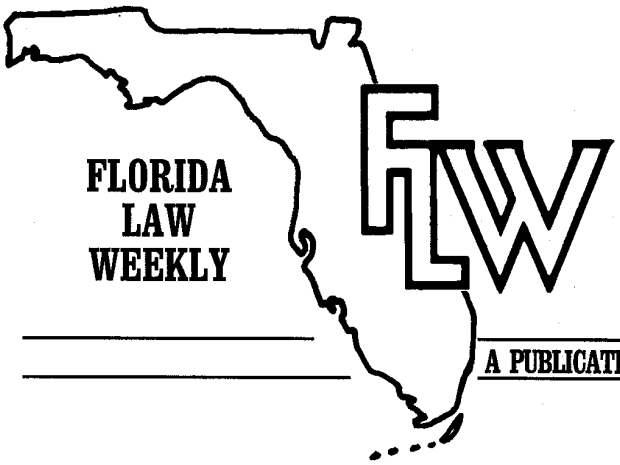
Volume 27, Number 12, April 30, 2020




# SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 985-1058

**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.*

- **CORPORATIONS—MERGER—APPRAISAL RIGHTS—FLORIDA BUSINESS CORPORATION ACT. Shareholders who did not own shares of a company as of the designated record date of a merger were not entitled to vote on the merger and, accordingly, were not entitled to assert appraisal rights. The controlling statute clearly limits appraisal rights to minority shareholders who owned their interests in the company as of the designated record date. Shareholders who acquired shares after the designated record date did not become eligible to assert appraisal rights merely because they were included as defendants in a suit filed by the corporation under section 607.1330. Section 607.1330's dispute resolution protocol works in tandem with other provisions of the Florida Business Corporation Act and presupposes that a shareholder is eligible to exercise appraisal rights and receive "fair value" as determined by the court.** *PERRY ELLIS INTERNATIONAL, INC. v. BCIM STRATEGIC VALUE MASTER FUND, LP. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed February 3, 2020. Full Text at Circuit Courts-Original Section, page 1012b.*
- **CRIMINAL LAW—EVIDENCE—STATEMENTS OF DEFENDANT—STATEMENT/PROFFER MADE IN CONNECTION WITH PLEA NEGOTIATIONS. Where a defendant exhibited an actual subjective expectation to negotiate a plea at the time of his statement/proffer and the expectation was reasonable given the totality of the circumstances, the statement/proffer was not admissible into evidence as an admission in the state's case-in-chief. Where neither the proffer agreement nor the transcript of the proffer agreement meeting included any mention of the protections afforded the defendant by section 90.410 and Rule 3.172(i), any waiver of those protections by the defendant was not knowingly, voluntarily or intelligently made.** *STATE v. HAWKINS. Circuit Court, Twelfth Judicial Circuit in and for Manatee County. Filed February 12, 2020. Full Text at Circuit Courts-Original Section, page 1024a.*

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**Bold** denotes decision by circuit court in its appellate capacity.

**TABLE OF CASES REPORTED (continued)**



* * *

**TABLE OF STATUTES CONSTRUED**

*Florida Statutes and Rules of Procedure construed in opinions reported in this issue.*



**TABLE OF STATUTES CONSTRUED (continued)**

**TABLE OF STATUTES CONSTRUED (continued)**

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* * *

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* * *

**DISPOSITION ON APPELLATE REVIEW**

*Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.*

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* * *

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# CIRCUIT COURTS—APPELLATE

**Mandamus—Petition seeking to compel clerk of court to file prisoner's statement of claim is denied—Clerk carried out its ministerial duty by screening claim pursuant to administrative order and refusing to accept claim for filing when it found that it was frivolous or malicious or that it reasonably appeared to be intended to harass one or more defendants**

JAVONEY D. ROBERTS, Petitioner, v. KEN BURKE, CLERK OF COURT, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000012-AP. UCN Case No. 522019AP000012XXXXCI. December 10, 2019.

## ORDER AND OPINION

Petitioner files this Petition for Writ of Mandamus challenging the Clerk of Court's refusal to file his small claims complaint. For the reasons set forth below, the Petition is denied.

### Facts and Procedural History

On December 17, 2018, Petitioner submitted a "statement of claims lawsuit along with [a] summons/notice to appear for pretrial conference mediation court hearing" to the Clerk. Petitioner also submitted an affidavit to determine indigent status. On January 8, 2019, after judicial review of the claim and indigency affidavit, the Court found first, that Petitioner was indigent, however, subsequently found that "Plaintiff/Petitioner's claim is frivolous, malicious, or reasonably appears to be intended to harass one or more named defendants/respondents and Plaintiff/Petitioner's claim is dismissed." Accordingly, the Clerk did not assign Petitioner's claim a case number nor proceeded with filing the claim. Thereafter, Petitioner filed the instant Petition.

### Discussion

> Mandamus is a common law remedy used to enforce an established legal right by compelling a person in an official capacity to perform an indisputably ministerial duty required by law. It may only be granted if there is a clear legal obligation to perform a duty in a prescribed manner. A duty or act is ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law.

*Austin v. Crosby*, 866 So. 2d 742, 744 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D406a] (internal citations omitted).

Petitioner alleges that the Clerk had a ministerial duty to file his complaint and notice to appear, and as such, that it was improper for the Clerk to refuse to file his claim.

The Court finds that Petitioner is not entitled to mandamus relief. The Court finds that the January 8, 2019 Order issued dismissing Petitioner's claims was issued pursuant to Administrative Order 2005-01. Administrative Order 2005-01 was created to comply with Section 57.085, Florida Statutes. "Section 57.085 attempts to solve the problem of frivolous civil suits by indigent prison inmates by requiring that lawsuits brought by indigent inmates be screened by the court *before being accepted for filing*." *Craft v. Holloway*, 975 So. 2d 620, 621 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D660b] (emphasis added).

The Court finds that the Clerk properly carried out its ministerial duty by following the determinations made in the court's January 8, 2019 Order. The Court finds the Clerk had no discretion as to whether or not to file Petitioner's claims. The January 8, 2019 Order directed that the claim be dismissed pursuant to the pre-screening procedures, which makes determinations about whether or not the lawsuits should be accepted for filing.

### Conclusion

Because the Clerk carried out its ministerial duty by properly complying with the court's January 8, 2019 order when it denied acceptance of Petitioner's claims for filing, it is

**ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Mandamus is **DENIED**. (PAMELA A.M. CAMPBELL, AMY M. WILLIAMS, and LINDA R. ALLEN, JJ.)

* * *

**Mandamus—Prisoners—Removal of detainer—County sheriff, not state, is proper respondent in petition for writ of mandamus seeking removal of detainer lodged by sheriff that is preventing prisoner from participating in work programs while incarcerated by state—Prisoner has no clear legal right to removal of detainer since county court case that resulted in its placement is still open and pending—Petition denied**

CHRISTOPHER GRANDA, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-CA-748. UCN Case No. 512019CA000748CAAXES. March 18, 2019.

## ORDER DENYING PETITION FOR WRIT OF MANDAMUS

THIS MATTER came to be heard on the Petitioner's Petition for Writ of Mandamus filed on February 28, 2019. Petitioner seeks removal of a detainer.

The Petitioner was charged by Misdemeanor Information with obstructing or resisting an officer without violence in Pasco County Court case number 17-MM-5377. That case remains open and pending. Petitioner asserts that a detainer has been lodged by the Pasco Sheriff's Office because of that case. Petitioner seeks removal of the detainer because it is preventing him from participating in either work release or work camp while he serves a Department of Corrections sentence in unrelated cases.

The Court first notes that the Petitioner has named the incorrect party as the Respondent. The Pasco Sheriff's Office is the government entity that placed the detainer. Therefore, this Court deems that the Pasco Sheriff's Office is the proper Respondent. *See Jenkins v. State*, 957 So. 2d 20, 22-23 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D964a] (holding that the circuit court had a sufficient basis to deem the sheriff's office as the proper respondent where Jenkins listed the State of Florida as the respondent but alleged that the Volusia County Sheriff's Office lodged the detainer).

Because the Petitioner has failed to establish a clear legal right to removal of the detainer, the petition must be denied. In the cases cited by the Petitioner, the district courts of appeal noted that those petitions showed a *prima facie* entitlement to relief because the detainers appeared to be improper. *See Moore*, 137 So. 3d at 612-13 (directing the trial court to issue an order to show cause because the petitioner appeared to have completed a contempt of court sentence and yet the Martin County Sheriff's Office detainer remained); *Jenkins v. State*, 957 So. 2d 20, 23 (holding that the mandamus petition sufficiently alleged his right to have a detainer from 1983 removed). *See also Clapp v. State*, 160 So. 3d 107 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D679a] (denying a defendant's motion for postconviction relief without prejudice to the defendant to file a petition for writ of mandamus because the violation of probation affidavits that resulted in the detainer had been withdrawn and the detainers were likely now improper).

In the instant petition, however, the county court case which resulted in the placement of the detainer by the Pasco Sheriff's Office is still open and pending. Therefore, the detainer is not improper and the Petitioner has no legal right to its removal.

It is therefore ORDERED that case number 19-CA-748 is hereby DENIED. (DANIEL D. DISKEY, SHAWN CRANE, and

KIMBERLY CAMPBELL, JJ.)

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Documentary evidence and testimony provide competent substantial evidence for finding that licensee was lawfully stopped for failing to stop before entering roadway from parking lot in business district—Appellate court takes judicial notice of generally known fact that block in which parking lot is located is composed of mostly businesses, and thus, meets statutory definition of business district—Petition for writ of certiorari is denied**

THOMAS WILLIAM STRAUB, JR., 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. 18-0065AP-88B. UCN Case No. 522018AP000065XXXXCI. December 9, 2019.

## ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles ("DHSMV") sustaining the suspension of his driving privilege for refusing to submit to a breath test pursuant to § 322.2615, Florida Statutes. Petitioner contends that the DHSMV's final order was not supported by competent, substantial evidence demonstrating that Petitioner was lawfully stopped. Upon consideration of the Petition, Response, Reply, "Petitioner's Reply to Court's Judicial Notice," and "Respondent's Response to Order Allowing Parties to Present Information Relevant to the Propriety of Taking Judicial Notice," the Petition for Writ of Certiorari is denied.

### Facts and Procedural History

In the DHSMV's final order, the Hearing Officer found the following facts to be supported by a preponderance of the evidence:

> On May 28, 2018[,] Officer Hennis conducted a traffic stop on a vehicle driven by Thomas William Straub Jr., the Petitioner, for failing to stop or yield prior to entering a roadway from a parking lot. Officer Hennis observed the Petitioner exhibiting indicators of impairment and contacted Officer Negersmith to conduct a DUI investigation.
>
> Officer Negersmith made contact with the Petitioner and found him to have slurred speech, a sway while standing, bloodshot eyes[,] and an odor of an alcoholic beverage on his breath. The Petitioner refused to perform Field Sobriety Tasks and was arrested for DUI. The Petitioner refused to provide breath samples after being read Implied Consent.

Based on Petitioner's refusal to provide a breath sample, his license was suspended. After a hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

### Standard of Review

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a].

### Discussion

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] (internal citations omitted). "Generally, 'the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.' " *State v. Arevalo*, 112 So. 3d 529, 531 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D551b] (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)). "The test is whether a police officer could have stopped the vehicle for a traffic violation." *Hurd*, 958 So. 2d at 602. This objective analysis " 'asks only whether any probable cause for the stop existed,' making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Id.* (quoting *Holland v. State*, 696 So. 2d 757, 759 (Fla.1997) [22 Fla. L. Weekly S387a]).

Petitioner asserts "that the Hearing Officer erred in determining that there was a legal stop prior to the arrest of Petitioner" because both the testimony and written record only contain "a nonspecific and conclusory" basis for the stop, which demonstrates that the officer had only an "unparticualrized suspicion" or "inarticulate hunch" that driving over the sidewalk without stopping when exiting a business was a violation of some unnamed statute. According to the Initial Brief, "[i]t is undisputed that Petitioner drove across the 'sidewalk area' that runs across the entrance/exit to the SunTrust Bank parking lot" on Clearwater Beach. Moreover, Petitioner does not seem to dispute that he did not stop. Instead, Petitioner argues that the record fails to show driving actions that violate any statute because the record is not "clear as to each material fact regarding the basis for the stop." In the Reply Brief, Petitioner expands on this argument by asserting that "[t]he record fails to reflect by the necessary competent substantial evidence that Petitioner was legally stopped" because it "lacks any evidence of the zoning at the location of the alleged violation" to show that it was in a "business district," as required by the applicable statute.

Section 316.125(2), Florida Statutes, states in relevant part that "[t]he driver of a vehicle emerging from an alley, building, private road or driveway within a business or residence district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway." Section 316.003(8), Florida Statutes, defines a business district as "[t]he territory contiguous to, and including, a highway when 50 percent or more of the frontage thereon, for a distance of 300 feet or more, is occupied by buildings in use for business."

Section 90.202(11), Florida Statutes, provides a court may take judicial notice of "facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court." Case law has interpreted this to allow judicial notice of "matters known in the community." *See McKinney v. State*, 640 So. 2d 1183, 1184 (Fla. 2d DCA 1994). Here, it is generally known within the community that the area of Clearwater Beach in question, the 400 block of Poinsettia Avenue near the SunTrust Bank, is comprised of mostly businesses. To be considered a business district, the law requires only 50 percent of an area to consist of "buildings in use for business" for a distance of a mere 300 feet. Accordingly, this Court takes judicial notice of the status of the 400 block of Poinsettia Avenue as a business district as defined in § 316.003, Florida Statutes.

Having resolved the business district issue, the Court must still determine whether competent, substantial evidence supports the Hearing Officer's decision that Petitioner was lawfully stopped. The Complaint/Arrest Affidavit for Driving Under the Influence lists the reason for the stop as "failing to stop/yield prior to entering a roadway from a parking lot (400 [block] of Poinsettia)." The Complaint/Arrest Affidavit for Refusal to Submit to Testing states Petitioner "was stopped for failing to yield or stop before entering the roadway." The Offense Report narrative indicates that Petitioner "failed to stop/yield before entering the roadway over a sidewalk." A review of the transcript of the hearing indicates that the stopping officer, Officer Hennis, testified that he witnessed Petitioner's vehicle leaving the SunTrust Bank parking lot and "not stop at the sidewalk." Officer Hennis elaborated:

> He doesn't stop at the sidewalk when he's exiting from the driveway onto the roadway and then he also does not stop at the road—he didn't make a stop at all. He just passes the driveway and enters the roadway without any kind of stop, you know, passing the sidewalk, onto the roadway and headed southbound . . . .

The DUI officer, Officer Negersmith, testified that Officer Hennis told him Petitioner was stopped for "failure to yield a [sic] stop before entering a roadway over a sidewalk on Poinsettia." He also testified that the location was on Clearwater Beach at the SunTrust Bank and across from Frenchy's restaurant. When counsel for Petitioner asked about the specifics of what Petitioner did wrong, Officer Negersmith stated Petitioner "came out of the parking lot and didn't stop, just drove out." Accordingly, the documentary evidence and testimony provide competent, substantial evidence that Petitioner was lawfully stopped.

**Conclusion**

Because competent, substantial evidence supports the Hearing Officer's decision that Petitioner was lawfully stopped, it is

**ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. (PAMELA A.M. CAMPBELL, AMY M. WILLIAMS, and LINDA R. ALLAN, JJ.)

* * *

**Municipal corporations—Historic district—Construction—Certificate of appropriateness—Appeals—Certiorari—Executive decision—Appellate court is without jurisdiction to review petition where petition challenged quasi-judicial ruling of city council that failed to grant an appeal of city's community planning and preservation commission's approval of second application for certificate of appropriateness to build home in historic district, but substantive argument in petition concerns the executive decision to accept a second application, despite city code provision stating that successive application filed within 18 months of denial of initial application shall not be accepted if new application is same or substantially similar to initial application**

WILLIAM COBB, et al., Petitioners, v. CITY OF ST. PETERSBURG, et al., Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 18-000067AP-88B. UCN Case No. 522018AP000067XXXXCI. September 23, 2019.

**ORDER AND OPINION**

Petitioners challenge a resolution adopted by the City of St. Petersburg's City Council, which failed to grant an appeal of the City's Community Planning and Preservation Commission's approval of an application for a certificate of appropriateness. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

**Facts and Procedural History**

In early 2018, Respondent Richard McGinnis submitted an application for a certificate of appropriateness ("COA") for the construction of a new single-family home within "the 18th Avenue Northeast local historic district" of the City of St. Petersburg ("City"). The application was unanimously denied by the City's Community Planning and Preservation Commission ("CPPC") after a public hearing. In March 2018, Respondent McGinnis submitted a second application, which was accepted by the City and then approved in a 6-1 vote by the CPPC after another public hearing. Petitioners, neighboring homeowners, appealed the approval to the City Council. On August 23, 2018, the City Council conducted a public hearing on the appeal. A motion to grant the appeal passed by a vote of 4-3, but a supermajority vote was required to overturn the CPPC's approval of the application. Petitioners then filed the instant Petition for Writ of Certiorari.

**Standard of Review**

The circuit court reviews a quasi-judicial decision of a local government for three elements: (1) whether the local government provided due process, (2) whether the local government followed the essential requirements of law, and (3) whether the local government's decision was supported by competent, substantial evidence. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1039 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a].

**Discussion**

Petitioners maintain that they were denied procedural due process and the City departed from the essential requirements of law by accepting a second COA application that Petitioners allege was substantially similar to the first application. Section 16.70.010.8(A) of the City's Code of Ordinances ("Code") states that a successive application shall not be accepted by the POD within 18 months of the denial of a previous application if the new application is "the same or substantially similar" to the old one. The POD is "the person officially designated by the Mayor to perform the duties described in that portion of the Code." § 1.2, Code.

"As a rule, only quasi-judicial actions [of local government agencies] are reviewable via certiorari." *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S389a]. "A decision is . . . quasi-judicial, as distinguished from executive, when notice and hearing are required and the judgment of the . . . agency is contingent on the showing made at the hearing." *City of St. Pete Beach v. Sowa*, 4 So. 3d 1245, 1247 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D380c] (citation omitted). Certiorari review of a legislative or executive decision of an agency is inappropriate because, "[a]s a practical matter, when an executive makes a decision without conducting a hearing, there is nothing for the circuit court to review." *Id.* (quoting *Pleasures II Adult Video, Inc. v. City of Sarasota*, 833 So.2d 185, 189 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2637a]). "When an administrative official or agency acts in an executive or legislative capacity, the proper method of attack on the official's or agency's action is a suit in circuit court for declaratory or injunctive relief on grounds that the action taken is arbitrary, capricious, confiscatory, or violative of constitutional guarantees." *Id.* (internal quotations and citation omitted).

