct. Jan. 14, 2004); *see also Hallman v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 181a (Fla. 6th Cir. Ct. Sept. 30, 2014) (finding that although an oath was not administered to the deputy, the language contained in the probable cause affidavit was sufficient to meet the statutory requirements under section 322.2615(2)).

Furthermore, the hearing officer actually administered an oath to Officer Hackett at the hearing during which Hackett swore or affirmed that the documents he submitted into the record were true and correct. *See Messer v. Dep't of Highway Safety & Motor Vehicles,* 3 Fla. L. Weekly Supp. 563b (Fla. 9th Cir. Ct. Dec. 15, 1995) (noting that the Department relied solely on the arresting officer's facially invalid arrest affidavit, but could have met its burden at the hearing "by calling and eliciting sworn testimony from the arresting officer").

The cases relied upon by Petitioner are distinguishable. In *Chase v. Department of Highway Safety and Motor Vehicles,* 6 Fla. L. Weekly Supp. 324b (Fla. 18th Cir. Ct. Mar. 15, 1999), the court granted certiorari because the hearing officer relied solely upon a facially invalid arrest report which did not provide any indication of the identity of the attestor or whether he or she had authority to administer an oath or notarize a document. In *Messer,* the court held that the hearing officer departed from the essential requirements of law in relying upon the arresting officer's charging affidavit which contained an illegible attestation signature, and provided no indication of the identity of the attestor or whether the attestor had authority to administer an oath or notarize a document. *Messer,* 3 Fla. L. Weekly Supp. 563b. In contrast, the affidavits in this case were facially valid and Officer Hackett provided sworn testimony. Thus, the reports were properly admitted into the record for consideration by the hearing officer.

(2) Accident Report Privilege

Petitioner argues that there was no competent substantial evidence to support the sustaining of his license suspension because the only evidence that establishes he was driving or in actual physical control of the vehicle—his own statements to Officer Hackett during the accident investigation—are protected by the accident report privilege.

Respondent argues that the accident report privilege codified in section 316.066(4), Florida Statutes, no longer applies in formal administrative hearings pursuant to section 322.2615(2)(b), which provides, "Notwithstanding s. 316.066(4),[2] the crash report shall be considered by the hearing officer." § 322.2615(2)(b), Fla. Stat. (2018).

The Court agrees with Respondent and finds, based on other circuit courts' interpretation of the statute, that the privilege does not apply in this case. *See Horne v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 442a (Fla. 13th Cir. Ct. Mar. 20, 2008) (interpreting "notwithstanding" to mean a hearing officer may consider hearsay statements despite any limitations under section 316.066, and finding the Department did not depart from essential requirements of law in considering petitioner's statements in the crash report); *see also Tackett v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 174a (Fla. 4th Cir. Ct. Sept. 10, 2014) (the accident report privilege does not apply to the administrative review of a license suspension pursuant to section 322.2615(2)(b)); *Stafford v. Dep't of Highway Safety & Motor Vehicles,* 19 Fla. L. Weekly Supp. 167c (Fla. 8th Cir. Ct. Sept. 19, 2011) (section 322.2615(2) abrogated the accident report privilege as applied to administrative license suspension review hearings); *Alford v. Dep't of Highway Safety & Motor Vehicles,* 17 Fla. L. Weekly Supp. 995a (Fla. 14th Cir. Ct. Feb. 18, 2010) (there is no crash report privilege in Florida administrative license suspension hearings because the privilege was abrogated by legislation in 2006); *Juettner v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 538b (Fla. 6th Cir. Ct. Mar. 26, 2008) (the accident report privilege is no longer applicable in administrative license suspension hearings). Thus, the hearing officer properly considered Petitioner's statements in the crash report to conclude that Petitioner was driving or in actual physical control of a vehicle.

(3) Detention

Petitioner argues that there was no competent substantial evidence to support the sustaining of his license suspension because there were no signs of impairment to detain him longer than necessary to issue a traffic citation and require field sobriety tests. He claims that the odor of alcohol and bloodshot eyes are not indicative of impairment, and that the DVD contradicts that he had slurred speech or any other indication of impairment.

Respondent argues that once the traffic crash investigation concluded, Officer Hackett had reasonable cause to detain Petitioner to conduct a DUI investigation because Petitioner caused a traffic crash after coming from a bar, had bloodshot eyes, had slurred speech, stumbled while he walked, and smelled of alcohol.

The Court agrees with Respondent. "To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State,* 992 So. 2d 839, 842 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (quoting *Eldridge v. State,* 817 So. 2d 884, 888 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1009a]); *State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]. "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]).

Here, the evidence in the record establishes that Petitioner was in a McDonald's drive-thru at approximately 3:30 a.m., after coming from a bar, when his foot slipped off the pedal and he hit the vehicle in front of him. Petitioner had bloodshot eyes and slurred speech, smelled of alcohol, and stumbled while walking. This evidence, which is not contradicted by the DVD in the record, is sufficient to support a finding of reasonable suspicion. *See State v. Taylor,* 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b] (finding reasonable suspicion where officer observed speeding, odor of alcohol, staggering, slurred speech, and watery and bloodshot eyes); *Castaneda,* 79 So. 3d 41 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and watery eyes); *Ameqrane,* 39 So. 3d 339 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and glassy eyes); *Origi,* 912 So. 2d 69 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot eyes). Thus, the hearing officer's finding of reasonable suspicion is supported by competent substantial evidence.

4) Arrest

Petitioner argues that there was no competent substantial evidence to support the sustaining of his license suspension because there was no probable cause for his arrest. He claims that the DVD establishes that he performed the field sobriety exercises in a normal manner.

Respondent argues that Officer Hackett's observations and

Petitioner's poor performance on the field sobriety exercises established probable cause for the arrest.

The Court agrees with Respondent. "[P]robable cause sufficient to justify an arrest exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.' " *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (quoting *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]).

Here, as noted above, Petitioner caused a traffic crash, had bloodshot eyes and slurred speech, stumbled while he walked, and smelled of alcohol. The evidence in the record also shows that although Petitioner successfully completed the finger-to-nose test, he performed poorly on the remaining field sobriety exercises, and the DVD does not contradict this evidence. *See State v. Geiss,* 70 So. 3d 642, 653 n.1 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1132a] ("probable cause may be found by a combination of factors, including an 'odor of alcohol on a driver's breath . . . the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.' "); *Whitley,* 846 So. 2d at 1166 (holding that erratic driving, an odor of alcohol, glassy eyes, slurred speech, and an admission of drinking alcohol were sufficient to provide the officer with probable cause to arrest defendant for DUI). Thus, the hearing officer's finding of probable cause is supported by competent substantial evidence.

Based upon the foregoing, this Court concludes that the hearing officer's order was supported by competent substantial evidence. It is therefore **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari Jurisdiction is **DENIED**. (**MCINTOSH and RUDISILL, JJ. concur**.)

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[1]*See* § 322.2615(2)(b), Fla. Stat. (2018) ("Notwithstanding s. 316.066(4), the crash report shall be considered by the hearing officer.").

[2]Section 316.066(4) provides in part:

> Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.

§ 316.066(4), Fla. Stat. (2018).

* * *

Licensing—Driver's license—Suspension—Driving under influence—Hearings—Failure of subpoenaed witness to appear—Arresting officer—Where arresting officer provided statement of just cause for nonappearance at formal review hearing, but failed to provide written statement of just cause for nonappearance at continued hearing within two days of hearing, petition for writ of certiorari is granted

HUGH ELLIOT MILLARD, JR., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 17-41-AP. September 1, 2018. Counsel: Mark L. Mason, Assistant General Counsel, for Respondent.

ORDER GRANTING "RESPONDENT'S MOTION FOR REHEARING"

[Original Opinion at 26 Fla. L. Weekly Supp. 484d]

(STACY, J.) **THIS MATTER** is before the Court on "Respondent's Motion for Rehearing" filed on August 22, 2018, pursuant to Florida Rule of Appellate Procedure 9.330. Having reviewed the Motion, and the court record and being fully advised in their premises, it is hereby

ORDERED AND ADJUDGED that "Respondent's Motion for Rehearing," which is reviewed as a Motion for Reconsideration, is **GRANTED**.

Upon reconsideration, the Court finds that at the first continued hearing on September 13, 2017, the arresting officer informed the hearing officer via email prior to the hearing that she would not be able to attend the hearing because she was scheduled for alpha/bravo shifts due to Hurricane Irma. According to the hearing transcript, it appears (though it cannot be ascertained with certainty) that the email was sent to the hearing officer on the date of that hearing.

At the second continued hearing on September 27, 2017, the arresting officer stated that she would not be able to attend the hearing prior to the hearing because she was under subpoena to appear in a separate proceeding in traffic court. However, there is no record evidence that shows the arresting officer provided a *written* statement showing just cause *within two days* of the hearing as required by Florida Administrative Code Rule 15A-6.015(2).

Accordingly, the Court reiterates its ruling that the Writ of Certiorari is **GRANTED**, and the Findings of Fact, Conclusions of Law and Decision issued on October 25, 2017, is hereby **QUASHED**.

* * *

Criminal law—Driving under influence—Discovery—Source code for Intoxilyzer 8000—Trial court abused its discretion by excluding breath test results as sanction for state's failure to provide source code for breath testing instrument where state did not possess the source code—Any ability to obtain source code from foreign corporation which possessed the code was thwarted when, in response to subpoena issued under Uniform Act to Secure the Attendance of Witnesses from without a State, foreign court found the source code was not material and declined to issue subpoena to corporation—Holding state responsible for foreign court's failure to issue a subpoena would nullify the intent and operation of Uniform Act and is precluded by supreme court's holding in *Ulloa v. CMI, Inc.*

STATE OF FLORIDA, Appellant, v. JOHN JAMES BONOTTO, Appellee. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 16-52-AP. L.T. Case No. 12-MM-9581-A. May 23, 2019. Appeal from the County Court for Seminole County. Honorable John L. Woodard, III, County Court Judge. Counsel: Phillip Archer, State Attorney, and Ben Fox, Assistant State Attorney, for Appellant. Kendell K. Ali, for Appellee.

(RECKSIEDLER, J.) The Appellant is charged with DUI.[1] During the pretrial process, he sought to obtain the source code of the Intoxilyzer 8000 machine through discovery. The State did not provide the source code because it did not possess that evidence. After numerous hearings, the trial court found that the source code was material. However, it was determined CMI, Inc., based in Owensboro, Kentucky, actually possessed the source code. The trial court issued a certificate to the Appellant to authorize the issuance of a subpoena duces tecum to CMI, Inc. The certificate permitted the Appellant to request the Kentucky court with jurisdiction over CMI, Inc. issue the subpoena for the source code. This process is set forth in the "Uniform Act to Secure the Attendance of Witnesses from without a State" in Criminal Proceedings (hereinafter referred to as "Uniform Act"), adopted by Florida, as codified in §§ 942.01-.06, *Florida Statutes,* and Kentucky. Contrary to the Florida court, the Kentucky court found the source code was not material and declined to issue a subpoena to CMI, Inc., which thwarted the ability to obtain the source code. The trial court, frustrated by the Kentucky court's application of the law, sanctioned the State and excluded the breath test results. The State appealed. In its appeal, the State did not contest the finding of materiality by the trial court, but challenged the sanction to exclude

the breath test results.

The Uniform Act enumerates a two-step procedure to compel the attendance of an out-of-state witness. First, the court in the jurisdiction seeking the attendance of a witness issues a certificate, which sets forth the basis for the finding of materiality and the duration the witness' presence is required. Thereafter, the certificate of materiality is presented to a judge in the court of record in the county where the witness is located. *See* Fla. Stat. §942.03(1). That court makes its own independent determination as to whether the witness is material and necessary. "[T]he witness does not need to travel to another state unless his or her own state's court has also determined that he or she is material and necessary to the case." *Ulloa v. CMI, Inc.,* 133 So. 3d 914, 922 (Fla. 2013) [38 Fla. L. Weekly S804a]. The act applies to witnesses required to testify and witnesses only required to produce documents. *Id.* at 925-26.

The trial court believed the Kentucky court was required to issue the subpoena pursuant to the Full Faith and Credit Clause. The United States Constitution dictates "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Art. IV, § 1, U.S. Const. "Florida courts are obligated by the Full Faith and Credit Clause to recognize judgments which have been validly rendered in the courts of sister states. . ." *Kemp & Associates, Inc. v. Chisholm,* 162 So. 3d 172, 176 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D372b] (quoting *Boardwalk Regency Corp. v. Hornstein,* 695 So. 2d 471, 471 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1415c]). However, the finding of materiality by the Florida trial court was not a judgment and therefore the Kentucky court was not bound by it. Consequently, Full Faith and Credit did not apply.

Because the Kentucky court had the authority to make its own findings and refuse to issue the subpoena, the only issue for this Court, in its appellate capacity, is whether the State may be sanctioned for failing to turn over the source code. *Ulloa* speaks to this point.

> A review of the Uniform Law as a whole shows that in order for a Florida court to require the attendance of an out-of-state witness to appear to testify in a Florida criminal proceeding, the Florida court cannot actually compel the out-of-state witness to take any action and cannot impose sanctions against the out-of-state witness for failing to obey. Instead, under section 942.03(1), the Florida court merely issues a certificate to the sister state court where the witness is located, so that the sister state can make certain findings and issue a summons to the witness who is appearing before that court. The sister state court then has the authority to impose sanctions if the witness does not comply. In other words, the same process that takes place in Florida when a Florida court receives a certificate from a sister state would then take place in that other state.
>
> Accordingly, this process requires two courts to work together, with both courts finding that the witness in question is material and necessary. The witness also has an opportunity to be heard, and the sister state can ensure that the witness endures no undue hardship. This process guarantees that both sovereign states are coordinating their efforts, that the witness has the opportunity to be heard by his or her own state court, and that the witness does not need to travel to another state unless his or her own state's court has also determined that he or she is material and necessary to the case.

Id. at 922. The trial court had no authority to override the Kentucky court's finding that the source code was not material and necessary to the case and ultimate refusal to issue a subpoena directed to CMI, Inc.

Once the Kentucky court declined to issue a subpoena to CMI, neither the Appellant nor the State could have acquired the source code. The State did not commit a discovery violation because at no time did it possess the source code. "[N]one of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession." *Sinclair v. State,* 657 So. 2d 1138, 1141 (Fla. 1995) [20 Fla. L. Weekly S293a]. Moreover, the State could not have *willfully* committed a discovery violation in failing to provide evidence it never could obtain. Therefore, the trial court was not permitted pursuant to Fla. R. Crim. P. 3.220 to sanction the State for not producing the source code. Alternatively, holding the State responsible for the Kentucky court's failure to issue a subpoena would nullify the intent and operation of the Uniform Act and is precluded by *Ulloa.* Under either rationale, the trial court abused its discretion. As such, the order excluding the breath test results for failure to disclose the source code should be reversed.

REVERSED AND REMANDED with instructions. (CHASE and SOUTO, JJ., concur.)

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[1]This case was intended to be a companion case with several other cases pending in the same division. However, the cases were never formally consolidated and the lower court record shows that the only hearings held and orders entered on the matter were rendered in the Appellee's case. Therefore, the other cases were not properly raised before this appellate court, so those appeals were dismissed.

* * *

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CIRCUIT COURTS—ORIGINAL

Criminal law—Search and seizure— Consent— Voluntariness—Consent to search was not freely and voluntarily given where officer who lawfully detained defendant for littering gave littering warning and then continued detention in presence of second armed officer in effort to obtain consent to search defendant's person, there was no indication that consent could be refused, and defendant appeared to be bewildered and upset—Statements of defendant—Where defendant was in custody when he made statements in response to interrogation, and reasonable person would not have felt as though he could leave or terminate interrogation, pre-*Miranda* interrogation was unlawful and any subsequent administration of *Miranda* was tainted and did not cure violation—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. CHARLES HARRIS, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County, Felony Division 16. Case No. 2019-CF-002332-A-O. December 12, 2019. Elaine A. Barbour, Judge. Counsel: Aiza Skelton, Assistant State Attorney, Orlando, for Plaintiff. David L. Redfearn and Yasin Amba, Assistant Public Defenders, Orlando, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

THIS CAUSE came on to be heard upon the Defendant's Motion to Suppress. The Court took testimony from Orlando Police Officers Brandon Glatthorn and Kevin Walczak as well as the Defendant. The Court viewed the body worn camera (BWC) footage in evidence (State's 1) and being otherwise advised, finds as follows:

FACTS

1. The competent substantial evidence is that in the evening hours of 2/15/19 the Defendant, a middle aged black male, was walking in Orange County eastbound on E. Colonial Drive. At the time of his stop he was in the area of Westmoreland and E. Colonial Drive—a high crime, high drug area. He was wearing a backpack and headed to the bus stop. Officer Glatthorn was in a marked patrol car northbound on Westmoreland when he observed the Defendant throw an object he suspected to be a cigarette butt into the roadway. A 7-11/gas station was located at the southeast corner of Westmoreland and E. Colonial Drive. At that time another officer, Officer Walczak, was at the 7-11 independently involved on an unrelated encounter. Both officers were in full uniform and had marked patrol cars. Officer Glatthorn made a decision to stop the Defendant for the civil infraction of littering. As Officer Glatthorn is pulling into the 7-11 his BWC depicts to his right a marked patrol car parked in front of the 7-11 (south side) and the Defendant to his left walking on a sidewalk eastbound in front of the 7-11. Initially there is no audio but it is apparent from the BWC that the Defendant's attention is called to Officer Glatthorn after he exited his patrol car by some statement, command or question because the Defendant stopped and turned to face Officer Glatthorn as he approached the Defendant. As Officer Glatthorn approached, the Defendant's full body is in view and the audio comes on. The Defendant is seen with his hands together just below his chest. It appears he has something in one or both hands. Officer Glatthorn told the Defendant to "keep your hands out". Officer Glatthorn testified that this statement was made for his safety because he observed the Defendant reach to his left pocket, however, the BWC up to this point does not support this gesture. Officer Glatthorn then asked the Defendant what he was smoking "over there" to which the Defendant responded "a cigarette". There was other brief discussion and clarification as to whether the Defendant was selling cigarettes, the officer stated it is illegal to sell cigarettes and then the Defendant stated that someone else asked him for a cigarette. During this exchange Officer Glatthorn asked the Defendant to reposition himself to a short distance away for his own safety due to vehicle traffic. Officer Glatthorn then asked the Defendant "Where did your cigarette go?" to which the Defendant responded "I threw it out." The officer stated, "That's littering, alright." The Defendant then put his head up in the air and stated "Oh, no." The Defendant was not asked to pick up the litter. The BWC now shows the Defendant from chest up. At evidentiary hearing Officer Glatthorn testified that at this point in his mind he had issued a verbal warning to the Defendant and was not going to issue a citation. No written warning was issued or statements of a verbal warning to signify to the Defendant that the task and purpose of his original stop had ended. In point of fact, it was not made clear to the Defendant at any point that the detention was for littering. Up until this point, Officer Glatthorn had no reason to believe the Defendant had was armed or had committed, was about to commit or was committing a crime. The Defendant was not told he was free to leave. Instead Officer Glatthorn began a criminal investigation and decided to attempt to obtain consent to search. Officer Glatthorn said to the Defendant, "Be honest with me man, you ain't got no pipes on you, nothing like that?" At this time Officer Walzcak comes partially into frame to the Defendant's left and Officer Glatthorn's right. The Defendant answers "No". Officer Glatthorn then said, "Do you mind if I have a quick look?" The Defendant appears to think about it briefly and appears to reach down as if he is going to pat his pockets at which time Officer Glatthorn stated, "Don't reach. . .I don't want you to reach" and the Defendant stated, "I have a lighter, I have money. . ." Officer Walczak then stated, "I know you're thinking about it, man. You keep going for that left pocket like I got a crack pipe, I know I got a crack pipe." Officer Glatthorn then stated, "Be real with me now." The Defendant then responded, "No." and Officer Glatthorn said, "So you don't mind if I take a quick look?" and the Defendant responds, "Take a quick look." Officer Glatthorn then asks that the Defendant put his hands on his head and a search of the Defendant's person ensues. The Defendant does appear surprised and taken aback at times by the statements and requests of law enforcement. Eventually the Defendant is found to be in possession of suspected crack cocaine. The Defendant was not Mirandized until after his arrest. At no time did the Officers draw their weapons, raise their voices or threaten the Defendant.

ANALYSIS AND RULING

2. Officer Glatthorn had probable cause to detain the Defendant for the suspected non-criminal infraction of littering. See, *F.S. 403.413 and 901.15(1).* However, once his task was completed by giving the Defendant the warning that Officer Glatthorn testified in his mind he had done, Officer Glatthorn had no authority to prolong the detention of the Defendant. See, *Thomas v. State,* 614 So.2d 468, 471 (Fla. 1993). This Court notes that as a society we ask a lot of police officers. We expect them to weed out and intercept illegal activity and keep our streets safe while at all times being respectful of the Constitutional protections we all enjoy. While it may be true that high crime areas are fraught with people in the commission of or about to commit criminal acts, it should be noted that they are also filled with law abiding citizens who must be free to go about their business unfettered by 4th Amendment violations. While hunches based on police experience often bear out, a hunch or mere suspicion cannot be allowed to pass Constitutional muster. It is a hard line for the police to walk or decipher in the heat of the moment. However, in the case at bar there was no evidence that the Defendant was believed to be armed or otherwise engaged in criminal activity to justify a *Terry* stop pursuant to F.S. 901.151. Instead Officer Glatthorn (who had already warned the Defendant of the illegality of littering and illegally selling cigarettes) now joined by Officer Walczak embarked on an immediate

quest to obtain consent to search his person. The question of whether consent is voluntarily given is a mixed question of law and fact determined from the totality of the circumstances. See, *United States v. Mendenhall,* 446 U.S. 544, 557, 100 S.C. 1870, 1878, 64 L.Ed.2d 497 (1980) and *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The State carries the burden of proving the consent was obtained freely and voluntarily and not merely by way of submission to a claim of lawful authority. See, *Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983). Where there is an illegal detention or other illegal conduct on the part of the police, consent will be found to be voluntary only if there is clear and convincing evidence that it was not the product of illegal police action. See, *Norman v. State,* 379 So.2d 643, 647 (Fla. 1980). Otherwise, the State must establish voluntariness of consent by a preponderance of the evidence. See, *Denehy v. State,* 400 So.2d 1216 (Fla. 1980). In the case at bar, given the totality of the circumstances, to include the time and place of the encounter, the number of officers present, the words used, the manner in which they were used, the age of the Defendant, the demeanor and responses of the Defendant and the lack of any indication that consent could be refused, this Court finds that the consent to search was obtained by police conduct that was at best cajoling in nature which resulted in the Defendant yielding to the apparent authority of the officers. The Defendant appeared befuddled, bewildered and at times upset by the various statements and requests of the officers. Given the totality of the circumstances, it is apparent that the Defendant's consent was not freely and voluntarily given. The State has not met its burden under either standard.

3. As to the Defendant's statements, the Court finds that the Defendant was in custody for the purposes of *Miranda* inasmuch as he was being investigated for a non-criminal infraction which became a criminal investigation, not told at any point that he was free to leave, was asked questions designed to lead to an incriminating response which were the functional equivalent of an interrogation and a reasonable person under the totality of the circumstances would not have felt as though he or she was free to leave or terminate the interrogation. Due to the violation of the Defendant's 4th Amendment Constitutional rights any subsequent administering of *Miranda* is tainted and uncured. See, *Ramirez v. State,* 739 So.2d 568, 573 (Fla. 1999) [24 Fla. L. Weekly S353a] and *Pirzadeh v. State,* 854 So.2d 740, 742 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1986a]

WHEREFORE, the Defendant's Motion to Suppress is GRANTED.

* * *

Insurance—Homeowners—Additional named insured under homeowners policy is not indispensable party to action concerning payment of benefits under policy

ANDREW GAINEY, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY dba SECURITY FIRST FLORIDA, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CA-004801-O. December 16, 2019. Chad K. Alvaro, Judge. Counsel: David Albert Spain, Morgan & Morgan, Orlando, for Plaintiff. Andrew Mitchell, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFEDANT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

Having come before the Court on the 4th day of December at 8:30 p.m. on Defendant's Motion to Dismiss for Failure to Join Indispensable Party/Motion to Add Indispensible[sic] Party and Defendant's Motion to Stay Discovery, it is hereby

ORDERED and ADJUDGED as follows:

1. This matter involves a first party dispute over payment of homeowner insurance policy benefits.

2. Defendant, Security First Insurance Company, in response to Plaintiff's complaint, requested dismissal of Plaintiff's complaint, or alternatively to add the additional named insured under the policy, Karen Rattigan, as an indispensable party to this action.

3. This Court finds that this case can be adjudicated in its merits without Karen Rattigan as a party to this action, and as such, is not an indispensable party. See *Phillips v. Choate,* 456 So. 2d 556, 557 (Fla. 4th DCA 1984).

4. Accordingly, Defendant's Motion to Dismiss for Failure to Join Indispensable Party/Motion to Add Indispensible[sic] Party is DENIED.

5. Defendant's Motion to Stay Discovery is DENIED AS MOOT. Defendant shall have (20) days to respond to Plaintiff's discovery requests.

* * *

Torts—Defamation—Cyberstalking—Anti-SLAPP statute—Action against opponent of retail pet sales for defamation and cyberstalking brought by owner of commercial pet retail business—Defendant is entitled to summary judgment on defamation count where plaintiff is general purpose public figure, undisputed evidence shows that defendant believed her statements about plaintiff's stores, and plaintiff cannot demonstrate substantial falsity of any of defendant's statements—To extent defamation count concerns statements made by defendant to county commission, statements are protected by privilege to petition government provided by First and Fourteenth Amendments and Florida common law—Because neither posting messages regarding plaintiff on social media nor conducting internet searches for plaintiff's name are communications "directed at a specific person," those actions do not constitute cyberstalking within meaning of section 784.048—Further, cyberstalking counts are deficient because plaintiff has not shown that defendant's communications caused him substantial emotional distress or lacked legitimate purpose—Final summary judgment entered in favor of defendant

LUIS MARQUEZ, Plaintiff, v. MICHELE LAZAROW, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, General Jurisdiction Division. Case No. 2019-023903-CA-31. January 10, 2020. Spencer Eig, Judge. Counsel: Juan-Carlos Planas, Law Firm of Juan-Carlos Planas, P.A., Miami, for Plaintiff. Thomas R. Julin and Timothy J. McGinn, Gunster, Yoakley & Stewart, P.A., Miami, for Defendant.

FINAL SUMMARY JUDGMENT

THIS CASE came before this Court on January 7, 2020, on defendant Michele Lazarow's Anti-SLAPP Motion to Dismiss the Second Amended Complaint with Prejudice or to Enter Final Summary Judgment and to Award Costs and Attorneys' Fees Incurred. All parties were represented by learned counsel.

The Undisputed Material Facts

In support of her motion, Lazarow filed a declaration which sets forth the facts which she asserts are not in dispute and which entitle her to judgment as a matter of law. Plaintiff did not file any record evidence and this Court must accept Defendant's Declaration as the undisputed facts in the matter (Plaintiff's counsel did file a Memorandum in Opposition).

The Legal Standard

A person "may not file or cause to be filed, . . . any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, . . . to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. 1 of the State Constitution." Fla. Stat. § 768.295(3).

Section 768.295, Florida Statutes, provides that:

> [a] person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response.

Fla. Stat. § 768.295(4).

A defendant facing a strategic lawsuit against public participation may simultaneously move to dismiss and for summary judgment. *See, e.g., Gundel v. AV Homes, Inc.,* 264 So. 3d 304, 313 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D351a]. Motions to dismiss and for summary judgment filed pursuant to Section 768.295 are also governed by the applicable Florida Rules of Civil Procedure. *Id.*

With regard to a motion to dismiss, "all allegations of the complaint must be taken as true and all reasonable inferences drawn therefrom must be construed in favor of the non-moving party." *Chodorow v. Porto Vita, Ltd.,* 954 So. 2d 1240, 1242 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1074a].

Summary judgment, by contrast, "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings[.]" *Fla. Bar v. Greene,* 926 So. 2d 1195, 1200 (Fla. 2006) [31 Fla. L. Weekly S171a]. "[S]ummary judgment is appropriate where, as a matter of law, it is apparent" from the evidence "that there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law." *Id.* (citation omitted). In ruling on a motion for summary judgment, this Court "must construe all the evidence, and draw every possible inference therefrom, in a light most favorable to the non-moving party." *See, e.g., JVN Holdings, Inc. v. Am. Constr. & Repairs, LLC,* 185 So. 3d 599, 600 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D326a] (citations omitted).

Conclusions of Law

Based on the undisputed evidence filed by Defendant, the Court finds that Marquez is a public figure for purposes of his defamation claim. The determination of whether a plaintiff is a public or private figure is an issue of law for the Court's determination. *Turner v. Wells,* 879 F.3d 1254, 1271-72 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C539a] (public figure status is a matter of law for the court); *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.,* 811 So. 2d 841, 845 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D701c] (quoting *Saro Corp. v. Waterman Broad. Corp.,* 595 So. 2d 87, 89 (Fla. 2d DCA 1992)) (public figure status " 'is a question of law to be determined by the court' ").

There are three types of public figures: (1) a general purpose public figure is one who has access to the media and invites attention and comment, *Silvester v. Am. Broad. Cos.,* 839 F.2d 1491, 1494 (11th Cir. 1988); (2) a limited purpose public figure is one who involves himself or herself in a public controversy, *id.*; and (3) an involuntary public figure is one who is drawn into a public controversy against his or her will. *See, e.g., Waldbaum v. Fairchild Publ'ns, Inc.,* 627 F.2d 1287, 1298 (D.C. Cir. 1980); *Friedgood v. Peters Publ'g Co.,* 521 So. 2d 236 (Fla. 4th DCA 1988).

Per this record, Marquez is a general purpose public figure by virtue of (1) his investment and participation in commercial pet retail, a highly controversial, highly regulated industry; (2) his voluntary public participation in controversies concerning the regulation of pet retailing; (3) his prominence in South Florida; (4) frequent news coverage of him and his Petland businesses; (5) his initiation of this litigation against Lazarow; and (6) his television interview publicizing the dispute between him and Lazarow and his version of events.

The test for liability in a defamation action depends on whether the plaintiff is a public or private figure. *Silvester,* 839 F.2d at 1493; *Brown v. Tallahassee Democrat, Inc.,* 440 So. 2d 588 (Fla. 1st DCA 1983); *From v. Tallahassee Democrat, Inc.,* 400 So. 2d 52 (Fla. 1st DCA 1981). A public figure is required to prove that the defendant published a substantially false, defamatory statement of fact with "actual malice," defined as knowledge of falsity or reckless disregard of the truth, with convincing clarity. *Damron v. Ocala Star-Banner Co.,* 263 So. 2d 291 (Fla. 1st DCA 1972) (affirming summary judgment against public figure libel plaintiff).

Because he is being found as a public figure here, Marquez cannot prevail on his defamation claim against Lazarow without clear and convincing evidence of "actual malice"—without clear and convincing evidence that Lazarow knew of the falsity of her statements about Marquez or recklessly disregarded the truth of those statements. Common law "malice"—which is present where the speaker's primary motive is to injure the plaintiff—is not the equivalent of the "actual malice" required by the Constitution. *See Nodar v. Galbreath,* 462 So. 2d 803, 806 (Fla. 1984).

The undisputed evidence in this record shows that Lazarow believes her statements about Marquez's Petland stores.

Lazarow also is entitled to summary judgment on Count I because the evidence offered by Lazarow shows Marquez cannot demonstrate the substantial falsity of any statements she is alleged to have made. Whether a plaintiff bringing a defamation case is a public or private figure, the "plaintiff must bear the burden of showing that the speech at issue is false before recovering damages . . . . To do otherwise could 'only result in a deterrence of speech which the Constitution makes free.' " *Phila. Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986) (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)).

To the extent Count I concerns statements Lazarow made to the Collier County Commission, those statements are protected by both the First and Fourteenth Amendment privilege to petition government and the Florida common-law privilege to petition government. *See Cal .Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972) (petitioning of government is immune unless nothing more than a "sham"); *Fridovich v. Fridovich,* 598 So. 2d 65 (Fla. 1992) (Florida recognizes privilege to petition government). The undisputed facts show Lazarow petitioned the Collier County Commission based on her stated concern that pet retailing is harmful to animals and consumers, not as a sham to harm Marquez.

Counts II and III are governed by section 784.0485, Florida Statutes, which creates a civil cause of action for cyberstalking, and section 784.048(1)(d), which defines the term "cyberstalk" as meaning "[t]o engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, *directed at a specific person* . . . causing substantial emotional distress to that person and serving no legitimate purpose." (Emphasis added.)

The courts have held that posting of messages about a specific person on social media websites is not cyberstalking because such postings are not "directed" at a specific person. *Chevaldina v. R.K./FL Mgmt., Inc.,* 133 So. 3d 1086, 1092 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D294b] (reversing injunction against cyberstalking for internet posts); *see also Logue v. Book,* No. 4D18-1112, 2019 WL 3807987 (Fla. 4th DCA Aug. 14, 2019) [44 Fla. L. Weekly D2083b] (same); *Scott v. Blum,* 191 So. 3d 502, 504 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1056a] (same); *David v. Textor,* 189 So. 3d 871, 874-75 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D131a] (reversing

temporary injunction with directions to dismiss petition); *Horowitz v. Horowitz,* 160 So. 3d 530, 531 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D785a] (reversing injunction because posts were not directed at a specific person).

Marquez does not allege Lazarow sent him electronic messages or communications. He alleges Lazarow posted messages about him on social media and searched for his name on the Florida Division of Corporations' sunbiz.org website. These alleged social media posts and internet searches were not "directed at" Marquez and therefore were not "cyberstalking." *See Chevaldina,* 133 So. 3d at 1092. Moreover, Lazarow's undisputed declaration affirms that she did not send Marquez any of the posts at issue.

Marquez also does not show that Lazarow's communications caused him the requisite "substantial emotional distress." " 'Courts apply a reasonable person standard, not a subjective standard, to determine whether an incident causes substantial emotional distress.' " *Logue,* No. 4D18-1112, 2019 WL 3807987, at *4 (quoting *David v. Schack,* 192 So. 3d 625, 628 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1239a]). "[T]he substantial emotional distress that is necessary to support a stalking injunction is greater than just an ordinary feeling of distress." *Shannon v. Smith,* No. 1D18-4587, 2019 WL 3296582, at *2 (Fla. 1st DCA July 23, 2019) [44 Fla. L. Weekly D1878b]. "Whether a communication causes substantial emotional distress should be narrowly construed and is governed by the reasonable person standard." *Shack,* 189 So. 3d at 875 (citations omitted).

A further deficiency of Counts II and III is that Marquez does not show Lazarow lacked a legitimate purpose. "Whether a communication serves a legitimate purpose is broadly construed and will cover a wide variety of conduct." *Textor,* 189 So. 3d at 875 (citations omitted). The undisputed record establishes that Lazarow' s communications were made for legitimate purposes.

Application of the Anti-SLAPP Statute

The record here establishes, and the Court finds on the basis of the undisputed facts that this lawsuit is without merit and that Marquez brought the suit primarily because Lazarow exercised her constitutional right of free speech in connection with a public issue.

CONCLUSION AND JUDGMENT

Luis Marquez shall take nothing by this action and Michele Lazarow shall go hence without day. The Court reserves jurisdiction to determine motions for attorneys' fees and costs to be awarded.

* * *

Civil procedure—Default—Vacation—Void judgment—Contracts—Liquidated/unliquidated damages—Motion to vacate default judgment on ground that judgment was void because damages awarded were unliquidated is denied—Although complaint alleged precise amount of damages due under parties' contract, and defendant, by defaulting, admitted to well-pled allegations of complaint, default does not automatically "liquidate" damages such that no further inquiry is necessary—Amount due in instant case, in which contract specified precise amount to be paid, was provable by a mere mathematical calculation and, as a result, liquidated—Damages are not unliquidated merely because an affidavit is needed in order to prove how much remains due on a contract that specifies what is required to be paid—Entry of a judgment based upon affidavit of indebtedness and without trial was legally appropriate under current state of the law

BAREKS DIS TICARET, A.S., Plaintiffs, v. EASTERN METAL COMPANY, LLC, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Circuit Civil Division. Case No. 18-17727 CA (22). December 27, 2019. Michael A. Hanzman, Judge. Counsel: Charles Gelman, Miami, for Plaintiff. Daniel R. Vega, Taylor Espino Vega & Touron, PLLC, Coral Gables, for Defendant Eastern Metals.

ORDER DENYING MOTION TO VACATE DEFAULT FINAL JUDGMENT

I. INTRODUCTION

Defendant Eastern Metal Company, LLC ("Eastern" or "Defendant"), moves to vacate this Court's September 12, 2018 "Default Final Judgment" pursuant to Florida Rule of Civil Procedure 1.540(b)(4), insisting that because the damages awarded were not "liquidated" the judgment—which was entered based upon Plaintiff's affidavit (and without a trial)—is void. Motion p. 6. Eastern claims "it had a due process right to notice and an opportunity to defend itself regarding the amount of [Plaintiff's] unliquidated damages"—a right it was deprived of "when counsel [for Plaintiff] served a notice of hearing (rather than a notice of trial) a mere fourteen (14) days before [Plaintiffs] motion for final default judgment was heard and granted at a five (5) minute motion calendar . . . ." Motion, p. 8.[1]

Plaintiff Bareks Dis Ticaret, A.S. ("Plaintiff" or "Bareks") disagrees, and claims that: (a) "by defaulting [Eastern] . . . admitted all of the well pleaded allegations of the Complaint," including the allegation that it owed the precise amount pled; and (b) that the damages awarded were "liquidated" and, as a result, the Court properly entered a Default Final Judgment based upon an affidavit attesting to the amount contractually owed. Plaintiff's Reply Brief, pp 1-2. Defendant's motion has been fully briefed and the Court entertained oral argument. The matter is now ripe for disposition.

II. FACTS AND PROCEDURE

This case commenced when Plaintiff filed suit seeking damages allegedly resulting from Defendant's breach of a contract involving the purchase of steel rebar. Plaintiff's "Complaint for Damages" alleged that:

> On or about August 5, 2017, Plaintiff and Defendant entered into a written agreement wherein Plaintiff would sell Defendant 2,500 KG of prime steel rebars at a price of $1,187,500.00.
>
> Defendant agreed to pay to Plaintiff this $1,187,500.00 sum upon receipt of said materials.
>
> Plaintiff has delivered and Defendant has received all of said rebars and owed [sic] Plaintiff a balance of $1,027,617.38.

Complaint, ¶¶ 4-6.

Defendant concedes that it was properly served with the complaint on June 5, 2018 when Plaintiff's process server delivered the complaint/summons to its statutorily designated registered office. *See* Fla. Stat. § 48.091(2). Despite this valid service Eastern filed no response to the complaint and was defaulted—a default it does not challenge.[2] Eastern therefore admitted all of the well pled allegations of the complaint. *See, e.g., Phadael v. Deutsche Bank Tr. Co. Americas*, 83 So. 3d 893 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D341a].[3]

On August 3, 2018 Plaintiff moved for entry of a Default Final Judgment, noticing the matter for hearing on August 21, 2018. The motion was supported by an "Affidavit of Indebtedness" attesting that "Defendant, Eastern Metal Company, LLC, owes Plaintiff the sum of $1,027,617.38 said sum excluding Plaintiff's pre-judgment interest and Plaintiff's attorney's fees and costs in procuring a Default Final Judgment in this matter." *See* Affidavit of Zeni Kirimli. The motion, however, was not heard on August 21 and Plaintiff re-noticed the matter for September 12, 2018. Defendant failed to attend that hearing and the Court—based upon the prior default and the Affidavit of Indebtedness—entered a Default Final Judgment for the amount claimed to be owed (*i.e.*, amount of $1,027,617.38).

On October 2, 2019 Eastern filed its motion seeking to vacate the September 12, 2018 Default Final Judgment, arguing that it is void as a matter of law because the damages at issue in this case are unliquidated and the Court was therefore required to conduct a trial prior to entry of a final judgment. Defendant's Supplemental Memorandum,

p. 5. Because the motion was filed more than one year after entry of the Default Final Judgment, Eastern's only viable avenue of relief is Rule 1.540(b)(4), a subsection of Rule 1.540 which affords a remedy if—and *only* if—an order or judgment is void because: (a) the court entering the order/judgment was not legally organized; or (b) the court entering the order/judgment lacked subject matter jurisdiction; or (c) the party against whom the order/judgment was entered was "illegally" deprived of an "opportunity to be heard." *Curbelo v. Ullman*, 571 So. 2d 443 (Fla. 1990). As this Court was clearly legally organized, and possessed subject matter jurisdiction over this dispute, Defendant must (and does) rely upon the claim that it was denied due process (*i.e.*, an opportunity to be heard); an opportunity that must be afforded if—and only if—Plaintiff's damages were not admitted when Eastern defaulted *and* were in fact unliquidated.

III. ANALYSIS

A. Did Eastern, by Defaulting, Conclusively Admit the Amount Owed.

The first question presented is whether Eastern admitted the amount owed when it defaulted, thereby obviating the need for this Court to determine whether Plaintiff's damages were liquidated or unliquidated. In other words, is Eastern's claimed admission the end of the inquiry? In *Dunkley Stucco, Inc. v. Progressive Am. Ins. Co.*, 751 So. 2d 723 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D450a], a decision relied upon by Plaintiff, the Fifth District answered that question in the affirmative, holding that by defaulting a defendant admits "all well pleaded allegations of the complaint," including any allegation that a plaintiff was damaged in a precise amount—in that case "$44,982.72." *Id.* at 724. In the Fifth District's view, once a defendant—by defaulting—admits to owing the specific amount alleged in the complaint, "[t]his admission converts what would have been an unliquidated amount into a liquidated one," and the amount owed has been "determined." *Id.* When this occurs, a defaulting defendant is "not thereafter entitled to a hearing to require plaintiff to again establish that amount to which defendant agrees he is liable." *Id.*

The rule adopted in *Dunkley Stucco* appears sensible and is obviously easy to apply. If a default in fact admits "all well pleaded allegations of the complaint," why would courts make an exception for an allegation setting forth a precise sum owed pursuant to a contract? In other words, if a defaulting defendant admits liability, causation, and any other fact "well pleaded," then why would it not also admit an allegation as to how much is owed, if the complaint in fact alleges a specific contractual amount?[4] It seems to this Court that an admission of "all well pleaded allegations" means *all* well pleaded allegations, including an allegation that a precise amount is due and owing *pursuant to a contract*.

Nevertheless, and despite its simplicity and logic, the rule adopted in *Dunkley Stucco* has been expressly rejected by at least one of our intermediate appellate courts and, in Defendant's view, implicitly rejected by others, including the Third District. In *Kotlyar v. Metro. Cas. Ins. Co.*, 192 So. 3d 562 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1182a], the Fourth District addressed a subrogation action where the plaintiff insurance carrier alleged that as a result of the defendant's negligence its insured had suffered personal injuries and that, as a result, it had paid—and was entitled to be subrogated for—"the sum of $50,000.00." *Id.* at 564. Plaintiff also alleged that it was entitled to subrogation in the amount of "4,789.85" paid in damages for its insured's vehicle. After defendant Kotlyar was defaulted, the trial court entered a final default judgment based upon "supporting affidavits which attested to the amounts paid to the insured as listed in the complaint." *Id*.

Upon discovering that a judgment had been entered against him, Kotlyar "filed a motion to vacate . . . arguing that the judgment was void because the complaint sought *unliquidated* damages, and that a defaulting party is entitled to notice and an opportunity to be heard when the amount of damages is unliquidated." *Id.* The appellate court agreed, holding that a default terminates "the defending party's right to further defend, except to contest the amount of *unliquidated* damages," pointing out that "[w]e have consistently held that '[a] default admits a plaintiff's entitlement to *liquidated* damages under a well-pled cause of action, but not to *unliquidated* damages.' " *Id.* at 565. Because the damages pled were in the court's view "unliquidated" (*i.e.*, personal injury and property damages to a vehicle), the *Kotlyar* majority concluded that defendant was entitled to notice and an opportunity to be heard on "the amount of damages prior to the trial court's entry of the final judgment," thereby disagreeing with the "Fifth District's position" in *Dunkley Stucco,* a position that—according to the *Kotlyar* court—"no other appellate district . . . has agreed with . . ." *Id.*[5]

Defendant says that the First District also disagreed with *Dunkley Stucco* in *Rich v. Spivey*, 922 So. 2d 326 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D561a]. In *Rich* the plaintiff appealed a final judgment awarding him only "$10.00 in nominal damages in his action alleging civil theft" after appellees defaulted. Appellant (plaintiff below) insisted that the trial court had erred in requiring a hearing to "determine damages" because: (a) appellant had pled specific damages ($2,828 for personal property and $1,399 for household items); and (b) the defendant, by defaulting, admitted these "well pleaded allegations of [the] complaint." *Id.* at 327. Rejecting this argument, the *Rich* court noted that the "only case that arguably supports" this position was *Dunkley Stucco,* a decision it found to be "factually dissimilar" because the plaintiff insurance company in *Dunkley Stucco* had alleged a specific amount actually paid to its insured ($44,982.72), whereas the plaintiff in *Rich* had merely "compiled at the end of his complaint a list of real and personal property, and his own valuation of each item." *Id.* The court then concluded that "[u]nlike the allegations in *Dunkley Stucco,* Rich's list does not constitute a well-pleaded allegation of fact that could be deemed admitted by appellees' failure to deny it." *Id.* at 328.

Although the *Rich* court attempted to distinguish *Dunkley Stucco*, it undoubtedly disagreed with the Fifth District and instead elected to follow and apply precedent (and secondary authorities) standing for the proposition that a default "operates as an admission of the truth of the well pleaded allegations of the pleading, except those concerning damages," including two decisions out of the Third District, *see Sec. Bank, N.A. v. BellSouth Advert. & Pub. Corp.*, 679 So. 2d 795, 803 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1673a]; *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1090a], and federal court' interpretations of Federal Rule of Civil Procedure 55, which specifically provides that upon a default:

> When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount shall enter judgment for that amount.

Id. Applying this rule, it has generally been held that a defaulting defendant admits the well-pleaded allegations of the complaint, except those relating to the amount of damages, but when the amount owed "is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount shall enter judgment for that amount[.]" *See* Charles A. Wright, Arthur R. Miller, and Mary K. Kane, *Federal Practice & Procedure Civil* § 2688, at 58-59, 63-67; *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319 (7th Cir. 1983); *Geddes v. United Fin. Group*, 559 F.2d 557 (9th Cir. 1977).

Neither party has cited (and this Court has been unable to locate) any precedent from the Third District directly addressing the issue of whether a default admits a well-pled allegation of the precise amount owed under a contract and, as a result, "liquidates" damages. Eastern, however, directs the Court to *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D942a] and *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1090a], and says that those decisions—at least implicitly—reject this bright-line rule.

In *Cellular Warehouse* the plaintiff sought damages in the amount of $41,742.46, which "included a liquidated damages claim in the amount of $8,800 for failure to make payments under the terms of [a] contract, as well as late fees." After the defendant defaulted the trial court, "without benefit of a trial," entered a default final judgment for all amounts pled, plus $3,500.00 in attorney's fees. The defendant was not provided "notice or an opportunity to be heard." *Id.* Reversing, the Third District first held that "[w]hile a default admits all well-pleaded allegations of a complaint including a plaintiff's entitlement to liquidated damages, it does not admit entitlement to unliquidated damages." *Id.* at 665, citing *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 662 (Fla. 5th DCA 1983). The Court then held that plaintiff's damage claims for items such as "lost business profits, stolen assets, and operating expenses" required testimony to "ascertain a value" and were thus unliquidated, whereas the amount owed under the contract ($8,800.00) was liquidated. As a result, the court held that it was error to enter a default final judgment that included the *unliquidated* damages absent notice and a hearing, and vacated "that portion of the default final judgment awarding *unliquidated* damages." *Id.* (Emphasis added).

The *Cellular Warehouse* opinion does not expressly state whether the amount claimed due ($41,742.46) was specifically pled in the complaint. Rather, the court notes only that this was the amount "sought." *Id.* The decision, therefore, did not directly tackle the issue of whether a default admits a precise amount actually pled as damages in a contract case. Nor does *Sec. Bank, N.A. v. BellSouth Advert. & Pub. Corp.*, 679 So. 2d 795 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1673a], a pre *Dunkley Stucco* decision which involved a garnishment proceeding and a pleading (writ of garnishment) which, by definition, involved an "unliquidated garnishment claim" demanding not a specific amount, but rather "whatever money" of the creditor the garnishee bank "had on deposit." In that instance the court simply applied the well-settled rule that once the garnishee bank defaulted, the "required procedure was the same as in any suit for an unliquidated sum where there has been a default." *Id.* The defendant is entitled to notice and a trial on damages. *Id.*

The Court also has considered the Third District's decision in *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1090a], another pre-*Dunkley Stucco* decision cited by the *Rich* court. The appellant, U.S. Fire, challenged an order striking its pleadings, and an order entering judgment in the amount of "$486,259.82 as liquidated damages"—an amount "derived from [appellee's] complaint and the proof of loss attached to the complaint." *Id.* at 171. After affirming the trial court's decision to strike appellant's pleading, the court agreed that a trial on damages was nonetheless required, citing the "well settled" rule that "a default judgment only admits to a plaintiff's entitlement to liquidated damages." *Id.* The court then observed that while the appellee had alleged that the "value of the property at issue was $486,259.82, the complaint asked for damages in excess of that amount," and observed that the "fact that [the complaint] alleged . . . that the value of the stolen inventory was a certain amount does not make the claim liquidated." *Id.*

Like *Cellular Warehouse* and *Sec. Bank N.A.*, *U.S. Fire* does not squarely address the question of whether a defaulted defendant admits the precise amount pled as damages for a breach of contract in a case where *only* the amount pled is sought, and the case also was decided prior to *Dunkley Stucco*. But it appears that the Third District has consistently applied the rule that a default only "admits to a plaintiff's entitlement to liquidated damages," and to date has adopted no exception to this rule in circumstances where a complaint for breach of contract pleads a specific amount due (*i.e.*, the *Dunkley Stucco* rule). So while this Court tends to agree with *Dunkley Stucco* and Judge Damoorgian's dissent in *Kotlyar*, and believes that a defendant should be deemed to admit a well pled allegation of a precise amount due *under a contract*, it will continue to apply the liquidated/unliquidated test even in a case, such as this, where a precise amount of contractual damages is pled in the complaint and a defendant—by defaulting—arguably admits that well-pled allegation.

B. Are Plaintiff's damages "liquidated" or "unliquidated"?

There is no doubt that a default judgment "only admits to a plaintiff's entitlement to liquidated damages," *U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1090a], and that damages "are liquidated when the amount to be awarded can be determined with exactness from a pleaded agreement between the parties, by an arithmetical calculation, or by application of definite rules of law." *DYC Fishing, Ltd. v. Martinez*, 994 So. 2d 461, 462-63 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2604a]. Conversely, damages are unliquidated "if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983). When damages are unliquidated a defaulted party "is entitled to notice of an order setting the matter for trial and must be afforded an opportunity to defend." *Viets v. Am. Recruiters Enterprises, Inc.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D851a]. *See also Bowman, supra* at 663 ("defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages").

Eastern argues that Plaintiff's damages were "unliquidated" because testimony was required (*i.e.*, an affidavit of indebtedness) in order to prove the amount due—an affidavit it insists was incorrect and failed to give it credit for payments made towards the purchase.[6] In support of this argument it cites cases which say that damages are unliquidated "if they require testimony to ascertain a value," *Rodriguez-Faro v. M. Escarda Contractor, Inc.*, 69 So. 3d 1097, 1099 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2142b], or—in other words—when ascertaining the exact sum owed requires "testimony to ascertain facts upon which to base a value judgment." *DYC Fishing, Ltd., supra,* at 463 (emphasis added). This does not, however, mean that just because *some* evidence—such as an affidavit of indebtedness—is required to prove an amount due, the damages are *ipso facto* unliquidated. Rather, these decisions are referring to instances where, for example, a plaintiff seeks to recover inherently imprecise damages for things such as "lost business profits, stolen assets, and operating expenses," that are not "capable of being determined by arithmetical calculation," and thus require testimony "to ascertain a value." *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 665 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a]. *See also Rich v. Spivey*, 922 So. 2d 326 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D561a] (plaintiff's damages for personal property and household items were unliquidated because they were based upon nothing other than his "own valuation of each item"); *Kotlyar v. Metro. Cas. Ins. Co.*, 192 So. 3d 562 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1182a] (claims for "personal injury, disability, discomfort, pain and suffering

. . . property damage to the Insured's vehicle . . . . are the very types of unliquidated damages for which a hearing must be held to determine the proper amount to be awarded").