Under the Code, the POD decides whether to accept an application and neither the CPPC nor the City Council can reconsider the acceptance of a second application or its similarity to the previous application. § 16.70.010.8(D), Code (stating that "[a] decision by the POD to accept an application is not appealable"); *see also Gulf & E. Dev. Corp. v. City of Fort Lauderdale*, 354 So. 2d 57, 61 (Fla. 1978) (opining that a city is "bound by the procedural requirements imposed by its . . . ordinances"). Therefore, although Petitioners are technically challenging the quasi-judicial ruling of the City Council that failed to grant their appeal, which is appropriate in a petition for writ of certiorari, their substantive arguments concern the decision to accept the second application. Because there was no hearing on the decision to accept the second application, it was an executive decision; therefore, this Court is without jurisdiction to review it. Although we are troubled by the inability of Petitioners to challenge the determination that the second application was not substantially similar, we are constrained to deny the Petition.

**Conclusion**

Because Petitioners' only issues radiate from an executive decision of the City, it is

**ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. (PAMELA A.M. CAMPBELL, THOMAS M. RAMSBERGER, and AMY M. WILLIAMS, JJ.)

* * *

**Licensing—Driver's license — Suspension — Appeals— Certiorari—Timeliness—Petition for writ of certiorari that was filed more than 30 days after final administrative order upholding driver's license suspension was mailed was untimely filed—Unauthorized motion for rehearing of final order did not suspend rendition of that order—No merit to argument that time for filing appeal was extended by additional 5 days under rule 2.514(b) because final order was mailed—Facts that final order was not mailed until three days after rendition, that there was seven-day delay in counsel receiving order, and that Department of Highway Safety and Motor Vehicles did not have e-service capability are of no moment where licensee had sufficient time to file timely "bare bones" petition for writ of certiorari, while requesting immediate extension of time within which to amend petition—Petition dismissed as untimely**

MICHAEL VELASCO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-2953-O. December 23, 2019. Counsel: Mark L. Mason, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Tallahassee, for Respondent.

FINAL ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI AND DIRECTING CLERK TO CLOSE CASE

(ROBERT J. EGAN, J.) THIS MATTER came before the Court for consideration of the Petition for Writ of Certiorari, filed on March 7, 2019 (Petition);[1] the Court's Order to Show Cause, filed on September 18, 2019 (Show Cause Order); Petitioner's Response, filed on October 9, 2019; and Respondent's Reply, filed on October 21, 2019. Petitioner is seeking review of a final administrative order of driver's license suspension that was rendered on February 1, 2019. The Court finds as follows:

Pursuant to Florida Rule of Appellate Procedure 9.100(c)(1), a petition for writ of certiorari must be filed within 30 days of the date of rendition of the order to be reviewed. The 30 day time limit set forth in Rule 9.100(c)(1) is jurisdictional. *See Penate v. State,* 967 So. 2d 364 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2455a] (appellate court lacked jurisdiction over petition for writ of certiorari that was filed more than 30 days from the date of rendition of the opinion). Under Florida Administrative Code Rule 15A-6.013(12), the rule governing formal review proceedings, the date of rendition "shall be the date of mailing entered on the driver license record." In the instant case, Petitioner's driver license record, which is attached as an exhibit to Respondent's Reply, reflects that the final administrative order of driver's license suspension was mailed on Friday February 1, 2019.[2] Accordingly, for purposes of Rule 15A-6.013(12), the final administrative order was rendered on February 1, 2019. As a result, the deadline to file the instant Petition was Tuesday March 5, 2019. *See* Fla. R. Jud. Admin. 2.514(a)(1). Therefore, the instant Petition was filed beyond the 30 day deadline as it was filed on March 7, 2019.

To be sure, Petitioner filed a motion for rehearing. However, under Florida law, only an authorized motion for rehearing suspends rendition. *See City of Palm Bay v. Palm Bay Greens, LLC,* 969 So. 2d 1187, 1190 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2897b],

> A motion can suspend rendition of an order only if the motion is authorized under the rules governing the proceeding in which the order was entered. A motion for rehearing does not suspend rendition of an administrative order because rehearing is not authorized in administrative proceedings. (Citations omitted.)

Florida Administrative Code Rule 15A-6.013 authorizes the entry of a final order by the hearing officer but does not additionally authorize a motion for rehearing with respect to a final order. Thus, Petitioner's motion for rehearing was unauthorized.

Because the instant Petition appeared to be untimely filed, the Court in its Order to Show Cause directed Petitioner to show cause why the Petition should not be dismissed for lack of jurisdiction as untimely. In the Response, Petitioner argues that his Petition should not be dismissed as untimely for six main reasons. Each is addressed in turn.

First, Petitioner argues that the time to file the Petition was extended by Florida Rule of Judicial Administration 2.514(b),[3] which allows an additional five days when a party "may or must act within a specified time after service and service is made by mail." Petitioner points out that although the final administrative order of driver's license suspension was issued on February 1, 2019, it "was not mailed until February 4, 2019, therefore cutting into the 30 day time period," as reflected by the postmarked envelope attached to his Response. Petitioner also points out that in *Mick v. Florida State Board of Dentistry,* 338 So. 2d 1297 (Fla. 1st DCA 1976), the court denied a motion to dismiss because the final order had been mailed, which added three days to the 30 day time limit pursuant to former Florida Rule of Appellate Procedure 3.18.

The Court rejects Petitioner's contentions. Under Florida law, Florida Rule of Judicial Administration 2.514(b), as incorporated by Florida Rule of Appellate Procedure 9.420(e), did not operate to extend the time for seeking appellate review by five days even though the final administrative order of driver's license suspension had been mailed to Petitioner. As *Donaldson v. State,* 136 So. 3d 1281, 1282 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D938a], *mandamus denied,* 151 So. 3d 1224 (Fla. 2014) explained,

> Since 2012, Florida Rule of Appellate Procedure 9.420(e) has explained that the computation of time in appeals is governed by Florida Rule of Judicial Administration 2.514(b). That rule provides that the automatic five-day extension applies only when some act is required to be done after service of a document by mail, not when the act is required to be done after rendition or filing of an order, even if the rendered order is mailed to the parties.

Thus, in *Matheny v. Indian River Fire Rescue,* 174 So. 3d 1129, 1130 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2240a], the court dismissed a petition for certiorari as untimely when it had been filed more than 30 days after rendition. In so doing, *Matheny* specifically rejected petitioner's argument that he was entitled to an additional five days pursuant to Rule 2.514(b), because this rule "applies only when another rule, a court order, or a statute requires a party to act within a specified time after service," whereas Rule 9.100(c) "requires a petition for writ of certiorari to be filed within thirty days after 'rendition of the order to be reviewed.' " *Id. Matheny* explained, "Rendition is not the same thing as service." *Id. See also Miccosukee Tribe of Indians of Fla. v. Lewis,* 122 So. 3d 504, 506 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2088a] (dismissing petition for certiorari as untimely when filed more than 30 days after rendition; mailing of order did not entitle petitioner to five additional days to file petition pursuant to Rule 2.514(b)).

The Court also finds that Petitioner's reliance on *Mick v. Florida State Board of Dentistry,* 338 So. 2d 1297 (Fla. 1st DCA 1976) is misplaced. As indicated, *Mick* relied on a former Florida Rule of Appellate Procedure. However, as explained, under present Florida law and rules of procedure, a petitioner is not entitled to an additional five days for filing a petition for writ of certiorari pursuant to Florida Rule of Appellate Procedure 9.420(e) and Florida Rule of Judicial Administration 2.514(b), since the five days is available "only when some act is required to be done after service of a document by mail, not when the act is required to be done after rendition or filing of an order, even if the rendered order is mailed to the parties." *Donaldson,* 136 So. 3d at 1282. *See also Matheny,* 174 So. 3d at 1130; *Miccosukee Tribe of Indians of Fla.,* 122 So. 3d at 506.

Further, it is of no moment that the final administrative order of driver's license suspension "was not mailed until February 4, 2019,

therefore cutting into the 30 day time period," as Petitioner argues. The Fifth District rejected this very argument in *Penate v. State,* 967 So. 2d 364 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2455a], in which the petitioner did not receive a copy of the circuit court's appellate opinion until 24 days after rendition, and complained that he did not have sufficient time to prepare a petition. *Penate* explained that the petitioner still had time to file a "bare bones" petition, while "requesting an immediate extension of time from this Court within which to amend his petition based on the circumstances surrounding his receipt of the opinion." *Id.*

Second, Petitioner, while conceding that the five day extension of time in Florida Rule of Judicial Administration 2.514(b) does not apply with respect to a notice of appeal, argues that unlike a notice of appeal, a petition for writ of certiorari "takes a considerable amount of time to prepare," and "is in sum a legal brief, which requires research of the issues, drafting, and citing." Thus, Petitioner "submits" that Florida Rule of Appellate Procedure 9.100(c)(1) contemplates the extension of time or additional days added in Florida Rule of Judicial Administration 2.514(b), so that the instant Petition was timely filed on March 7, 2019.

However, Petitioner's point that a petition for writ of certiorari takes a considerable amount of time to prepare was addressed in *Penate,* which, as indicated, explained that a petitioner could file a "bare bones" petition, while "requesting an immediate extension of time" from the appellate court to file an amended petition. 967 So. 2d at 364. In any event, *Penate* squarely held that under Rule 9.100(c)(1) a petition for writ of certiorari must be "filed within 30 days of the date of rendition." *Id.*

Third, Petitioner argues that even if the five day extension provision in Florida Rule of Judicial Administration 2.514(b) does not apply, there is "nothing" on the final administrative order of driver's license suspension or "in the record at this time" to demonstrate when it was filed with the clerk to begin running of the 30 day period. Petitioner points out that according to Rule 9.020(h), rendition takes place when a "signed, written order is filed with the clerk of the lower tribunal."

Petitioner's third argument overlooks Florida Administrative Code Rule 15A-6.013(12), which provides that the date of rendition "shall be the date of mailing entered on the driver license record." As indicated, Petitioner's driver license record reflects that the final administrative order of driver's license suspension was mailed on February 1, 2019. As a result, the final administrative order of driver's license suspension was rendered on February 1, 2019 pursuant to Rule 15A-6.013(12).

Fourth, Petitioner argues that even if the five day extension provision in Florida Rule of Judicial Administration 2.514(b) does not apply, the time to file his Petition "was tolled" by Rule 9.020(h)(1)(B), which tolls rendition for an "authorized" motion for rehearing. Petitioner points out that he filed a motion for rehearing on February 13, 2019, and that the hearing officer sent him a letter on February 15, 2019 stating that his request for rehearing was denied. According to Petitioner, the 30 days for filing his Petition did not commence until the letter "was filed with the clerk of the lower tribunal."

The Court rejects Petitioner's argument. Florida Rule of Appellate Procedure Rule 9.020(h)(1)(B) by its own terms only allows for a motion for rehearing that is "authorized." Contrary to his position, his motion for rehearing was not authorized. As explained, Florida Administrative Code Rule 15A-6.013 authorizes the entry of a final order by the hearing officer but does not additionally authorize a motion for rehearing with respect to a final order. Under Florida law, a motion for rehearing that is not authorized does not suspend rendition. *City of Palm Bay v. Palm Bay Greens, LLC,* 969 So. 2d 1187, 1190 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2897b].

Five, Petitioner argues that Respondent "has unclean hands" because the "method and manner of providing notice" of the final administrative order of driver's license suspension "divested" him of seven days in which to file his Petition. Petitioner urges that if his "Petition was not timely filed, it was due to a three day delay in mailing the order and a seven day delay in counsel receiving the order" and Respondent not participating in the e-service requirements set forth in Florida Rule of Judicial Administration 2.516.

Petitioner's fifth argument lacks merit. As explained, under *Penate,* Petitioner could have filed a "bare bones" petition, while "requesting an immediate extension of time" from the appellate court to file an amended petition. 967 So. 2d at 364. And whereas the complained-of delay in receiving the order in the instant case was seven days, in *Penate* the delay was 24 days. Further, the e-service requirements set forth in Florida Rule of Judicial Administration 2.516 pertain only to documents in a "court proceeding" according to Rule 2.516(a), and simply do not apply to an administrative proceeding such as the instant administrative driver's license suspension proceeding.

Sixth, and finally, Petitioner argues that as a matter of due process or "fundamental fairness," this Court should relinquish jurisdiction and remand to Respondent to vacate the February 1, 2019 final administrative order of driver's license suspension and enter a new order so that his Petition may be decided on the merits. Petitioner cites to Florida case law setting forth Florida public policy in favor of deciding cases on the merits, while conceding that the cited cases "address the filing of briefs, which is non-jurisdictional."

Petitioner's sixth argument also lacks merit. Petitioner concedes that the cases he cites for support merely "address the filing of briefs, which is non-jurisdictional." Again, under *Penate,* Petitioner could have filed a "bare bones" petition, while "requesting an immediate extension of time" from the appellate court to file an amended petition. 967 So. 2d at 364. There is simply no valid basis for relinquishing jurisdiction for entry of a new order when Petitioner had time to file a timely Petition.

In short, Petitioner has failed to show good cause why his Petition should not be dismissed for lack of jurisdiction as untimely. The final administrative order of driver's license suspension was rendered on February 1, 2019, and his motion for rehearing did not suspend rendition as it was unauthorized. *See* Fla. Admin. Code R. 15A-6.013. Since the instant Petition was not filed until March 7, 2019, it is untimely and this Court lacks jurisdiction to consider it on the merits. *See* Fla. R. App. P. 9.100(c)(1); *Penate,* 967 So. 2d at 364-65 (court lacked jurisdiction over petition for writ of certiorari filed more than 30 days from the date of rendition of order). Therefore, Court determines that the Petition must be dismissed.

Based on the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DISMISSED. The Clerk of the Court is directed to CLOSE this case forthwith. (HARRIS and WHITEHEAD, JJ., concur.)

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[1]Petitioner filed an Amended Petition on March 8, 2019. The Petition and Amended Petition were not brought to the Court's attention until September 12, 2019 because they had been inadvertently misfiled by the Clerk of the Court.

[2]Petitioner has not sought to challenge or otherwise take issue with Respondent's inclusion of his driving record as an exhibit to the Reply.

[3]Florida Rule of Appellate Procedure 9.420(e) provides that that the computation of time in appeals is governed by Florida Rule of Judicial Administration 2.514(b).

* * *

**Insurance—Automobile—Windshield repair—Appraisal— Appeals — Certiorari—Petition for writ of certiorari challenging trial court's order abating action for 120 days in order for parties to engage in appraisal process is denied—Added time and expense of engaging in perhaps unnecessary and inappropriate appraisal does not rise to level of irreparable harm that justifies certiorari review—Trial court's dismissal of count for declaratory relief does not result in irreparable harm where repair shop may yet prevail in some aspect of case that would render dismissal of action for declaratory relief moot**

AUTO GLASS AMERICA LLC, a/a/o Donald Grimme, Appellant, v. ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2017-CV-64-A-O. L.T. Case No. 2016-SC-5428-O. January 7, 2020. Appeal from the Order of Faye L. Allen, Orange County Judge. Counsel: Chad A. Barr and Heather M. Kolinsky, Law Office of Chad A. Barr, P.A., Altamonte Springs, for Appellant. Kyle Maxson and Benjamin S. Thomas, Martinez Denbo, LLC, St. Petersburg, for Appellee.

(Before ROCHE, SCHREIBER, BLECHMAN, JJ.)

(**PER CURIAM**.)[1] The Appellant, Auto Glass America, appeals from the trial court's "Order on Motion to Dismiss and/or Abate and Demand for Appraisal and Motion to Dismiss Count II" entered on April 27, 2017. This Court determines that it does not have jurisdiction to consider Appellant's claims as an appeal from a non-final order. *See Shell v. Foulkes,* 19 So. 3d 438 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2039a] (finding a lack of jurisdiction under the appellate rules and general law for circuit courts to review non-final orders). The order in question is clearly non-final because it does not dismiss the entire complaint and merely abates part of the action for a period of 120 days in order for the parties to engage in a contractual appraisal process. Further judicial labor is contemplated by the trial court's order. *See McGurn v. Scott,* 596 So. 2d 1042, 1043 (Fla. 1992).

However, this court may construe an improper appeal as a petition for writ of certiorari. Fla. R. App. P. 9.040(c). In order to grant certiorari to review an interlocutory order the Appellant must establish three elements: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the reminder of the case (3) that cannot be correct on post-judgment appeal." *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.,* 104 So. 3d 344, 351 (Fla. 2012) [37 Fla. L. Weekly S691a]. This analysis necessarily begins with the jurisdictional requirement that the last two elements (lasting material injury and lack of remedy via plenary appeal) are established. *Id.*

The primary harm suggested by Appellant is the added time and expense of engaging in what it views as an unnecessary and inappropriate appraisal. However, Florida law is clear that being required to "expend time and money on an unnecessary arbitration" does not rise to the level of irreparable harm to "justify certiorari review." *Zabawa v. Penna,* 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D886a]. *See also Mariner Health Care v. Griffith,* 898 So. 2d 982, 984 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D643a] ("[T]he inconvenience and expense of litigation after an allegedly incorrect interlocutory ruling does not constitute the kind of material harm or irreparable injury for which certiorari review is available"). The trial court's decision to abate the first count of the complaint and enforce the contractual appraisal provision does not result in irreparable harm for which plenary review is inadequate.

Accordingly, it is not necessary to determine whether the trial court's decision to require appraisal involved a departure from the essential requirements of the law, as any error would be properly reviewed on plenary appeal. Appellant's arguments regarding the trial court's decision to invoke the appraisal clause, not to hold an evidentiary hearing or allow limited discovery, and to reject the prohibitive costs argument are akin to allegations of departure from the essential requirements of law. Even if the trial court erred in these respects, the decision is properly considered on plenary appeal. *See Citizens Prop. Ins. Corp.,* 104 So. 3d at 351.