Put simply, a close examination of precedent reveals that damages are unliquidated when evidence must be qualitatively weighed in order to establish, as a matter of judgment, the value of a plaintiff's injuries or damaged property, or the value of such things as lost-profits, attorney's fees, etc. *See, e.g., Gold v. M & G Services, Inc.*, 491 So. 2d 1297 (Fla. 3d DCA 1986) (claim for *reasonable* attorney's fees is one for unliquidated damages). But precedent does not hold—or suggest—that damages are unliquidated merely because an affidavit is needed in order to prove how much remains due on a contract that specifies what is required to be paid. To the contrary, binding authority from the Third District makes clear that in such a case a court may properly base a default final judgment on such an affidavit because determining how much remains due and owing on a fixed-price contract is merely an "arithmetical calculation." *See Cellular Warehouse, Inc. v. GH Cellular, LLC,* 957 So. 2d 662 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a] ("$8,800.00 due for failure to make payments under the terms of the contract" amounted to liquidated damages and judgment for that amount was properly entered without a trial); *Estrada v. Estrada*, 274 So. 3d 426 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1047a] (damages in the amount of $2.2M awarded represented amount paid to acquire sham quit-claim deeds and were liquidated).

When a party agrees to pay a specific sum pursuant to a contract, is sued for that precise sum, and defaults, the amount owed is: (a) arguably admitted by a failure to respond to the complaint, *see Dunkley Stucco, supra*; and (b) even if not admitted, is subject to arithmetical calculation (*i.e.*, liquidated) and may be proven by an affidavit attesting to the precise sum owed.[7] No value judgment is required based upon a qualitative analysis of evidence. Rather, the amount can be ascertained by simply subtracting the amount(s) paid from the amount contractually required. And a rule that mandates a trial in such a case would, for all practical purposes, eliminate default final judgments in contract cases, save those rare instances where an agreement contains an actual liquidated damage clause. *See, e.g., Hartford Fire Ins. Co. v. Controltec, Inc.*, 561 So. 2d 1334 (Fla. 5th DCA 1990). That is of course one example of a case where a damage claim is clearly liquidated, but the presence of a liquidated damage clause is not the *sine qua non* to damages being liquidated for purposes of entering a post-default final judgment without a trial. Again, if the damages can be ascertained by arithmetical calculation (*i.e.*, contract required payment of $100.00, defendant paid $20.00 and owes $80.00) they are liquidated. Here, Defendant agreed to pay a specific sum and it defaulted. The amount remaining due was then provable by a mere arithmetical calculation and entry of a judgment based upon an affidavit, and without a trial, was legally appropriate under the current state of the law.[8]

IV. CONCLUSION

As our Supreme Court has made clear, "grounds upon which a final judgment may be set aside, other than by appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments." *DeClaire v. Yohanan*, 453 So. 2d 375, 380 (Fla. 1984). Rule 1.540(b) furthers that policy by cabining post-judgment challenges to a one-year repose period, except in those rare instances when a judgment is void. Even claims based on perjury are foreclosed after that one year expires. *See* Rule 1.540(b)(3).

In this case, Eastern was legally served with process at the address designated with the Secretary of State at the time of service—albeit an address it no longer used. When Eastern failed to respond to the complaint a default was properly entered, and the allegations of the complaint deemed admitted. Eastern therefore forfeited the right to claim that it did not receive what it contracted for (*i.e.*, that the goods alleged to be delivered were in fact not delivered, or were not delivered as represented). And because the contract specified the precise amount to be paid, the amount remaining due was subject to simple arithmetical calculation and, as a result, liquidated. No testimony was needed order to ascertain the value of the damages claimed.

The Court is no doubt troubled at the prospect that Plaintiff may have sworn that it was owed an amount greater than the contract price less what had previously been paid. But a judgment entered as a result of a false—even a knowingly false—affidavit is not void. Such a judgment may be attacked on grounds of fraud, provided that challenge is mounted under Rule 1.540(b)(3) within a year.[9] Plaintiff, however, waited over a year to file its Rule 1.540(b) motion and, as a result, is not entitled to relief unless the judgment is void. It is not. For that reason, this Court unfortunately has no procedural route to travel in order to grant relief. *See Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2068a] ("the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served"). And while the Court is tempted "take a short cut to justice," *Russell v. Thielen*, 82 So. 2d 143, 146 (Fla. 1955), and entertain an evidentiary hearing to determine the amount actually remaining due under the contract, Rule 1.540(b) does not permit this inquiry, and its command may not jettisoned "just because [the Court] thinks it is . . . the 'fair' thing to do." *Guardian Ad Litem Program v. O.R.*, 45 So. 3d 974 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2275a]. So while it gives the Court "no pleasure to reach the result . . . clearly required by the law of our state," *Ruiz v. State*, 388 So. 2d 610, 613 (Fla. 3d DCA 1980), it is hereby **ORDERED**:

Defendant's "Motion to Vacate Default Final Judgment" is **DENIED**.

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[1]Eastern also asks the Court to vacate its post-judgment order appointing a Receiver.

[2]The default was entered by the Clerk on July 13, 2018.

[3]While Defendant acknowledges that it was effectively served with process because the complaint and summons were delivered to its registered office, Eastern did not actually use that office at the time of service. As a result, an unidentified receptionist was served at an office center "where small companies like Eastern can rent space. . ." Tombo Affidavit, ¶ 20. Eastern never actually received pleadings/notice in the case, or learned of the Court's Default Final Judgment, until July 2019 when its principal, Roberto Tombo, was contacted by the Receiver's counsel. *Id.* ¶¶ 27-33. But in the eyes of the law Eastern was on notice of all proceedings because it was served with initial process and subsequent notices at the Blue Lagoon suite which was Eastern's statutorily designated office. What happened here is unfortunate and caused by Defendant's failure to update its registered address after it moved its business. *See, e.g., Seay Outdoor Advert., Inc. v. Locklin*, 965 So. 2d 325 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2270b] (party served at address specified in court order, and who failed to fulfill its obligation to notify court of any change of address, had notice and an opportunity to be heard and, as a result, judgment entered against it was not void). Because of this oversight, Plaintiff was permitted to lawfully serve process at, and send all further notices to, an address that Eastern no longer used. But this is not a case where a defendant willfully (or recklessly) ignored judicial process at its peril. *See, e.g., Whitney v. A Aventura Chiropractic Care Ctr., Inc.*, 21 So. 3d 95 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2186b] ("[i]gnoring a lawsuit after service of the original complaint . . . is the legal equivalent of ignoring the dashboard signal for "no brakes" in a rapidly-moving automobile"). Nevertheless, service was lawful and effectuated.

[4]As opposed, for example, to a specific amount sought for personal injuries, pain and suffering, or such other types of harm not subject to precise calculation.

[5]Both *Dunkley Stucco* and *Kotlyar* drew dissents. In *Dunkley Stucco* Judge Dauksch believed that "[j]ust because appellee pleaded and demanded [a] specific amount does not render the damages liquidated," and that because the damages in that case were in fact unliquidated, a judgment based upon "an affidavit [was] insufficient" and a denial of due process. In *Kotlyar*, Judge Damoorgian advocated in favor of adopting the "Fifth District's reasoning in *Dunkley*," pointing out that when a pleading alleges "the exact amount of damages being sought," and a defendant defaults, "[b]y definition, the damages [become] liquidated" and there remains "no question" as to what amount is owed.

[6]According to Eastern it had actually paid $517,500.00 of the $1,187,500.00 contract price and, as a result, Plaintiff's damages are at most $670,000.00. Supplemental Memorandum, p. 7, fn. 3; Tombo Affidavit, ¶¶ 14, 15. This claim, if true, is

extremely troubling but, as will be explained later, even a perjurious affidavit used to procure a final judgment does not render that final judgment void.

[7]The Court again is not relying on the rule embraced in *Dunkley Stucco* (*i.e.*, the rule that a defendant admits a specific amount of damages pled). Rather, the Court concludes that even if this rule is not in play, Plaintiff's damages were still liquidated and, for that reason, the Default Final Judgment entered *sans* a trial is not void.

[8]If this Court were sitting as an appellate judge, and writing on a clean slate, it would do away with the "liquidated/unliquidated" damages distinction altogether and simply hold that a defaulting defendant is entitled to a trial on damages, after notice and an opportunity to be heard. If a plaintiff's damages are what the law now describes as liquidated (*i.e.*, subject to being determined with exactness by a pleaded agreement, arithmetical calculation, or application of definite rule of law), the amount to be awarded can in most cases be adjudicated on summary judgment. And if the amount owed is contested for any reason, and the evidence is conflicting, a trial will be required. But this "liquidated/unliquidated" paradigm is definitionally ambiguous, difficult to apply, and results in inevitable disputes (such as the one here) over which category a damage claim fits, causing uncertainty both in procedure and outcome, not to mention unnecessary party expense and judicial labor. If given the opportunity this Court would abandon this impractical, unworkable and meaningless distinction and adopt a simple rule requiring that all defaulting defendants be granted a trial (or a summary judgment hearing) on damages, period. But the Court's constitutional duty is to apply the law as it is, not as the Court thinks it should be. *L.P. v. Dep't of Children & Family Services*, 962 So. 2d 980 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1830b].

[9]Though not particularly relevant, the Court notes that Eastern became aware of the final judgment in July 2019, two months before the one-year repose period of Rule 1.540(b)(3) expired.

* * *

Estates—Wills—Codicil—Undue influence—Rebuttable presumption of undue influence arose where proponent of codicil enjoyed confidential relationship with testator and was a substantial beneficiary under the contested codicil—Motion for summary judgment as to issue of undue influence denied—Lack of testamentary capacity—Motion for summary judgment as to issue of testamentary incapacity is granted, as there is no basis upon which to find a material factual issue for trial on issue of testator's competence at time codicil was drafted

IN RE: THE ESTATE OF AMPARO BERENICE BUECHELE, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2018-5387-CP-02. December 30, 2019. Milton Hirsch, Judge.

ORDER ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. Facts

Amparo Berenice Buechele died on August 17, 2018. In December of that year, Helene Buechele, one of Amparo's adult children, filed a petition for administration, along with the customary related paperwork. Included were a will dated October 8, 2002, and a codicil dated February 13, 2008.

On January 7, 2019, Helene's brothers Mark, Charles, Paul, and Gregory; and her sister Lorraine; filed an answer and affirmative defenses directed to the codicil.[1] The affirmative defenses asserted a lack of testamentary capacity on Amparo's part at the time that the codicil was drafted and signed; and undue influence on the part of Helene.

Three weeks later Helene moved for summary judgment. Regarding the assertion of undue influence, she pointed out that the codicil was prepared by a Mr. Hearn, an attorney who had known and been friendly with Amparo and her husband for 40 years, *Pet.'s Mtn. for Summary J'ment* p. 3, and that Mr. Hearn provided an affidavit averring, *inter alia*, "that Helene Buechele was not present and took no part in the procurement or execution of the will or codicil." *Id.* p. 3-4. Helene, for her part, denies any role in procuring the codicil. She notes that her siblings were not present when the codicil was prepared or executed and thus are not positioned to assert on the basis of their own knowledge a claim of undue influence on her part. As to the issue of testamentary incapacity, Helene again relies upon the Hearn affidavit.

> Mr. Hearn . . . states that if he thought the deceased lacked testamentary capacity he would not have allowed her to execute the codicil. Mr. Hearn's long term personal and professional relationship with the deceased gave him direct and personal information about the deceased's mental condition prior to and at the time of the execution of the codicil.

Pet.'s Mtn. for Summary J'ment p. 6.

The following month, Helene's siblings countered with the filing of declarations by Mark Buechele and Lorraine Buechele-Lacal. Declarants swear—and this is largely uncontroverted—that in the twilight of her life Amparo, who lived to age 90, experienced increasing loss of cognitive function. Declarants also make allegations—allegations largely conclusory in nature—that Helene exercised overreaching influence on her mother. *See, e.g., Declaration of Mark Buechele* ¶ 8 ("it became apparent that [Helene] was . . . taking control of my mother and all of her personal affairs").

In December of this year, perhaps in an effort to bring some progress to a case that seems mired in a discovery battle of attrition, both sides filed supplemental memoranda regarding the issue of summary judgment. That issue is now ripe for adjudication.

II. Analysis

These warring siblings are in agreement about very little, but they are in agreement about the principle that underlies summary judgment: "A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mobley v. Homestead Hospital, Inc.*, ___ So. 3d ___, ___ (Fla. 3rd DCA Dec. 26, 2019) [45 Fla. L. Weekly D2a] (citing Fla. Rule Civ. P. 1.510(c)). "When considering a motion for summary judgment, the trial court may not weigh the credibility of witnesses or resolve disputed issues of fact." *Mobley*, ___ So. 3d at ___ (citing *Strickland v. Strickland,* 456 So. 2d 583, 584 (Fla. 2d DCA 1984)). "The court must draw every possible inference in favor of the party against whom summary judgment is sought." *Mobley*, ___ So. 3d at ___ (citing *Gonzalez v. B & B Cash Grocery Stores, Inc.,* 692 So. 2d 297, 299 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1081a]). "The existence of a genuine issue of material fact precludes summary judgment." *Mobley*, ___ So. 3d at ___ (citing *Pinchot v. First Fla. Banks, Inc.,* 666 So. 2d 201, 202 (Fla. 2d DCA 1995) [21 Fla. L. Weekly D64a]). *See* Fla. R. Civ. P. 1.510(c).

A. As to the affirmative defense of undue influence

With respect to the issue of undue influence, however, another rule of law also enters into the summary-judgment calculus: "the rule that where there is evidence supporting the existence of a rebuttable presumption with respect to a material issue and the moving party bears the burden of disproving the presumed fact, the moving party is precluded from obtaining summary judgment." *RBC Ministries v. Tompkins*, 974 So. 2d 569, 571 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D523b] (Canady, J.) (citing *Heisig v. Heisig (In Re Estate of Short),* 620 So. 2d 1106, 1106 (Fla. 4th DCA 1993)). This rule is rendered applicable to the matter at bar pursuant to the oft-cited case of *Carpenter v. Carpenter*, 253 So. 2d 697 (Fla. 1971).

Carpenter teaches that if "a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will"—or in this case, the contested codicil—"the presumption of undue influence arises." *Carpenter*, 253 So. 2d at 701. "Undue influence comprehends overpersuasion, coercion, or force that destroys or hampers the free agency and will power of the testator." *Newman v. Smith*, 82 So. 236, 246 (Fla. 1918). A will or codicil procured by undue influence is of course void as a matter of law. Fla. Stat. § 732.5165. The presumption described by *Carpenter* thus "implements public policy against abuse of fiduciary or confi-

dential relationships," Fla. Stat. § 733.107(2). "[O]nce a will contestant establishes the existence of the basis for the rebuttable presumption of undue influence, the burden of proof shifts to the proponent of the will to establish by a preponderance of the evidence the non-existence of undue influence." *RBC Ministries*, 974 So. 2d at 572 (citing *Diaz v. Ashworth*, 963 So. 2d 731, 735 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1324c]; *Hack v. Janes*, 878 So. 2d 440, 443-44 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1652b]).

There can be no serious suggestion that Helene is not a substantial beneficiary, nor that she lacked a confidential relationship with Amparo. For completeness of the record, I find, in reliance on the parties's various pleadings, that both of those two *Carpenter* factors are present here. The *Carpenter* factor that remains—the one at issue here—is whether Helene was active in procuring the contested codicil.

Allen v. In Re Estate of Dutton, 394 So. 2d 132 (Fla. 5th DCA 1981), although clearly not "on all fours," is instructive. Attorney Thomas Gurney had prepared Ellen Dutton's will. *Allen*, 394 So. 2d at 134. The will named Gurney as executor "and recommended the hiring of his law firm to represent [Ellen's] estate." *Id*. A very substantial share of Ellen's considerable wealth was to be distributed to such charitable beneficiaries as Gurney, in his unfettered discretion, selected. *Id*. It was conceded that at or about the time of the drafting of the will, Ellen "relied extensively on Gurney and his secretary to cope with ordinary business decisions. They spent a lot of time with her." *Id*. In connection with the will contest, Gurney argued the inapplicability of the *Carpenter* presumption on the grounds that although he undoubtedly had a confidential relationship with the testator, and was active in procuring the terms of the will, there was insufficient evidence of the third *Carpenter* factor—that Gurney was a substantial beneficiary. This argument the court rejected. "Gurney's absolute discretion to distribute the bulk of Ellen [Dutton's] estate to charities [of his own choosing] endows him with sufficient collateral benefits to make him a substantial beneficiary of the will." *Id*. at 134-35 (citing *In Re Estate of Nelson*, 232 So. 2d 222 (Fla. 1st DCA 1970); *Zeigler v. Coffin*, 123 So. 22 (Ala. 1929)).

An analogy may readily be made to the facts at bar. As noted *supra*, there can be little doubt that Helene enjoyed a confidential relationship with her mother, and that she is a substantial beneficiary under the contested codicil. Admittedly, the evidence presently before the court of Helene's active procurement of the terms of the codicil is less than overwhelming. It relies, as previously noted, on statements—many of them conclusory, many of them seemingly based on hearsay, all of them undoubtedly self-serving—appearing in the declarations filed by Mark and Lorraine. But for present purposes that less-than-overwhelming evidence is sufficient. Nor does the content of Mr. Hearn's affidavit, with its assertion that Helene "took no part in the procurement or execution of the will or codicil" serve to eliminate any dispute of fact. Hearn's testimony, even if true, establishes only that Helene did no procuring or lobbying in Mr. Hearn's presence—not that she did none at all. Such record evidence as exists at this stage of the litigation, taken in its entirety, gives rise to the *Carpenter* presumption. And "once the presumption arises, the undue influence issue cannot be determined in a summary judgment proceeding." *Allen*, 394 So. 2d at 135 (citing *In Re Knight's Estate*, 108 So. 2d 629 (Fla. 1st DCA 1959)); *RBC Ministries*, 974 So. 2d at 573.

It may well be that Helene will prevail on the undue influence issue at a trial on the merits. But that issue cannot be resolved otherwise than by trial on the merits. It cannot be resolved by summary judgment. Helene's motion for summary judgment as to that issue is respectfully denied.

B. As to the affirmative defense of testamentary incapacity

There is a strong presumption in favor of testamentary capacity. In keeping with that presumption, the threshold for a finding of capacity is low. No more is required than that the testator, at the time of execution of the will, have a general understanding of the nature and extent of the property to be disposed of; of his relationship to those who would be the natural objects of his bounty; and of the effect of the will as executed. *Raimi v. Furlong*, 702 So.2d 1273, 1286 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2184j] (citing *In Re Wilmott's Estate*, 66 So. 2d 465, 467 (Fla. 1953); *In Re Weihe's Estate*, 268 So. 2d 446, 448 (Fla. 4th DCA 1972); *In Re Dunson's Estate*, 141 So. 2d 601, 604 (Fla. 2d DCA 1962)). "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment." *Raimi*, 702 So. 2d at 1286 (quoting *In Re Weihe's Estate*, 268 So. 2d at 448).

As noted *supra*, Amparo lived to the age of 90, dying in 2018. The codicil at issue was executed fully a decade earlier, in 2008. That a woman of 90 years of age experienced some loss of cognitive function is hardly surprising; it would be surprising if she did not. The question before me, however, is not whether in 2018 Amparo had the full use of her mental faculties, but whether in 2008 she had that basic use of her mental faculties required by the law of testamentary capacity. Pleadings filed by the opponents of the codicil, for example, make reference to medical records dating to 2012. But such records are insufficient to raise a question of fact regarding Amparo's cognition at the time of the execution of the codicil four years earlier. By contrast, Helene refers to an examination by a Dr. Espinosa in July of 2008. *See Pet.'s Supplemental Memorandum* p. 2. The doctor appears to have concluded that, although Amparo lacked the intellectual acuity she likely had at a younger age, she more than manifested the rudimentary level of cognitive function required for testamentary capacity.

Here, the declarations of Mr. Hearn are a good deal more probative than they are in connection with the issue of undue influence. As to the latter, it is at least possible that Helene exercised an overreaching influence on her mother at times and in ways not apparent to Mr. Hearn. But Hearn claims to have known Amparo over the course of decades. He would likely have recognized a material loss of mentation if she had manifested one at or about the time he prepared the codicil to her will. And if he recognized such a material loss of mentation, he would have been ethically bound as a member of the Florida Bar to take steps to verify Amparo's testamentary capacity before he proceeded with the execution of the codicil.

To the same effect is the affidavit of Orfelina Ramirez. Ms. Ramirez identifies herself as having worked as a "care assistant" to Amparo from July of 2009 until the time of Amparo's death. *Aff. of Orfelina Ramirez* ¶2. She swears that, "[d]uring the years from 2009 until sometime in 2012, every Saturday and Sunday . . . Amparo . . . would drive her car to the hairdressing salon, the library and the church," *id*. at ¶3—activities which, if performed without incident, offer some circumstantial evidence of basic intellectual wherewithal.[2]

Appended as an exhibit to an affidavit filed by Helene is a letter dated April 3, 2009, written by Mark to an officer of the Wachovia Bank. In that letter, Mark accuses the bank officer of "hav[ing] told my mother that she is incompetent when her medical care-givers (who are far more competent than you on these matters) disagree with your opinion." Apparently, then, Amparo's doctors were still of the opinion about a year after the execution of the codicil that Amparo was of sound mind. Mark made this assertion in his capacity as a member of the Bar, and would not have done so if it were not true.

I am keenly aware that, as noted *supra*, the standard for the granting of summary judgment is exacting, and trial courts must be chary in finding that standard to be met. Our betters on the courts of appeal never tire of reminding us, for example, that "[s]ummary judgments should be cautiously granted in negligence and malpractice suits," *Davis v. Green*, 625 So. 2d 130, 131 (Fla. 4th DCA 1993).

(That is not, emphatically not, to suggest that summary judgment should be carelessly granted in probate suits. In probate litigation as elsewhere, judgment will lie only when there exists no material dispute of fact.)

The present lawsuit has been atrabilious. There has been no shortage of name-calling and finger-pointing on both sides. Interspersed with that name-calling and finger-pointing, the answering siblings have, in their various declarations and pleadings, expressed their feelings that at all times material their mother must surely have suffered from a state of intellectual decay inconsistent with testamentary capacity. I have no doubt that their feelings are sincerely held. Indeed I need not and cannot consider the sincerity or credibility of their feelings, because summary judgment must be determined without weighing or even attempting to weigh the evidence.

But more than an expression of feeling, however sincere, is required to create a material issue of fact sufficient to defeat a motion for summary judgment. The bench and bar have only recently been reminded that all too often, "cases in Florida improperly attached to the summary judgment standard some statement like the following: '[i]f the record on appeal reveals the merest possibility of genuine issues of material fact, or even the slightest doubt in this respect, the summary judgment must be reversed'." *Mobley v. Homestead Hospital, Inc.*, ___ So. 3d ___, ___ (Fla. 3d DCA Dec. 26, 2019) [45 Fla. L. Weekly D2a] (Logue, J., concurring) (*quoting Piedra v. City of N. Bay Village*, 193 So. 3d 48, 51 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1087a] (in turn citing *Estate of Marimon ex rel. Falcon v. Fla. Power & Light Co.*, 787 So. 2d 887, 890 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1069a]). But this dependence on "merest possibilities" and "slightest doubt," as Judge Logue very clearly points out, misstates the law. "A court might sense a scintilla [of doubt], conjure up a 'mere possibility,' or feel a 'slightest doubt' even when an objective review of the record reveals the absence of "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party'." *Mobley v. Homestead Hospital, Inc.*, ___ So. 3d ___, ___ (Fla. 3d DCA Dec. 26, 2019) [45 Fla. L. Weekly D2a] (Logue, J., concurring) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (in turn citing *First Nat'l Bank of Az. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). "The over-arching question . . . is whether there is a [material] factual issue for trial." *Mobley v. Homestead Hospital, Inc.*, ___ So. 3d ___, ___ (Fla. 3d DCA Dec. 26, 2019) [45 Fla. L. Weekly D2a] (Logue, J., concurring). With respect to Amparo's testamentary competence, there is simply no basis upon which to find a material factual issue for trial.

Relying principally on *Lubarsky v. Sweden House Properties*, 673 So. 2d 975 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1256a] and *UFF DAA, Inc. v. Towne Realty, Inc.*, 666 So. 2d 199 (Fla. 4th DCA 1995) [21 Fla. L. Weekly D24b], the answering siblings argue that discovery is still ongoing and that summary judgment is therefore not yet ripe for adjudication. *Lubarsky* involved a claim of premises liability. A hearing on defendant's claim for summary judgment was set for February 24, 1995. *Lubarsky*, 673 So. 2d at 976. Plaintiffs sought a continuance on the grounds that they "had been unable to serve for deposition . . . a corporate principal of [the landlord defendant] because he was in Mexico and would not return until April." *Id*. There was some basis to believe that this particular corporate representative had visited the demised premises shortly before the accident giving rise to plaintiff's claim. *Id*. On these facts, the trial court's denial of the plaintiff's motion for continuance and granting of the landlord's motion for summary judgment was error. Plaintiffs had been "diligent in seeking the deposition of" the corporate representative, *id*. at 977, and sought a continuance of only two months (*i.e.*, from February to April, at which time the deposition could be taken). The appellate court saw "no reason why this short continuance should not have been granted, so that the summary judgment could be determined based on all pertinent facts." *Id.*

The case at bar has been pending for a year. The parties have developed such information as exists regarding the decedent's mental state at the time of the execution of the codicil. The answering siblings point to no deposition that remains to be taken that would materially add to the present fund of information on that score. Those affidavits and reports that have been cited by the parties speak with one voice: although Amparo undoubtedly experienced cognitive decline by the end of her life, there is no reason to believe that ten years earlier—*i.e.*, at the time the codicil was executed—she had fallen below that minimum standard of mental competence required of a testator. This is not a case like *Lubarsky*, in which a diligent litigant sought a very brief continuance to complete an important deposition that could not have been taken earlier, but would surely be taken within 60 days. The answering siblings identify no pending deposition that remains to be taken and will be taken shortly, and that is likely to provide critical information on the subject of Amparo's competence at the time of the drafting of the codicil. So far as appears from the existing record, no deponent exists who might provide such a deposition.

Nor does *UFF DAA, Inc. v. Towne Realty, Inc.*, 666 So. 2d 199 (Fla. 4th DCA 1995) [21 Fla. L. Weekly D24b] support the answering siblings' position. There, out-of-state deponents failed to appear for their duly-scheduled depositions. *UFF DAA, Inc.*, 666 So. 2d at 200. The plaintiff, who had set the depositions, promptly moved to compel discovery and for sanctions. *Id*. While those motions were pending, the trial court granted summary judgment for the defendant. The appellate court reversed, because it is "error to enter summary judgment when discovery is in progress *and the deposition of a party is pending*." *Id*. (citing *Sica v. Sam Caliendo Design, Inc.*, 623 So. 2d 859 (Fla. 4th DCA 1993); *Singer v. Star*, 510 So. 2d 637 (Fla. 4th DCA 1987)) (emphasis added). No deposition of a party, relating to the issue of Amparo's mental condition at the time of the codicil, is pending. No deposition of a non-party relating to that issue is pending. The general principle stated in *UFF DAA, Inc*., is of course an accurate statement of the law, but it simply has no applicability here.

Helene's motion for summary judgment as to the issue of testamentary incapacity is respectfully granted.

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[1]Mark, in addition to being a litigant herein, is a member of the Florida Bar and represents himself and the other answering siblings.

[2]The affiant adds that Amparo did her driving "with [her husband] sitting next to her" in the car. If her adult children, including those who now oppose admission of the codicil to probate, were aware that their mother routinely drove their father around town, and made no objection to her doing so, it suggests that they had some measure of confidence in her cognitive function at the time. If Amparo's adult children, including those who now oppose admission of the codicil to probate, were unaware that their mother routinely drove their father around town, it suggests that they were insufficiently familiar with her daily life to express an informed view as to her cognitive function and abilities.

* * *

Guardianship—Accounting reports—Confidentiality—In response to petition by Workers' Compensation Insurance Guaranty Association, which provides medical and indemnity benefits for incompetent ward, seeking to examine guardianship accounting report based on allegation that guardian used ward's funds to purchase vehicle for himself, guardian is ordered to produce relevant accounting reports for in camera review by court

IN RE GUARDIANSHIP OF EMILCE SALAZAR, Ward. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2016-4231-GD-02. December 31, 2019. Milton Hirsch, Judge.

ORDER ON PETITION TO EXAMINE GUARDIANSHIP ACCOUNTING REPORT

The Florida Workers' Compensation Insurance Guaranty Association ("the Association") functions as Florida's workers' compensation insurer of last resort. *See gen'ly* Fla. Stat. §§ 631.901-932. It "evalu-

ates workers' compensation claims made by insureds against insolvent [insurance] companies or funds and determines if such claims are covered claims which should be paid or settled with funds from" the Association. *See* https://fwciga.org/.

In the case at bar it is uncontested that the ward was and is entitled to workers' compensation insurance benefits through a now-insolvent insurer. *See Petition Seeking Review and/or Inspection of Ward's Annual Guardianship Accounting Report* ("Association's Petition") ¶2. Consistent with its statutory mandate, the Association "has continually provided and shall continue to provide all medical and indemnity benefits to further the best interest of the ward who has been deemed incompetent." *Id*. ¶9.

The ward's guardian is his adult nephew. *Id.* ¶4. The Association claims that the guardian used the ward's funds—funds provided, in whole or in part, by the Association—to purchase a car for himself. *Id.* ¶6.[1] Citing this conduct, and alleging that the Association

> is statutorily charged with responsibility for the ongoing care of the ward [and that] in administering said duties [the Association] must make all efforts to ensure the guardian is meeting the statutory obligation vested in him, as guardian, where the money paid by [the Association] into the [ward's] account [is] for the care and betterment of the ward, and not for the guardian's personal use[2]

the Association brings the present petition, seeking to examine the annual guardianship accounting report.

For his part, the guardian takes the position that the Association is a mere

> debtor of the ward, has interests that are adverse to the guardian and adverse to the ward, is not an interested party, and has no standing to participate in these proceedings. In fact, Petitioner is merely a guarantor of the ward's insolvent insurance carrier who owes the ward money for his very substantial injuries.

Guardian's Objection to [the Association's] Petition Seeking Review and/or Inspection of Ward's Annual Guardianship Accounting Report ("Guardian's Objection") ¶3. Regarding the Association's suggestion that prior conduct on the part of the guardian gives rise to a reasonable inference that the guardian may, even now, be departing from his fiduciary duty and serving his own interests,[3] the guardian offers a bluntly conclusory rebuttal: "Petitioner's allegations of prejudice are simply not true. Even if they are true, such allegations are inadequate to justify production or inspection of the [accounting] reports." *Id*. ¶5. Implicit in the guardian's response is the suggestion that granting the Association's petition would unleash a tidal wave: the confidentiality of sensitive guardianship-related documents, documents often laden with intensely personal information, would be forfeited any and every time an insurer made a naked allegation of defalcation on the part of a guardian.

The guardian has a statutory obligation to file an annual report. Fla. Stat. § 744.367. The contents of that report are confidential, subject to the court's oversight. Fla. Stat. § 744.3701. The Association seeks access to the report in order to confirm or dispel its suspicions of wrongdoing on the part of the guardian; and if confirmed in those suspicions, to act upon them. The guardian is adamant that the Association has no standing to demand to see the report; and that even if the court were to determine that the Association has such standing, it would be error on these facts for the court to grant the Association access to a document rightly swathed in confidentiality.

This is a matter of first impression. Both parties acknowledge that no reported opinion or other authority is squarely controlling herein. Both parties also acknowledge that the reported opinion most nearly controlling, or at least most instructive, is *Rudolph v. Rosecan*, 154 So. 3d 381 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2460b].

In *Rudolph*, the father of a 22-year-old autistic man was appointed his guardian. *Rudolph*, 154 So. 3d at 382. The order establishing the guardianship, however, vested substantial shared parenting responsibility in the ward's mother. *Id*. At some point, the father refused to provide the mother with copies of the annual guardianship accounting reports. *Id*. At issue before the court was the mother's claim of entitlement, as an "interested person," to copies of the reports.

The court began its analysis by noting an anomaly in the law. Fla. Stat. § 744.367(4) and Fla. Prob. R. 5.700(a) both provide that any "interested person" (defined in Fla. Stat. § 731.201(23) as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved") may file written objections to a guardianship accounting report. But Fla. Stat. § 744.3701 provides that such an accounting report is confidential, and absent leave of court may not be seen by anyone other than the court, the guardian, the guardian's attorney, and the ward if he or she is not a minor or incapacitated. Thus the law "create[s] a conundrum because an 'interested person' may object to a guardianship report, but is not actually given the right to inspect it." *Rudolph*, 154 So. 3d at 385 n. 2.

This conundrum, however, is not insoluble. The statute rendering guardianship accounting reports confidential is subject to the court's capacious equitable oversight. *See* Fla. Stat. § 744.3701(1) (reports confidential "[u]nless otherwise ordered by the court"). In *Rudolph*, the court concluded that

> because the parenting plan does not give the mother any right to, or interest in, the financial decisions made for her son, she is not an "interested person" with standing to object to the annual accounting or other financial matters for her son.

Rudolph, 154 So. 3d at 385. The negative inference is that, had the mother been clothed with some right or interest in the financial decisions made for the ward, she would have been an interested person for purposes of the statute; and the court would have been obliged at least to consider whether the equities favored permitting her to inspect the accounting reports so that she might lodge any proper objection to them.

Unlike the mother in *Rudolph*, the Association is a public entity with a far-reaching mandate to act for the people of the State of Florida. It is the insurer of last resort for working Floridians injured in the course of their employment. It acts, and spends public funds, on behalf, and for the benefit, of the people of this state. In the case at bar, it suspects—not entirely without foundation—that those public funds may be misused or pilfered. In its present pleadings it commits itself forthrightly to "provid[ing] and . . . continu[ing] to provide all medical and indemnity benefits to further the best interest of the ward." *Association's Petition* ¶10. The Association asserts that it has paid $2,171,781.58 to the ward to date, with the expectation of continued payment. *Associations's Petition* ¶9. As noted *supra*, that money is in some sense derived from, and spent on behalf of, the people of this state. In the circumstances, I am hard-pressed to conclude that the Association "may [not] reasonably be expected to be affected by the outcome of" the matter at bar, *viz.*, is not an "interested person."

But not every "interested person" is entitled, without more, to pierce the confidentiality that envelopes guardianship accounting reports. On the contrary; that confidentiality is to be preserved unless and until the balance of equities[4] weighs clearly in favor of inspection. Included among those equitable considerations, for example, would be the Association's delay in acting upon suspicions of misconduct that date back two or three years; any exceptional or unfair prejudice to the ward or the guardian resulting from inspection of the accounting reports by the Association; the likelihood that such reports, if divulged to the Association, would be seen by others to whom they were not intended to be divulged; the extent to which the Association, and the public,[5] would be damaged by denial of inspection; and the like.

But certainly the most pressing of such equitable factors is the existence or not of a sufficient factual predicate to suspect malfea-

sance or misfeasance on the part of the guardian. The Association, in support of its concerns, cites to a single act of putative misconduct committed some years ago and subsequently ratified by my predecessor. The guardian, in a less-than-helpful rebuttal, asserts no more than that the Association's suspicions of wrongdoing "are simply not true. Even if they are true, such allegations are inadequate to justify production or inspection of the [accounting] reports." *Guardian's Objection* ¶5. But if the Association's suspicions are true—if they are true in the smallest degree—they may well be adequate and more than adequate to justify inspection of the accounting records. The guardian, after all, is to be held to the strictest standard of conduct—to a standard characterized by "the punctilio of an honor the most sensitive."

Whether the Association's wariness is well-founded is something that I am unable to determine in the absence of a more particularized factual record. Accordingly, the guardian is hereby ordered to produce to the court *in camera* the guardianship accounting report for the latest year available, and for the two preceding years, such production to be made not later than Friday, January 17. The court, or the court's designee, will review the reports; after which a further order will be entered.

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[1]The Association acknowledges, for what it may be worth, that about a year-and-a-half after the guardian purchased the car, the guardian obtained the court's retroactive consent to the purchase being made with the ward's funds. *Association's Petition* ¶¶7 and 8.

[2]For this proposition the Association cites Fla. Stat. § 631.57. *Association's Petition* ¶10. Section 631.57 says a great many things, but it does not anywhere say that the Association is obliged to "make all efforts to ensure the guardian is meeting the statutory obligation vested in him." It does say that the Association succeeds to "all rights duties, defenses, and obligations of the insolvent insurer" in whose shoes it stands. Fla. Stat. § 631.57(1)(b). I assume for purposes of this order that the Association, like any insurer, has the right and duty to take reasonable steps to see to it that it is not being bilked and that its payments are not being syphoned off by someone not entitled to them.

[3]In the oft-quoted language of then-Chief Judge Cardozo: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" for a fiduciary such as the guardian herein. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

[4]As with any decision that turns on the weighing and balancing of equities, the decision that I reach in this case will be of limited precedential value to other cases. The notion of "interested person" for these purposes is intensely fact-bound and protean. *See Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 508 (Fla. 2006) [31 Fla. L. Weekly S763a]. That is not necessarily a bad thing; it rebuts, to some degree, any suggestion on the part of the guardian that permitting inspection in this case will unleash a tidal wave of inspections, or requests for inspection, in future cases.

[5]Whether the totality of the equities would favor disclosure of the report to a private insurance-carrier or other private party on these or similar facts is a question not before me.

* * *

Torts—Action by former wife against former husband and entities that directly or indirectly owned certain properties acquired during marriage, advancing various legal and equitable claims, including breach of fiduciary duty, unjust enrichment, fraud, constructive fraud, and conversion—Evidence overwhelmingly demonstrated that the properties at interest were acquired during parties' marriage with joint funds and/or funds borrowed and personally guaranteed by plaintiff/former wife and defendant/former husband; the parties intended to acquire each property jointly with intent to own them together and use them as a family; and the complex ownership structure employed was driven solely by estate/tax planning considerations and not intended to alter parties' intent to beneficially own the properties together and equally—Because plaintiff/former wife contributed equally to purchase of properties and joint funds were used to maintain them post-acquisition, plaintiff is entitled to resulting trust against two condominium units—In the alternative, plaintiff is entitled to remedy of a constructive trust upon these units in order "to restore property to the rightful owner and prevent unjust enrichment"—With respect to third property, which was sold, former husband misappropriated plaintiff's share of proceeds "in breach of fiduciary duty owed to her, and by way of constructive fraud and inequitable conduct"—Plaintiff awarded money judgment in amount of sum she was entitled to receive from sale of property as well as prejudgment and postjudgment interest—Unique circumstances of case warrant imposition of equitable lien upon former husband's interests in the entities that are the sole members of the limited liability companies that own the condominium units, and on the condominium units themselves, thereby enabling plaintiff to proceed directly against those assets in order to recoup funds former husband misappropriated from sale of third property—Plaintiff granted immediate joint possession of both condominium units, together with former husband, and court will exercise its discretion and appoint custodian to preserve the properties and protect rights of both parties—Counts asserting alternative claim for unjust enrichment dismissed as moot—Fraudulent inducement claim dismissed, as court does not find that defendant intended to deprive plaintiff of her rights at the time the properties at issue were acquired—Count alleging conversion dismissed to extent it is based upon real estate itself and funds received from sale of third property—Various other claims dismissed as duplicative and moot

JANETT POLL SARLABOUS, Plaintiff, v. CONSTANTINO BAGATELAS KOURANOV; INFINITY ASSET HOLDINGS, LLC; INFINITY PROPERTY HOLDINGS, LLC; INFINITY FINANCIAL HOLDINGS, LLC; INFINITY GROUP FINANCIAL HOLDINGS, LTD.; and AGP GLOBAL, LTD., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Circuit Civil Division. Case No. 18-10087 CA (22). December 12, 2019. Michael A. Hanzman, Judge. Counsel: Jorge L. Fors, Fors | Attorneys at Law, Coral Gables, for Plaintiff. Juan C. Ramos-Rosado, DMRA Law LLC, Miami, for Defendant.

PARTIAL FINAL JUDGMENT

I. INTRODUCTION

Plaintiff, Janett Poll Sarlabous ("Plaintiff" or "Poll"), and Defendant Constantino Bagatelas Kouranov ("Defendant" or "Bagatelas"), were married and later divorced in their home country, Panama. During the marriage the parties (or according to Bagatelas himself individually) acquired, among other things, three pieces of real estate at issue here; two condominiums in Miami, Florida and an apartment in Boston, Massachusetts. Each property was used by the family until sometime in 2017 when the marriage began to encounter difficulties.

In early 2018 the Boston property was sold, realizing net proceeds of approximately $1. 5 Million. Those proceeds were deposited into the bank account of Infinity Financial Holdings, LLC, a Florida Limited Liability Company which was then the title owner. In March of 2018 Poll discovered that Bagatelas had secured signatory authority over that bank account (authority previously held by the parties' accountant) and had removed the money. She then travelled to Miami to celebrate her 50th birthday with her daughter and discovered that Bagatelas had changed the locks on the two Florida condominiums.

On March 28, 2018 Poll filed this action advancing a number of legal and equitable claims against Bagatelas and the entities that directly/indirectly own(ed) the properties. As for Bagatelas, Poll brings claims for "Breach of Fiduciary Duty," "Unjust Enrichment," "Fraud," "Constructive Fraud" and "Conversion." She also brings claims for "Unlawful Detainer" seeking to recover joint possession of the Miami Properties, and asks this Court to impose a constructive/resulting trust on Bagatelas' "interest in the properties and the Companies" which hold title to them. Finally, Poll asserts claims directly against the entities that directly/indirectly hold (or held) title to these properties for "Unjust Enrichment," and seeks to impose an "equitable lien" on their interests.[1]

On June 18, 2019 Defendants filed their Answer denying the material allegations of the Complaint and asserting fifteen (15)

Affirmative Defenses. Bagatelas also filed a Counterclaim for damages, alleging that Poll had "illegally planted surveillance devices in the Property in order to invade his privacy, monitor his conduct, and listen to his conversations," thereby violating Florida Statute § 934.10. Poll filed her Answer and Affirmative Defenses to the Counterclaim on July 17, 2018.

In order to expeditiously adjudicate all disputes involving the real estate the parties agreed to a non-jury trial on all causes of action pled by Poll, except her claim for damages based upon Bagatela's alleged removal of her "personal property" from the Miami condominiums. This stipulation also left for another day Bagatelas Counterclaim for invasion of privacy. Trial commenced on November 7, 2019 and continued on November 8, 10th and 15th. The parties were then ordered to file post-trial memorandum. The matter is now ripe for disposition and the Court, having carefully considered the extensive testimonial and documentary evidence presented—both qualitatively and quantatively—now enter this "Partial Final Judgment."[2]

II. FINDINGS OF FACT

Poll is a citizen of Panama and the President and CEO of Group Machetazo, an entity which owns and operates a variety of businesses (real estate, Pollo Tropical Franchises, chemical facilities, "big box" stores, etc.) in Panama. Bagatelas also is a citizen of Panama who came from humble beginnings. He and Poll met as teenagers when Bagatelas was working summer jobs at the Machetazo Group, eventually married in 1990, and divorced in 2018.[3] Two children were born of the marriage—Allen Michael Bagatelas Poll (age 27) and Kristen Janett Bagatelas Poll (age 22).

After the parties married, Bagatelas worked with Poll's father and eventually started his own businesses (gas stations, wholesaler, department stores, construction business, etc.). His construction/development company did considerable work with Group Machetazo, building some of its facilities/stores. During the 28-year duration of the marriage both Poll and Bagatelas worked outside the home and each contributed to the expenses of the family.

Prior to the marriage Poll owned a condominium at the Imperial on Brickell Avenue that had been gifted by her Father. The family would frequently stay there while visiting South Florida. Eventually, she and Bagatelas wanted a larger unit and entered into a contract to purchase Unit 59F at the Four Seasons (also on Brickell).[4] Poll and Bagatelas both individually signed the contract as "buyers." After the parties hired counsel (Robert Adams), but before closing, it was decided that they would acquire the Unit through use of a corporation. Adams then formed Allkris Estate Corp. ("Allkris"), a closely held Florida corporation owned jointly by Poll and Bagatelas.[5]

Allkris was assigned the purchase contract and acquired Unit 59F for the sum of $2.2 million, with $400,000.00 in deposit money put up prior to closing. That deposit came from the October 2010 sale of Poll's condominium at the Imperial. Those funds were first placed in a joint account held by Poll and Bagatelas at Bank of America and then transferred from that joint account to the escrow agent.[6] At the closing, Allkris paid an additional $1.6 million obtained from a loan secured by property owned by a Panamanian company—Prometora Malibu S.A.; a loan that both Poll and Bagatelas personally guaranteed.[7] The remaining $700,000.00 due for the purchase was paid post-closing at the rate of $100,000.00 per month. Those payments came from the joint Bank of America account into which both parties regularly deposited funds, and which was used to pay for the family's expenses.

After acquiring Unit 59F the parties had an opportunity to purchase the adjoining (but smaller) Unit 59A; an opportunity they decided to take. Allkris—the owner of 59F—entered into the purchase contract as "buyer," agreeing to pay $1,119,000.00 for the property. A ten percent (10%) down payment was made using funds from the joint Bank of America account. The remaining funds needed to close also came from that account and, in particular, from proceeds that had been recently realized on the sale of a jointly owned home in Los Angeles. At or about this same time the parties also purchased an apartment in Boston where their son was attending college. The Boston property—which was bought for approximately $1.450,000.00—was acquired with funds from the joint Bank of America account (the 10% deposit), and through refinancing Unit 59F at the Four Seasons.

As mentioned earlier, prior to the closing of Unit 59F Poll and Bagatelas had retained Robert Adams ("Adams"), a Miami attorney specializing in real estate and tax law. Adams had advised them to take title to Unit 59F in the name of a corporate entity, and, as also pointed out earlier, he incorporated Allkris so that it could be assigned the purchase agreement and close on that unit. Adams testified that both Poll and Bagatelas were his clients; they were "invariably together when we met"; and that they owned Allkris equally. He also testified that they were clearly buying the property as "husband and wife," and that neither ever said, or even suggested, that it was being acquired as his or her own personal investment.

Adams also represented the couple in their subsequent acquisition of Unit 59A and assisted Boston counsel in connection with the purchase of the Boston apartment. By that time (2014) he and the parties accountant, Albert Aguiar ("Aguiar"), had begun to focus on estate/tax issues unique to foreign owners of U.S. real estate; particularly the fact that non-residents receive only a "very small exemption for taxation" upon death. Adams and Aguiar therefore recommended that the parties employ a commonplace double-tiered partnership structure to acquire (or hold) title to the U.S. properties; a structure that would: (a) protect the ultimate beneficial owner from a large estate tax; and (b) enable the parties to claim capital gain treatment on a sale.

To accomplish these goals, Adams and Aguiar first recommended that Florida Limited Liability Companies (LLCs) be formed to take title to the properties. The parties accepted their advice and it was understood by Poll, Bagatelas, Adams and Aguiar that the "ultimate owners" of these entities would be Poll and Bagatelas. Adams and Aguiar then formed the three (3) LLCs which now (or in the case of Boston did) hold legal title to the properties. Adam and Aguiar then formed two BVI entities, Infinity Group Financial Holdings, Ltd. and AGP Global LLC, which were substituted as the members of the three LLCs. They also formed Infinity Holdings Management LLC, a Delaware entity that would manage the BVI entities. Later, in anticipation of filing the parties' 2014 tax returns, Adams prepared formal ownership certificates reflecting that each Poll and Bagatelas owned fifty percent (50%) of the Delaware Management entity and the BVI entities which were the members of the Florida LLCs. He testified that he discussed this joint (50/50) ownership with his joint clients (Poll and Bagatelas) and that neither objected. Like Adams, Aguiar also unequivocally testified that based upon his meetings with Poll and Bagatelas, he understood that both of them were the ultimate beneficial owners of all three (3) properties—50/50.[8]

At present, Defendant Infinity Asset Holdings, LLC, ("Infinity Asset") a Florida LLC, owns Unit 59A. Defendant Infinity Property Holdings, LLC ("Infinity Property"), a Florida LLC, owns Unit 59F,[9] and Defendant Infinity Financial Holdings ("Infinity Financial"), a Florida LLC, owned the now sold Boston apartment. Defendant Infinity Group Financial Holdings, Ltd. owns ninety nine percent (99%) of the membership interests in each of these LLCs, with Defendant AGP Global, Ltd. owning the remaining one percent (1%). So to sum things up, the Court finds that Poll and Bagatelas were intended to be—and currently are—the joint owners of both BVI entities (Infinity Group Holdings, Ltd. and AGP Global, Ltd.), and that these BVI entities are the sole members of the three (3) Florida

LLC's which own(ed) these properties. Thus, Poll and Bagatelas jointly and equally own(ed), albeit indirectly, all three properties.

Notwithstanding this joint and equal ownership, once the parties' marriage began to deteriorate Bagatelas embarked on a plan to divest Poll of her equity in the properties and secure that equity for himself. He first created a stock certificate which purported to make him the sole owner of Infinity Group Financial Holdings, Ltd., the BVI entity that controlled 99% of the membership interests in the three Florida LLCs that hold/held title to the real estate. Neither Adams nor Aguiar prepared, or had ever seen, that certificate, and the prior certificates reflecting joint ownership—which Adams had previously prepared and had delivered to Poll—were never voided.[10]

Neither Poll nor counsel were aware that this new certificate existed at the time the parties decided to sell the Boston property, and both Poll and Bagatelas had agreed to use the proceeds from that sale to retire the debt secured by Unit 59F; debt jointly assumed/guaranteed in order to finance the Boston purchase. Bagatelas, however, had a different plan, and when the sale of the Boston property closed he asked Aguiar, who at the time was the sole signatory on the Infinity Group Financial Holdings account at Popular Bank, to send the proceeds to an unfamiliar BVI account he controlled. Aguiar appropriately declined that request. Undeterred, Bagatelas then used his new stock certificate to secure signatory authority on the account and convinced Popular Bank to wire the money to the BVI account in his name only. Put simply, Bagatelas stole the money realized from the closing of the Boston property. He also locked Poll out of, and assumed sole dominion over, Units 59A and 59F.

The parties spent considerable trial time going through the excruciating details of: (a) countless deposits/withdrawals into and out of the parties joint accounts; (b) the ownership of various Foundations/Trusts each have had an interest(s) in; (c) each real estate transaction; and (d) the steps taken in forming and documenting ownership of the various entities involved in acquiring these properties. Belaboring that minutia would do nothing other than lengthen this Order. Suffice it to say that the cumulative body of evidence presented overwhelmingly demonstrates that: (a) all of theses properties were acquired during the parties' marriage with joint funds, and/or funds borrowed and personally guaranteed by both Poll and Bagatelas; (b) the parties intended to—and did—acquire each of these properties jointly with the intent to own them together and use them as a family; and (c) the complex ownership structure employed was driven solely by estate/tax planning considerations, and was never intended to (nor did it) alter the parties' intent to beneficially own these properties together and equally. Given this compelling proof the Court categorically rejects Bagatelas' claim that he acquired these properties for his own account, and also rejects, as completely untenable, his testimony that he initially placed Poll's name on the purchase contracts so she could take care of the properties for their children "in the event something may happen to me." Rather, the Court finds that all three (3) of these properties were acquired by the parties together, with equal ownership rights, and for purposes of using them as a family, and that Bagatelas' claim of sole ownership reeks of afterthought and is incompatible with, and antithetical to, reality.

III. CONCLUSIONS OF LAW

The evidence again clearly and convincingly establishes that all three of the properties at issue here were acquired using funds from joint bank accounts and debt guaranteed by both Poll and Bagatelas. They also were acquired during the marriage. As a result, the law presumes that these properties were intended to be, and were, jointly acquired and owned. *See, e.g., Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45 (Fla. 2001) [26 Fla. L. Weekly S106a]; *Sorgen v. Sorgen*, 162 So. 3d 45 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1367a]; *Lakin v. Lakin*, 901 So. 2d 186 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D809a]. The Court, however, is not relying merely upon this presumption, as the evidence confirms beyond doubt that all three properties were in fact acquired jointly and with joint funds (or jointly guaranteed debt), and with the intention that Poll and Bagatelas each would beneficially own 50% of each property. The Court therefore concludes, as a mixed question of fact and law, that the two Units at the Four Seasons (59A and 59F) are beneficially owned by Poll and Bagatelas (50% each), and that Poll was entitled to receive 50% of the proceeds realized from the sale of the Boston property.