Appellant also challenges the trial court's dismissal of the second count of its complaint, requesting declaratory relief. As discussed above, the case is ongoing. Appellant may yet prevail in some aspect of the case rendering dismissal of the action for declaratory relief moot. Accordingly, the trial court's dismissal of the second count of the complaint does not result in irreparable harm for which plenary appeal is inadequate and substantive review of the trial court's decision is premature. *Id.*

We determine that this case involves no harm which could not be corrected in a post-judgment appeal. Accordingly, Appellant's construed petition for writ of certiorari is **DENIED**. Appellant's Motion for Award of Appellate Attorneys' Fees and Costs, filed January 29, 2018 is also **DENIED**. (SCHREIBER and BLECHMAN, JJ., concur.)

[1]We dispense with oral argument. Fla. R. App. P. 9.320.

* * *

**Mandamus—Prisoners—Discipline—Venue for petition for writ of mandamus compelling Department of Corrections to dismiss disciplinary report against prisoner properly lies in Leon County where department is headquartered**

MIRATEL CAPITAINE, Petitioner, v. MARK S. INCH, Secretary, Florida Department of Corrections, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-12721-O. January 21, 2020.

**ORDER TRANSFERRING PETITION FOR WRIT OF MANDAMUS TO SECOND JUDICIAL CIRCUIT COURT OF LEON COUNTY**

(TENNIS, J.) **THIS MATTER** came before the Court on the Petition of Writ of Mandamus, filed on October 16, 2019. Petitioner seeks to compel the Department of Corrections to dismiss a disciplinary report against him. Because the instant Petition challenges prison disciplinary action, venue properly lies in Leon County, where the Department of Corrections is headquartered, so transfer to the Second Judicial Circuit Court of Leon County is required under Florida law. *See Wromas v. Jones*, 201 So. 3d 648 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2419a] (transferring mandamus petition involving prison disciplinary action to Second Judicial Circuit Court of Leon County pursuant to Florida Rule of Appellate Procedure 9.040(b)(1)). *See also McNeil v. Bailey*, 50 So. 3d 109 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2884a] (venue proper in Leon County where Department of Corrections is headquartered with respect to mandamus petition involving prison disciplinary action).

Therefore, pursuant to Florida Rule of Appellate Procedure 9.040(b)(1), it is **ORDERED** and **ADJUDGED** that the Petition of Writ of Mandamus is **TRANSFERRED** to the Second Judicial Circuit Court of Leon County. The Clerk of Court shall **TRANSFER** this matter forthwith. (BLACKWELL and CALDERON, JJ., concur.)

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Appeals—Certiorari—Licensee waived claim that hearing officer departed from essential requirements of law where certiorari petition but did not provide any argument on that issue—Lawfulness of arrest—Competent, substantial evidence supported order upholding license suspension where, in addition to odor of alcohol on licensee's breath, there was evidence that licensee was speeding, had watery bloodshot eyes, and admitted to consuming alcohol**

UGISTE MAHARAJ, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Polk County. Case No. 2019CA-000547, Section 30. January 7,

2020. Counsel: James R. "Rusty" Franklin and John Liguori, Bartow, Co-Counsel for Petitioner. Mark L. Mason, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Tallahassee, for Respondent.

**ORDER DENYING PETITIONER'S *AMENDED PETITION FOR WRIT OF CERTIORARI***

(ELLEN S. MASTERS, Chief Judge.) This matter came before the Court on the Petitioner's *Amended Petition for Writ of Certiorari* (hereinafter "Amended Petition"), filed on February 13, 2019. Petitioner seeks review of the *Findings of Fact, Conclusions of Law and Decision* issued by The Florida Department of Highway Safety and Motor Vehicles (hereinafter "DHSMV") on January 11, 2019. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c).

I

On January 11, 2019, the DHSMV conducted a formal administrative review hearing on Petitioner's driver's license suspension. Eight exhibits were admitted into evidence by the DHSMV: 1) DDL-1 Notice of Suspension; 2) DDL-2 Petitioner's driver's license; 3) DDL-3 Florida Uniform Traffic Citation number 888UM9E; 4) DDL-4 Florida Highway Patrol Incident Report; 5) DDL-5 Florida Highway Patrol Arrest Report; DDL-6 Alcohol and Drug Influence Report; DDL-7 Breath Alcohol Test Affidavit; DDL-8 Affidavit of Refusal to Submit to a Breath Test. Trooper Alexandro Costales testified.

Based on a preponderance of the evidence, the DHSMV's hearing officer made the following findings of facts:

> On December 12, 2018, Trooper Costales of the Florida Highway Patrol observed a vehicle traveling at a high rate of speed and received a laser reading of 96 mph in a 70-mph zone.
>
> Upon making contact with the driver, who was identified as Ugiste Maharaj via his Florida Driver's License the trooper noticed bloodshot, watery eyes and he detected the distinct odor of an alcoholic beverage on his breath as he spoke. The petitioner admitted to consumption of alcoholic beverages to Trooper Costales.
>
> Due to problems with the petitioner's foot the trooper administered the Finger to Nose Test and the Modified Rhomberg Balance Test on which further clues of impairment were exhibited.
>
> The petitioner was transported to Polk County Jail and refused to submit to a breath test and was read Florida's Implied Consent Warning and again refused to submit to a breath test.

(Petr's Amd. App. A. 3.).

II

When reviewing an administrative proceeding on a petition for writ of certiorari, this Court must determine whether the hearing officer followed the essential requirements of the law, whether Petitioner was afforded due process, and whether the decision below is supported by competent substantial evidence. *See Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. "[T]he circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer's findings." *Department of Highway Safety and Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

III

Under the argument heading of the Petitioner's Amended Petition, Petitioner states that the hearing officer's order departed from the essential requirements of the law and was not supported by competent substantial evidence because the evidence did not establish probable cause for his arrest. However, nowhere in the "Argument" section does the Petitioner make any arguments with respect to whether the hearing officer followed the essential requirements of the law. Because the Petitioner did not present any argument on the issue of whether the hearing officer followed the essential requirements of the law, that issue has not been properly presented to the Court for review and is waived. *See Anheuser-Busch Companies, Inc. v. Staples,* 125 So. 3d 309, 310 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2125a]; *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.,* 972 So. 2d 275, 281 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D248a].

Accordingly, the only issue properly before the Court is whether the decision below is supported by competent substantial evidence. The Petitioner contends that the hearing officer's order is not supported by substantial, competent evidence because the evidence presented did not establish probable cause for his arrest.

The Petitioner relies on *State v. Brown,* 725 So. 2d 441 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a], and *State v. Kliphouse,* 771 So. 2d 16, 22-23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f], and essentially argues that that the hearing officer's decision was predicated on speeding, an admission of drinking alcohol prior to the traffic stop, and the odor of alcohol, which the Petitioner contends are insufficient indicators of impairment to establish probable cause for his arrest. However, unlike the instant case, both the *Brown* and the *Kliphouse* cases involved only one indicator or impairment, the odor of alcohol. *Kliphouse* further provides that "[w]hile the odor of alcohol on a driver's breath is considered a critical factor, other components central to developing probable cause may include 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." *Kliphouse,* 771 So. 2d at 22-23. *Kliphouse* does not state that all the components must be found, just that other components *may include* those listed. Furthermore, "probable cause exists 'where the facts and circumstances, as analyzed from the officer's knowledge and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Department of Highway Safety and Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citing Department of Highway Safety and Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]).

Here, the hearing officer was presented with evidence of other components in addition to the odor of alcohol. There was evidence that the Petitioner was traveling at a high rate of speed, going 96 mph in a 70-mph zone. Further, upon making contact with the Petitioner, the trooper noticed that the Petitioner had bloodshot, watery eyes, and the distinct odor of an alcoholic beverage on his breath as he spoke. Additionally, the Petitioner admitted to the trooper that he had consumed alcoholic beverages. All of these findings are supported by the record presented to the Court. Therefore, the hearing officer's order is supported by competent substantial evidence

Accordingly, based on the record before the Court, the Petitioner's *Amended Petition for Writ of Certiorari* (hereinafter "Amended Petition"), filed on February 13, 2019, is **DENIED**.

* * *

**Licensing—Driver's license —Suspension—Appeals— Certiorari—Where licensee did not file transcript of formal review hearing, and proposed statement of evidence was contradicted by Department of Highway Safety and Motor Vehicles, petition for writ of certiorari is dismissed**

CASSANDRA O. MASON, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Highlands County. Case No. 2019-CA-000313. January 10, 2020. Counsel: Mark L. Mason, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Tallahassee, for Respondent.

**ORDER OF DISMISSAL**

(ELLEN S. MASTERS, Chief Judge) This matter came before the Court on the Response to Order Directing Petitioner to Supplement the Record and Proposed Statement of the Evidence, both filed on

December 16, 2019. Petitioner filed an Amended Petition for Writ of Certiorari on July 31, 2019 seeking review of an administrative order suspending her license. After reviewing the Petition, Amended Petition, Response, Proposed Statement of the Evidence, court file, and applicable law, the Court finds as follows:

The Petition, as well as the Amended Petition, filed in this case was accompanied by an appendix containing several documents, but not a transcript of the administrative hearing held in this case. "Where a party is entitled as a matter of right to seek certiorari review in the Circuit Court from an administrative action, the Circuit Court must determine (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent and substantial evidence." *Dep't. of Hwy Safety and Motor Vehicles v. Favino,* 667 So.2d 305 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a].

On November 19, 2019, the Court directed Petitioner to provide a copy of the transcript of the administrative hearing. To date, Petitioner has not provided the Court with a copy of the transcript. Petitioner instead filed a Response to Order Directing Petitioner to Supplement the Record and a Proposed Statement of the Evidence on December 16, 2019. In her Response, Petitioner indicates she will not provide the transcript of the administrative hearing because she believes it is unnecessary. In her Proposed Statement of the Evidence, Petitioner indicates no continuances were offered to her by the hearing officer. However, this directly contradicts Respondent's assertion, therefore the Court cannot consider the Proposed Statement of the Evidence a settled and approved Statement of the Evidence. *See* Fla. R. App. P. 9.200(b). Accordingly, the Court is precluded from determining (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent and substantial evidence.

In accordance with *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979), it is **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari and subsequent pleadings are hereby **DISMISSED**. *See also Kass Shuler P.A. v. Barchard,* 120 So. 3d 165 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1807d]; *Smith v. Orhama, Inc.,* 907 So. 2d 594 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1748a]; *Myret, LLC v. Group LX, Inc.,* 245 So. 3d 1024 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1453b].

* * *

**Appeals—Law of case—Challenge to trial court's jurisdiction to require appellants to complete fact information sheets and to hold them in contempt for failing to do so is barred by law of case doctrine where jurisdictional issues were decided in prior appeal in same case—Appeal challenging trial court's jurisdiction to correct case style is also barred by law of case doctrine—Moreover, order correcting style is not appealable order**

FRANK A. McCLUNG, JR. and MARIAN E. TELLMAN McCLUNG, Appellant, v. ELIA E. ESTEVEZ, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case Nos. 2014-275-AP-01, 2014-276-AP-01. L.T. Case No. 2011-026200-CC-23. February 12, 2020. An Appeal from the County Court for Miami-Dade County, Caryn C. Schwartz, Judge. Counsel: Frank A. McClung Jr. and Marian E. Tellman-McClung, pro se. Andrew P. Kawel, for Appellee.

[Rehearing Denied 3-3-20]

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

(WALSH, J.) This appeal stems from a 2011 eviction of the defendants-appellants Frank A. McClung, Jr. and Marian E. Tellman-McClung. On July 24, 2012, the trial court entered a final judgment against defendant-appellant "Frank McClung and all others in possession of the subject property and/or unit" in case no. 2011-026200-CC-23. The appellate court affirmed, per curium and without written opinion in case number 2012-81-AP-01 on September 10, 2012. The McClungs then filed a Petition for Writ of Certiorari in the Third District Court of Appeal. The Petition was denied on October 1, 2012. *McClung v. Estevez,* 101 So. 3d 848 (Fla. 3d DCA 2012) [unpublished].

On October 17, 2013, the trial judge entered a final judgment for attorney's fees against both defendants. Appellants appealed the final judgment taxing attorney's fees in case number 2013-394-AP-01, and on May 1, 2019, another panel of this court affirmed the judgment for attorney's fees. Following this appeal, the McClungs filed three more unsuccessful appeals from post-judgment orders, in 2014-394-AP-01, 2014-122-AP-01, and 2014-155-AP-01.

**Current Consolidated Cases on Appeal**

In case number 2014-275-AP-01, the McClungs challenge a June 18, 2014 order holding them in contempt for failure to complete a fact information sheet. In 2014-276-AP-01, they appealed separately from the trial court's order correcting the style of the lower court case.

In 2014-275-AP-01, the order on appeal states, in part, "Frank McClung is held to be in contempt of court for willfully violating this court's several orders that he serve fact information sheets. Marian Tellman-McClung who appeared throughout the case as defendant, and who acknowledged personal service in her answer filed on December 27, 2011, is also held to be in contempt of court for willfully violating this court's several orders that she serve fact information sheets."

The McClungs argue that the trial court lacks subject matter jurisdiction, that jurisdiction never vested in the trial court, that whatever jurisdiction existed was suspended and remains dormant, and further claim lack of *in personam* jurisdiction. From these arguments, they posit that their non-compliance with an order issued without jurisdiction is not contempt of court. These arguments are duplicative of arguments made in at least one prior appeal. In case number 2013-000394-AP-01, the appeal from the final judgment taxing attorney's fees, Appellants specifically raised the same lack of jurisdiction claims they raise now in 2014-275-AP-01—that the trial court was without jurisdiction in various ways in order to enter the attorney's fees award.

The issues raised by the appellants in case number 2014-275-AP-01 are barred by the law of the case doctrine. The doctrine of the law of the case (also known as judicial estoppel) bars questions of law already determined in the same case with the same parties in the same court. *See Greene v. Massey,* 384 So. 2d 24, 28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case."). Appellants cannot challenge the lower court's jurisdiction after they have unsuccessfully made the same arguments in a prior appeal. *See also Brunner Enterprises, Inc. v. Dept. of Revenue,* 452 So. 2d 550 (Fla. 1984); *State, Dept. of Revenue v. Bridger,* 935 So. 2d 536 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1573a]; *Thornton v. State,* 963 So. 2d 804 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1821c]; *Dade County Classroom Teachers' Ass'n v. Rubin,* 238 So. 2d 284, 289 (Fla. 1970).

In case number 2014-276-AP-01, Appellants challenge a post-judgment order correcting the style of the case. Appellants argue that the order correcting style was a nullity, and that the trial court was without jurisdiction to amend a final judgment. Again, all arguments challenging the trial court's jurisdiction are barred by the law of the case doctrine. Moreover, this order is not appealable. *See Polo v. Polo,* 643 So. 2d 55, 56 (Fla. 3d DCA 1994); *RD & G Leasing, Inc. v. Stebnicki,* 626 So. 2d 1002, 1003 (Fla. 3d DCA 1993). Appeal of

nonfinal orders to the circuit court is governed by general law and no general law authorizes an appeal from an order amending the style of a case. See Art. V, § 5(b), Fla. Const.; *Blore v. Fierro,* 636 So. 2d 1329 (Fla. 1994). Nor could such an order merit certiorari relief where the aggrieved party, Mrs. McClung, has answered and participated in her eviction case from its inception.

AFFIRMED as to 2014-275-AP-01. DISMISSED as to 2014-276-AP-01. (TRAWICK and REBULL, JJ., concur.)

* * *

**Criminal law—Speedy trial—Trial court erred in discharging defendant and dismissing case based on a state-charged continuance setting trial date outside speedy trial period—Defense-requested continuance based on alleged discovery violations by state should not have been charged to state where there were, in fact, no discovery violations warranting the continuance—Neither failure to turn over to defense unrecorded oral statement of victim nor failure to turn over sooner a photograph that victim gave to prosecutor on day before trial was discovery violation**

STATE OF FLORIDA, Appellant, v. ZONIA ALVELO, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-392-AC-01. L.T. Case No. A371 DGP. February 12, 2020. An Appeal from the County Court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Samuel Slom, Judge. Counsel: Wesley W.E. Stafford, Assistant State Attorney, for Appellant. Stephen J. Weinbaum, Assistant Public Defender, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) We reverse the order and judgment of dismissal (both signed 12/17/18) granting the defendant's motion for final discharge based on an alleged violation of Florida Rule of Criminal Procedure 3.191, regarding Speedy Trial.

The State's failure to turn over the unrecorded oral statement allegedly made by Mathias Quiroga (that Ms. Alvelo drove her car into his car), is not a discovery violation. *See State v. McFadden,* 50 So. 3d 1131 (Fla. 2010) [35 Fla. L. Weekly S556a]. In *McFadden,* the Florida Supreme Court holds that "on its face," the discovery rule of the Florida Rules of Criminal Procedure, 3.220, does not include an obligation to turn over unrecorded oral statements. *See id.* at 1133.

Nor was it a discovery violation for the State to fail to turn over sooner to the defense a photograph given to the prosecutor by Mr. Quiroga (a private party) the day before trial was set to start. *See generally* 15 Fla. Jur 2d *Criminal Law—Procedure* § 1542 (2019).

> The State is charged with constructive knowledge of evidence and information held by other departments of the executive branch of Florida's government, including the police and law enforcement officers, and the Department of Children and Families. An assistant state attorney is charged with knowledge of information held by other lawyers and agents working in the state attorney's office.
>
> The agency's "knowledge" is imputed to the state attorney for purposes of the State's duty to disclose. The State is charged with constructive knowledge of information in the hands of law enforcement officers, thus, the knowledge of law enforcement officers is imputed to the prosecutor, for purposes of the rule requiring the disclosure of persons known to the prosecutor to have information relevant to the offense charged. Accordingly, the mere fact that the prosecution has no actual knowledge of the existence of a tape does not relieve the State of its obligation to properly respond to the defendant's discovery request.
>
> ***However, none of the Florida Rules of Criminal Procedure dealing with discovery require the State to disclose information that is not within the State's actual or constructive possession. Thus, the State is not required to produce investigative files where the files are not in the State's possession or control. It is also unlikely that the State would be deemed to have constructive possession of information held by a private party regardless of whether the State had actual knowledge of its existence.***

15 Fla. Jur 2d *Criminal Law—Procedure* § 1542 (2019) (emphasis added) (footnotes omitted); *see also Barron v. State,* 990 So. 2d 1098 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2002a] (holding that federal DEA files were not in the possession, custody, or control of the State).