Because Poll contributed equally to the purchase of all the properties and joint funds were used to maintain them post-acquisition, she is entitled to a resulting trust against Units 59A and 59F by operation of law. *See, e.g., Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957); *Steinhardt v. Steinhardt*, 445 So. 2d 352, 352 (Fla. 3d DCA 1984) (resulting trust arises "where a person furnishes the money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property"); *Abreu v. Amaro*, 534 So. 2d 771, 772 (Fla. 3d DCA 1988) (once a plaintiff "proves that he paid the purchase price for a piece of property, a presumption arises that it was the parties' intention that the [party] holding legal title was to hold the property in trust for the payor"); *Willard Homes, Inc. v. Sanders*, 127 So. 2d 696 (Fla. 2d DCA 1961) ("where the purchase money of land is paid by one person and title is taken in the name of another a resulting trust arises and the party taking the title is presumed to hold it in trust for him [sic] who pays the purchase price").

The Court also, in the alternative, finds that Poll is entitled to the remedy of a constructive trust upon Units 59A and 59F; a *remedy* imposed in order "to restore property to the rightful owner and prevent unjust enrichment." *Abreu, supra*. *See also Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957). Poll is entitled to this remedy because she has proven, by clear and convincing evidence, that: (a) at the time these properties were acquired, Poll and Bagatelas were in a confidential relationship (*i.e.*, marriage); (b) Poll was expressly promised that she would own a 50% beneficial interest in each property; (c) she permitted the properties to be titled in the name of the Florida LLCs in reliance on this promise/understanding; and (d) allowing the LLCs/Bagatelas to retain these properties to her exclusion would result in unjust enrichment. *See, e.g., Abreu, supra* at 772, citing 5 G. Thompson, *On Real Property* § 2345, at 134 (1979 Repl.).

While the Court's finding that Poll and Bagatelas each currently own fifty percent (50%) of the BVI entities that are sole members of the Florida LLCs which own Units 59A and 59F (and its imposition of resulting/constructive trusts on these Units) ensures that Poll will receive her share of current equity, it will not compensate her for the $780,000.00 she was entitled to receive from the sale of the Boston home. Poll therefore asks the Court to enter judgment against Bagatelas for this amount *and* to impose an equitable lien against Bagatelas' 50% indirect interest in the remaining properties (Units 59A and 59F) based upon "general considerations of a right or justice as applied to a particular circumstance of a case." *Wichi Mgmt. LLC v. Masters*, 193 So. 3d 961, 963 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1096a]. Because the Court finds that Bagatelas misappropriated Polls' share of the proceeds from the parties' Boston home in breach of a fiduciary duty owed to her, and by way of constructive fraud and inequitable conduct, it concludes that the unique circumstances of this case warrant imposing an equitable lien upon Bagatelas' interests in the BVI entities which, in turn, are members of the two LLCs which own the remaining properties, *and* on the properties themselves, in order to prevent Bagatelas from being unjustly enriched. While the Court could simply enter a money

judgment against Bagatelas for the amount taken ($780,000.00), there is no reason why the Court, given the circumstances of this unusual case, should not also impose an equitable lien on Bagatelas interest in the entities which indirectly own the remaining properties and the properties, thereby enabling Poll to proceed directly against those assets in order to recoup the funds Bagatelas misappropriated from the sale of the Boston property. *See, e.g., Special Tax Sch. Dist. No. 1 of Orange County v. Hillman*, 179 So. 805 (Fla. 1938).

The Court also finds that prior to the dissolution of the marriage the parties were in joint possession of Units 59A and 59F, and that Poll has since been unlawfully divested of her possessory rights by Bagatelas. The Court will therefore grant Poll immediate joint possession of both Units, together with Bagatelas. *See* § 82.01, Fla. Stat., (2019), *et. seq.*; *Se. Fid. Ins. Co. v. Berman*, 231 So. 2d 249 (Fla. 3d DCA 1970). Given the dissolution of the parties' marriage and the acrimony between them, the Court also will exercise its discretion and appoint a Custodian to preserve the properties and protect the rights of both parties. *See Ins. Mgmt., Inc. v. McLeod*, 194 So. 2d 16 (Fla. 3d DCA 1966); *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241 (Fla. 1930).

IV. CONCLUSION

While the transactions involving the acquisition of the properties at issue here are a bit complicated, the case itself is not. These parties, while married, used joint funds (and jointly borrowed and guaranteed debt) to acquire two condominiums in Miami and an apartment in Boston; three properties intended to be used (and in fact used) as a family. When the marriage abruptly ended Bagatelas decided he did not want to share the equity in these assets with Poll. So he usurped the sales proceeds from the Boston property, locked Poll out of the Miami properties, and attempted to rewrite history by claiming that he acquired all of these assets for his own account and with his own funds, never intending to own them with his then wife. The evidence proves otherwise, and the Court again rejects Bagatelas' claim in its entirety.

Of course, had Bagatelas really intended to acquire these properties for himself (and he did not), and had Poll agreed to this arrangement (and she did not), this understanding could have been documented on the back of a napkin, with Poll simply acknowledging, in writing, that she owned no interest in the properties or the entities that directly or indirectly held legal title. Nowhere did she do that, and not a shred of evidence (other than his own self-serving testimony) supports Bagatelas' claim that he—and he alone—was to beneficially owns these assets.

For the foregoing reasons it is hereby **ORDERED**:

1. On Counts I (Breach of Fiduciary Duty) and XII (Constructive Fraud), Poll is awarded judgment against Bagatelas in the amount of Seven Hundred Eighty Thousand Dollars ($780,000.00), together with pre-judgment interest at the legal rate commencing on the date which Bagatelas had these funds wired to his BVI entity through the date of this Judgment, and shall accrue post-judgment interest from the date of this Judgment forward at the rate provided by law, for which let execution issue. Count II, which seeks damages against Bagatelas based upon the alternative claim of "Unjust Enrichment," is dismissed as Moot, and Count XI (Fraud in the Inducement) is also dismissed, as this Court does not find that Bagatelas intended to deprive Poll of her rights *at the time the properties were acquired* (*i.e.*, the Court finds no fraud *in the inducement*).

2. As an additional remedy based upon the Court's finding of Constructive Fraud (Count XII), and as a remedy awarded under Count XIII and XIV, the Court imposes a Resulting Trust and a Constructive Trust in favor of Poll on Bagatelas' interest in the BVI entities which are the members of the LLCs that hold legal title to Units 59A and 59F of the Four Seasons on Brickell Avenue, and on said Units. The Court also imposes an Equitable Lien against Bagatelas' interests in the BVI entities which are the members of the LLCs which hold legal title to Units 59A and 59F, and on said Units, up to the amount necessary to fully satisfy the Judgment (with interest) specified in paragraph 1 above. These trusts/liens shall immediately attach to:

Condominium Unit 59A, in MILLENNIUM TOWER RESIDENCES, A CONDOMINIUM, together with an undivided interest in the common elements, according to the Declaration of Condominium thereof, recorded in Official Records Book 21766, Page 4639, as amended from time to time, of the Public Records of Miami-Dade County, Florida (Folio 01-4139-076-0200); and

Condominium Unit 59F, in MILLENNIUM TOWER RESIDENCES, A CONDOMINIUM, according to the Declaration thereof recorded on October 24, 2003, under Clerk's File No. 20030797700 in Official Records Book 21766, Page 4639, of the Public Records of Miami-Dade County, Florida, as amended from time to time. (Folio 01-4139-076-1740); and

Bagatelas' ownership interests in:

A. Infinity Group Financial Holding, Ltd.
B. AGP Global, Ltd.

Bagatelas is enjoined from transferring, selling, pledging, hypothecating or encumbering his fifty percent (50%) ownership interest in these entities.

3. Count XV, alleging conversion against Bagatelas, is dismissed to the extent it is based upon the real estate itself and the funds received from the Boston sale, as real estate may not be the subject of conversion claim, *see Am. Intern. Land Corp. v. Hanna*, 323 So. 2d 567 (Fla. 1975), and the Court has already entered judgment against Bagatelas for all sums misappropriated and has granted equitable relief. To the extent this Count is based upon an alleged conversion of Poll's personal property it remains pending, as does Bagatelas' counterclaim for invasion of privacy.

4. The claims pled in Counts III, IV and V, are dismissed as duplicative and moot.

5. As for Counts VI and VII, the Court finds that Poll, as the 50% owner of each of the BVI entities sued, has failed to prove that either Infinity Financial or AGP Global have been unjustly enriched and said counts are dismissed. Counts VIII, IX and X are also dismissed as duplicative and moot.

6. As for Count XVI (Unlawful Detainer), the Court awards Poll immediate joint possession of Units 59A and 59F, as legally described above. The Court also appoints Melanie Damian, Esquire as Custodian Pendente Lite over both of the Florida LLCs which own title to the Units (Infinity Assets and Infinity Holdings) pursuant to Florida Statute § 605.0703(3). *See, e.g., Kosow v. Kovens*, 473 So. 2d 776 (Fla. 3d DCA 1985); *Puma Enterprises Corp. v. Vitale*, 566 So. 2d 1343 (Fla. 3d DCA 1990); *Romay v. Caribevision Holdings, Inc.*, 173 So. 3d 1055 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1792a]; *Granada Lakes Villas Condo. Ass'n, Inc. v. Metro-Dade Investments Co.*, 125 So. 3d 756 (Fla. 2013) [38 Fla. L. Weekly S777a]; *Key Caisee Corp. v. Seashore Shell Co.*, 470 So. 2d 792 (Fla. 3d DCA 1985); *Edenfield v. Crisp*, 186 So. 2d 545 (Fla. 2d DCA 1966). The Custodian shall take immediate possession of both entities (and all of their assets wherever located including Units 59A and 59F) and shall recommend to the Court whether the real estate owned by these LLCs (Units 59A and 59F) should be sold, or whether the parties can, on a long-term basis and *without* ongoing Court supervision, own and use them jointly. The Custodian shall also periodically report to the Court on the status of these assets. Both parties (Poll and Bagatelas) shall from this point forward each pay fifty percent (50%) of the costs of maintaining the properties and all fees billed by the Custodian, who shall ensure that the properties are properly maintained and that all

obligations (taxes, insurance, etc.) are timely paid.[11]

[1]Poll also seeks an accounting, injunctive relief, and the appointment of a Receiver.

[2]The Court believes that the remaining claims (*i.e.*, Polls' claim for conversion of her personal belongings and Bagatelas' invasion of privacy claim) are independent of, and severable from, those disposed of herein and, as a result, this Partial Final Judgment is appealable. *See, e.g., Gov't Employees Ins. Co. v. Arreola*, 231 So. 3d 508 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1287b]; *El Segundo Original Rey de la Pizza Cubana, Inc. v. Rey Pizza Corp.*, 676 So. 2d 1031 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1463a].

[3]The divorce court in Panama did not adjudicate the parties' respective claims to the U.S. real property at issue here.

[4]The parties first contracted to buy Unit 41E, but later elected to purchase Unit 59F after that unit became available.

[5]Allkris is a portmanteau based upon the names of the parties' children, Allen and Kristen.

[6]At trial Bagatelas claimed that an unidentified check drawn on the couples' Bank of America account in the amount of $370,000.00 was in fact made payable to Poll and was for repayment of the funds used to make the deposit on Unit 59F. Although the Court left the record open this claim was never verified, and the check was never produced or entered into evidence.

[7]While the evidence as to who owned this company at the time was disputed, it makes no difference for purposes of the Court's adjudication of this dispute. Nor does it matter that neither Poll nor Bagatelas were ever called on their personal guaranties.

[8]Aguiar also was assigned responsibility for managing the properties (*i.e.*, preparing tax returns, paying bills and collecting rents on Unit 59A which was leased at times).

[9]Because Unit 59F had already been acquired at the time this structure was put in place Allkris quit-claimed the Unit to Infinity Property.

[10]Poll picked up the original certificates from Adams, gave them to Bagatelas, and never saw them again.

[11]In a claim that can only be characterized as "chutzpah," Bagatelas asks this Court to "set-off" against the funds owed to Poll the amount of $1.2 million he claims to have spent in order to maintain the properties "since each of the purchases" (i.e., association fees, property insurance, and real estate taxes). The Court has already concluded that joint funds were used to maintain the properties up until the parties separated, and Bagatelas clearly is not entitled to a "set-off" in the amount he spent to maintain the Units *after* he wrongfully usurped sole possession. His request for a set-off is therefore denied.

* * *

Dissolution of marriage—Contempt—Attorney's fees—Equitable distribution—Child custody—Travel with child—Court declines to hold former husband in contempt for failing to make timely monthly equitable distribution payments to former wife because amounts have since been paid—Former husband is required to pay all former wife's reasonable attorney's fees and costs incurred by her with regard to former husband's default and noncompliance with final judgment and mediated settlement agreement where former husband was in default and noncompliant when motion for contempt was filed, and MSA requires non-prevailing party to pay such fees and costs—Court rejects argument that former wife waived right to seek attorney's fees based on alleged "accord and satisfaction" as a result of language former husband wrote on the back of the check—Court finds former husband in contempt for failing to deliver child's passport as required by parties' MSA—Former wife entitled to reasonable attorney's fees and costs incurred with regard to former husband's willful noncompliance with regard to passport issue

IN RE: THE MARRIAGE OF: THOMAS EARL HARRINGTON III, Former Husband, and JEANETTE MARIE POSPISHIL F/K/A JEANETTE MARIE HARRINGTON, Former Wife. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502018DR011205XXXXMBFC. December 13, 2019. Renatha S. Francis, Judge. Counsel: John Douglas Boykin, Ciklin Lubiz, West Palm Beach, for Former Husband/Petitioner. Jonathan S. Root, Jonathan S. Root, P.A., Boca Raton, for Former Wife/Respondent.

ORDER GRANTING FORMER WIFE'S MOTION FOR CONTEMPT, FOR ENFORCEMENT, AND FOR SANCTIONS

THIS CAUSE came before the Court on November 12, 2019 on JEANETTE MARIE POSPISHIL's ("Former Wife") Motion for Contempt, For Enforcement, and for Sanctions ("the Motion"), filed August 13, 2019. Having reviewed all the evidence, including testimony from Former Wife, and THOMAS EARL HARRINGTON III ("Former Husband"), and having taken judicial notice, as required by both parties, of the various recent travel adversaries issued by the United States Department of State for the country of Ecuador, the Court **GRANTS** Former Wife's motion for the reasons that follow.

I. FACTS

On April 4, 2019, this Court entered a Final Judgment of Dissolution of Marriage which incorporated the parties' Mediated Settlement Agreement and Parenting Plan (hereinafter "Final Judgment," "MSA" respectively). For reasons that will become clear, three provisions in these documents are central to the resolution of this case: Article "I", paragraph "5" of the MSA; Paragraph "G" of the Final Judgment; and Section "VIII" paragraph "4" of the MSA.

Article I, paragraph 5 obligates Former Husband to pay Former Wife $2,000.00 per month on account of an $8,000.00 equitable distribution payment due and owing by him to her. It is enforced by paragraph "G" of the Final Judgment entitled "Enforcement," which provides that:

> [The] [p]arties understand that each may seek enforcement of the terms of this Agreement through the power of contempt against the defaulting or non-performing party in this or any other Court having jurisdiction over them. The non-prevailing party shall be responsible for all reasonable attorney's fees and costs.

Section VIII, paragraph of the MSA provides that:

> Either parent may travel out of the country with the child during his/her time-sharing and only to Hague recognized countries and *countries* that do not have a current United States Department "*red alert*."
>
> *******
>
> The Father shall always hold the child's passport and upon a reasonable request shall provide the same the Mother within 48 hours of her request.

(Emphasis added). Former Wife brought the Motion for Former Husband's failure to comply with payment of his equitable distribution payment, and for violating Section VIII of the MSA.

A. Equitable Distribution Enforcement

With respect to the payment, Former Wife alleged Former Husband failed to make the required $2,000.00 payments due on July 1, 2019 and August 1, 2019, prior to her filing of the Motion. She acknowledges that he did eventually pay—late—on September 8, 2019. And she executed a satisfaction of money judgment, noticing that all sums due were fully paid. At the final hearing, Former Husband presented no testimony or evidence regarding an inability to pay the amount owed.

B. Travel

With respect to the travel, Former Wife alleged that Former Husband refused to provide and deliver to her, the passport for the parties' minor child for an intended trip to the Guayaquil province in Ecuador on October 5-9, 2019.

On July 31, 2019, and August 6, 2019, she sent Former Husband emails through the program, "Our Family Wizard," giving him notice that she would be traveling with the parties' minor child to Ecuador in October (in which she even invited Former Husband to join them), and she advised him that there was "NO" red alert for Guayaquil (the city to which she would be traveling with the parties' minor child), and advised that there was no red alert with regard to "entire country" of Ecuador. Ecuador is a member of the Hague Convention.

Nevertheless, Former Husband refused to acquiesce to Former Wife's request for the minor child's passport claiming (a) the city to which she was going was unsafe, (b) she would effectively be kidnaping the minor child and improperly removing the minor child from Florida if she were to travel to Ecuador, and (c) certain portions or provinces (akin to states of the United States) of Ecuador were

under a red alert (whereas the rest of the country was only under a yellow alert or level 2 alert—a minimal alert meaning "exercise caution"—other countries such as Israel, France, Germany, Italy and Jamaica have level 2 alerts).

As noted, at the parties' joint request, the Court took judicial notice of the U.S. Department of State travel advisories to Ecuador, specifically for the dates April 9, 2019, October 9, 2019, and November 7, 2019. It is significant that at the time Former Wife requested the minor child's passport (and currently) only certain cities or provinces of Ecuador had a Level 4 or red alert travel advisory, and none of those pertained to the area in which the Former Wife intended to travel with the minor child. It is also significant that the parties' MSA specifically references "countries" with red alerts—as distinguished from parts (or provinces) of countries—and at no time has the "country" of Ecuador been under a red alert (only parts and portions).

Finally, testimony at the hearing revealed that Former Wife is a citizen of the United States, she has a residential lease for her home here in Florida, she is employed here in Florida as an accountant, she owns real property in the United States and she has family in the United States, i.e., her mother. In contrast, she has no family, no job, no real estate, and no connections in Ecuador.

II. ANALYSIS

A. Equitable Distribution Enforcement

Here, Former Husband paid the Former Wife the $4,000 due and owing with regard to the July 1 and August 1, 2019, required payments, as well as the payments due and owing for May and June 2019.

For this reason, the Court will not hold Former Husband in contempt. He was, however, non-compliant and in default when Former Wife filed the Motion. So the Court shall require him to pay all of Former Wife's reasonable attorney's fees and costs incurred by her with regard to Former Husband's default and noncompliance with the Final Judgment and MSA as it relates to the July 1 and August 1, 2019, required monthly payments. *See Coe v. Abdo*, 790 So.2d 1276, 1279 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1985a] [The court "has no discretion to refuse to award attorney's fees and costs where required by the contract. . . .The contract called for the prevailing party to be awarded attorney's fees. Since the wife has prevailed on all of the issues in this case, she is entitled to an award of reasonable attorney's fees."]; *Rose v. Rose*, 615 So.2d 203, 204 (Fla. 4th DCA 1993) ["Where the contract provides for attorney's fees to be awarded to the prevailing party in litigation arising out of the contract, the trial judge is without discretion to decline to enforce the provision."]. The Court rejects Former Husband's argument that Former Wife waived her right to seek attorney's fees and costs based upon an alleged "accord and satisfaction" as a result of language he wrote on the back of the check.

The parties, through their respective counsel, shall attempt to agree upon the amount of such reasonable attorney's fees and costs but if unable to agree, the Court shall reserve jurisdiction to schedule a hearing to determine the reasonable amount of same.

B. Travel

Former Wife is also asking the Court to find Former Husband in contempt on this issue, but with respect to his failure to deliver the minor child's passport as contemplated by the parties' MSA.

As a threshold matter, the Court recognizes that ordinarily[1] the contempt power of the court cannot be invoked to enforce property right obligations. *See* Art. I, § II, Fla. Const. (guaranteeing the fundamental right of freedom from being imprisoned for a debt, except in cases of fraud).

But this is not that. Specifically because Former Wife is not seeking Former Husband to pay a debt, only to compel him to act. When court requires "the performance of an act, and not the payment of money, the trial court can enforce the provision through contempt without running afoul of the constitution." *Williams v. Williams*, 251 So. 3d 926, 928 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1575a]; *see also Roth v. Roth*, 973 So. 2d 580, 591 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D182d] (finding no reversible error in the trial court's holding the husband in contempt for failing to sign a mortgage and promissory note, which was an act he was fully capable of performing. "To hold otherwise would permit a party to simply disregard provisions of a final judgment that required that party to perform some act.") And so the Court now finds Former Husband in contempt for *failing to deliver the passport* as required by the parties' MSA.

Having found Former Husband in contempt, he is ordered, as a purge, to comply with Former Wife's prospective written requests for the minor child's passport and produce same to the Former Wife within 48 hours of her request. *See*, *e.g.*, *Nical of Palm Beach, Inc. v. Lewis*, 981 So.2d 502, 504 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D788a] (Affirming purge requirement of "NOT committing any future violation of a 1998 settlement agreement."]; *Politz v. Booth*, 910 So.2d 397 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2242a] (similar). Failure of Former Husband to comply with the purge requirement may constitute a basis to modify his entitlement to hold the minor child's passport in accordance with the MSA.

As a result of Former Husband's contempt and noncompliance and default with the Final Judgment and MSA, and pursuant to the parties' prevailing party attorney fee provision in the Final Judgment, the Court now awards Former Wife her reasonable attorney's fees and costs incurred with regard to Former Husband's willful noncompliance with regard to the passport issue. The parties, through their respective counsel, shall attempt to agree upon the amount of such reasonable attorney's fees and costs. But if unable to agree, the Court shall reserve jurisdiction to schedule a hearing to determine the reasonable amount of same.

The Court reserves jurisdiction to enforce the terms of this Order and to enter such further orders as the Court deems just and proper.

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[1]The Court uses the term "ordinarily" because case law makes clear that there are circumstances where a party may waive a fundamental constitutional right, provided such waiver is voluntary, knowing, and intelligent. *See Williams v. State*, 736 So. 2d 699, 704 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D949c]. And determining that waiver has occurred is possible, even in the absence of an evidentiary hearing, simply by reviewing the record. *See*, *e.g.*, *Vetrick v. Hollander*, 743 So. 2d 1128, 1131 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2193b] (noting that an evidentiary hearing was needed to determine if proper waiver occurred because "[t]he issue of waiver cannot be determined from this record."). The Court need not pass upon this issue today.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—PIP policy that limits reimbursement to 80% of 200% of allowable amount under Medicare Part B fee schedule clearly and unambiguously elects to limit reimbursement to permissive statutory fee schedule—Policy does not create unlawful hybrid payment methodology—Insurer properly reimbursed medical provider using participating physicians fee schedule specified in policy rather than non-facility limiting charge

MRI ASSOCIATES OF LAKELAND LLC d/b/a HIGHLAND MRI a/a/o Eddie Crockett, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2018 16158 CODL, Division 73 (MILLER). December 4, 2019. A. Christian Miller, Judge. Counsel: Michelle Reeves, Ocala, for Plaintiff. Benjamin Floyd and Robert M. Lyerly, Progressive PIP House Counsel, Maitland, for Defendant.

FINAL SUMMARY JUDGMENT

This matter is before the court on the Defendant's Motion for Summary Disposition/Judgment filed on April 5, 2019. The court has reviewed the Motion and the Plaintiff's Response, conducted a hearing on the matters, and considered the arguments and authorities cited by the parties. Based upon the above, the court finds and rules as follows.

Factual Findings

On August 25, 2013, Eddie Crockett was injured in a car crash. As part of his resulting medical treatment, Mr. Crockett received an MRI from MRI Associates of Lakeland LLC, a medical provider operating under the name "Highland MRI" ("Highland"). Highland agreed to bill Mr. Crockett's insurance company directly for its services under an assignment of benefits. Accordingly, Highland later billed Progressive American Insurance Company ("Progressive") $2,400.00 for an MRI it provided to Mr. Crockett on October 9, 2013.

Under the terms of Mr. Crockett's PIP insurance policy, Progressive allowed $1,006.02 of Highland's original billed amount based upon 200% of the 2007 participating level of Medicare physicians fee schedule. Progressive then reimbursed Highland 80% of the allowed amount, for a total payment of $804.82.

The relevant policy language in Progressive's policy endorsement reads as follows:

> **UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS**
>
> If an **injured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those **medical benefits** and contest them.
>
> **We** will determine to be unreasonable any charges incurred that exceed the maximum charges set forth in Section 627.736(5)(a)(1)(a through f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
> . . .
>
> f. for all other medical services, supplies and care, 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B, except as follows:
>
> . . .
>
> The applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the year in which the services, supplies or care is rendered and for the area in which such services, supplies or care is rendered. This applicable fee schedule or payment limitation applies throughout the remainder of that year, notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it may not be less than the allowable amount under the applicable schedules of Medicare Part B for 2007 for medical services, supplies and care subject to Medicare Part B.
> . . .
>
> **We** will reduce any payment to a medical provider under this Part II(A) by any amounts **we** deem to be unreasonable **medical benefits**. However, the **medical benefits** shall provide reimbursement only for such services, supplies and care that are lawfully rendered, supervised, ordered or prescribed. . . .

Form A085 FL (05/12), page 1 (emphasis in original).

Analysis and Conclusions of Law

As a preliminary matter, the court finds that there is no triable issue of *fact,* and thus the court must only determine if Progressive is entitled to a judgment as a matter of law. *See Fla. Sm. Cl. R.* 7.135. Based upon the arguments and authorities raised by the parties, the court believes that determination turns on the resolution of two legal issues: (1) did Progressive provide sufficient notice of its intent to use fee schedule payment limitations and (2) if so, did Progressive correctly apply the limitations to Highland's bill? Each of these issues will be addressed in turn below.

I. Sufficiency of Notice—Fee Schedule Payment Limitations

Section 627.736(5)(a)5, Florida Statute (2013)[1] provided "Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. . . ." Thus under the plain language of the statute in effect at the time this action arose, Progressive only had to provide notice at the time of issuance or renewal of the policy that it may limit payment pursuant to the Medicare fee schedules.

As the parties are keenly aware, in *Geico v. Virtual Imaging,* the Florida Supreme Court previously declared that an insurer must "clearly and unambiguously elect the permissive payment methodology in order to rely on it." 141 So.3d 147, 158 (Fla. 2013) [38 Fla. L. Weekly S517a]. However, the *Virtual Imaging* Court was interpreting and applying the 2008 version of the PIP statute, which did not contain the simple notice requirement added by the Legislature in the 2012 amendment. In fact, the Supreme Court recognized this distinction and explicitly limited the application of its holding in *Virtual Imaging* to just those cases arising under pre-July 1, 2012 policies. *Id*. at 150 ("Because the GEICO policy has since been amended to include an election of the Medicare fee schedules as the method of calculating reimbursements, and the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012, *see* § *627.736(5)(a)* 5., Fla. Stat. (2012), our holding applies only to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology, which was January 1, 2008, through the effective date of the 2012 amendment, which was July 1, 2012."). Thus it appears that as a result of the legislative amendments in 2012, as of July 1, 2012, the "clear and unambiguous" election standard was replaced with a simple notice requirement.

Upon a review of Progressive's policy language in this case, Progressive provided notice to the policyholder (and any subsequent assignees such as Highland) that it intended to apply the Medicare fee schedule limitations with the language that reads "Pursuant to Florida law, *we will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:* . . .f. for all other medical services, supplies and care, *200 percent of the allowable amount under the participating physicians fee schedule of Medicare*

Part B. . ." Form A085 FL (05/12), page 1 (emphasis added). Progressive's policy clearly put Mr. Crockett and his assignees on notice that it "*will* limit reimbursement" and further, that the limitation will be calculated by using "participating physicians fee schedule of Medicare Part B." As stated above, the statute now only requires simple notice that an insurer may limit payment. The policy language at issue in this case satisfies this requirement.

Highland also argues that Progressive's policy creates an unlawful hybrid payment methodology which blends together the reasonable expenses methodology with the permissive fee schedule payment limitation methodology. This argument is unavailing. As the Second District Court of Appeal recently explained in *State Farm v. MRI Associates of Tampa,*

> In 2012 the legislature substantially amended section 627.736(5), setting forth the schedule of maximum charges limitation as a subsection of the reasonable charge calculation methodology. Ch. 2012-197, § 10, at 2743-44, Laws of Fla. As a result of this amendment, the reasonable charge and schedule of maximum charges methodologies are no longer coequal subsections of 627.736(5)(a); instead the reasonable charge method is set forth in subsection (5)(a), and the schedule of maximum charges limitation is provided in subsection (5)(a)(1). *Based on the current construction of the PIP statute, we conclude that there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer.*

State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc., 252 So. 3d 773, 777-78 (Fla. Dist. Ct. App. 2018) [43 Fla. L. Weekly D1149a], *review granted,* No. SC18-1390, 2019 WL 3214553 (Fla. July 17, 2019) (emphasis added).

II. Proper Application of Fee Schedule Limitations

Highland also argues that Progressive used the wrong fee schedule in calculating the reimbursements. Highland contends that due to alleged ambiguities in its policy language as to which fee schedule would be used, Progressive should have used the fee schedule that resulted in the highest rate of reimbursement. At the hearing, Highland agreed that as it was not a facility, and thus the non-facility rate would apply. Highland did dispute, however, that Progressive properly used the non-facility base rate ($503.01) instead of the non-facility *limiting* charge ($549.54), which would have resulted in an additional $74.44 in reimbursement (80% of 200% of the fee schedule amount).

First, the court looks to the policy language to determine if there is any ambiguity about which fee schedule rate would be applied. In the language of Progressive's policy at issue, it provides "for all other medical services, supplies and care, 200 percent of the allowable amount under the *participating physicians fee schedule* of Medicare Part B. . . ." Form A085 FL (05/12), page 1 (emphasis added). Highland's argument that "allowable amount" is ambiguous completely ignores the fact that it is followed *three words later* by a direct reference to the specifically applicable fee schedule in this case—"the ***participating physicians fee schedule***." The court cannot find this to be ambiguous at all. If fact, it is quite clear which fee schedule applies. Furthermore, this language directly tracks the statutory language in section 627.736(5)(a)1.f., Florida Statutes (2013).

Highland's argument was rejected by the Third District Court of Appeal previously in *Millennium Diagnostic v. Security National,* 882 So.2d 1027 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1817b]. In Millennium, the Court held that the appropriate fee schedule is the participating fee schedule, rather than the limiting charge. *Id.* at 1030. Furthermore, the "user's manual" published by the Centers for Medicate & Medicate Services[2] ("CMS") describes the limiting charge as follows: "LIMITING CHARGE equals 115 percent of the *non*participating fee schedule amount and is the maximum the *non*participant may charge a beneficiary on an unassigned claim. The *non*participating fee schedule amount is equal to 95 percent of the Medicare Physician Fee Schedule." (emphasis added). Thus it is clear from both *Millennium* as well as the fee schedule user's manual that the participating physician's fee schedule is the appropriate schedule Progressive should have utilized, rather than the limiting charge, as argued by Highland. Therefore, the court finds that Progressive correctly applied the participating physicians fee schedule limitation in this case.

WHEREFORE it is ORDERED AND ADJUDGED that Plaintiff, MRI ASSOCIATES OF LAKELAND LLC D/B/A HIGHLAND MRI A/A/O EDDIE CROCKETT, take nothing by this action and that Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY, go hence without day.

The court reserves jurisdiction to determine any appropriately filed motions for attorney's fees and costs.

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[1]The 2018 version of section 627.736(5)(a)5 reads largely the same, only omitting "Effective July 1, 2012."

[2]The "user's manual" as colloquially referred to by this court is a government publication also known as the "MLN BOOKLET." This manual is a reference guide that explains how providers can obtain Medicare payment information using the online, searchable Medicare Physician Fee Schedule (MPFS) website.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—PIP policy that limits reimbursement to 80% of 200% of allowable amount under Medicare Part B fee schedule clearly and unambiguously elects to limit reimbursement to permissive statutory fee schedule—Pursuant to terms of policy and section 627.736(5)(a) 1-3, insurer is permitted to utilize Medicare Multiple Procedure Payment Reduction to calculate reimbursement amounts so long as application does not result in utilization limit

SACOWI MEDICAL CLINIC LLC, a/a/o Princess Pollard, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-SC-010388-O (72), Civil Division. October 1, 2019. Faye L. Allen, Judge. Counsel: Olivia Miller, Altamonte Springs, for Plaintiff. Belinda Rivera and Robert M. Lyerly, Progressive PIP House Counsel, Maitland, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW AND PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on July 1, 2019 on Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law and Plaintiff's Motion for Final Summary Judgment, and the Court having heard argument of counsel, and being otherwise advised in the premises, finds as follows:

UNDISPUTED FACTS

Progressive issued a policy of insurance to its insured which provide PIP coverage with effective dates of February 28, 2016 through August 28, 2016. It was reported that on July 1, 2016, Defendant's insured, Princess M. Pollard, was involved in a motor vehicle accident in which she allegedly sustained injuries. As a result of those alleged injuries, Princess M. Pollard sought treatment with the Plaintiff for dates of service 7/12/2016 to 10/19/2016. Princess M. Pollard executed and assignment of benefits, assigning to Plaintiff her rights under her policy of insurance with Defendant. At the time of the accident Princess M. Pollard was covered under Defendant's Policy Form 9611D FL (07/13). The bills submitted to the Defendant were paid under the permissive payment methodology of Fla. Stat. 627.736(5)(a)(1)-(3). Defendant also applied the Multiple Procedure Payment Reductions (hereinafter "MPPR") to specified "Always Therapy" codes. After applying MPPR to the specified codes for the

year in which the services were rendered, the amount allowed by the Medicare Physician's Fee Schedule was less than that allowed by Medicare pursuant to the 2007 Physician's Fee Schedule. In those instances, Progressive allowed 200% of the 2007 Physician's Fee Schedule and paid 80% of that amount.

ISSUES

The issues before the court are (1) whether Defendant gave proper notice of its intent to utilize the schedule of maximum charges provided for in Fla. Stat. §627.736(5)(a)(1)a-f; (2) whether Defendant was permitted to apply the Multiple Procedure Payment Reduction (hereinafter "MPPR") to certain charges submitted by Plaintiff; and (3) whether Defendant properly paid for dates of service 7/14/2019, 7/15/2019, 7/20/2019, 7/22/2019, 7/28/2019 and 7/29/2019.

ANALYSIS/CONCLUSIONS OF LAW

(1) Defendant Gave Proper Notice of its Intent to Utilize the Schedule of Maximum Charges Provided for in Fla. Stat. 627.736(5)(1)a-f

Based on the policy period, Fla. Stat., §627.736 (2013) applied to the policy at issue. The pertinent part of Fla. Stat., §627.736 applicable to the competing motions for summary judgment are as follows:

(5) CHARGES FOR TREATMENT OF INJURED PERSONS.
* * *

1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
* * *

f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:

i. The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).

ii. Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.

iii. The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.

The applicable policy provisions are as follows:

Unreasonable or Unnecessary Medical Benefits. If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those **medical benefits** and contest them.

We will determine to be unreasonable any charges incurred that exceed the maximum charges set forth in Section 627.736(5)(a)(2) (a through f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
* * *

f. for all other medical services, supplies and care, 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B, except as follows:

(1) for services, supplies and care provided by ambulatory surgical centers and clinical laboratories, 200 percent of the allowable amount under Medicare Part B; and

(1) for durable medical equipment, 200 percent of the allowable amount under "The Durable Medical Equipment Prosthetics/Orthotics and Supplies" fee schedule of Medicare Part B.

However, if such services, supplies or care is not reimbursable under Medicare Part B, as provided in this subsection f., **we** will limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under Section 440.13 of the Florida Statutes, and rules adopted thereunder which are in effect at the time such services, supplies or care is provided. Services, supplies or care that is not reimbursable under Medicare or workers' compensation will not be reimbursed by **us.**

Consistent with *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] decision, and for the reasons outlined in *Sea Spine Orthopedic Institute, LLC v. Progressive Select Insurance Company,* 26 Fla. L. Weekly Supp. 121c, Progressive clearly stated that it will determine to be unreasonable any charges that exceed the schedule of maximum charges provided for pursuant to Fla. Stat. §627.736(5)(a)1. Progressive also clearly stated that it will limit reimbursement to, and pay not more than 80% of the schedule of maximum charges.

This Court is persuaded by and bound by the Supreme Court's decision in *Orthopedics Specialists.* Progressive complied with its statutory obligation to include the fact-based method for determining what satisfies the reasonable medical expense requirement pursuant to Fla. Stat. §627.736(5)(a) in its policy. Moreover, Progressive also gave clear notice to the insured that it will deem any charges in excess of the schedule of maximum charges to be unreasonable and the it will pay no more than the schedule of maximum charges.

(2) Pursuant to Fla. Stat. 627.736(5)(a)(3) and the Terms of the Policy, Defendant is Permitted to Apply MPPR to Certain Always Therapy Codes

The Court is guided by the opinion of the Florida Supreme Court in *GEICO General Ins. Co. v. Virtual Imaging Services*,141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a] and *Allstate Fire & Cas. Ins. Co. v. Stand-Up MRI of Tallahassee,* 188 So. 3d 1 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b]. It is also guided by the fact that the legislature substantially amended the PIP statute to allow insurance companies like Defendant to use Medicare's coding policies and payment methodologies when determining reimbursement under Fla. Stat., §627.736(5)(a)(1)-(3). Based on the plain meaning statutory language set forth in Fla. Stat., §627.736(5)(a)(1)-(3) and the terms of the policy, which mirror the statute, Progressive is permitted to utilize Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services to calculate the reimbursement amounts for Plaintiff's charges so long as their application does not result in a utilization limit. No argument or evidence was presented that would suggest that applying MPPR resulted in a utilization limit.

(3) Defendant Properly Paid All Dates of Service

In its Motion for Final Summary Judgment, Plaintiff argued that Defendant failed to pay for specified procedure codes for dates of service 7/14/2019, 7/15/2019, 7/20/2019, 7/22/2019, 7/28/2019 and 7/29/2019. In support of this argument, Plaintiff relied upon pages 57-61 of the affidavit of Defendant's Litigation Specialists, Samuel H. Fiske. Plaintiff's reliance on the aforementioned affidavit does not support Plaintiff's Motion for Final Summary Judgement as Plaintiff did not account for the fact that the affidavit of Defendant's Litigation Specialists included Reconsideration EOBs evidencing the fact that the procedure codes specified in Plaintiff's motion were paid pursuant to the Policy and Florida Statutes, §627.736(5)(a)1-3. Plaintiff failed to put for the any admissible summary judgment evidence that would dispute Defendant's payment such that Plaintiff's summary judgment must fail.

It is hereby ORDERED and ADJUDGED:

1. Plaintiff's Motion for Summary Judgment is Denied.

2. Defendant's Motion for Summary Judgment is Granted. Plaintiff shall take nothing from its Complaint and Defendant shall go hence forth without day. The court reserves jurisdiction to award attorney's fees and costs to Defendant.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Demand letter—Sufficiency—Demand letter is required to strictly comply with requirements of section 627.736(10)—Where there are inconsistencies between amount demanded in letter and amount due reflected in attached ledger, letter does not strictly or substantially comply with statutory requirements—Insurer did not waive defenses based on demand letter where insurer explicitly reserved right to raise additional defenses in response to letter—Dismissal of action, not abatement, is appropriate remedy for deficient demand letter

SPINE CORRECTION F/K/A ALIGNLIFE a/a/o Griselda Rubio, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 10th Judicial Circuit in and for Polk County, Civil Division. Case No. 2019-SC-001125. December 20, 2019. Mary Catherine Green, Judge. Counsel: J. Allen Foretich Jr., Schiller Kessler Group, Fort Lauderdale, for Plaintiff. Edward H. Stickles, III, Ramey & Kampf, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR FAILURE TO SERVE A STATUTORILY COMPLIANT PRE-SUIT DEMAND

THIS CAUSE, having come to be heard before the Court on December 5, 2019 on Defendant's Motion for Summary Judgment for Failure to Serve a Statutorily Compliant Pre-Suit Demand and the Court having heard the argument of counsel, and being otherwise advised in the Premises, the Court finds as follows:

Factual Background

1. Plaintiff served State Farm with a document dated January 14, 2019, purporting to be a pre-suit demand in accordance with Fla. Stat. §627.736(10).

2. The correspondence asserts that State Farm owed additional Personal Injury Protection (PIP) benefits in the amount of $3,810.39 for the dates of service of June 8, 2018 through October 29, 2018.

3. Attached to the correspondence was a copy of a billing ledger which revealed an "Insurance Responsibility" of ($38.89) and a "Patient Responsibility" of $5,351.07.

4. The billing ledger shows a $0.00 balance for all dates of service under the "Insurance Responsibility" with the exception of August 15, 2018 which shows an insurance balance of -$36.65 and July 13, 2018 which shows a -$2.24 balance.

5. Defendant filed a Motion for Summary Judgment on April 29, 2019 alleging Plaintiff failed to serve a valid pre-suit demand in accordance with Fla. Stat. §627.736(10) at least 30 days prior to filing the instant action.

Legal Analysis

I. The plain language of the No-Fault Statute requires strict compliance with the pre-suit demand requirements of Fla. Stat. 627.736(10)

Defendant has asserted that this Court should adopt a "strict compliance" standard with respect to the requirements of Fla. Stat. §627.736 while Plaintiff has alleged that the Court should adopt a "substantial compliance" standard.

Subsection 627.736(10)(a), Fla. Stat., provides as follows:

> ***As a condition precedent to filing any action for benefits under this section,*** written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

These statutory requirements have not changed since the enactment in 2001. The Florida Supreme Court stated that this legislation "requires an insured to provide a pre-suit notice of intent to initiate litigation and provides an insurer additional time to pay an *overdue* claim." *Menendez v. Progressive,* 35 So.3d 873, 879 (Fla. 2010) [35 Fla. L. Weekly S222b] (emphasis supplied). The Florida Supreme Court further observed that an insured "must now take additional steps beyond filing an application for PIP benefits and beyond complying with §627.736(4). This includes the preparation and provision of a written notice of intent to litigation . . . ." *Menendez,* 35 So.3d at 881. The effect of the pre-suit demand letter is to provide an insurer additional time to remit payment for a claim **before** a lawsuit may be enacted:

> An insurer has additional time to meet its obligation under the statute, and an action for a claim of benefits and attorneys' fees ***cannot*** be initiated until the additional time for payment has expired. ***Thus, the statue allows the insurer additional time to pay the claim and affects the insured's right to sue and recover attorneys' fees***.
>
> *Menendez,* 35 So.3d at 881 (emphasis supplied).

The statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits. *MRI Associates of America, LLC v. State Farm Fire and Casualty Company,* 61 So.3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] (*citing, Menendez,* 35 So.3d 879-880) (emphasis supplied).

While there appears to be no binding authority upon this Court, it is persuasive that many of the surrounding jurisdictions have adopted a strict compliance standard as asserted by defense. *See Quality Auto Rehab, LLC a/a/o Renaldo Carrasco v. State Farm Mut. Auto. Co.*, 23 Fla. L. Weekly Supp. 584b (Fla. Hillsborough Cty. Ct., April 14, 2014)(Ober, J.); *West Coast Spine & Injury Center a/a/o Aimee Arias v. State Farm Mut. Auto. Ins. Co.,* 17 Fla. L. Weekly Supp. 38b (Fla. Hillsborough Cty. Ct., 2009)(Myers, J.); *Chambers Medical Group, Inc. v. Progressive Express Ins. Co*., 14 Fla. L. Weekly Supp. 207a (Fla. Hillsborough Cir., December 1, 2006) (Appellate); *First Health Chiropractic a/a/o Sheila Gholami v. State Farm Mutual Automobile Insurance Company,* FLWSUPP 1805GHOL (Fla. Orange Cty. Ct. October 25, 2010) [18 Fla. L. Weekly Supp. 484a] (Plogstedt, A.); *Florida Emergency Physicians Kang & Associates, M.D., P.A. a/a/o Scott Rubenfeld v. Progressive Express Insurance Company,* 13 Fla. L. Weekly Supp. 391a (Fla. Seminole Cty. Ct. December 6, 2005)(Sloop, J.)

Subsection §627.736(10), F.S. as renumbered in 2008, does not differ in material terms from the pre-2008 version of the No-Fault Statute. Both versions of the statute required Plaintiff to serve a pre-suit demand which included an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. *Fla. Stat. 627.736(10).*

Based upon the plain language of the statute, the court finds that strict compliance with the requirements of subsection 627.736(10), F.S. is required. As espoused by the *Chambers* court, "A 'substantial compliance' standard would trigger significant litigation as to the sufficiency of the papers attached to a demand letter. . .and providers would be relieved of their obligation under the statute."

II. Inconsistencies between the demand correspondence and itemized ledger do not comply with the strict requirements of Fla. Stat 627.736(10).

As stated above, Plaintiff's pre-suit correspondence asserts that State Farm owed additional Personal Injury Protection (PIP) benefits in the amount of $3,810.39 for the dates of service of June 8, 2018 through October 29, 2018. While the attached ledger shows an "Insurance Responsibility" of ($38.89) and a "Patient Responsibility" of $5,351.07. The billing ledger shows a $0.00 balance for all dates of service under the "Insurance Responsibility" with the exception of August 15, 2018 which shows an insurance balance of -$36.65 and July 13, 2018 which shows a -$2.24 balance.

"Inaccurate, misleading, illegible, or stall information contained in a demand does not strictly comply with the statutory requirements."

Chambers, 14 Fla. L. Weekly Supp. 207a. The Plaintiff's demanded amount and the amount due and owing under the attached billing ledger are conflicting.

Plaintiff has taken the position that State Farm is the party in the best position to determine the amount due and owing and that Plaintiff cannot know the amount actually due until discovery is completed. The Court is not persuaded by this argument. Fla. Stat. 627.736(10) clearly and unambiguously places the responsibility to determine the amount due and owing on the Plaintiff, not the carrier.

"If the intent of §627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the court's and the parties' time and resources." *Venus Health Center a/a/o Joaly Rojas v. State Farm Fire & Casualty Company,* 21 Fla. L. Weekly Supp. 496a (Fla. 11th Jud. Cir. App. 2014). In *Venus,* the provider asserted that it did not have the "burden of adjusting the claim" however the *Venus* court was not persuaded by this argument. The Court went on to state that the reason the exact amount owed is so important is "If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorney's fees."

Without requiring that the Plaintiff identify the specific amount owed in the pre-suit demand, the statutory pre-suit demand requirements would be eviscerated, and the insurer would be in the untenable position of hoping that they guessed the amount due and owing correctly and waiting to be sued.

As such, this Court finds that the inconsistencies between the demanded amount and the amount due in the itemized ledger does not strictly, or even substantially, comply with the requirements of the statute and that State Farm was not afforded the opportunity to resolve this matter without litigation. *See Florida Injury Longwood a/a/o Aaron Clements v. USAA Casualty Insurance Company*, 25 Fla. L. Weekly Supp. 970b (Fla. Orange Cty. Ct. 2017)(Allen, F.); *Conforti Chiropractic and Wellness Center, Inc. a/a/o Albert Dort v. USAA General Indemnity Company,* FLWSUPP 2606DORT (Fla. Hills. Cty. Ct. 2018) [26 Fla. L. Weekly Supp. 512c] (Fernandez, G.); *Bain Complete Wellness, LLC a/a/o Kerri McDougald v. Garrison Property and Casualty Insurance Company,* FLWSUPP 2607MCDO (Fla. Hills. Cty. Ct. 2018) [27 Fla. L. Weekly Supp. 743b] (Ober, J.); *Ted Berger, D.C., P.A. a/a/o Giselle Victor v. Geico General Insurance Company,* FLWSUPP 1806VICT (Fla. Broward Cty. Ct. 2011) [18 Fla. L. Weekly Supp. 545c] (Trachman, L.); *North Florida Health Care, Inc. a/a/o Spencer Pitcher v. USAA Casualty Insurance Company,* 18 Fla. L. Weekly. Supp. 548a (Fla. Duval Cty. Ct. 2011)(Higbee, R.); *First Health Chiropractic a/a/o Sheila Gholami v. State Farm Mutual Automobile Insurance Company,* FLWSUPP 1805GHOL (Fla. Orange Cty. Ct. 2010) [18 Fla. L. Weekly Supp. 484a] (Plogstedt, A.); *and Injury Centers of St. Pete, Inc. a/a/o Stetson Estes v. Garrison Property and Casualty Insurance Company a/k/a USAA,* 25 Fla. L. Weekly Supp. 192a (Fla. Hills. Cty. Ct. 2017)(Perrone, F.).

III. State Farm did not waive any defenses relating to the pre-suit demand.

Within Plaintiff's Notice of Filing of Authority in Opposition to Defendant's Motion for Summary Judgment Regarding Demand Letter Sufficiency, several cases cited relate to a waiver of the defense of invalid pre-suit demand.

In response to Plaintiff's pre-suit demand, State Farm provided a response dated February 4, 2019. *See Exhibit B of the Affidavit of Tracey Pope in support of Motion for Summary Judgment.* Within this response, State Farm specifically reserved the right to raise defenses regarding the validity of the pre-suit demand.

State Farm does not have an obligation to respond to the pre-suit demand under the No-Fault statute. *Alliance Spine & Joint, Inc. v. USM Casualty Insurance Company,* 24 Fla. L. Weekly Supp. 555c (Fla. Miami-Dade Cty. Ct. 2016). The Court in *Alliance* correctly noted that, "[t]he PIP statute imposes no legal duty on an insurer to send a response to a demand letter, much less one that would anticipate every potential legal defense to a lawsuit." *Id.* Additionally, Judge Schwartz noted the following with respect to waiver:

> However, it is neither required nor legally permissible to require a non-attorney, claims adjuster to anticipate every legal defense to a potential suit when explaining why a claim was being denied, especially when the majority of the reasons for the denial or reduction were already determined and communicated to the Plaintiff through EORs prior to receipt of Plaintiff's demand. In order for Plaintiff to demonstrate that Defendant waived its affirmative defenses pertaining to the pre-suit demand, it would have had to produce evidence of the following three elements of waiver: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Husky Rose, Inc. d/b/a Danny's 19th Hole Restaurant and Lounge v. Allstate Ins. Co.,* 19 So.3d 1085 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2037a].

See also Ted Berger, D.C., P.A. a/a/o Giselle Victor v. Geico General Insurance Company, FLWSUPP 1806VICT (Fla. Broward Cty. Ct. 2011) [18 Fla. L. Weekly Supp. 545c] (Trachman, L.); *and First Health Chiropractic a/a/o Sheila Gholami v. State Farm Mutual Automobile Insurance Company,* FLWSUPP 1805GHOL (Fla. Orange Cty. Ct. 2010) [18 Fla. L. Weekly Supp. 484a] (Plogstedt, A.).

Therefore, the Court finds that State Farm did not waive any defenses based upon the pre-suit demand as State Farm explicitly reserved the right to raise additional defenses in the response to the pre-suit demand.

IV. Dismissal, not abatement, is the appropriate remedy.

The correct remedy when a party has failed to comply with pre-suit notice requirements is summary judgment. *Chambers Medical Group, Inc. v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. App. 2013).

The appellate division of the Ninth Judicial Circuit, which also follows a strict compliance standard, similarly ruled that the proper remedy is dismissal, not an abatement or stay. *Medical Therapies, LLC. v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. App. 2014). The Court reasoned that an abatement or stay is proper when a lawsuit is premature because it can be cured by the passage of time, however the passage of time would not satisfy the condition precedent of requiring a statutorily compliant demand letter; instead a new lawsuit would need to be filed. *Id.*

Other courts have similarly ruled that abatement or stay is not the proper remedy for curing a defective demand letter. *See Richard W Merritt, D.C., P.A. v. Auto Club South Insurance Company,* 22 Fla. L. Weekly Supp. 734b (Fla. Polk Cty. Ct. 2014) (Florida Courts have held that as defects in a required pre-suit demand may not be cured merely by the passage of time, a lawsuit filed subsequent to a defective demand is not merely premature, and as such, "dismissal, and not abatement, is the proper remedy); *James D. Shortt, MD., P.A. v. State Farm Fire and Casualty Co.*, 23 Fla. L. Weekly Supp. 769a (Fla. Sarasota Cty. Ct. 2015) (Because the Plaintiff would be required to do some affirmative act, i.e, the submission of a new presuit demand letter, any alleged defect(s) in the original demand cannot be cured by the passage of time and does not render the lawsuit prematurely filed. Therefore, abatement is not the proper remedy); *and Foundation Chiropractic Clinic, Inc. v. State Farm Mut Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 694c (Fla. Palm Beach Cty. Ct. 2013) (Lawsuit is not premature because it cannot be cured by the passage of time, instead

demand failed to comply with statutory conditions precedent; lawsuit is not premature and dismissal, not abatement, is the proper remedy).

As such, the Court finds that dismissal is the appropriate remedy.