Because there were no discovery violations, there was no basis for a state-charged continuance setting the trial date outside of the speedy trial time period. *See generally State v. Naveira,* 873 So. 2d 300 (Fla. 2004) [29 Fla. L. Weekly S169a] (holding that a defense continuance request should not have been charged to the State where the information and discovery are filed and turned over on the last day of the speedy trial period). As a result, the lower court should not have discharged the defendant and dismissed the case for violation of Rule 3.191.

We reverse the judgment of dismissal and remand for further proceedings consistent with this opinion. (TRAWICK AND WALSH, JJ., concur)

* * *

**Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Summary judgment—Opposing affidavits filed by insurer precluded summary judgment in favor of medical provider on issue of reasonableness of charges where affidavits created genuine issue of material fact**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. AMERICAN MOBILE HEALTH SERVICE, INC. a/a/o Raysa Diaz, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-179-AP-01. L.T. Case No. 2012-3067-SP-26. February 14, 2020. An Appeal from the County Court in and for Miami-Dade County, Hon. Lawrence D. King, County Court Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, LLC, for Appellant. David B. Pakula, Corredor, Husseini & Snedaker, P.A., for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(PER CURIAM.) In this case, the trial court entered final judgment awarding personal injury protection (PIP) benefits to Appellee. Judgment was entered after the trial court granted Appellee's motion for summary judgment on the issues of relatedness, medical necessity and reasonableness of the Appellee provider's x-rays and charges. We find that the expert's affidavit provided by Appellant was sufficient to create a genuine issue of material fact which required the denial of Appellee's motion for summary judgment. We must therefore respectfully reverse the decision of the trial court.

Raysa Diaz, the insured, was involved in a parking lot automobile accident. Over a month later Appellee, the provider, took physician ordered x-rays of Diaz of the cervical, thoracic and lumbar spine, and the left shoulder. Appellee accepted the assignment of benefits from Diaz and submitted bills to Diaz' insurer, Appellant State Farm Mutual Automobile Insurance Company (State Farm). State Farm paid the claim at reduced reimbursement levels. Appellee disputed this reduction and brought this action.

Appellee filed a motion for final summary judgment on the reasonableness of its charges.[1] In support of its motion Appellee presented two affidavits:

> 1) the affidavit of William Ferreira, the provider's owner and administer. He stated that he had reviewed hundreds of PIP Explanations of Benefits (EOBs) and was familiar with reasonable reimbursements. He also reviewed charges of other providers for the same services and indicated that the provider's charges were billed at a lower rate. He concluded that the charges at issue were usual and customary in the community and were reasonable.
>
> 2) the affidavit of Dr. Kevin J. Wood, D.C., the owner of a chiropractic facility. Dr. Wood discussed his experience as a chiropractic physician and manager of various facilities throughout the State of Florida, including one where he was the facility owner; as

a medical director of a health care facility; and as a peer review physician with an extensive background in the review of medical billing. His experience was primarily in South Florida. Based on this experience, he also concluded that Appellee's charges were usual and customary in the community and were reasonable.

In response to the motion for summary judgment, Appellant presented several documents, including

1) the affidavit of Missy Stover, a claims representative for State Farm who was assigned to the provider's claim file and who said that State Farm had considered the Medicare Part B fee schedule in determining the reasonableness of the provider's fees for x-rays;

2) the deposition of Dr. Wood, who said that if he suspected bone fractures or dislocations, he would not "touch a person" before obtaining x-ray results; and

3) The affidavit of Dr. Michael W. Mathesie, D.C. He stated that he had been a board-certified practicing chiropractic physician for twenty-seven years. He proffered that he was a forensic expert, a State of Florida Department of Health (DOH) expert witness consultant, a DOH regulatory board member and a consumer advocate ombudsman. He reviewed thousands of medical bills and EOBs from multiple insurance companies. He also indicated that he had reviewed forms, bills and medical records of providers from all over the State of Florida. Based upon this experience, he stated that he was aware of medical billing and coding practices for the billing codes at issue in this case for providers throughout not only Miami-Dade, Broward and Palm Beach counties, but the entire State. He also said that he was aware of the reimbursement levels and payments accepted in South Florida by managed care payers, Health Maintenance Organizations (HMOs), Preferred Provider Organizations (PPOs), private health insurance coverage, PIP carriers, and self-paying patients. He also indicated familiarity with various state and federal fee schedules. Based on this experience, he stated that Appellant's reimbursement was at the "highest end range of reimbursement rates for all other insurance coverage," and opined that the total charges of the provider here were unreasonable, while the amount approved and paid by Appellant were reasonable.

The standard of review applicable to summary judgment is *de novo,* and requires the appellate court to view the evidence in a 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. Southern 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]; *United Automobile Ins. Co. v. Miami-Dade County MRI, Corp. a/a/o Beisy Munoz* 2017-170-AP-01 (Fla. 11th Cir. Ct. Dec. 31, 2019). 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].

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

With 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.

Here, the trial court considered the affidavits in support of the motion provided by Ferreira and Dr. Wood. The court apparently found that they were sufficient to establish that the provider's charges were reasonable.[2] The court likewise had before it the affidavits of Dr. Mathesie and Stover, along with deposition excerpts of Dr. Wood in opposition to the motion. In the absence of findings, it is unclear why the trial court found that these documents, and in particular the affidavit of Dr. Mathesie, were insufficient to establish a genuine issue of material fact on the reasonableness of the provider's charges.[3]

As our review is *de novo,* we have reviewed Dr. Mathesie's affidavit in conjunction with the other documents presented in opposition to the summary judgment motion in a light most favorable to the Appellant. Several of the most compelling aspects of Dr. Mathesie's affidavit are detailed above. We find that "at the very least [these documents were] 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." *United Automobile Ins. Co. v. Miami-Dade County MRI, Corp. a/a/o Beisy Munoz* 2017-170-AP-01 (Fla. 11th Cir. Ct. Dec. 31, 2019), citing *Ortega v. Citizens Property Ins. Corp.,* 257 So.3d 1171, 1172 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2427b]. Thus, the trial court should not have granted the Appellee's motion for summary judgment.

Reversed and remanded for proceedings consistent with this opinion. (TRAWICK, WALSH and REBULL, JJ., concur.)

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[1]Appellee's motion also asked the court to grant summary judgment on the issues of relatedness and medical necessity. The court granted the motion. However, Appellee has now confessed error as to these issues.

[2] The trial court's order contains no findings, but simply grants the motion for summary judgment.

[3]The trial court did not hold *a Daubert* hearing and thus made no findings as to whether any of the experts were qualified to render the opinions expressed in their affidavits. While Appellee's answer brief argues that under *Daubert* the trial court acted within its discretion in determining that Dr. Mathesie's affidavit was inadmissible, in the absence of *a Daubert* hearing or any specific findings by the court, Appellee's argument is not supported by the record. Thus, we will not consider any *Daubert* issue here despite "a great temptation in cases like this one to provide precedent where precedent is needed," *Clark v. State,* 170 So.3d 69, 71 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1289b].

* * *

**Appeals—Non-final orders—No statute authorizes appeal of order vacating default summary judgment and staying garnishment proceedings—Order is not reviewable by certiorari where there was no error for which appellant cannot seek plenary appeal if final judgment is entered against her**

DANILO VERA-GONZALEZ AND DAISY GONZALEZ, Appellants, v. DELUXE MOTORS USA, LLC, STEPHANIE GUEVARA, DELUXE MOTORS, INC. and RIGOBERTO GUEVARA, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-203-AP-01. L.T. Case No. 2014-015525-CC (23). February 12, 2020. An Appeal from County Court in and for Miami-Dade County, Florida, Martin Shapiro, Judge. Counsel: Damilo S. Vera-Gonzalez and Daisy Gonzalez, in proper person, Appellants. Bernard I. Probst, and Melissa V. Jordan, Walton Lantaff Schroeder & Carson LLP, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

**ORDER OF DISMISSAL**

(PER CURIAM.) This is an appeal from an order setting aside a final summary judgment. Finding we have no jurisdiction; we dismiss this appeal.

In the underlying lawsuit, the Appellants sued Deluxe Motors, USA, LLC and Deluxe Motors, Inc., Rigoberto Guevara, and his daughter, Stephanie Guevara, for their refusal to return the Appellants' deposit toward purchase of a used vehicle. While the Appellants never filed any proof of service upon Ms. Guevara, Ms. Guevara filed a motion to dismiss responding to the allegations in the complaint. The Appellants filed and set a hearing for final summary judgment, and Ms. Guevara did not appear. The trial court entered final summary judgment against all defendants, including Ms. Guevara.

Ms. Guevara filed a motion to set aside judgment, claiming lack of proper service of process and lack of notice of the hearing where judgment was entered. After an evidentiary hearing, the trial court granted the motion and vacated Ms. Guevara's judgment. The trial court heard and denied the Appellants' motion to reconsider. Neither order makes any findings, nor did the trial judge quash service upon Ms. Guevara. Ms. Guevara failed to supplement this record with a transcript of proceedings for either hearing, and it is unclear whether the judgment was vacated for lack of service of process or lack of notice of the summary judgment hearing.[1]

On appeal, the Appellants insist that Ms. Guevara was properly served and if not, that in answering the complaint in her motion to dismiss, Ms. Guevara waived service. In turn, Ms. Guevara argues that the Complaint names her in her individual capacity, that she was never properly served, that the only proof of service in the file was upon the corporate entities, and that she was noticed for the summary judgment hearing at a nonexistent address.

Although not raised by the parties, "[a]n appellate court has an independent duty to determine whether it has appellate jurisdiction and is not bound by the trial court's caption or the parties' characterization of an order." *Medeiros v. Firth,* 200 So. 3d 121 (Fla. 5th DCA 2015) [41 Fla. L. Weekly D765a], *citing Almacenes El Globo De Quito, S.A. v. Dalbeta L.C.,* 181 So. 3d 559, 560 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2785b].

Because the order on appeal is neither an appealable non-final order nor a final order, this appeal must be dismissed. Jurisdiction to hear nonfinal appeals is governed by Rule 9.130 in the district courts of appeal. *See* Art. V, § 4(b)(1), Fla. Const.; Rule 9.130(a)(1), Fla. R. App. P. However, jurisdiction to hear appeals from nonfinal orders in the circuit courts is governed by general law. *See* Art. V, § 5, Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law"); *Blore v. Fierro,* 636 So. 2d 1329 (Fla. 1994) ("The authority for appeals to the circuit court is established solely by general law as enacted by the legislature").

Here, no statute authorizes an appeal from an order vacating summary judgment and staying garnishment proceedings, and therefore, this appeal must be dismissed until such time as the lower court enters an appealable final order. *See* Padovano, P., *Florida Appellate Practice* § 5:3 (2019 ed.); *911 Dry Solutions, Inc. v. Florida Family Insurance Company,* 259 So. 3d 167, 169 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1929a] (where Legislature has not enacted law authorizing appeal from order compelling appraisal, appeal from county court to circuit court was properly dismissed); *Shell v. Foulkes,* 19 So. 3d 438, 440 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2039a] (Appeal of county court order of default in eviction action properly dismissed); *State v. Sowers,* 763 So. 2d 394 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1264b] (no circuit court jurisdiction to hear appeal of order in limine).

Nor is appeal of the trial court's order authorized by Section 59.04, Florida Statutes. This statute permits an appeal from an order granting a new trial:

> Upon the entry of an order granting a new trial, the party aggrieved may prosecute an appeal to the proper appellate court without waiting for final judgment. If the judgment is reversed, the appellate court may direct that final judgment be entered in the trial court for the party obtaining the verdict unless a motion in arrest of judgment or for a judgment notwithstanding the verdict be made and prevail.

The order below set aside a final summary judgment; it did not grant a "new" trial nor is there a "verdict" to reinstate. Section 59.04 by its plain language governs appeals of orders which set aside a "verdict" entered following a trial on the matter. Here, summary judgment was entered following a failure of the defendants to appear; in effect, it was a default summary judgment. No statute authorizes a circuit court appeal from an order setting a summary judgment aside. *See, contra, Housing Authority of City of Tampa v. Burton,* 874 So. 2d 6 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1142a] (Section 59.04 authorizes appeal from order setting aside jury verdict and granting a new trial).

Nor is the trial court's order a final order or judgment, which would be appealable under section 59.06, Florida Statutes. "Florida's test of finality for appellate purposes is well established: the order constitutes the end of judicial labor in the trial court, and nothing further remains to be done to terminate the dispute between the parties." *Bloomgarden v. Mandel,* 154 So. 3d 451, 454 (Fla. 3d DCA 2014) [40 Fla. L. Weekly D95a], *citing Miami-Dade Water and Sewer Auth. v. Metro. Dade County,* 469 So. 2d 813, 814 (Fla. 3d DCA 1985). Clearly, judicial labor is not at an end—the judgment below was vacated and the case remains pending. And again, Rules 9.110 and 9.130(a)(4) do not establish the jurisdiction of this Court to hear such an appeal—only the Florida Statutes may authorize circuit court appellate jurisdiction.

Nor is the trial court's order reviewable by certiorari, because there was no departure from the essential requirements of law resulting in irreparable harm. *See Pannell v. Triangle/Oaks Ltd. Partnership,* 783 So. 2d 325 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D989a]; *citing Rodriguez v. Young America Corp.*, 717 So. 2d 621 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2196b] (citing numerous cases). The trial court's order vacated the judgment against Ms. Guevara and the case remains pending. There was no error for which Ms. Guevara cannot seek plenary appeal if and when a final judgment is secured against her.

We therefore dismiss this appeal because an order which sets aside a default summary judgment is not an appealable order.

Finally, even if we had jurisdiction, we would find no error in the trial court's order setting aside this final summary judgment.[2]

Appeal DISMISSED. (TRAWICK, WALSH and REBULL, JJ., concur.)

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[1]However, it appears that Ms. Guevara waived defects in service of process because she answered every allegation in the complaint.

[2]We note that the Plaintiffs, in obtaining their summary judgment, sent several pleadings to Ms. Guevara at a nonexistent address. The trial judge relied on that same nonexistent address provided by the plaintiffs in serving its orders. Moreover, the trial court's unelaborated order vacating the summary judgment was entered after an evidentiary hearing for which no transcript has been provided to this Court.

* * *

**Criminal law—Appeals—*Anders* appeal**

LUTHER WHITE, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000177-AC-01 L.T. Case No. AAX8X3E. February 6, 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: Luther White, in proper person, Appellant. Christine Zahralban, Assistant State Attorney, for

Appellee.

(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 Luther White. The Court provided Mr. White 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. White 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 June 10, 2019 judgment for driving in this state without a valid driver license issued under Chapter 322 of the Florida Statutes, in violation of subsection 322.03(1). The trial court withheld adjudication.

Affirmed.

* * *

**Counties—Employees—Discipline—Mayor did not depart from essential requirements of law in rejecting hearing examiner's recommendation that ten-day suspension be rescinded, which was based on hearing officer's conclusion that train operator should be excused for negligence that led to train derailment because of confusion and lack of operator training attributable to transportation department—Questions of whether operator was negligent in failing to verify track alignment and whether that failure was fault of transportation department are ultimate facts that are matter of opinion infused with policy considerations for which county and department have special responsibility—Further, mayor's decision to sustain department's ten-day suspension of operator complied with county code, which authorizes employee suspension for any cause which will promote the efficiency of the service and puts no constraints on mayor's authority to sustain discipline after receipt of hearing examiner's record**

ROBENSON ANTOINE, Appellant, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000020-AP-01. L.T. Case No. 01-18-0002-5975. January 29, 2020. A Petition for Writ of Certiorari to review Miami-Dade County Mayor's Final Decision Sustaining a 10-Day Disciplinary Suspension. Counsel: Osnat K. Rind, Phillips, Richard & Rind, P.A., for Appellant. Marlon D. Moffett, Miami-Dade County Attorney's Office, for Appellee.

(Before DARYL TRAWICK, LISA WALSH and THOMAS REBULL, JJ.)

(THOMAS REBULL, J.) Mr. Antoine's petition for writ of certiorari seeks to quash the Miami-Dade County Mayor's decision to reject a hearing examiner's recommendation that his ten day suspension from employment be rescinded; thereby sustaining the suspension imposed by the Miami-Dade County Department of Transportation and Public Works. We deny the petition, because we find that the County Mayor's decision is not a departure from the essential requirements of the law, and is supported by competent substantial evidence.

On October 4, 2017, Robenson Antoine was a train operator employed by the Miami-Dade County Department of Transportation and Public Works. That day, he operated a rail train that derailed. The Department imposed a ten day suspension on Mr. Antoine under Article II, Section 2-47 of the County Code of Ordinances. The relevant portion of that provision provides:

> ***Any employee may be suspended*** or reduced in grade or dismissed by the head of his department or designee thereof as approved in the manner provided for in an administrative order ***for any cause which will promote the efficiency of the service***.
>
> * * *
>
> Any employee who has completed the probationary period may appeal the action to a hearing examiner . . . .
>
> * * *
>
> The hearing examiner shall conduct a hearing after notice upon the charges and shall transmit his findings of facts, conclusions, and any recommendations together with a transcript of all evidence taken before him and all exhibits received by him, ***to the Manager***[1] ***who may sustain, reverse or modify the suspension, reduction in grade, or the dismissal.***

(emphasis added).

The facts section of the Department's Disciplinary Action Report provided as follows:

> On Wednesday October 4, 2017, at approximately 1:29 pm. Train Operator Robenson Antoine was operating rail cars 189-191 a four car train which was out of service, traveling to yard limits. Operator Antoine was given permission from the Rail Traffic Controller at Central Control to pass Signal OKE #18 on a red signal ***after verifying*** the switch positions for proper alignment for a route from Track#2 to Palmetto Yard Limits. Operator Antoine repeated instructions and proceeded to Yard Limits, white traveling over Switch #9 the front truck of rail car #189 derailed Causing damages to the power rail and the current collector on the front truck of rail car #189.
>
> Train Operator Robenson Antoine ***failed to verify*** proper track alignments after he was given permission to pass OKE Signal#18 on a red signal causing damages and passenger service delays. Train Operator Antoine actions violates Miami Dade County Personnel Rules and Miami-Dade Transit Working Procedures.