As such, the Court finds as follows:

1. Fla. Stat. §627.736(10) requires strict compliance with the requirements of the statute as a condition precedent to a lawsuit based upon personal injury protection benefits;

2. Plaintiff's pre-suit demand contains inconsistencies between the amounts demanded within the correspondence and the total balance within the attached ledger;

3. These inconsistencies result in Plaintiff's pre-suit demand failing to strictly, or even substantially, comply with the requirements of Fla. Stat. §627.736(10);

4. State Farm did not waive the ability to raise a defense based upon the pre-suit demand;

5. Dismissal is the appropriate remedy for failure to comply with the condition's precedent.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion for Summary Judgment for Failure to Serve a Statutorily Compliant Pre-suit Demand is hereby **GRANTED**.

2. Judgement is hereby entered in favor of Defendant, State Farm Mutual Automobile Insurance Company.

3. Plaintiff shall take nothing from this action and Defendant shall go hence without day.

4. The Court reserves jurisdiction to consider any applicable claims for reasonable attorneys' fees and costs, if any.

* * *

Insurance—Personal injury protection—Provider's motion for leave to file amended reply which would interject new and inconsistent theory of recovery over five years into litigation, sought by provider after defendant had prevailed before the Florida Supreme Court on the sole issue pled and litigated in the case, is denied—Motion to strike or exclude unpled issues is granted

ACTIVE WELLNESS CENTER INC. (a/a/o Ignacio P. Chavez), Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-575-SP-24 (01). December 14, 2018. Diana Gonzalez-Whyte, Judge. Counsel: Ryan Peterson, The Patino Law Firm, Hialeah, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING ALLSTATE'S MOTION TO EXCLUDE/STRIKE ISSUES WAIVED AND/OR NOT PLED BY THE PLAINTIFF IN ITS COMPLAINT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED REPLY

[Original Opinion at 26 Fla. L. Weekly Supp. 844a]

[Editor's note: Order republished to include inadvertently omitted material. Court's ruling unchanged.]

THIS CAUSE, having come before the Court on September 11, 2018 on Defendant's Motion to Exclude/Strike Issues Waived and/or Not Pled by the Plaintiff and Plaintiff's Motion for Leave to File Amended Reply, the Court having reviewed Defendant's Motion, Plaintiff's Motion, heard argument of counsel, and being otherwise fully advised on the premises, this Court makes the following findings of fact and conclusions of law:

Material Facts

On March 5, 2013, the Plaintiff filed a three-count Complaint for PIP benefits payments in connection with an automobile accident. The Complaint specifically alleges that "the amount in controversy is $36.00, plus interest, penalty, and postage, if applicable."[1] Count II of the Complaint, titled "Declaration of Rights against Defendant on Behalf of Plaintiff Related to Fee Schedules," asserted that the controversy at issue was "whether the Defendant may limit reimbursement to the fee schedules in Fla. Stat. 627.736(5)(a)(2) in light of the language in the policy form at issue here, which states that the Defendant shall pay a 'reasonable fee.' " The Plaintiff took the position, as articulated in its Complaint, that "the Defendant may not utilize the fee schedules in this case, as the language of Florida Statute §627.736(5)(a)(2) is permissive in that an insurer 'may limit' reimbursement to the applicable Medicare and Worker's Compensation fee schedules" because "the insurer in this case did not exercise the option to limit reimbursement at the applicable fee schedules because it did not make clear that it would do so under the terms of the insurance policy issued."

On April 10, 2014, Allstate answered the Complaint by asserting only one defense, wherein Allstate quoted the language in its policy and asserted that Allstate's policy expressly elected reimbursement based on the fee schedule limitations authorized by the Florida PIP statute. Thereafter, the Plaintiff timely filed a Reply wherein it specifically asserted that "the fee schedule does not apply as the insurance policy in this case does not permit the insurer to pay pursuant to the fee schedule at issue." The Plaintiff further reiterated its position that it was seeking 80% of its bills, reasserting that "the Plaintiff submitted bills which were reasonable in price, and the Defendant is obligated to pay those bills." Notably, at no point did Plaintiff allege in its pleadings that Defendant miscalculated or misapplied the fee schedules.

On January 26, 2017, in *Allstate Insurance Company v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] (the "*Serridge* decision"), the Florida Supreme Court held that the policy language at issue in this case provides "legally sufficient notice" of Allstate's election to reimburse based on the fee schedule limitations. Following the *Serridge* decision, the Plaintiff allowed this case to lie fallow, triggering a Notice of Lack of Prosecution. Thereafter, Plaintiff engaged in a flurry of record activity, including additional discovery and deposition requests, multiple notices for trial, and a motion *in limine.* Critically, at no point in these filings did Plaintiff identify a new litigable issue.

It was not until July 12, 2018 that Plaintiff filed its "Motion for Leave to Amend to File Plaintiff's Amended Reply" in which Plaintiff attempted to raise new claims (hereinafter "*Unpled Issues*").[2] It was not until after the Florida Supreme Court issued its ruling in *Serridge* that Plaintiff first alluded to a different theory of recovery. Specifically, in its proposed Amended Reply, the Plaintiff alleged for the first time that Defendant misapplied the deductible, and that "the Defendant utilized the incorrect methods of calculating the reimbursement and/or fee schedules and has not paid at the schedule of maximum charges in the No Fault Act."

Legal Standard and Conclusions of Law

I. Unpled Issues

Florida law is well established that a party is bound by the issues as framed by its own pleadings, and the Complaint must be pled with sufficient particularity to permit the Defendant to prepare its defense. *See Assad v. Mendell,* 550 So. 2d 52, 53 (Fla. 3d DCA 1989). Inherent in that statement is the notion that a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings. *See, e.g., Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So. 2d 561, 563 (Fla. 1988) (if a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim); *Bank of Am. v. Asbury,* 165 So. 3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("Litigants in civil controversies must state their legal positions within a particular

document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"). Furthermore, the law is clear that a judgment must be based on a claim or defense that was either properly pled or tried by consent of the parties. *See Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990). This principle is so grounded in the law that the Florida Supreme Court has held that where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.,* 537 So. 2d at 563.

The Florida Supreme Court case of *Arky, Freed* is the seminal case holding that unpled claims and issues may not be tried. Relying on *Arky, Freed,* the Third District Court of Appeal has consistently held that parties are precluded from recovery on unpled claims tried without the consent of the parties. *See Sunbeam Television Corp. v. Mitzel,* 83 So. 3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] ("when a plaintiff pleads one claim but tries to prove another, it is error for a trial court to allow the plaintiffs to argue the unpled issue at trial"); *Bloom v. Dorta-Duque,* 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] ("[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled"); *Robbins v. Newhall,* 692 So. 2d 947, 949 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b] (reversing final judgment where plaintiff had alleged three specific acts of negligence, but tried the case on a fourth alleged act that was never pled). Many other Florida courts have held that it is error for a trial court to allow a plaintiff to argue an unpled theory or cause of action at trial. *See E.I. Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.,* 857 So. 2d 925, 930 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a]; *see also Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So. 3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (relying on *Arky, Freed* and *Du Pont* to find error in trial court's consideration of an unpled defense). *See also Cioffe v. Morris,* 676 F.2d 539, 543 n. 8 (11th Cir. 1982) (confirming that unpled issues tried without consent deny due process).

Numerous cases have followed *Arky Freed* to bar the injection of new claims or theories into an action, including in cases where the new claim or theory was devised to evade a recent ruling that undermined the original claim or theory. For example, in *Noble v. Martin Memorial Hospital Association, Inc.,* 710 So. 2d 567 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D58a], after nearly five years of litigation defending against a claim for money damages, defendant hospital filed a motion for summary judgment based on a newly decided federal case which would entitle the hospital to immunity. *Id*. at 568. Shortly after defendant's summary judgment motion was filed, the plaintiff filed a motion to amend its complaint to seek injunctive relief. *Id*. The trial court denied leave to amend and granted summary judgment to the defendant, and the Fourth District Court of Appeal affirmed. In affirming, the Fourth District reasoned that the "claim for monetary damages stood alone for over four years. This . . . is a case where [plaintiff] did not want injunctive relief until it appeared that his quest for monetary damages had come to an end." *Id*. The Fourth District held that the trial court properly exercised its discretion to deny leave to amend where it was clear the plaintiff "only wanted injunctive relief if his request for monetary relief was to be denied." *Id.* at 569.

II. Amendment of Pleadings

Leave to amend may be denied "if allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.,* 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998) [24 Fla. L. Weekly D56b] (citations omitted). Under Rule 1.190, the test of prejudice to the nonmoving party is the primary consideration in determining whether a motion to amend should be granted or denied. *Lasar Mfg. Co., Inc. v. Bachanov,* 436 So. 2d 236, 238 (Fla. 3d DCA 1983). Florida law is clear that leave to amend is properly denied when there is a sufficient showing of prejudice to the opposing party in preparing for the "new issue." *See Designers Title Int'l Corp. v. Capitol C. Corp.,* 499 So. 2d 4, 5 (Fla. 3d DCA 1986) (trial court committed reversible error when it allowed plaintiff to amend its pleading at the end of trial to plead a new cause of action, "a material change which under the facts of this case greatly prejudiced the defendants").

Further, while as a general proposition leave to amend is freely granted, that general proposition diminishes as trial approaches and does not apply at all where prejudice would result. The trial court is "vested with the discretion to deny such motions where appropriate." *Noble,* 710 So. 2d at 567, 568.

It is well established Florida law that there comes a point in litigation where each party is entitled to some finality, and the rule of liberality gradually diminishes as the case progresses to trial. *Levine v. United Cos. Life Ins. Co.,* 659 So. 2d 265, 266-67 (Fla. 1995) [20 Fla. L. Weekly S444c] ("*Levine*"); *Alvarez v. DeAuguirre,* 395 So. 2d 213, 216 (Fla. 3d DCA 1981) (stating that "a trial judge may deny further amendments where a case has progressed to a point that liberality ordinarily to be indulged has diminished"); *Versen v. Versen,* 347 So. 2d 1047, 1050 (Fla. 3d DCA 1977) ("this rule of liberality does not authorize a party to state a new and different cause of action under the guise of an amendment, or if it will change the issue, introduce new issues, or materially vary the grounds of relief. . ."); *Ruden v. Medalie,* 294 So. 2d 403, 406 (Fla. 3d DCA 1974) ("a trial judge in the exercise of sound discretion may deny an amendment where the same materially varies from the relief initially sought, or where a case has progressed to a point that the liberality ordinarily to be indulged has diminished"); *U.S. v. State,* 179 So. 2d 890 (Fla. 3d DCA 1965) ("such amendments are not allowable if they would change the issue, or introduce new issues, or materially vary the grounds for relief" (emphasis omitted).

Moreover, an amendment must be denied where the amendment seeks to raise an issue that is inconsistent with the original pleading. *Warfield v. Drawdy,* 41 So. 2d 877 (Fla. 1949) ("We have discovered no case which authorizes such an amendment inconsistent with the allegations of the original bill") *see Bailey v. State Farm Mut. Auto. Ins. Co.,* 789 So. 2d 1181, 1182 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1739b] (affirming the trial court's order granting insurer's motion for summary judgment where the Plaintiff took inconsistent positions in parallel actions); *Salcedo v. Asociacion Cubana, Inc.,* 368 So. 2d 1337 (Fla. 3d DCA 1979) ("the universal rule which forbids the successful assertion of inconsistent positions in litigation precludes the acceptance of any such result").

Courts separately have held that leave to amend should not be granted where a party knew or should have known of the matter to be pled early in litigation, but declined to do so. *See U.S. v. State,* 179 So. 2d at 892-893; *Watkins v. Watkins,* 123 Fla. 267, 274 (1936) (" 'It is also held that applications to amend should be made promptly after the necessity for the amendment has been discovered' ") (quoting *Griffin v. Societe Anonyme La Floridienne J. Buttgenbach & Co.,* 53 Fla. 801, 830) (1907)); *San Martin v. Dadeland Dodge, Inc.,* 508 So. 2d 497, 498 (Fla. 3d DCA 1987) (affirming denial of leave to amend where "plaintiff, in the exercise of due diligence, should have been aware of the alleged basis for the proposed fraud count long before he sought to amend his complaint"); *U.S. v. State,* 179 So. 2d 890 (affirming denial of leave to amend where party knew of relevant facts two years before seeking leave to amend); see also *Tampa Bay Water v. HDR Engineering, Inc.,* 731 F.3d 1171, 1186 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C672a] ("A district court may find undue delay

when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings"); *Soltys v. Costello,* 520 F.3d 737, 743 (7th Cir. 2008) ("Eleventh hour additions . . . [are] bound to produce delays that burden not only the parties to the litigation but also the judicial system and other litigants.' ") (quoting *Perrian v. O'Grady,* 958 F.2d 192, 195 (7th Cir. 1992)); *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 72 (2nd Cir. 1990) (a trial court may "deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant. . . The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay").[3]

Courts have also separately held that a party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment. *Inman v. Club on Sailboat Key, Inc.,* 342 So. 2d 1069, 1070 (Fla. 3d DCA 1977); see also *Noble,* 710 So. 2d at 568 (holding a party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment). Moreover, a party may not defeat a summary judgment by altering previously filed pleadings, especially when the matters it seeks to present were available prior to summary judgment. *Boyd v. Int'l Fid. Ins. Co.,* 412 So. 2d 944, 945 (Fla. 3d DCA 1982).

Conclusions of Law

A party is bound by the issues as framed by its own pleadings, and the Complaint must be pled with sufficient particularity to permit the Defendant to prepare its defense. *Assad,* 550 So. 2d at 53; *see also Arky, Freed Stearns, Watson, Greer, Weaver & Harris, P.A.,* 537 So. 2d. at 563 (holding that claims must be pled with sufficient particularity at the outset of a suit for the opposing party to prepare a defense); *see also Bank of Am.,* 165 So. 3d at 809 (holding that "[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are").

The sole issue framed for disposition within the pleadings and litigated by the parties in this case for over five years was whether the subject policy properly elects the Fee Schedules, or whether, as Plaintiff asserted in its initial pleadings and maintained for five years, it was due 80% of its bills.[4] It was not until well *after* the Florida Supreme Court found in favor of Allstate on this issue, quashing the ruling from the Fourth District Court of Appeal, that the Plaintiff contended for the first time that there were issues presented in this lawsuit other than whether the subject policy properly elects the Fee Schedules. With the current amendment, Plaintiff seeks to reverse course by alleging that, while the Defendant may limit reimbursement to the fee schedules, it did not apply the fee schedules correctly. Plaintiff's proposed Amended Reply offers no factual support for this allegation. In fact, the Plaintiff did not disclose its new theory of recovery with any of the required specificity until Plaintiff's counsel did so *ore tenus* during the course of the hearing on the subject motions. During argument, the Plaintiff alleged for the first time that Allstate breached the insurance contract by reimbursing three CPT Codes at 80% of the billed amount rather than 100%, a theory of recovery which could only ripen upon the Plaintiffs concession that the insurer **did** properly elected to limit reimbursement to the schedule of maximum charges. In essence, Plaintiff now takes a position which is wholly inconsistent with the position that it vigorously litigated over the past five years of litigation.

Plaintiff was on notice of how the Defendant paid Plaintiff's bills before the instant lawsuit was filed and could have alleged the facts supporting this new alleged underpayment in its original Complaint or even the original Reply, both before the Supreme Court decided that Defendant's policy properly elected the Fee Schedules.

Allowing the Plaintiff to amend its Complaint to raise a new and inconsistent theory of recovery over five years into litigation, and after Defendant prevailed at the Florida Supreme Court on the sole issue pled and litigated in this case, would unfairly prejudice the Defendant. Defendant will also sustain prejudice because, consistent with the sole issue Plaintiff litigated being whether Defendant's policy properly elected the Fee Schedules, Defendant conceded numerous other defenses, including, as potentially applicable in this case, deficient demand.

As held by the Florida Supreme Court in *Levine, supra,* Defendant is entitled to finality in this five-year-old case. The prejudice to Defendant in having to litigate an entirely new issue which Plaintiff knew about before it filed the Complaint as well as the original Reply overrides Plaintiff's need to raise this issue five years after the inception of this lawsuit, and only after the Supreme Court ruled against Plaintiff on the sole dispositive issue litigated by the parties during the course of this litigation. It is clear that up until the finalization of the Florida Supreme Court's ruling in *Orthopedic Specialists* in favor of Allstate on the issue of policy language as to application of fee schedule, Plaintiff's position was that the *Serridge Issue* was the sole issue presented by this litigation and as such, *Orthopedic Specialists* is case-dispositive in this matter. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion to Strike/Exclude Issues Waived and/or not Pled by Plaintiff is GRANTED. Plaintiff's Motion for Leave to Amend its Reply is DENIED.

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[1]During argument, defense counsel asserted that the amount in controversy delineated in Plaintiff's Complaint was equal to the difference between 80% of the billed amount minus payments made by Allstate, a representation that was not refuted by Plaintiff's counsel.

[2]Plaintiff's Motion alleges that the Plaintiff was seeking leave to file an Amended Reply to remedy "clerical mistake." The Court rejects Plaintiff's assertion that the changes in the proposed Amended Reply are merely clerical, and specifically finds that the new Reply raises new material issues not previously encompassed within the original pleadings.

[3]Decisions of the Federal courts construing federal rules of civil procedure identical to Florida's rules of procedure have been held to be in point as to the proper construction of the Florida Rules. *U.S. v. State,* 179 So.2d 890 (1965); *Carson v. City of Fort Lauderdale,* 173 So.2d 743 (Fla. 2d DCA 1965).

[4]The Court rejects Plaintiff's argument that any specific theories of recovery are encompassed within what it labeled a "general breach of contract" count. To accept Plaintiff's position would be to allow Plaintiff to vaguely allege the same unspecified breach of contract across multiple lawsuits, and then materially change its theories as it sees fit to litigate any number of potential theories of recovery, without making it absolutely clear to the Court and to the Defendant what the issues to be adjudicated are. *See Bank of Am.,* 165 So. 3d at 809; *see also Robbins,* 692 So. 2d 947 (rejecting Plaintiff's argument that a fourth theory of negligence was encompassed within the general negligence count of its Complaint). The prejudice to Defendant is crystalized here by the fact that its proposed Amended Reply is identical to one in a second case of nearly identical posture where the same motions were argued by the parties, but where Plaintiff's newly raised theory of recovery was totally different than the one in the instant case. *See Right Choice Medical & Rehab Corp. a/a/o Evelyn Martinez v. Allstate Fire and Casualty Insurance Company,* Case No. 2013-123-SP-24 (01) (11th Jud. Cir.).

* * *

STATE OF FLORIDA, Plaintiff, v. JEREMY BRANDON MITCHELL, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 MM 13427 NC. December 17, 2019. Dana Moss, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR DISCHARGE

This matter came before the Court on the Defendant's Motion for Discharge, wherein he contends that he was first arrested for the misdemeanor charge of criminal mischief on June 18, 2019, and then formally charges 101 days later on September 27, 2019. The Defendant argued this runs afoul of the speedy trial rule, Fla. R. Crim. P., Rule 3.191, and he is entitled to immediate discharge. The Court

agrees. *See Genden v. Fuller,* 648 So. 2d 1183 (Fla. 1994). Accordingly, it is

ORDERED and ADJUDGED that the Defendant's Motion for Discharge is granted.

* * *

Insurance—Personal injury protection—Application—Misrepresentations—Where PIP policy application requests information for "Drivers," insured was not required to disclose household member who did not drive insured vehicle—Insurer may not rely on premium quote documents in support of claim that disclosure of additional household member would have resulted in increased premium where insurer claimed that documents were privileged during discovery—Absent quote documents, there is no evidence that disclosure of household member would have resulted in higher premium—Where insurer violated PIP statute by failing to pay or deny claim within 30 days, and did not invoke additional time available under section 627.736(4)(i), insurer waived ability to investigate or deny claim based on alleged material misrepresentation

ORLANDO MEDICAL AND WELLNESS, (a/a/o Moises Montoya), Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-040604. ORLANDO MEDICAL AND WELLNESS, (a/a/o Jennifer Brea), Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. Case No. 18-CC-040610. January 9, 2020. Daryl M. Manning, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Joseph Wolfe, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FINAL FOR SUMMARY JUDGMENT

THIS MATTER having come before the court on October 28, 2019 on Plaintiff's Motion for Final Summary Judgment. The court having considered the Motion, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. This is a consolidated Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's rescission of the subject policy. Defendant's rescission was based upon an alleged material misrepresentation for a failure by the named insured, Jennifer Brea, to list a household member on the insurance application.

2. Plaintiff's motion for summary judgment seeks entry of summary judgment arguing that the bold insurance policy application language of DRIVER is ambiguous and, as such, must be construed against its drafter, the Defendant. Plaintiff further argues that, at the end of 90 days after submission of the claim, the insurer must pay or deny the claim. Lastly, Plaintiff argues that the Defendant failed to pay interest on the returned premiums and as such, the insured was not returned to the status quo.

3. Defendant contends that the alleged household members should have been listed on Pages 1 and 5 of the insurance policy application. Defendant's policy application states:

> "**DRIVER INFORMATION -** Names of all drivers in household, all children and all persons that use the vehicles. Coverage is provided only for the drivers listed below".
>
> **Name of driver (Exactly as shown on Driver's License)**

4. It is undisputed that the alleged household member, Janet Contreras, was not involved in the subject accident and did not drive the insured vehicle at any time.

5. In *Better Care Chiropractic Center, LLC (a/a/o Augustin, Cyndia Rose) v. Titan Ins. Co.,* (9th Jud. Cir., Orange County, Case No. 2013-CC-1994-O, April 6, 2017, Faye L. Allen, Judge) [25 Fla. L. Weekly Supp. 180a], the court held that the following policy application section language, DRIVER AND HOUSEHOLD INFORMATION, was ambiguous in granting summary judgment for the Plaintiff and denying summary judgment for the Defendant. *Also,* Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment. *Florida Pain & Wellness Centers, Inc. (a/a/o Dennis P. Williams) v. American Colonial Ins. Co.,* (Fla. 9th Jud., Orange Cty. Ct., November 16, 2017, Judge Eric H. Dubois) [25 Fla. L. Weekly Supp. 815b].

6. The Court finds that language of Defendant's application for insurance requests information for *DRIVERS,* as opposed to household members. As such, the alleged household member was not required to be listed on said application for insurance inasmuch as it is undisputed that the household member did not the insured vehicle.

8. Defendant filed an affidavit from John Mejia, its underwriting corporate representative, in an attempt to support its contention that the failure to list the alleged household members resulted in an increased premium for the subject policy. In response, Plaintiff filed a Motion to Strike Mr. Mejia's affidavit and attachments based upon the deposition of Mr. Mejia. During the deposition of Mr. Mejia, Plaintiff inquired as to what documents Defendant had in its possession to support a premium increase regarding the undisclosed household member. Beginning on Page 25, Mr. Mejia referred to premium "quote" documents. Plaintiff requested that these "quote" documents be attached to the deposition transcript. Defendant's counsel refused to allow said documents to be attached claiming that said documents were privileged.

9. Since a party is not permitted to use this objection as both a sword and a shield, the Court will not allow Defendant to rely upon any documents or evidence that the Defendant objected to as work product privilege and failed to disclose to Plaintiff on those grounds during the discovery phase of the case. *Heath Diagnostics of Orlando, LLC (a/a/o Tonya Shaw) v. State Farm Mut. Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 966a (Fla. 17th Jud. Cir. Ct., February 11, 2016, John D. Fry, Judge); Defendant shielded itself from discovery of information that goes to the very heart of this case and is now attempting to use that same information to defeat Plaintiff's case at trial. When the Defendant refused to provide the discovery responses, it did so at its own peril and cannot now rightfully complain that it is barred from using its trade secret as a sword. *Clear Vision Windshield Repair (a/a/o Richard Voss) v. Government Employees Ins. Co.,* 23 Fla. L. Weekly Supp. 649a (Fla. 17th Jud. Cir. Ct., May 11, 2015, Robert W. Lee, Judge).

10. As such, there is no evidence in the record that the premium rate would have been any different with the disclosure of the alleged household member on the insurance application.

11. At the end of 90 days after submission of the claim, the insurer must pay or deny the claim. Court found terms in application for insurance were ambiguous. Insurer also failed to pay interest on premiums and fees. *Colonial Medical Center (a/a/o Daunte Draper) v. Century-National Ins. Co.,* 27 Fla. L. Weekly Supp. 71a (Fla. 9th Jud. Cir. Orange Cty. Ct., Case No. 16-CC-13154-O, March 1, 2019, Faye Allen, Judge) citing to *GEICO Indemnity Co. v. Central Florida Chiropractic Care (a/a/o David Cherry) v. GEICO Ind. Co.,* FLWSupp 2608CHER (9th Jud. Cir. Orange County [Appellate], Case No.: 2016-CV-000038-A-O, May 11, 2017, Judge Steve Jewett) [26 Fla. L. Weekly Supp. 613a] wherein the court stated that the legislative intent of the Section (4)(i) of the 2013 Amendment was to extend the investigative time period available to the insurer, while also mandating that the claim must be denied or paid 30 days following the initiation of the claim.

12. Because the Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), they waived their ability to investigate or deny the claim for material misrepresentation. As such, Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Insurance—Personal injury protection—Examination under oath—Failure to attend—Where insurer's request for EUO was made more than 30 days after it received medical bills, request was untimely

HILLSBOROUGH THERAPY CENTER, INC. (a/a/o Rolando Perez), Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-045153, Division L. January 6, 2020. Cynthia S. Oster, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Hector Muniz, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on February 7, 2019 on the parties' competing Motions for Final Summary Judgment. The court having considered the arguments presented by the parties, record evidence filed, applicable statutes and case law, and being otherwise fully advised in the premises, finds:

1. Both parties filed competing motions for final summary judgment based upon an alleged failure to appear for EUOs by the named insured, Rolando Perez.

2. The undisputed facts reflect the following:

a. On July 3, 2017, Defendant received the first set of Plaintiff's medical bills.

b. On October 4, 2017, Defendant submitted its initial request for an EUO to occur on October 12, 2017.

c. On October 12, 2017, Rolando Perez failed to appear at the EUO.

d. Defendant noticed Plaintiff for a second EUO to occur on October 25, 2017.

e. On October 25, 2017, Rolando Perez failed to appear at the second scheduled EUO.

f. On November 3, 2017, Defendant issued its denial of payment of Plaintiff's medical bills, based upon an alleged failure to attend EUOs.

3. Section 627.736(4)(b), Florida Statutes, requires PIP benefits to be paid within 30 days after the insurer is furnished written notice of the fact of a covered loss.

4. Although the Court agrees with the Defendant that attendance at an EUO is a condition precedent to recovering PIP benefits pursuant to Section 627.736(6)(g), Florida Statutes, this does not mean the insurer has an indefinite period of time to schedule an EUO. See *Central Florida Chiropractic Care (a/a/o David Cherry) v. Geico Ind. Co.*, 24 Fla. L. Weekly Supp. 152a (Fla. 6th Cir. Cty. Ct., Orange Cty., April 22, 2016, Judge Steve Jewett).

5. It is undisputed that Defendant's request for an EUO was not made until well outside the 30 day window for payment of the claim. Therefore, such a request is untimely. *Bain Complete Wellness, LLC (a/a/o Manuel Ortiz) v. Windhaven Ins. Co.*, (Fla. 13th Jud. Cir., Hillsborough Cty., Case No. 17-CC-011964, July 9 2018, Jared Smith, Judge) [26 Fla. L. Weekly Supp. 413b]; citing *Tropical Healing Power, LLC (a/a/o Brandon Venable) v. Mendota Ins. Co.* 19 Fla. L. Weekly Supp. 142a (Fla. 13th Jud. Cir., Hillsborough Cty., May 6, 2011, Herbert M. Berkowitz, Judge) wherein the court followed the 30 day "statutory countdown" for the scheduling an EUO begins when Defendant has notice of the claim of the claim and the medical bills for which Plaintiff seeks reimbursement.

6. If Defendant had requested an EUO prior to the 30 day time period for payment, and Defendant failed to attend said EUO, depending on the facts, Defendant may have a defense for non-payment of PIP benefits due to Plaintiff's failure to cooperate. However, that is not the case here.

7. Defendant failed to request an EUO within the 30 day time period for payment nor did it pay or deny the claim within the 30 day time period. As result, Defendant was in breach of its insurance contract.

8. As such, Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

9. Defendant's Motion for Final Summary Judgment is **HEREBY DENIED**.

* * *

Arbitration—Trial de novo—Timeliness of motion—Motion for trial de novo must be made within 20 days of service of arbitrator's decision—Five-day mailing period not added to deadline where arbitrator's decision was served by email—Trial court required to enter judgment in accordance with arbitrator's decision where motion for trial de novo was not timely filed

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. SHEVRON MONTGOMERY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-10379 COCE (53). March 4, 2020. Robert W. Lee, Judge. Counsel: Odlays Nodarse-Buscemi, Miami, for Plaintiff. Benjamin Hyman, Miami, for Defendant.

FINAL JUDGMENT ON ARBITRATOR'S DECISION IN FAVOR OF PLAINTIFF

THIS CAUSE came before the Court for consideration of the notice of filing Arbitration Award filed by Russel Lazega, Arbitrator, and the Court's having reviewed the docket, the entire Court file, and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was submitted to mandatory arbitration. The arbitrator served his decision by email and U.S. mail on February 6, 2020. Under Rule 1.820(h), Fla. R. Civ. P., a motion for trial de novo must be "made" within 20 days of the "service" of the arbitrator's decision. Under Florida law, "a party has the right to move for a trial within twenty days after service of the arbitrator's decision. If no motion for trial is timely served, then the trial court *must* enforce the decision of the arbitrator and has no discretion to do otherwise" (emphasis added). *Bacon Family Partners, L.P. v. Apollo Condominium Ass'n*, 852 So.2d 882, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1795a]. *See also Johnson v. Levine*, 736 So.2d 1235, 1238 n.3 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1456a]; *Klein v. J.L. Howard, Inc.*, 600 So.2d 511, 512 (Fla. 4th DCA 1992). The Court lacks discretion to deny entry of a judgment in accordance with the arbitrator's decision when the parties fail to timely request a trial de novo or otherwise fail to dispose of the case of record within the de novo deadline. *See Connell v. City of Plantation*, 901 So.2d 317, 319 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1154b].

A five-day mailing period is not added to this deadline because the arbitrator served his decision by email. *See* Rules 1.090(a), 2.514(b). The parties' request for trial de novo was therefore required to be ***filed*** no later than February 6, 2020. The 20-day deadline is, however, a "bright line" deadline. *Stowe v. Universal Property & Cas. Ins. Co.*, 937 So.2d 156, 158 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1859a]. No motion or request for trial de novo has been filed.

As a result, the Court is required to enter judgment in accordance with the Arbitrator's decision. *See Gossett & Gossett, P.A. v. Fleming*, 10 Fla. L. Weekly Supp. 839b (Broward Cty. Ct. 2003). Accordingly, the Court has this day unsealed the Arbitrator's decision. In the Court's view, the Arbitration Decision clearly reflects that the arbitrator appropriately considered the parties' arguments, as well as their submitted stipulations and evidence. Rules 1.820(c), 11.060(d). The Court referred the entire case to arbitration. The parties advised the arbitrator that only a single issue existed which needed to be arbitrated. The arbitrator rendered a decision on that issue in favor of Plaintiff. As a result, the Court concludes that the parties have stipulated that there are no other issues to be tried. As a result, it is hereby ADJUDGED THAT:

The Plaintiff shall recover from the Defendant, SHERVON MONTGOMERY, the sum of $2,997.77, which sum shall hereafter bear interest at the rate of 6.83% per annum. The Plaintiff retains jurisdiction to consider an award of interest.

* * *

Labor—Unpaid wages—Action by fitness coach against limited liability company that owned franchise location where plaintiff worked and against individual managing members asserting claim for unpaid wages—Partial summary judgment granted in favor of plaintiff on certain claims against LLC, as plaintiff provided summary judgment evidence supporting her prima facie case and defendants did not demonstrate disputed issue of material fact—Genuine issues of material fact exist as to remaining items sought by plaintiff—Piercing corporate veil—Genuine issues of material fact remain as to personal liability of individual defendants

NAOMI BETH GRAFF, Plaintiff, v. JJAK OTF, LLC, a Florida Limited Liability Company, d/b/a Orange Theory Fitness; ANDREA O'BRIEN; and JOHN O'BRIEN, Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-21354 COCE (53). January 13, 2020. Robert W. Lee, Judge. Counsel: Peter Solnick, Aventura, for Plaintiff. Ephraim Roy Hess, Fort Lauderdale, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on January 9, 2020 for hearing of the Plaintiff's Motion for Summary Judgment, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court GRANTS IN PART and DENIES IN PART the Plaintiff's Motion, and finds as follows:

Background:

The Plaintiff is a fitness coach who for several years worked at the Orange Theory Fitness location in Weston. The Defendant JJAK OTF, LLC was the owner of the franchise location ("JJAK"), and the Defendants Andrea O'Brien and John O'Brien were managing members of JJAK. The Plaintiff alleges that she worked as a coach for several years under a "tiered" payment agreement where she would get paid per class taught, depending on the number of participants. This agreement was not in writing. The Plaintiff further alleges that she was required as a condition of her continuing relationship with JJAK to do several additional tasks for which she was not paid. These tasks are grouped into the following areas: (1) attending monthly meetings; (2) reviewing the fitness training protocol for the day; (3) arriving early and staying late for each session to set-up and clean-up the fitness area, and to mingle with clients; (4) completing webinar and other after-hours educational assignments; (5) attending community outreach events; and (6) participating weekly in at least two fitness sessions conducted by other coaches. She seeks $4,372.50 in claimed unpaid wages. The Plaintiff filed "summary judgment evidence" supporting her prima facie claim.

At the hearing, the Defendants did not deny that the Plaintiff had done these tasks. They, however, raised three points at the hearing. First, that all these tasks were included as part of the "tiered" amount she was paid for each class. Second, because the Plaintiff worked for four years without taking issue with the arrangement, she cannot now claim that her compensation agreement was something different. And third, that the Defendants Andrea and John O'Brien cannot be held responsible because the Plaintiff has failed to allege or provide evidence that the "corporate veil" should be pierced. Finally, the Defendants urge that this is not a statutory "unpaid wage" case, arguing that Florida Statute §448.08 (2019) does not create a discrete statutory claim for unpaid wages. Rather, the Defendants suggest that if Plaintiff prevails, this is merely an action for breach of contract.

The Court notes that Florida law provides for a discretionary award of attorney's fees when a party prevails "in an action for unpaid wages." The Court concludes that whatever one may call the action in this case, it is clearly an "action for unpaid wages," thus triggering the application of Florida Statute §448.08. *See, e.g., Hingson v. MMI of Fla., Inc.*, 8 So.3d 398, 400 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D588a] (claim for "breach of employment agreement" triggered application of statute); *Crockett v. United Indian River Packers, Inc.*, 12 Fla. L. Weekly Supp. 472a (19th Cir. App. 2004) (statute applied to "action for unpaid wages"); *Wade v. Solomon, Ginsberg & Vigh, P.A.*, 16 Fla. L. Weekly Supp. 345b (Hillsborough Cty. Ct. 2008) ("action to collect unpaid wage" triggered statute); *Walker v. Jacksonville Stallions, LLC*, 14 Fla. L. Weekly Supp. 384c (Duval Cty. Ct. 2007) (action in which defendant "failed to pay wages" triggered statute); and *Laloi v. Progressive American Ins. Co.*, 4 Fla. L. Weekly Supp. 805a (Palm Beach Cty. Ct. 1997) (referring to statute's application to "litigation over collection of wages").

The Defendant filed its response and "summary judgment evidence" on January 7, 2020 at 4:54 p.m., just minutes before the deadline set forth in Rule 1.510(c), Fla. R. Civ. P. Through an error in filing—which may lie at the feet of the Clerk of Courts—the exhibits were not attached to the Defendant's Response. They were filed about 4 hours later, at 8:51 p.m. Importantly, however, with one exception, the documents referred to in the timely-filed Response were already of record. The Court finds that notice of reliance on these documents was accordingly timely under Rule 1.510(c) (requiring that the "adverse party [. . .] identify [. . .] any summary judgment evidence on which the adverse party relies"). However, the "Unsworn Declaration of Andrea O'Brien" attached as Exhibit 1 to Defendant's Response is unavailing as not being timely served and filed as required by rule. However, even if it were, it fails to meet the requirements of Rule 1.510 that "summary judgment evidence" be by affidavit, not unsworn declaration. When Florida law specifically requires that an "affidavit" be submitted, such as the summary judgment rule, a declaration or verification will not suffice. *See Defense Control USA, Inc. v. Atlantis Consultants Limited Corp.*, 4 So.3d 694, 698 (Fla. DCA 3d DCA 2009) [34 Fla. L. Weekly D391a] (when statute or rule of procedure require an affidavit, verification cannot be used instead).

The question for the Court is whether any of the Defendant's summary judgment evidence demonstrates a "genuine issue as to any material fact." Rule 1.510(c). Moreover, even if the Plaintiff is not entitled to a final judgment, the Court must specify whether any "facts [. . .] appear without substantial controversy," which facts are "deemed established" at any further proceeding in the case. Rule 1.510(d).

Court's Ruling:

As to the liability of the Defendants Andrea and John O'Brien, the Plaintiff has failed to demonstrate its entitlement to judgment. The Defendants have raised a "failure to pierce the corporate veil" defense, and the Plaintiff has failed to rebut this defense. Further, the Plaintiff's reliance on Article X, §24(b) of the Florida Constitution is misplaced, as the instant case is not a "minimum wage" case. Therefore, it is irrelevant how the word "employer" is defined under the Federal Fair Labor Standards Act. While the Court agrees that the record suggests that the Defendants Andrea and O'Brien may be entitled to summary judgment in their favor because of these issues, these Defendants have not moved for summary judgment.

As to the Defendant JJAK, the Court finds that there are no genuine issues of material fact as to the Plaintiff's claim for unpaid attendance at mandatory meetings ($425.00), unpaid attendance at mandatory community outreach events ($20.00), unpaid participation in mandatory webinar and other online assignments ($172.50), unpaid participation in training and workout sessions ($1,040.00), and bonuses ($20.00). In each of these instances, the Plaintiff provided summary judgment evidence supporting her prima facie case, and in none of these instances did the Defendants demonstrate a disputed issue of material fact. (See Def. Resp. to Plaintiff's Statement of

Undisputed Facts, etc., ¶¶12(g), 20, 22-23, 26, 38). Therefore, the Plaintiff is entitled to a partial summary judgment in the amount of $1,677.50 against the Defendant JJAK.

As to the remaining items sought by Plaintiff (required pre- and post-session tasks, such as review of workout program, set-up of class, clean-up, mingling with clients, etc.), the Court finds that the summary judgment evidence demonstrates genuine issues of material fact. For these items, the Plaintiff has not established without material dispute that these items were not included as part of the "tiered" compensation agreement. First, the Court agrees with the Defendant that the Plaintiff's inaction in waiting four years before taking issue with the compensation structure (see Plaintiff's Affidavit ¶¶29 - 30) is some evidence that she knew the agreement included these tasks. Second, the Defendant has pointed out Plaintiff's own statements in her deposition that can be read as suggesting she knew these tasks were included in her compensation agreement, and further that it was never discussed whether she would be paid for these additional tasks (see Def. Resp. ¶¶12, 12(i), 14, 16). Third, in her amended answer to Defendant's Interrogatory No. 3, the Plaintiff did not claim that she spent any time preparing for class (see Def. Resp. ¶12(a)). Moreover, a co-worker testified that it only took her 5 minutes to do a task the Plaintiff asserts took more time. Fourth, the requirement to complete CPR training is arguably no more than an underlying required credential.

Concerning the requirements of Rule 1.510(d), as to the remaining issues for which summary judgment has not been entered, the Court finds the following facts to be established without substantial controversy, and these facts are deemed established in any further hearing or other proceeding in this case:

1. The Plaintiff Naomi Graff was employed as a coach/trainer at Orange Theory Fitness in Weston, Florida ("OTF Weston"). In her capacity as a trainer/coach, she taught group workout classes.

2. Plaintiff was required to teach each class using a template provided by Orange Theory Fitness.

3. OTF Weston agreed to pay Plaintiff for each class based on a pay scale tied to how many participants attended the session.

4. In addition to teaching her class, the Plaintiff was required to do additional tasks, including: (a) reviewing the template prior to the scheduled class which provided the workout of the day and how it was to be conducted; (b) arriving before each class between 15-30 minutes early to set up the weight and demo stations, music, and workout television; to ensure that the studio was clean; to welcome new members to explain the workout; to contact new members by telephone; to video the prior class and post the session to social media; (c) staying after a class for between 15-30 minutes to clean up the studio, put away the equipment and weights, take out the trash, clean each treadmill, rower and TRX straps, mingle with participants about their results, and turn off monitors; and (d) completing CPR training.

5. For the tasks set forth in paragraph 4 above, the Plaintiff is seeking $2,695.00.

6. There was no specific communication between the Plaintiff and OTF Weston whether the additional tasks were or were not included in her compensation arrangement.

7. The Plaintiff resigned on April 23, 2019 and at that time demanded what she believed to be her unpaid wages. At that time, she had worked at OTF Weston for more than four years.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as set forth above. Further, however, there remain genuine issues of material fact as to the personal liability of the Defendants Andrea and John O'Brien, and as to the tasks set forth in paragraph number 4 above.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Exhaustion of policy limits—Payment using 2007 Medicare Limiting Charge was proper and did not constitute gratuitous payment or bad faith—Having exhausted benefits in payment of valid timely bills, insurer is not liable for further payments to medical provider

SPINE & EXTREMITY REHABILITATION CENTER, INC., a/a/o Abisai Tores, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 19th Judicial Circuit in and for St. Lucie County. Case No. 562019SC000400AXXXHC. December 11, 2019. Daryl Isenhower, Judge. Counsel: Joshua Costello, Schiller, Kessler & Gomez, PLC, Ft. Lauderdale, for Plaintiff. Melissa McDavitt and Madison O'Connell, Conroy Simberg, West Palm Beach, for Defendant.

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT REGARDING EXHAUSTION OF BENEFITS

THIS CAUSE having come before the Court for hearing on November 18, 2019 upon Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY's Motion for Final Summary Judgment based upon Exhaustion of Benefits. The Court, having read the submissions by the parties, having heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The subject action involves a claim for personal injury protection insurance benefits filed by Plaintiff, SPINE & EXTREMITY REHABILITATION CENTER, INC. (hereinafter "Plaintiff") as assignee of ABISAI TORES (hereinafter "Claimant") against Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (hereinafter "Defendant"), arising out of a motor-vehicle accident that occurred on September 13, 2017.

2. Plaintiff alleges that State Farm has failed to make payments for PIP benefits allegedly owed to it for services rendered to the Claimant arising from an automobile accident occurring on September 13, 2017.

3. On the date of the accident, the Claimant was covered by a policy of automobile insurance which provided, inter alia, $10,000.00 in personal injury protection benefits and no medical payments coverage with State Farm. Claim number 59-1418-K40 was assigned to the claim for benefits.

4. At hearing the parties agreed the 9810A policy of insurance properly elects the schedule of maximum charges for reimbursement.

5. Plaintiff submitted its insurance claims forms for treatment of Claimant, accompanied by medical records, for dates of service from October 23, 2017 through March 30, 2018.

6. The Claimant sought treatment with several other medical providers as well, who in turn submitted bills to State Farm for that treatment. State Farm had an obligation to evaluate all the bills received from all of the medical providers Abisai Torres treated with following the subject accident, and render payment subject to Florida Statute 627.736 and the policy of insurance.

7. State Farm reimbursed Abisai Torres' medical providers with valid claims, including the Plaintiff, in accordance with Florida Statute 627.736 and the 9810A policy of insurance.

8. On or about April 10, 2018, State Farm issued a payment to the Plaintiff. By virtue of that payment of benefits, State Farm exhausted all remaining benefits under the PIP portion of the subject contract of insurance between State Farm and Abisai Torres. As of April 10, 2018, State Farm issued payment in the total amount of $10,000, the full amount available under the subject policy of insurance.

9. It is undisputed Defendant paid the total $10,000.00 of Personal Injury Protection Benefits under the subject policy of insurance.

10. Defendant moved for summary judgment on the grounds that

the $10,000.00 in available Personal Injury Protection Benefits were properly exhausted.

11. Based on these facts, this Court has determined that Defendant's motion for summary judgment should be granted.

CONCLUSIONS OF LAW

A. EXHAUSTION OF BENEFITS

12. As a result, based on the record evidence presented in this case, the benefits under the Policy were legally limited to $10,000. Since the $10,000.00 limit has been paid out, Defendant had no additional liability to Plaintiff when this case was filed, and continues to owe no additional liability to Plaintiff. *See Simon v. Progressive Exp. Ins. Co.*, 904 So. 2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b]; *Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando,* 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a], and *Sheldon v. United Services Auto. Ass'n*, 55 So. 3d 593 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a]. Absent a finding of bad faith, an insurer is not liable to pay any further PIP Benefits in excess of policy limits. *Progressive Am. Ins. Co. v. Stand-Up MRI*, 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a].

13. It is undisputed that State Farm paid the available $10,000.00 in PIP Benefits under the policy for valid claims submitted by the Claimant's numerous medical providers. Because payment was made in accordance with the No-Fault Statute and 9810A policy, State Farm cannot be held liable for the Plaintiff's bills beyond the exhaustion of benefits, absent a finding of bad faith. There is no bad faith arising from State Farm's payment of the insured's medical bills in the ordinary course of treatment and submission of those bills.

B. BAD FAITH

14. "An insurer does not act in bad faith when it processes the plaintiff's bill in accordance with then-existing law. If an insurer has an objectively reasonable basis under Florida law for reducing or denying the provider's charge(s) in the manner that it did, then it possesses the reasonable proof that is necessary under subsection (4)(b)." *Emergency Physicians, Inc. d/b/a Emergency Resources Group, a/a/o Thomas Losoncy v. Auto-Owners Ins. Co*., 24 Fla. L. Weekly Supp. 832b (7th Jud. Cir. December 6, 2016) (citing *Virtual Imaging Svcs., Inc. a/a/o Yudi Vigoreaux v. United Svcs. Auto. Ass'n*, 18 Fla. L. Weekly Supp. 491a (Fla. 11th Jud. Cir. February 2, 2011); and *Wellness Assoc. of Fla., Inc. a/a/o Daniel North v. USAA Casualty Ins. Co*., 18 Fla. L. Weekly Supp. 1056a (Fla. 15th Jud. Cir, July 26, 2011)). When an insurer takes a legal position based on the applicable statute, bad faith does not exist if there is no binding case law on the issue, even if there were non-binding County Court opinions supporting the alternative. *Pembroke Pines MRI, Inc. a/a/o Brian Schoedinger v. USAA Casualty Ins. Co.,* 17 Fla. L. Weekly Supp. 479a (Fla. 17th Jud. Cir. March 29, 2010).

15. It is undisputed that Plaintiff has not alleged bad faith by State Farm in its processing of the claim in any pleading, including Plaintiff's Motion for Summary Judgment. Thus, absent an allegation of showing of bad faith, State Farm is not liable for bills in excess of policy limits.

C. FLORIDA STATUTE 627.736(5)(A)(2)

16. Plaintiff contends that payment for at the 2007 Limiting Charge under Medicare Part B to an MRI provider was voluntary and/or gratuitous, as it exceeded the amount State Farm was obligated to pay under the policy and Florida Statute.

17. However, Florida Statute 627.736(5)(a)(2) is silent as to whether an insurer should apply the participating or non-participating fee schedule when the 2007 fee schedule is higher than the applicable-fee schedule for the service year in which the services are rendered.

The current version of the PIP Statute Florida Statute §627.736(5)(a)(2) states:

> [T]he applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the service year in which the services, supplies, or care is rendered and for the area in which such services, supplies, or care is rendered, and the applicable fee schedule or payment limitation applies to services, supplies, or care rendered during that service year, notwithstanding any subsequent change made to the fee schedule or payment limitation, **except that it may not be less than the allowable amount under *the applicable schedule* of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.** For purposes of this subparagraph, the term 'service year' means the period from March 1 through the end of February of the following year." (Emphasis added.)

Prior to 2012, Florida Statute §627.736(5)(a)(3) stated,

> "[T]he applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, **except that it may not be less than the allowable amount under *the participating physicians* schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B**."

18. It is undisputed the Legislature replaced the "participating" with "applicable" when describing which fee schedule to use if the 2007 fee schedule is higher than the service year.

19. It is also undisputed the statute does not explicitly prohibit of the 2007 Limiting Charge for determining the proper reimbursement.

20. As such, it appears the Legislature indicated multiple fee schedule amounts are proper for reimbursing a claim, other than just the Participating Physician Fee Schedule.

21. There is ambiguity as to the proper fee schedule amount an insurer should utilize in reimbursement when the 2007 fee schedule is higher than the applicable service year fee schedule.

22. Any ambiguity should be resolved in favor of the insured or the insured's assignor's (medical providers) *State Farm Mutual Auto Ins. Co. v. Menendez,* 70 So.3d 566, 570 (Fla. 2011) [36 Fla. L. Weekly S469a].

23. Because the payment at the 2007 Limiting Charge did not exceed its obligation under the statute, the payment was neither voluntary nor gratuitous.

POLICY LANGUAGE

24. At hearing, the parties agreed the 9810A policy of insurance, applicable to this claim, properly elected the schedule of maximum charges.

25. The policy, as indicated below, mirrors the No-Fault Statute's language regarding the applicable fee schedule for reimbursement.

26. The 9810A policy of insurance, of which Plaintiff's seeks reimbursement under states in part:

> We will pay in accordance with the No-Fault Act properly billed and documented reasonable charges for bodily injury to an insured caused by an accident resulting from the ownership, maintenance, or use of a motor vehicle.
>
> . . .
>
> We will limit payment of Medical Expenses described in the Insuring Agreement of this policy's No-Fault Coverage to 80% of a properly billed and documented reasonable charge, but in no event will we pay more than 80% of the following No-Fault Act "schedule of maximum charges" including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers
>
> . . .
>
> For purposes of the above, the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the year in which the services, supplies, or care

is rendered and for the area in which such services, supplies, or care is rendered, and the applicable fee schedule or payment limitation applies throughout the remainder of that year, notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it will not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.

(9810A Policy Form, Ex. 1 at 14-16 (underlining added)).

27. Identical to the No-Fault Statute, the 9810A policy does not specify whether the "participating" or "limiting" amount should be utilized when the 2007 fee schedule is higher than the applicable service year fee schedule and instead uses the word "applicable".

28. Like the No-Fault Statute, the 9810A policy does not expressly prohibit the "Limiting Charge" payment.

29. Based on the ambiguity, State Farm paid the Insured's providers at the highest possible rate in accordance with policy of insurance, which was the 2007 Limiting Charge amount.

30. State Farm's payment to the Insured's providers did not exceed its contractual obligation and thus were not voluntary or gratuitous.

CONCLUSION

It is undisputed that benefits totaling $10,000.00 were exhausted by payment to legitimate claims of the Claimant's providers. It is also undisputed that State Farm is not liable for benefits in excess of the $10,000.00 under the policy absent a finding of bad faith, which has not been alleged in the pleadings.

There is no logical basis for an allegation of bad faith (and Plaintiff has not asserted a bad faith claim) by Defendant in processing of the Claimant's medical bills. The payments made to each of the Claimant's providers did not strategically or prematurely exhaust benefits nor did Defendant gain by these payments. Even if State Farm had paid less to any one of the Insured's providers, it would have still paid a total of $10,000.00 in benefits available under the policy. State Farm's payment of the less than $100.00 disputed amount to one provider over another would not have achieved any more positive result for State Farm and thus cannot logically be considered bad faith.

Plaintiff's assertion that payment at the 2007 Limiting Charge amount exceeded State Farm's contractual and statutory obligation is not supported by the evidence. At the time of State Farm processed the instant claim and at present, there is a lack of binding clarification from the Courts as to the use of the 2007 Limiting Charge. Thus, State Farm had a reasonable basis to process the bills in the manner it did.

Because the Statute and Policy are ambiguous and fail to address whether the "participating" or "limiting" amount should be utilized when the 2007 fee schedule is higher than the applicable service year fee schedule, State Farm must resolve the dispute in favor of the insured's medical providers by providing the highest allowable amount under the statute and policy. As such, State Farm's payments at the 2007 Limiting Charge amount have not exceeded its statutory or contractual obligation and thus were not voluntary or gratuitous.

ORDERED and ADJUDGED, as follows:

1. That Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiff's Motion is DENIED.

2. That judgment be and hereby is entered for Defendant, that Plaintiff take nothing by this action and that Defendant go hence without day.

The Court reserves jurisdiction to determine attorney's fees and costs.

* * *