(emphasis added). As a result, the Department suspended Mr. Antoine for 10 days. Under section 2-47 he appealed the Department's action to a hearing examiner.

The hearing examiner held an appeal hearing on October 30, 2018. Unfortunately, the hearing examiner's Recommendation didn't have anything called "findings of fact." It has an "Introduction," an "Analysis," a "Conclusion," and a "Recommendation." The Introduction is essentially a recitation of the procedural history of the case and the allegations of the Disciplinary Action Report. The Analysis is a summary of the testimony and the parties competing contentions. The Recommendation rescinds the ten day suspension. The hearing examiner's Conclusion provides as follows:

> 1. Central Control knew of existing problems in the area and yet allowed an operator to proceed on his own, through red signals, without first determining and fixing the cause of the track "being out of correspondence."
>
> 2. The pictures of track configurations submitted by the County were not taken just before the incident in question.
>
> 3. The evidence supported ***the claimant's confusion*** [sic] contributed by the nature of Central Control's communication and his experience is [sic] dealing with the normal switches, signs, and signals.
>
> 4. The evidence depicted the complexity in determining the correct alignment of the peculiar movable frog switch.
>
> 4[sic]. Although the claimant's seniority is 19 years with the County, without any disciplinary action, he was a Train Operator for only one year. Testimony from Supv. Salvarrey supported the fact that the claimant was not sufficiently trained and knowledgeable with the frog switch situation.

(emphasis added).

The Mayor rejected the hearing examiner's recommendation, and

sustained the ten day disciplinary suspension imposed by the Department. The Mayor's January 15, 2019 final decision provides in pertinent part:

> I have reviewed the findings, recommendation, and the entire record from the appeal hearing of the Hearing Examiner in the matter of your ten (10) day suspension that was imposed by the Department of Transportation and Public Works (DTPW).
>
> I accept the Hearing Examiner's findings in this case; however, I cannot agree with his conclusion or recommendation. The Hearing Examiner acknowledged the undisputed facts that you were operating a rail train that derailed. ***The Hearing Examiner found that there was evidence that you were confused in determining the correct alignment of the switching mechanism at Switch #9.*** I accept the Hearing Examiner's findings and the undisputed facts that you were operating a train that derailed because of Switch #9. ***I do not accept the Hearing Examiner's conclusion and recommendation that you should be excused from operating a train that derailed because of an asserted lack of training, communications with Central Control or any other excuses. A fundamental responsibility of a train operator is to operate the train safely and keep the train on track so that it does not derail. I do not accept these excuses for your failure to keep the train you were operating on track.*** Your failure to keep the train you were operating on track violated the rules with which you were charged, including your failure to maintain a constant lookout for unsafe conditions, and your failure to take the safest course of action when confronted with uncertain situations. Therefore, I reject the recommendation of the Hearing Examiner and hereby sustain the 10-day disciplinary suspension imposed by the Department on March 28, 2018.

(emphasis added).

Mr. Antoine now petitions this court for a writ of certiorari to quash the Mayor's decision to reject the hearing examiner's recommendation that his ten day suspension be rescinded.

I.

Mr. Antoine argues that the Mayor's decision is a departure from the essential requirements of law. He argues that our standard of review is the familiar inquiry as to whether the lower tribunal (1) afforded due process; (2) departed from the essential requirements of the law; and (3) issued a decision supported by competent substantial evidence. The key to his argument, however, is as follows as set forth in his petition:

> In considering the case, the relevant inquiry is whether the **Hearing Examiner's** determinations are supported by competent substantial evidence, not whether the **Mayor's** decision is supported by competent substantial evidence. While the Mayor may disagree with the Hearing Examiner's conclusions, he is nevertheless bound by them if competent substantial evidence exists in the record to support them.

(Pet. for Writ of Cert. at 4).

In *Raghunandan v. Miami-Dade County*, 777 So. 2d 1009 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D22c], the court approved the County Manager's rejection of the hearing examiner's ***conclusion*** that the employee was not incompetent or inefficient. In so doing, the Third District embraced the analysis of the Fourth District Court of Appeal in *Schrimsher v. School Board of Palm Beach County,* 694 So.2d 856 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1372e]. As described by the *Raghunandan* Court, in *Schrimsher*:

> [T]he School Board properly rejected the hearing officer's ***interpretation of facts*** regarding Schrimsher's behavior and actions, concluding that the issue of whether his actions constituted misconduct or incompetence sufficient to warrant discharge was ***a matter of opinion*** infused by policy considerations for which the agency has special responsibility.

*Raghunandan v. Miami-Dade County*, 777 So. 2d 1009, 1010 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D22c].

In this case, the Department contended that Mr. Antoine was negligent in "not verifying that his track was not clear to proceed." (Hrg. Examiner Recommendation at 2). Mr. Antoine contended that the County did not properly and sufficiently train him to determine proper track alignment. The hearing examiner concluded that Mr. Antoine's "confusion" was "contributed by" Central Control's communications and his lack of experience and training with this switch.

In sum, the hearing examiner couldn't help but conclude that Mr. Antoine was "confused" when he failed to visually verify proper track alignment; but the examiner excused that confusion—and ultimately the conclusion that Mr. Antoine was negligent—by blaming it on the Department's lack of training and Central Control's communication. Under *Raghunandan* and *Schrimsher,* the Mayor was free to disregard the hearing examiner's conclusion that Mr. Antoine was not negligent or, alternatively, that his negligence was the fault of the Department. *See also Miami-Dade County v. Jones,* 778 So. 2d 409 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D333c] (reversing circuit appellate division and concluding Public Health Trust President had discretion to ignore mitigating factors and reject excuses for misconduct).

In *Raghunandan,* the hearing examiner found that the section which the employee supervised was "out of control," but nevertheless concluded that the County hadn't proved that he was "incompetent" or "inefficient." The Manager rejected those ***conclusions***, and imposed disciplinary sanctions. This Court affirmed that determination. On second tier certiorari, the Third District Court of Appeal denied the petition, based on the same analysis in *Schrimsher.*

The *Schrimsher* Court, citing an earlier decision, recognized the "conundrum" faced by reviewing courts "in attempting to give deference to ***agency findings of fact*** supported by competent substantial evidence yet, at the same time, ascertain whether the agency accorded the same respect to the ***hearing officer's findings***." *Schrimsher v. Sch. Bd. of Palm Beach County,* 694 So. 2d 856, 861 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1372e]. In resolving this issue, the Court relied on, and quoted extensively from, a First District Court of Appeal opinion, *McDonald v. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977).

> ***[C]ourts . . . must review the entire record, including the hearing officer's findings*** . . . .
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> * * *
>
> The weight which should be given to the hearing officer's findings, as opposed to the agency's substituted findings, will depend greatly upon the nature of the hearing officer's inquiry and the bases for his findings of fact.
>
> * * *
>
> In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings ***when the question is simply the weight or credibility of testimony by witnesses,*** or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight. . . .
>
> At the other end of the scale, ***where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility,*** a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings. . . .
>
> Thus, the substantiality of evidence supporting an agency's substituted finding of fact depends on a number of variables: how susceptible is the factual issue to resolution by credible witnesses and other

evidence, how substantially the hearing officer's discarded findings are supported by such evidence, how far the factual issue tends to be one of opinion, how completely agency policy occupies a field otherwise open to different opinion.

*Schrimsher v. Sch. Bd. of Palm Beach County,* 694 So. 2d 856, 862 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1372e] (emphasis added).

In this case, the hearing examiner didn't expressly make "findings of fact." In his "Conclusion," he noted the complexity in determining proper track alignment for the "frog switch" at issue. He also noted that Mr. Antoine was not sufficiently trained and knowledgeable with the "frog switch situation." And, as set forth above, he concluded that Mr. Antoine's "confusion" was contributed by the Department's failures.

Whether Mr. Antoine was negligent in failing to verify track alignment, and whether that failure was the fault of the Department, are plainly "ultimate facts" which are "matters of opinion" that are "infused by policy considerations for which the Department and the County have special responsibility." In reviewing the entire record of the proceedings, including the examiner's findings, we conclude that Mayor's decision is supported by competent substantial evidence. In his closing argument before the hearing examiner, Mr. Antoine's representative described the evidence as follows:

MR. WRIGHT: ***Well, it is obvious that the switch was misaligned and what Mr. Antoine didn't do, did not do in this case was to read the switch.*** However, that being said, also, this case was just about training.

(Tr. of Hr'g of 10/30/18 at 171) (emphasis added).

Plainly, the hearing examiner's "conclusions" in this case were really matters of opinion. They were not classic findings of fact which depended on the weight or credibility of witness testimony, such as eyewitness identification or "who-said-what-to-whom." Under *Raghunandan, Schrimsher,* and *McDonald,* we find that the Mayor's decision properly rejected the examiner's "interpretation of facts," and is supported by competent substantial evidence, and conforms to the essential requirements of the law. As a result, we deny the Petition.

II.

Even if the Mayor's rationale is incorrect, it will be allowed to stand if there is any basis in the record to support his decision to sustain the ten day suspension.

It is elementary that the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor. . . . Stated another way, 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.

*Dade County Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644 (Fla. 1999) [24 Fla. L. Weekly S71a] (internal quotations and citations omitted).

In this case, the Mayor's decision to sustain the suspension complies with the plain language of Article 11, Section 2-47 of the County Code. As highlighted and excerpted above, a County employee may be suspended for "any cause which will promote the efficiency of the service." There's plenty of evidence in the record to support the determination that the County's suspension of Mr. Antoine was for a cause which will promote the efficiency of the train service.

Moreover, the plain language of section 2-47 places no constraints on the Mayor—after having received everything from the hearing examiner—"who may sustain . . . the dismissal." The actions by the Department and the Mayor in this case comply with the plain language of the applicable code provision and thus cannot be a departure from the law's requirements and are supported by competent substantial evidence.

For all of these reasons, the Petition for Writ of Certiorari is denied. (TRAWICK AND WALSH, JJ., concur.)

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[1]In 2012, the Code essentially substituted the County Mayor for the County Manager for all delegations of "authority, power, and responsibility . . . ."

Sec. 1-4.4. - Transfer of Delegated Authority from the County Manager to the County Mayor.

Commencing with the elimination of the County Manager as a Miami-Dade County Home Rule Charter County officer on November 20, 2012, all delegations of Board authority, power and responsibility to the County Manager provided in enactments of this Board including, but not limited to, ordinances, resolutions, implementing orders, regulations, rules, and provisions of the Code of Miami-Dade County are hereby delegated to the County Mayor or the County Mayor's designee. ***All references*** in enactments of this Board including, but not limited to, ordinances, resolutions, implementing orders, regulations, rules, and provisions of the Code of Miami-Dade County ***relating to the County Manager shall be deemed to be references to the County Mayor or the County Mayor's designee.***

* * *

**Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement— Multiple Procedure Payment Reduction—Insurance policy gave adequate notice of insurer's use of MPPR where policy clearly and unambiguously elected the use of Medicare coding policies and payment methodologies, which includes utilization of the MPPR method—A specific reference to MPPR was not required—MPPR should not be considered an improper utilization limit**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. MILLENNIUM RADIOLOGY, LLC, a/a/o Saloma Dudley, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 16-098-AP-01. L.T. Case No. 14-003280-SP-23. February 8, 2019. On appeal by State Farm Mutual Automobile Insurance Company ("State Farm") from a "Final Judgment and Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Cross Motion for Summary Judgment" (the "Final Judgment") entered on February 29, 2016. Counsel: De Ann J. McLemore, Mark D. Tinker and Charles W. Hall, Banker Lopez Gassler P.A., for Appellant. Robert J. Hauser, Pankauski Hauser PLLC, and Yigal D. Kahana, Law Offices of Yigal D. Kahana, for Appellee.

[Lower court opinion at 25 Fla. L. Weekly 554a.]

(Before HIRSCH, DIAZ, and BLUMSTEIN, JJ.)

(BLUMSTEIN, J.) On or about August 19, 2013, Saloma Dudley ("Dudley") was injured in an automobile accident. At all relevant times, Dudley was insured under a State Farm 9810A Insurance Policy (the "Policy"), On September 24, 2013, Dudley had two MRIs performed at Millennium Radiology LLC ("Millennium") and assigned her State Farm PIP benefits to Millennium, which then billed State Farm for each procedure. In determining a reasonable amount for reimbursement, State Farm applied a Multiple Procedure Payment Reduction ("MPPR"). Millennium filed an action in county court alleging that State Farm breached the terms and conditions of its Policy and Florida's No-Fault Motor Vehicle Law.

Millennium filed a "Motion for Final Summary Judgment" and State Farm filed a "Cross Motion for Summary Judgment." There was no issue as to the relatedness and medical necessity of the services at issue. Millennium argued that State Farm was obligated by its Policy to reimburse pursuant to the Medicare Part B participating physician fee schedule (the "Medicare Part B Schedule); however, instead it reimbursed using the MPPR method. Millennium contended that this reduction of benefits violated the terms of the Policy and Florida's No-Fault Law. State Farm's "Cross Motion for Summary Judgment" claimed that the Policy explicitly allowed State Farm to limit reimbursement pursuant to not just the Medicare Part B Schedule, but also, the Medicare coding policies, including the MPPR method. State Farm claimed that the Policy at issue is unambiguous and must be applied as written.

The trial court in its Final Judgment found as a matter of law that the Policy is clear and unambiguous in its election to pay pursuant to

the 2007 Medicare Part B Schedule; however, the trial court further found that the general references in the Policy to Medicare coding policies were vague and ambiguous. The trial court found that the Policy did not clearly and unambiguously elect the MPPR, and does not permit State Farm to limit reimbursement to less than 80% of the allowable amount under the 2007 Medicare Part B Schedule. Accordingly, the trial court granted Final Summary Judgment for Millennium and denied State Farm's Cross Motion for Summary Judgment. This appeal followed.

This Appellate Court finds that the State Farm Policy clearly and unambiguously elects the use of Medicare coding policies and payment methodologies, which includes utilization of the MPPR method. The Office of Insurance Regulation ("OIR") approved the Policy.[1] MPPR is a permissible payment methodology and not an improper "utilization limit."

MPPR is basically a payment methodology used by the Medicare program to reduce payment for medical services when two or more services have been rendered on the same day, to the same patient, by the same physician, in the same session. Performing all services in one session reduces time, labor, and general costs associated with performing multiple procedures over multiple days. The State Farm Policy clearly and unambiguously elects the use of Medicare coding policies and payment methodologies, including applicable modifiers such as the use of MPPR. Further, the PIP Statute was amended in 2012 and expressly permits the use of Medicare payment methodologies and/or coding policies. § 627.736(5)(a)(3), Fla. Stat. (2012).

In *Geico General Insurance Company v. Virtual Imaging Services, Inc.,* 141 So. 3d 147, 160 (Fla. 2013) [38 Fla. L. Weekly S517a], the Florida Supreme Court held that "in order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." However, the Court did not dictate a specific form for such notice. *Allstate Indemnity Company v. Markley Chiropractic & Acupuncture, LLC*, 226 So. 3d 262, 266 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D793b]. Reason dictates that if *Virtual Imaging* does not require an insurer to use the specific term "Medicare" in electing and notifying its insured of the use of the Medicare fee schedule, then State Farm is not required to use the letters/acronym "MPPR" in notifying the insured of its possible use to determine costs. *Id.*

The courts *in Allstate Fire and Cas. Ins. v. Stand-Up MRI of Tallahassee, P.A.,* 188 So. 3d 1 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b]; *Markley, LLC,* 226 So. 3d at 266 (*Virtual Imaging* requires no "magic words"); *Fla. Wellness & Rehab. v. Allstate Fire & Cas. Ins. Co.,* 201 So. 3d 169 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1619c]; and, *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a], interpreted an Allstate Policy, which is somewhat similar to the Policy at issue in the instant ease. The Allstate policy references "any and all limitations authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the laws, including, but not limited to, all fee schedules."

The State Farm Policy references "the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers," hacking the language of the 2012 amendment.[2] The State Farm Policy is even more specific than the general reference to "all fee schedules" in the Allstate Policy that was upheld in the cases above and provides more than sufficient notice of the method of reimbursement.[3] State Farm gave adequate notice of its election of the fee schedules to limit its payments.

Based upon the above, this Appellate Court finds that the 2012 amendment to the No-Fault Statue explicitly permitted State Farm to utilize the Medicare coding policies and payment methodologies, that a specific reference to MPPA was not required, and thus, State Farm's Policy gave adequate notice of their possible use.[4]

While this issue was not addressed below, MPPR should not be considered an improper utilization limit. MPPR is a payment methodology used by Medicare to place limitations on the amount of reimbursement available, when more than one medical service such as an MRI is provided to the same patient in the same session. "It is not a utilization limit simply because it limits reimbursements." *SOCC, P.L., a/a/o Youssef Assal v. Progressive Am. Ins. Co.,* 24 Fla. L. Weekly Supp. 163b (Fla. 13th Jud. Cir. Cnty. Ct. Apr 18, 2016); *see also Path Med. Broward a/a/o Shantí Bryant v. Progressive Select Insurance Company,* CONO 15-005121 (Fla. 17th Jud. Cir. Cty. Ct. June 15, 2016) [24 Fla. L. Weekly Supp. 894a]. A limit on utilization means a limitation on the use or duration of a particular service or item. *Interventional Spine Ctr., LLC, a/a/o Pascal Fils-Aime v. Progressive Am. Ins. Co.,* 23 Fla. L. Weekly Supp. 610a (Fla. 11th Jud. Cir. Cnty. Ct. Oct. 7, 2015). MPPR in no way limits the uses, duration, or the number of procedures, a provider may perform on a patient or that a patient may access. MPPR is simply a payment reduction employed due to the economic efficiencies achieved by performing multiple procedures in the same day.

Accordingly, the "Final Judgment and Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Cross Motion for Summary Judgment" is REVERSED and this matter is REMANDED with instructions to enter judgment in favor of State Farm on its Cross Motion for Summary Judgment. The trial court is further instructed to address all motions for fees and costs based upon this Appellate Court's opinion. (HIRSCH and DIAZ, JJ., concur.)

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[1]While the decision of the OIR is subject to judicial review, there is no reason to determine that the OIR approval is invalid.

[2]Section 627.736(5)(a)(3), Fla. Stat. (2012) provides, in part, that: "subparagraph 1. does not prohibit an insurer from using the Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount of reimbursement for medical services."

[3]The Ninth Judicial Circuit Appellate Court in *State Farm Automobile Insurance Company v. Florida Emergency Physicians Kang & Associates, M.D., P.A.,* 2016-CV-000024-A-O (Fla. 9th Jud. Cir. Ct. Dec 18, 2017) [25 Fla. L. Weekly Supp. 774a], found "the State Farm notice . . . to be at least as clear as Allstate Notice in *Orthopedic Specialists*.

[4]*See also Millennium Radiology, LLC a/a/o Angela Renteria v. State Farm Fire and Casualty Company,* 23 Fla. L. Weekly Supp. 360a (Fla. 11th Jud. Cir. Cty. Ct. Aug. 11, 2015) (State Farm was permitted to use MPPR to determine allowable amount under Medicare Part B schedule); *Interventional Spine Ctr., LLC, a/a/o Pascal Fils-Aime v. Progressive Am. Ins. Co.,* 23 Fla. L. Weekly Supp. 610a (Fla. 11th Jud. Cir. Cnty. Ct. Oct. 7, 2015) (MPPR provides an allowable, amount under Medicare Part B schedule); *AFO Imaging, Inc. a/a/o Asha Brown v. State Farm Mut. Auto. Ins. Co.,* 24 Fla. L. Weekly Supp. 165b (Fla. 13th Jud. Cir. Cty. Ct. Mar. 15, 2016) (2012 version of the No-Fault Statute explicitly permits an insurer to consider Medicare coding policies); *Sports Imaging Center, LLC v. State Farm Mutual Automobile Insurance Company,* 562014SC000513C2 (Fla. 19th Jud. Cir. Cty. Ct. Nov. 8, 2017) (State Farm's 9810A policy properly incorporates the ability to limit payment); *Plantation Open MRI, LLC v. State Farm Mutual Automobile Insurance Company,* COCE 14 - 011350 (54) (Fla. 17th Jud. Cir. Cty. Ct. Nov. 3, 2017) [25 Fla. L. Weekly Supp. 831a] (State Farm 9810A Insurance Policy permitted it to reimburse below the 2007 Medicare Part B Fee schedule through the application of MPPR.).

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Where officer responding to accident scene observed licensee behind wheel of running vehicle with seatbelt fastened, licensee had odor of alcohol and slurred speech, and licensee admitted to being drunk, officer had probable cause to believe that licensee was driving or in actual control of vehicle while impaired—Accident report was admissible at administrative license suspension hearing—Petition for writ of certiorari is denied**

CARMEN STROIA, 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-8114, Division D. February 3, 2020. Counsel: Eliam Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Samuel Frazier, Assistant General Counsel, and Christie S. Utt, General Counsel, DHSMV, Jacksonville, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMILY A. PEACOCK, J.) THIS MATTER is before the court on Petitioner's amended petition for writ of certiorari filed August 27, 2019. A response was filed September 26, 2019. Petitioner did not file a reply. In such proceedings the hearing officer is to determine whether three elements have been established by a preponderance of the evidence: whether law enforcement had probable cause to believe that the person whose license was suspended was driving on in actual physical control of a motor vehicle while under the influence of drugs or alcohol; whether the person whose license was suspended refused to submit to a test of his or her blood alcohol level after being requested to do so by law enforcement; and whether the person was advised that refusal to submit to a test would result in the suspension of his or her driving privileges for one year, or, in the case of a second or subsequent refusal, 18 months. *See* §322.2615(7), Florida Statutes. In turn, the court reviews the hearing officer's administrative decision to determine whether Petitioner was afforded due process, whether competent, substantial evidence supports the decision, and whether the decision conforms to the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). Having reviewed the pleadings, appendices, and applicable law, the court finds as follows:

Petitioner's Issue 1 contends the record lacks competent, substantial evidence that Petitioner was driving or in actual, physical control of a motor vehicle while under the influence. Related to that is whether the hearing officer departed from the essential requirements of law by considering the accident report.

Petitioner's Issue 2 contends the hearing officer departed from the essential requirements of law when she considered Petitioner's statements made after the civil traffic investigation but before any Miranda warnings were provided, in violation of the Petitioner's right against self-incrimination.

With regard to Issue 1, the court finds that competent, substantial evidence supports that Petitioner was driving under the influence. The record shows that Petitioner was involved in a traffic accident on May 11, 2019. The victim stated that he was stopped for traffic when Petitioner rear-ended his vehicle. The victim also stated that Petitioner was driving erratically, which included going over the median and off the roadway. When Officer Uno arrived, he observed Petitioner behind the wheel of her car with her seatbelt fastened. She smelled of alcohol, and her speech was very slurred. When asked if she were okay, Petitioner admitted "I'm drunk." While waiting for the DUI investigation to begin, she fell asleep. Although the DUI investigation revealed more evidence of impairment, the information obtained before the formal DUI investigation began was sufficient to provide probable cause that Petitioner was driving under the influence.

With regard to Issue 2, Petitioner contends that the traffic crash report was improperly admitted as evidence at the administrative hearing. That argument is without merit as the accident/crash report privilege has not been applicable in administrative license suspension hearings since October 1, 2006. *See* § 322.2615(2)(b), Fla. Stat. (2013) ("Notwithstanding s. 316.066(4), the crash report shall be considered by the hearing officer."); *see generally Alison Carlson v. Dep't of Highway Safety & Motor Vehicles,* 15-CA-4336 (Fla. 13th Jud. Cir. Aug. 3, 2015). Moreover, there was sufficient basis derived from the accident investigation to provide probable cause to believe Petitioner was operating a motor vehicle under the influence. Upon making contact with Petitioner, the officer investigating the crash observed that Petitioner was the registered owner of the vehicle, the engine was still running, she was still behind the wheel of her car and wearing her seatbelt. She had no passengers. Significantly, Petitioner smelled of alcohol, her speech was very slurred, and she admitted that she had been drinking and to being "drunk." This information was obtained before Petitioner was placed under arrest; indeed, it was obtained before the formal DUI investigation began. Under the circumstances, the timing of Miranda is not an issue in this context. It is therefore

ORDERED that the petition is DENIED on the date imprinted with the Judge's signature.

* * *

**Licensing—Driver's license—Suspension—Lawfulness of stop—Law enforcement had reasonable suspicion for traffic stop where licensee was observed weaving within his lane of travel repeatedly, crossing into bike lane, and swerving in manner that caused another vehicle to take evasive action—No merit to argument that record does not support anticipated 18-month suspension where order does not reference length of suspension—Petition for writ of certiorari is denied**

BRIAN CHRISTIE, 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-12655, Division G. January 9, 2020. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Kathy A. Jimenez-Morales, Chief Counsel, Christie S. Utt, General Counsel, Department of Highway Safety and Motor Vehicles, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARTHA J. COOK, J.) THIS MATTER is before the Court on Brian Christie's amended Petition for Writ of Certiorari filed January 6, 2020. The court has reviewed the petition, appendix, and applicable law. Rule 9.100(f)(3), (h) Fla. R. App. P. Having reviewed the petition, the court finds as follows:

As to Issue I, in which Petitioner claims the record lacks competent, substantial evidence that law enforcement had reasonable suspicion for the traffic stop, the record shows Petitioner was observed at 2:44 in the morning of May 19, 2019, repeatedly weaving within his lane of travel, striking both the inside and outside lane markers more than three times, crossing into the bike lane, and swerving such that it caused another vehicle to take action to avoid a collision. On this issue, the petition is DENIED. *Roberts v. State*, 732 So.2d 1127 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a] (weaving several times sufficient to justify stop); *Ibrahim K. Karabiyik v. State, DHSMV,* Case No. 15-CA-633 at *2 (Fla. 13th Jud. Cir. 2015)(where information present in record supports administrative decision there is no requirement that an officer provide the level of detail Petitioner highlights as missing).

As to Issue II, in which Petitioner claims the record does not support an anticipated 18-month suspension, the order does not reference in any way the length of the suspension. On this issue the petition is DENIED. *Valeria Calderon v. State, DHSMV,* Case No. 19-CA-7924 (Fla. 13th Jud. Cir. Dec. 31, 2019).

Based on the applicable law and the facts as presented, the amended petition does not set forth a preliminary basis for relief. It is therefore ORDERED that the petition is DENIED without need for a response on the date imprinted with the Judge's signature.

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—No merit to argument that request for breath test was not incident to lawful arrest where, although hearing officer made factual finding that would suggest that traffic stop occurred after licensee was asked to submit to breath test, competent substantial evidence supports finding that arrest occurred before breath test request—No merit to argument that record lacks competent substantial evidence to support finding that licensee previously refused a breath test so as to support imposition of 18-month suspension—Duration of suspension is determined by Department of Highway Safety and Motor Vehicles and is not subject to hearing officer's review**

VALERIA CALDERON, 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-7924, Division H. December 31, 2019. Counsel: Paul Horning, Plotnick Law, P.A., St. Petersburg, for Petitioner. Nathaniel D. Sebastian, Asst. General Counsel and Christie S. Utt, General Counsel, Department of Highway Safety and Motor Vehicles, Jacksonville, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMMETT L. BATTLES, J.) This case is before the court to review a hearing officer's decision to uphold the suspension of Petitioner's driving privileges. Petitioner's driving privilege was suspended as the result of her refusal to submit to a breath test to determine her blood alcohol level, which refusal violates §316.1932(1)(a)1.a, Florida Statutes. This court has jurisdiction. Rule 9.030(c), Fla. R. App. P. The timely petition asserts that the record lacks competent, substantial evidence to uphold the suspension where allegedly irreconcilable conflicts in the evidence do not support that the request for Petitioner to submit to the breath test was made incident to or after lawful arrest. Under §316.1932(1)(a)1.a, a breath test must be requested incident to lawful arrest. "Incident to arrest" means the request for a breath test must be made *after* arrest. *State, Dept. of Highway Safety and Motor Vehicles v. Whitley,* 846 So. 2d 1163 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a]. Although the hearing officer made a factual finding that would suggest the traffic stop occurred after Petitioner was asked to submit to a breath test, which would ordinarily require this court to quash the order, other more competent evidence supports that arrest occurred before Petitioner was asked to submit to a breath test. With regard to the length of the suspension, the law does not charge the hearing officer with the task of determining the length of the suspension in this context. It requires the hearing officer only to determine whether Petitioner was advised that a second refusal would result in an 18-month suspension. Because the record shows that Petitioner was so advised, the petition must be denied on both issues.

Petitioner was arrested on May 7, 2019, and charged with driving under the influence of alcohol (DUI). The Department administratively suspended Petitioner's driver's license on the date of her arrest for a period of 18 months for a second refusal to submit to a breath test. Petitioner requested a formal review of this administrative suspension through the Bureau of Administrative Reviews. A formal review hearing was conducted on June 21, 2019. No witnesses were present.

Sworn narratives in the Criminal Report Affidavit and Arrest Report both indicate that Petitioner was stopped for speeding around 2:45 a.m. Trooper Sullivan noticed signs of alcohol consumption during the stop. Moreover, Petitioner admitted to consuming some alcohol. Based on these circumstances Tpr. Sullivan conducted further investigation to determine whether Petitioner was impaired. When Petitioner performed poorly on field sobriety exercises, Tpr. Sullivan attempted to arrest Petitioner, but she resisted. Ultimately, according to the Breath Test Affidavit, Petitioner was placed under arrest at 2:59 a.m. and was asked to submit to a breath test to determine her blood alcohol level at 3:03 a.m. She refused. Thereafter, Petitioner was transported to the Hillsborough County Jail. Her driving privilege was administratively suspended for 18 months for a second refusal.

Petitioner sought formal administrative review of the suspension. A hearing was conducted June 21, 2019. No witnesses were present. Petitioner moved to invalidate the suspension arguing the record contained insufficient evidence that Petitioner's refusal to submit to a breath test occurred incident to lawful arrest as required by §316.1932(1)(a). Petitioner argued that inconsistencies in the evidence suggest the breath test request improperly *preceded* arrest. She also asserted that the record contained no evidence of a second refusal. The hearing officer sustained the suspension, finding that all elements necessary to sustain the suspension for refusal to submit to a breath test were supported by competent, substantial evidence. Petitioner now seeks review of that order. The court reviews the hearing officer's decision to determine whether Petitioner received procedural due process, whether the hearing officer observed the essential requirements of law, and whether competent, substantial evidence supports upholding the suspension. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

Petitioner argues that the recorded times in the record create the impression that the request that Petitioner submit to a breath test preceded her arrest. The Criminal Report Affidavit indicates the "offense time" as occurring at 2:47 (all times are a.m.), with arrest occurring at 3:59. The arrest report shows the offense time as 2:47 and the arrest time as 2:49. The breath test affidavit indicates an arrest time of 2:59 and a request to submit to the test occurring at 3:03. The hearing officer's order makes a finding that Petitioner was *stopped* at 3:05 based on a notation in the traffic citation. The detailed narrative and narrative summary are consistent that the stop occurred at or about 2:46, give or take a minute or two.

As previously noted, a breath test must be made *after* lawful arrest. *Whitley,* 846 So. 2d at 1167. It is not known why the hearing officer made the specific factual finding that the stop occurred at 3:05 without determining when arrest was made in relation to the request that Petitioner submit to a breath test. It is especially curious when the time is so inconsistent with the rest of the record. Although the order as written suggests a conclusion that the arrest occurred after the breath test, the totality of the record suggests otherwise. The narratives in the Criminal Report Affidavit, Arrest Report, Breath Test Affidavit, all of which are sworn to, indicate that Petitioner was placed under arrest, and that she resisted arrest, all before she was asked to take a breath test. It is incumbent on the hearing officer to resolve conflicts in the evidence. *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). With regard to this issue, the court finds the evidence is not in hopeless conflict. *Leslie Champion v. State Dep't. of Highway Safety and Motor Vehicles,* Case No. 11-CA-367 (Fla. 13th Jud. Cir. Sept. 2, 2015).

With regard to the length of the suspension, Petitioner contends that, in the absence of Petitioner's driving record, the record lacks competent evidence that Petitioner previously refused a breath test. The Department responds that the *length* of the suspension is not subject to the determination of the hearing officer. Under §322.2615(7)(b), Florida Statutes, the hearing officer's review is limited to whether the law enforcement officer had probable cause to believe the driver was driving or in actual control of a motor vehicle while under the influence; whether the driver refused to submit to [a breath test] after being requested to do so by a law enforcement officer, and whether the driver was told that if she refused to submit to a test her privilege would be suspending for a year, or, in the case of a second refusal, a period of 18 months. Competent, substantial evidence supports that Tpr. Sullivan advised Petitioner that her

driving privilege would be suspended for 12 months for a first refusal and 18 months for a second. Section 322.2615(8), which is not one of the enumerated criteria for the hearing officer to consider in this context, requires the Department, not the hearing officer, to impose the appropriate suspension length upon the conclusion of the administrative review. Although Petitioner perhaps raises a valid concern that disallowing the hearing officer to consider the appropriate length of the suspension would deny the Petitioner meaningful process to challenge the department's initial determination that he has a prior refusal, this court cannot rewrite the law.[1] The court notes that the hearing officer upheld the suspension without any reference to its duration. It is therefore

ORDERED that the petition is DENIED on the date imprinted with the Judge's signature.

[1]The court is aware that the driving record is a departmental record to which a hearing officer would have access, even if it does not appear in the record.

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to urine test—Competent substantial evidence established licensee's refusal to submit to urine test where licensee was not cooperative with law enforcement when he was requested to provide urine sample, made no attempt to provide sample during 50 minutes that officer took to complete paperwork, and never indicated that he had any medical issue that would prevent him from urinating—Petition for writ of certiorari is denied**

SHAWN TARN PAYMAR, 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. 502018CA012978XXXXMB. January 23, 2020. 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. Lori A. Huskisson, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks review of an order affirming the suspension of his driver license based on his refusal to submit to a urine test. Petitioner contends that the suspension order is not supported by competent, substantial evidence proving that Petitioner refused to submit to a urine test. We disagree and deny the Petition for Writ of Certiorari.

Petitioner was pulled over on suspicion of driving under the influence after a law enforcement officer witnessed Petitioner fail to maintain his lane and strike a curb on two occasions. During the stop, Petitioner exhibited several indicators of impairment and performed poorly on the field sobriety exercises. Petitioner also admitted to consuming a small amount of alcohol and the arresting officer found a pill bottle containing five (5) Xanax pills in Petitioner's vehicle. Based on the foregoing, Petitioner was arrested and taken to the breath testing facility. There, he provided two breath samples yielding breath alcohol concentrations of .037 and .036. Petitioner remained respectful and cooperative throughout this process.

After Petitioner provided his breath samples, the arresting officer asked Petitioner to provide a urine sample. Upon this request, Petitioner's demeanor noticeably shifted and he became combative and nonresponsive. Petitioner refused to answer questions in a straightforward manner instead giving sarcastic responses to the officer and the breath test technician. The arresting officer made it clear that if Petitioner did not agree to provide a urine sample, it would count as a refusal, and Petitioner acknowledged that a refusal would lead to a suspension of his license. Petitioner then agreed that he would let the officer know when he was ready to provide a sample. The officer warned Petitioner that if he did not provide a sample before the officer finished his paperwork, it would qualify as a refusal.

The officer took about fifty minutes thereafter to complete his paper work. During that time, Petitioner made no effort to provide a sample. Neither did Petitioner indicate he had any medical issues that would prevent him from giving a sample. Upon completion of his paperwork, the officer documented Petitioner's refusal and Petitioner's 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.

"In the context of an alleged refusal to submit to a urine test, it must be determined that the driver's "refusal [was] willful to the extent that if the [driver] *is able to submit,* he or she is expected to take the test." *Brass v. Dep't of Highway Safety & Motor Vehicles,* 19 Fla. L. Weekly Supp. 5a (Fla. 15th Cir. Ct. 2011) (quoting 11 Fla. Prac., DUI Handbook § 10:2 (2010-2011 ed.) (emphasis and alterations provided)). "[F]ailure to perform a urine test is not a refusal when the driver physically cannot provide a urine sample" after making good faith attempts to do so. *Id.* For example, in *Brass,* this Court found that a driver did not refuse to provide a urine sample where he was very cooperative throughout the process, tried to urinate on several occasions, and testified that he had a prostate issue which affected his ability to urinate. *Id.* Likewise, in *Wolok v. Dep't of Highway Safety & Motor Vehicles,* 1 Fla. L. Weekly Supp. 204a (Fla. 11th Cir. Ct. 1992), the court held that the driver did not willfully "refuse" to provide a sample where the driver's unrebutted testimony established that he had a "bashful kidney," could not provide a sample due to officers looking at his genitals, and requested that officers turn on the water tap to assist him in providing a sample. *Id.* Finally, in *Strouse v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 309a (Fla. 9th Cir. Ct. 2014) the court held that a driver did not refuse to provide a urine sample where he agreed to provide the sample every step of the way, asked for water but was denied, and made efforts to urinate but was unsuccessful. *See also Dunn v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 18a (Fla. 9th Cir. Ct. July 26, 2005) (holding that *Wolok* stands for the proposition that a defendant does not refuse a urine test when he or she makes a good faith effort to perform the test but fails to do so because of a physical impediment).

Petitioner's case is wholly distinguishable from cases where courts found there was no "refusal" by drivers who attempted in good faith to provide a sample but could not physically do so. To begin with, there is competent substantial evidence that Petitioner was not cooperative once it was requested that he provide a urine sample. He was argumentative, nonresponsive, and often gave sarcastic responses. Further, Petitioner was placed in a holding cell with unlimited access to water, but there is no evidence he ever drank any. Neither did Petitioner ever request a cup to provide the sample or indicate that he would like to try to urinate. Finally, Petitioner never indicated/testified/informed law enforcement that he had any medical issue that would prevent him from urinating, or that he wanted to urinate but he was unable to. Under these circumstances, we hold that there is competent substantial evidence establishing that Petitioner's inaction and unwillingness to cooperate qualified as a refusal to submit to the urine test. *See Farah v. Dep't of Highway Safety & Motor Vehicles,* 3 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct. 1994) (holding that a refusal to submit to a breath test is not contingent upon the licensee expressly stating that he or she is refusing to submit to the test, but may occur by act or inaction of the licensee). Accordingly, Petitioner's Petition for Writ of Certiorari is **DENIED**. (NUTT, HAFELE, and BONAVITA, JJ., concur.)

* * *

**Insurance—Personal injury protection—Coverage—Motorized scooter—Trial court erred in entering summary judgment in favor of insured who was injured while driving motorized scooter—There was genuine issue of material fact as to whether scooter was "self-propelled vehicle" such that insured was barred from recovering under terms of PIP statute and policy that provide coverage only when insured is occupant of motor vehicle or not occupant of self-propelled vehicle at time of accident—Although "self-propelled vehicle" is not defined in policy or statute, features of scooter suggest that it is self-propelled vehicle within ordinary meaning of that term where scooter has two wheels and 49cc motor, is used for transporting persons on roads, and lacks pedals permitting human propulsion**

GEICO GENERAL INSURANCE COMPANY, Appellant/Defendant, v. SHANNAN DELAROSA, Appellee/Plaintiff. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 18-AP-07-P. L.T. Case No. 16-SC-100-P. September 20, 2019. Counsel: Rebecca O'Dell Townsend and Scott Dutton, Dutton Law Group, P.A.; and Rebeca Quintero, Law Office of Haydee De La Rosa-Tolgyesi, for Appellant. Chris Kasper, Ovadia Law Group, P.A., Boca Raton, for Appellee.

## OPINION

(TIMOTHY J. KOENIG, J.) Appellant GEICO General Insurance Company ("GEICO" or "Appellant") appeals from a final judgment entered by the County Court in favor of Appellee and Plaintiff below Shannan Delarosa ("Delarosa" or "Appellee"). The issue in this case is a matter of first impression: whether the motorized scooter Delarosa rode during an accident with another vehicle is a "self-propelled vehicle," such that she is barred from recovering personal injury protection (PIP) benefits under the auto insurance policy she purchased from GEICO, and under the Florida Motor Vehicle No-Fault Law (the "No-Fault Law"), Fla. Stat. §§ 627.730-627.7405 (2019). The County Court (Hon. Sharon Hamilton) ruled for Delarosa on cross-motions for summary judgment and entered final judgment in Delarosa's favor on October 1, 2018. GEICO timely appealed.

Upon review, the Court finds that there are genuine issues of material fact as to whether Delarosa's scooter is a "self-propelled vehicle" as that term is used in her insurance contract with GEICO, and in the relevant statutes. Accordingly, the Court now **REVERSES** the County Court's summary judgment in Delarosa's favor, **AFFIRMS** the court's order denying GEICO's motion for summary judgment, and **REMANDS** the case for further proceedings.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts are as follows: On December 28, 2015, Delarosa was involved in an automobile accident while riding a motorized scooter. At the time of the accident, she was covered by an automobile insurance policy she purchased from GEICO, which included no-fault PIP coverage, as required by law. Under the terms of the policy, and the corresponding PIP Statute (the "PIP Statute"), Fla. Stat. § 627.736 (2019), an insured is entitled to benefits for bodily injury sustained in an accident with a motor vehicle without regard to fault if, at the time of the accident, the insured was either (a) herself an occupant of a "motor vehicle" or (b) *not* an occupant of a "self-propelled vehicle." *See* Fla. Stat. § 627.736(e)(1) (2019). (Appellant has interpreted this latter provision to mean that the accident victim was a "pedestrian.")

On November 10, 2016, Delarosa initiated this lawsuit alleging breach of contract after GEICO denied her claim for reimbursement of medical bills she allegedly incurred as a result of injuries sustained from the accident. On June 29, 2017, GEICO filed its Answer. In it, GEICO states its position that Delarosa is not entitled to PIP benefits because the "49cc two-wheeled scooter" she was riding at the time of the accident is not a "motor vehicle" as defined by the subject insurance policy and the relevant statutes and because Delarosa was not a "pedestrian," *i.e.,* she was riding a "self-propelled vehicle," at the time of the loss. (R. at 11).

Delarosa filed a motion for summary judgment on February 12, 2018. In her motion, she concedes that her scooter is not a "motor vehicle" as defined by the policy or the relevant statutes but maintains that it is also not a "self-propelled vehicle" as that term is construed under the relevant case law. GEICO did not file an opposition to Delarosa's motion, but instead responded with a motion for summary judgment of its own, filed on June 13, 2018, reasserting the arguments raised in its Answer. In support of its motion, GEICO attached an affidavit from litigation adjuster Nina Gomes, who attested that "PIP coverage was denied as the scooter [Delarosa] was traveling in was only 49cc and only has 2 wheels—therefore it would not meet the definition of a motor vehicle. Further, as the scooter is self-propelled [Delarosa] would not meet the definition of a pedestrian." (R. at 36). Delarosa did not object to the admissibility of GEICOS's evidence or file an opposition to GEICO's motion.[1]

On July 2, 2018, the County Court held a hearing on the parties' competing motions for summary judgment, and on August 8, 2018, without a written opinion, granted Delarosa's motion and denied GEICO's motion. (R. at 95). The County Court entered final judgment in favor of Delarosa on October 1, 2018. This appeal followed.

## II. DISCUSSION

The Court reviews the lower court's entry of summary judgment *de novo. Barcelona Hotel, LLC v. Nova Cas. Co*., 57 So. 3d 228, 230 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D458a]. Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130-31 (Fla. 2000) [25 Fla. L. Weekly S390a]. In determining whether summary judgment is appropriate, the court must decide whether the record evidence establishes "*irrefutably* that the nonmoving party *cannot* prevail were a trial to be held." *Redlands Ins. Co. v. CEM Site Constructors, Inc.,* 86 So. 3d 1259, 1261 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1115a] (emphasis in original). In reviewing summary judgment on appeal, the court sitting in appellate capacity must consider the evidence in the light most favorable to the non-moving party "and if the slightest doubt exists, summary judgment must be reversed." *Id.* at 206.

*A. Preservation of Issues on Appeal*

As a threshold matter, the Court addresses Delarosa's contention that GEICO has not preserved the issues raised on appeal because GEICO: (1) did not include a transcript of the summary judgment hearing or an executed affidavit from its litigation adjuster in the record on appeal; and 2) did not file a written opposition or evidence to Delarosa's motion for summary judgment below.

Delarosa's first point has been rendered moot by the Court's June 28, 2019, order granting Appellant's motion to supplement the record on appeal. Delarosa's contention is also inconsistent with clearly established principles of appellate review, which state that while a summary judgment hearing transcript might be helpful to an appellate court, it is not necessary for [the court's] *de novo* review" of a summary judgment order. *Muchnick v. Goihman,* 245 So. 3d 978, 981 n. 1 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D986b].

Delarosa's second point is refuted by the record, which shows that the County Court construed GEICO's motion for summary judgment as both an opposition to Delarosa's motion and as GEICO's own motion for summary judgment, hearing argument on both motions at the same hearing and deciding both motions on the same date because the motions raised the same issue: whether the scooter Delarosa drove at the time of her accident is a "self-propelled vehicle." This distinguishes this case from the cases Delarosa cites where the appellate court summarily affirmed the trial court because based on the record

presented the court was "unable to review the factual or legal basis for the trial court's decision." *See, e.g., Rose v. Clements,* 973 So. 2d 529, 530 (Fla. 1st DCA 2007) [33 Fla. L. Weekly D56a]. Here, even without the benefit of a written decision, the record makes abundantly clear the issues the parties raised below, as GEICO raised its primary defense in its Answer and both parties briefed the issue in their respective motions for summary judgment. Thus, the Court finds that GEICO has preserved the issues before the Court on appeal.

*B. PIP Benefits Under the Insurance Contract*

In deciding whether the County Court erred in ruling that Delarosa is entitled to PIP benefits as a matter of law, the first issue the Court must address is whether there are genuine issues of material fact as to Delarosa's eligibility for PIP benefits under the terms of her agreement with GEICO. To be clear, the factual record before the Court is fairly thin. Delarosa submitted no evidence or affidavits in support of her motion for summary judgment, attaching instead only the cases on which her argument primarily relies. Conversely, while GEICO submitted with its motion a composite exhibit attached to the litigation adjuster affidavit, nothing in this composite exhibit provides competent, authenticated evidence linking Delarosa to the vehicle purportedly depicted in the exhibit or otherwise proving the vehicle's alleged characteristics.[2] Nonetheless, the parties have made two representations to the Court that weigh heavily in the Court's analysis and that allow the Court to reach its ultimate conclusion: (1) that the scooter lacks pedals permitting propulsion by human power and (2) that the scooter is powered by a 49-cubic centimeter engine.

Questions of insurance policy interpretation are questions of law and are subject to *de novo* review. *Penzer v. Transportation Ins. Co.,* 29 So. 3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a]. In interpreting insurance contracts, courts follow "the generally accepted rules of construction, meaning that insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage." *Id.* (internal citation omitted). "If the relevant policy language is susceptible to more than one reasonable interpretation. . .the insurance policy is considered ambiguous." *Id.* (citation omitted). "To find in favor of the insured on this basis, however, the policy must actually *be* ambiguous." *Id.* (emphasis in original). "A provision is not ambiguous simply because it is complex or requires analysis. . . . If a policy provision is clear and unambiguous, it should be enforced according to its terms." *Id.* (internal citation omitted).

Here, the subject policy states that PIP benefits will be provided "for injuries incurred as a result of bodily injury, caused by an accident arising out of the ownership, maintenance or use of a motor vehicle and sustained by. . . [the insured] while *occupying a motor vehicle* or, *while a pedestrian* through being struck by a motor vehicle. . . ." (R. at 51, emphasis added). "Motor vehicle," in turn, is defined by the policy in part as "any self-propelled vehicle of four or more wheels which is of a type both designed and required to be licensed for use on the highways of Florida. . . ." (R. at 50). "Pedestrian" is defined as "a person while not an occupant of any self-propelled vehicle." (R. at 50).

Delarosa does not dispute that the motorized scooter she rode at the time of the accident is not a "motor vehicle" as defined by the policy. Instead, she claims she is entitled to PIP benefits because, she argues, at the time of the accident she was a "pedestrian"— that is, she was "not [the] occupant of any self-propelled vehicle." Delarosa bases this claim on two propositions: (1) that the scooter is "not a vehicle within the ordinary meaning of that term" and (2) that the term "self-propelled vehicle" is not defined by the policy and is therefore ambiguous and should be construed against the insurer. (Supp. Br. at 9). Neither of these arguments are persuasive.

"The failure to define a term involving coverage does not necessarily render the term ambiguous." *Barcelona Hotel*, 57 So. 3d at 230. "Instead, when an insurance coverage term is not defined, the term should be given its plain and ordinary meaning." *Id.* at 230-31. "Where a policy does not define a term, courts often discern the plain meaning of the term by relying on other sources, such as dictionaries, to determine the accepted meaning. . . ." *Exotic Motorcars and Jewelry, Inc. v. Essex Ins. Co.,* 152 So. 3d 673, 676 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2407a].

*Watson v. Prudential Property & Cas. Ins. Co.* (*Watson I*), 696 So. 2d 394 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1439a], is instructive. In that case, the court applied a "plain meaning analysis in deciding whether an employee shuttle bus was a "motor vehicle" for purposes of an automobile insurance contract. Like the insurance policy in this case, there, the definition of "motor vehicle" tracked the No-Fault Law definition, which, at the time, excluded vehicles "used in mass transit." *Id.* at 395. Relying on dictionary definitions of "mass transit," the court held that the employee shuttle bus was a "motor vehicle" because it was not a system of conveyance available to the mass of the people, but instead was open exclusively to company employees to shuttle them to and from the company parking lot. *Id.* at 396-97. *See also Exotic Motorcars,* 152 So. 3d at 676-77 (using dictionary definitions and plain meaning analysis to construe the term "test drive" in an insurance contract); *Barcelona Hotels*, 57 So. 3d at 230-32 (similar analysis, construing the term "vehicle" in an insurance policy and finding that an excavator is a "vehicle" under the terms of the agreement).

Similarly, here, the Court can discern the meaning of "self-propelled vehicle," as that term is used in Delarosa's insurance policy, through a plain meaning analysis. The Merriam-Webster dictionary defines "self-propelled" as "containing within itself the means for its own propulsion."[3] The Cambridge Dictionary, meanwhile, defines "self-propelled" as "able to move by its own power."[4] And Dictionary.com defines "self-propelled," as it pertains to vehicles, as a vehicle "propelled by its own engine, motor, or the like, rather than drawn or pushed by a horse, locomotive, etc."[5] These same dictionaries define "vehicle," respectively, as "a means of carrying or transporting something. . .such as. . . [a] motor vehicle";[6] "a machine, usually with wheels and an engine, used for transporting people or goods on land, especially on roads";[7] and "any means in or by which someone travels or something is carried or conveyed; a means of conveyance or transport."[8]

Drawing on these sources, the Court finds that there are genuine issues of material fact as to whether the scooter Delarosa rode at the time of the accident is a "self-propelled vehicle" under the plain and ordinary meaning of that term. The parties have represented that Delarosa's scooter has wheels and an engine and is used for transporting (at the very least) persons on the road. The parties have further represented that the scooter lacks pedals permitting human propulsion and that, instead, it is powered by a 49-cubic centimeter engine. While the record is devoid of competent evidence establishing that the particular scooter Delarosa rode meets these characteristics, if proven true before a trier of fact, these features would strongly suggest that, by definition, the scooter is self-propelling, thus creating a triable issue of material fact.

Delarosa contends that this particular scooter is not a "self-propelled vehicle," as that term is commonly understood, by measure of its small engine (in Delarosa's characterization). The size of the engine, however, has no bearing on the function of the scooter as a means of transport, *i.e.,* on its status as a vehicle. Delarosa further contends that because the term "self-propelled vehicle" is not defined by the policy, the term must be strictly construed against the insurer, GEICO. As Appellant correctly points out, however, that rule applies only when the policy language is actually ambiguous and susceptible

to more than one reasonable interpretation. *Prenzer,* 29 So. 3d at 1005. As explained above, the plain and ordinary meaning of "self-propelled vehicle" can be ascertained by relying on traditional tools of textual interpretation. Further, Delarosa has not identified any reasonable alternative interpretation of "self-propelled vehicle" to which the term is susceptible, and the Court cannot discern one either. Thus, the term is not ambiguous, and the rule of strict construction does not apply.

*C. PIP Benefits Under § 627.736*

Even if Delarosa is ineligible to recover PIP benefits under the terms of her insurance contract with GEICO, she might nevertheless be entitled to collect the benefits under the pertinent provisions of the No-Fault Law that govern such insurance policies. Thus, the second issue the Court must address is whether there are genuine issues of material fact as to Delarosa's eligibility for PIP benefits under the relevant provisions of the PIP Statute, Fla. Stat. § 627.736 (2019).

Florida's No-Fault Law creates a comprehensive statutory scheme to "provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits," Fla. Stat. § 627.731 (2019). The PIP Statute is "an integral part of the no-fault statutory scheme. . .requir[ing] motor vehicle insurance policies issued in Florida to provide PIP benefits for bodily injury arising out of the ownership, maintenance, or use of a motor vehicle." *GEICO Gen. Ins. Co. v. Virtual Imaging Services, Inc.,* 141 So. 3d 147, 152-53 (Fla. 2013) [38 Fla. L. Weekly S517a]. That statute states, in relevant part, that "[t]he insurer of the owner of a motor vehicle shall pay personal injury protection benefits for. . .injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle." Fla. Stat. § 627.736(e)(1) (2019). Section 627.736 thus creates a guarantee of minimum coverage for personal injuries sustained in an accident with a motor vehicle, without regard to fault, where the insured either (a) was herself an occupant of a motor vehicle or (b) was *not* the occupant of a self-propelled vehicle.

In this case, Delarosa concedes that the scooter she rode at the time of the accident, which has only two wheels, is not a "motor vehicle" for purposes of § 627.736 because it does not meet the applicable statutory definition, which defines a motor vehicle for purposes of the No-Fault Law, in part, as "any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of the state. . . ." Fla. Stat. § 627.732(3) (2019). Therefore, she is entitled to PIP benefits under § 627.736 only if her scooter is *not* a "self-propelled vehicle" as that term is used in the statute.

"The term 'self-propelled vehicle' is not defined for the purpose of section 627.736 or any other related statute, so [courts] must therefore interpret the term in its normal and ordinarily accepted usage." *Esker v. Nationwide Mut. Fire Ins. Co.* . 593 So. 2d 303, 303 (Fla. 2d DCA 1992). "As always, legislative intent is the polestar that guides a court's inquiry under the No-Fault Law, including the PIP Statute." *Virtual Imagining Services,* 141 So. 3d at 154 (internal citation omitted). "Such intent is derived primarily from the language of the statute. Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Law." *Id.* (internal citation omitted).

Here, Delarosa urges the Court to conclude that her motorized scooter is not a "self-propelled vehicle" as that term is used in § 627.736(e)(1), citing two cases—State *Farm Mut. Auto. Ins. Co. v. Link.,* 416 So. 2d 875 (Fla. 5th DCA 1982), and *Velez v. Criterion Ins. Co.,* 461 So. 2d 1348 (Fla. 1984). In *Link,* the court considered whether a moped is a "motor vehicle," a "self-propelled vehicle," or neither, under a previous version of this statute. In concluding that a moped is neither, the court began by noting two features of the definition of "motor vehicle" in the then-operative version of § 627.732. First, it explicitly excluded mopeds from the definition of "motor vehicle." Second, it expressly incorporated the definition for "moped" in chapter 316, which, at the time, was subsumed in the definition of "bicycle," Fla. Stat. § 316.003(2) (1982), distinct from "motor vehicles," Fla. Stat. § 316.003(21) (1982), and "vehicles" more generally, Fla. Stat. § 316.003(64) (1982). *Link,* 416 So. 2d at 877. Based on these features of the law, the court reasoned that a moped is not a "self-propelled vehicle" under § 627.736 because it is not a "vehicle" at all, but instead is a "bicycle," as those terms were defined by the then-applicable statutes. *Id.* at 878. The Florida Supreme Court adopted the reasoning in *Link* in *Velez,* and in subsequent cases lower courts extended the reasoning of these decisions, holding, in various contexts, that a moped is neither a "motor vehicle" nor a "self-propelled vehicle," but instead is a "bicycle," for purposes of the PIP Statute and insurance contracts. *See, e.g., Prinzo v. State Farm Mut. Auto. Ins. Co. ,* 465 So. 2d 1364 (Fla. 4th DCA 1985); *Lane v. Allstate, Inc.,* 472 So. 2d 823 (Fla. 4th DCA 1985); *Ortiz* v. *Bankers Standard Ins. Co.,* 475 So. 2d 1012 (Fla. 3d DCA 1985).

Delarosa's reliance on *Link* and *Velez* is unavailing for two reasons. First, the holding in those cases has been largely abrogated by subsequent amendments to the No-Fault Law, which cast doubt on the cases' continued vitality. In its current form, § 627.732, which has been amended more than a dozen times since *Link* and *Velez* were decided, no longer expressly excludes "mopeds" from the definition of "motor vehicle," Fla. Stat. § 627.732(3) (2019), and, in fact, does not mention the word "moped" at all. Nor does the statute any longer expressly incorporate the definitions in chapter 316, which, in any case, have been amended to separate out the definition of "moped," Fla. Stat. § 316.003(41) (2019), from that of "bicycle," Fla. Stat. § 316.003(4) (2019). Thus, because *Link* and *Velez* relied on features of the statutory framework that no longer exist, it is unclear the extent to which the reasoning in those cases continues to apply.

Second, even assuming *Link* and *Velez* are still good law, the rule from those cases is of no help to Delarosa because her motorized scooter is not a moped. Section 316.003 establishes the criteria a vehicle must meet to be classified as a moped, each of which is set up by the mandatory nature of the statute's language as a necessary requirement for a vehicle to meet the statutory definition. That statute states in relevant part that, among other things, a "moped" is a "vehicle with pedals to permit propulsion by human power." Fla. Stat. § 316.003(41) (2019). Here, it is undisputed that Delarosa's scooter does not have pedals; thus, under a straight-forward reading of the statute, it is not a moped and *Link* and *Velez* do not apply. Delarosa argues that her scooter is a moped because it "has almost all of the defining characteristics of a moped." (Supp. Br. at 12). "Almost," however, in this context, is not enough. A vehicle must meet all the requirements set out in the statute to fall within the statutory definition.

The Court agrees with GEICO that *Miller v. Allstate Ins. Co.,* 560 So. 2d 393 (Fla. 4th DCA 1990), and its progeny control the outcome in this case. In *Miller,* the Fourth District Court of Appeal considered whether the occupant of a lawnmower-tractor was entitled to PIP benefits under § 627.736. There, as here, it was undisputed that the vehicle at issue did not meet the statutory definition of "motor vehicle" under the No-Fault Law and so did not entitle the claimant to PIP benefits under the first prong of the PIP Statute. Thus, as here, the question of whether the insured was entitled to PIP benefits turned on whether the accident victim's vehicle, *i.e.,* the lawnmower-tractor, was a "self-propelled vehicle" as that term is used in the second prong of the PIP Statute. In answering that question in the affirmative, the

court reviewed the legislative history of the statute, noting that the legislature added the term "self-propelled vehicle" to broaden the range of vehicles excluded from PIP coverage to include vehicles like ATVs, ditchdiggers, and cranes, which, under previous versions of the statute, may have been entitled to PIP coverage. *Id.* at 394. The court distinguished these vehicles from mopeds and bicycles, which courts, like those in *Link* and *Velez,* had earlier held were not self-propelled vehicles, observing that unlike mopeds and bicycles, this other set of vehicles "requir[ed] no outside power source." *Id.*

*Miller* was subsequently cited with approval by the Second District Court of Appeal in *Esker.* In that case, the court considered whether the occupant of a school bus was entitled to PIP benefits under § 627.736. As in *Miller* and as in this case, there was no dispute as to whether the school bus was a "motor vehicle" entitling its occupants to PIP benefits under the first prong of the PIP Statute because the definition of "motor vehicle" in the operative version of the No-Fault Law explicitly excluded "any vehicle which is used in mass transit or public school transportation." *Id.* at 304 (citing Fla. Stat. §§ 627.732(1)(b) (1990)). Thus, again, the case turned on whether the accident victim's vehicle was a "self-propelled vehicle" as that term is used in the PIP Statute. Noting that "[t]he term 'self-propelled vehicle' is not defined for the purpose of section 627.736 or any other related statute," the court found its task to be to "interpret that term in its normal and ordinarily accepted usage." *Id.* Under that standard, the court held, "a school bus is clearly a 'self-propelled vehicle.' " *Id.*

Finally, and of the most significance for this case, the Third District Court of Appeal adopted the reasoning in both *Miller* and *Esker* in *Progressive Cas. Ins. Co. v. Watson* (*Watson II*), 696 So. 2d 543 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1730b]—binding precedent in this jurisdiction. In *Watson II,* the court considered whether an occupant of a jitney[9] is entitled to PIP benefits under § 627.736. As in previous cases, and as in this case, the claimant conceded her ineligibility for PIP benefits under the first prong of the PIP Statute since the definition of "motor vehicle" in the version of the No-Fault Law in effect at the time explicitly excluded most commercial vehicles and modes of public transportation. Thus, again, the result in the case turned on the definition of "self-propelled vehicle" as that term is used in the PIP Statute. Applying the "normal and ordinarily accepted usage" of that term, as set forth in *Esker,* and *Miller's* definition of a "self-propelled vehicle" as one "requiring no outside power source," the court in *Watson II* found that "a 'jitney' is clearly a 'self-propelled vehicle.' " *Watson II,* 696 So. 2d at 545 (citing *Esker* and *Miller*).[10]

Applying these same principles here, the Court finds that there are genuine issues of material fact as to whether Delarosa's motorized scooter is a self-propelled vehicle under the PIP Statute, and therefore, that the County Court erred in granting summary judgment in Delarosa's favor. The parties have stipulated that Delarosa's scooter does not have pedals permitting human propulsion and that the scooter is powered by its own, self-contained 49-cubic centimeter engine. This creates a triable issue of material fact as to whether the scooter requires any outside power source—if it does not, then *Miller* applies—and whether the scooter is a self-propelled vehicle under the "normal and ordinarily accepted usage" of that term, as set forth above. While the lack of competent evidence in the record on these points precludes the Court's reaching the issue conclusively, should these representations be proven true before the trier of fact, there would be a strong presumption that Delarosa's scooter is a "self-propelled vehicle" for purposes of the PIP Statute, and therefore, that her claim for PIP benefits fails as a matter of law.

Delarosa again falls back on her argument that the scooter is not a "self-propelled vehicle" as that term is used in the PIP Statute because of the scooter's purported small engine size. Delarosa's proffered interpretation, however, is at odds with the statutory definition of "vehicle," which states that a vehicle is "*[e]very* device in, upon, or by which any person or property is or may be transported or drawn upon a highway, *except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks*." Fla. Stat. § 316.003(102) (2019) (emphasis added). Indeed, as this statutory provision importantly shows, when the legislature intends to carve out an exception to the broad definition of "vehicle" based on a device's particular characteristics—such as engine size—it does so in explicit terms, just as it did for personal delivery devices and mobile carriers. *See* Fla. Stat. §§ 316.003(40), 316.003(55) (2019).

* * *

Delarosa has, in the proceedings below and throughout this appeal, urged the Court to treat her scooter like a moped for purposes of her claim to PIP benefits because, in her view, her scooter is essentially, or functionally, a moped. This contention, however, misconstrues the role of the courts: In the absence of a clear directive from the legislature in the text of the statute or from a higher court, this Court cannot read into the PIP Statute an exception that stands at odds with the statute's plain meaning. *See Esker,* 593 So. 2d at 304 ("We are not at liberty, except in extraordinary circumstances, to take legislative terms and impart some other meaning to that term other than that clearly expressed by the legislature according to the ordinary meaning of the terms used," even to "prevent what [the party] fears will be harsh results.").

*D. Scope of Relief on Appeal*

Having found that there are genuine issues of material fact warranting reversal of the County Court's final judgment, the Court now addresses the scope of relief on appeal. Appellant in this case has asked the Court to remand with instructions to enter judgment in GEICO's favor (presumably based on Appellant's view that it was entitled to summary judgment at the trial court level). As a general matter, a trial court's order denying a party's motion for summary judgment is a non-final, non-appealable order. *Taggart v. Morgan,* 943 So. 2d 250, 250 (Fla. 3d. DCA 2006) [31 Fla. L. Weekly D2800b]. However, under Rule 9.110(h) of the Florida Rules of Appellate Procedure, upon review of a lower tribunal's final order, "the court may review any ruling or matter occurring before the filing of the notice [of appeal]," including a denial of a motion for summary judgment. *See Nationstar Mortgage, LLC v. Craig,* 193 So. 3d 74, 77 n. 6 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1146a] (holding that an order denying a motion for summary judgment "is deemed to have been merged into the final summary judgment" and is thus properly reviewable on appeal).

Here, while at first blush it appears that the scooter Delarosa rode at the time of her accident is a "self-propelled vehicle," such that she is ineligible to recover PIP benefits under the terms of her insurance contract with Appellant and under the PIP Statute, the evidentiary deficiencies identified in Section II.B., *supra,* preclude the Court from finding that Appellant is entitled to judgment as a matter of law as the Court is without competent evidence in the record establishing the features and characteristics of the particular scooter Delarosa rode. The determination of the ultimate legal issues in the case, therefore, is more appropriately left to the trier of fact in the first instance, where the parties will have the opportunity to develop the evidentiary record and present argument. *See Novotny v. Estate of Dantone,* 848 So. 2d 398, 399 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1485a].

## III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that the County Court's final summary judgment in favor of Delarosa is **REVERSED**, the order denying GEICO's motion for summary judgment is **AFFIRMED**, and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

[1]The affidavit GEICO submitted with its June 13, 2018, motion was not signed by Ms. Gomes. Apparently having caught the error, GEICO filed a virtually identical motion with an executed affidavit the next day, June 14, 2018. This second motion for summary judgment was initially inadvertently omitted from the record on appeal. On June 28, 2019, however, this Court granted GEICO's motion to supplement the record with the corrected version of the motion. Thus, the Court properly has before it GEICO's June 14, 2018 motion for summary judgment.

[2]Specifically, the evidence GEICO submitted with its motion includes: (1) an unauthenticated photograph of a motorized scooter (R. at 86); (2) an unauthenticated printout with data on a vehicle (VIN #: JH2AF60067K50093) (R. at 87); (3) a letter to Appellant's counsel from the Florida DMV denying a public records request for "information on the owner and registrant of a vehicle" (R. at 85); and (4) a Manufacturer's Certificate of Origin for VIN #: JH2AF60067K502684 (R. at 89). None of these documents identifies Delarosa as the owner of the vehicle in question, and the Court has no way of knowing whether the vehicle depicted is an accurate representation of her scooter.

[3]"Self-Propelled" Definition, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/self-propelled (last visited August 16, 2019).

[4]"Self-Propelled" Definition, Dictionary.Cambridge.org, https://dictionary.cambridge.org/dictionary/english/self-propelled (last visited August 16, 2019).

[5]"Self-Propelled" Definition, Dictionary.com, https://www.dictionary.com/browse/self-propelled (last visited August 16, 2019).

[6]"Vehicle" Definition, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/vehicle (last visited August 16, 2019).

[7]"Vehicle" Definition, Dictionary.Cambridge.org, https://dictionary.cambridge.org/dictionary/english/vehicle (last visited August 16, 2019).

[8]"Vehicle" Definition, Dictionary.com, https://www.dictionary.com/browse/vehicle (last visited August 16, 2019).

[9]Jitney Definition, Dictionary.com, https://www.dictionary.com/browse/jitney (last visited August 16, 2019) ("a small bus or car following a regular route along which it picks up and discharges passengers, originally charging each passenger five cents").

[10]These latter two cases (*Watson II* and *Esker*) are also important on another point in that they illustrate the legislature's intent to exclude a set of vehicles from PIP coverage even though those vehicles—unlike ATVs, ditchdiggers, cranes, and lawnmower-tractors—are legally and commonly used on public highways (an issue Delarosa raised in the proceedings below).

* * *

**Civil procedure—Dismissal—Failure to appear at trial—Trial court erred in dismissing breach of contract action with prejudice as sanction for plaintiff's failure to appear at trial and failure of plaintiff's counsel to appear in person as ordered at hearing on motion to set aside dismissal where trial court did not consider *Kozel* factors in deciding if there was suitable alternative sanction**

REPUBLIC SERVICES OF FLORIDA, L.P. d/b/a ALL SERVICE REFUSE, Appellant, v. AUTO PLANET, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-021098 (AP). L.T. Case No. COCE17-007696. January 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Michael Davis, Judge. Counsel: Lauren Wajsman, Busch, Reed, Jones, and Leeper P.C., Marietta, Georgia, for Appellant.

**OPINION**

(PER CURIAM.) Republic Services of Florida, L.P. d/b/a All Service Refuse ("Appellant") appeals a final judgment in favor of Auto Planet, LLC ("Appellee"). Having carefully considered the brief, the record, and the applicable law, the final judgment is hereby **REVERSED** as set forth below:

In the county court proceedings, Appellant filed a breach of contract action to recover unpaid balances for recycling and disposal services rendered on behalf of Appellee. The county court later noticed the action for trial, however, both the Appellant and the Appellee failed to appear for the trial proceedings. As a result, the county court dismissed Appellant's case with prejudice. Counsel of record for Appellant, Jeffrey S. Leeper, Esq. ("Mr. Leeper"), subsequently, filed a motion to set aside dismissal, which included a notarized affidavit, signed by Mr. Leeper stating that he failed to attend the trial because the email copy of the Notice of Trial was sent to his SPAM email folder. The court set the matter for hearing and in its signed notice of hearing, the court noted that "Jeffrey Leeper is to appear at the hearing either in person or via telephone." Instead, on the date of the hearing, another attorney appeared on behalf of Mr. Leeper. In its Final Judgment entered in favor of Appellee, the county court opined that it was denying Appellant's motion to set aside dismissal due to Mr. Leeper's absence to testify as to his sworn affidavit. This Court reviews the county court's decision to impose sanctions under an abuse of discretion. *Gordon v. Gatlin Commons Prop. Owners Ass'n, Inc.,* 254 So. 3d 452, 456 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1620a].

Appellant argues that the county court abused its discretion in dismissing its case with prejudice in light of the fact that Appellant's counsel did not receive the Notice of Trial that was, inadvertently, delivered to counsel's SPAM email folder. Specifically, Appellant contends that the county court dismissed its case without considering the *Kozel* factors enumerated by the Florida Supreme Court in *Kozel v. Ostendorf,* 629 So. 2d 817, 818 (Fla. 1993). In addition, Appellant asserts that the county court further abused its discretion by denying its motion to set aside dismissal simply because another attorney, rather than Mr. Leeper, appeared at the hearing on Appellant's motion. Appellee did not file an answer brief.[1]

In *Kozel,* the Florida Supreme Court set forth the following factors to assist the trial court in determining whether a dismissal with prejudice is warranted:

> 1) Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
>
> 2) Whether the attorney has been previously sanctioned;
>
> 3) Whether the client was personally involved in the act of disobedience;
>
> 4) Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5) Whether the attorney offered reasonable justification for noncompliance; and
>
> 6) Whether the delay created significant problems of judicial administration.

*Id.*

A careful review of the Final Judgment demonstrates that the county court failed to expound upon the *Kozel* factors in making its final determination in favor of Appellee. While we understand the county court's frustration, the law is clear: when imposing the ultimate sanction of dismissal with prejudice, the court must consider the *Kozel* factors. *Id.* "After considering these factors, if there is a viable alternative sanction that is less severe than a dismissal with prejudice, the trial court should employ that alternative." *Gordon,* 254 So. 3d at 456 (holding that trial court's dismissal of plaintiff's complaint with prejudice was unwarranted and a lesser sanction was appropriate). Accordingly, the Florida Supreme Court has opined that "a fine, public reprimand, or contempt order may often be" a suitable alternative sanction to a dismissal with prejudice. *Kozel,* 629 So. 2d at 818. Therefore, the Final Judgment entered in favor of Appellee is hereby **REVERSED** and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

[1]On December 21, 2018, the circuit court, in its appellate capacity, entered an Order to Show Cause for Failure to File Answer Brief, to which Appellee did not respond.

* * *

**Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness, relatedness and necessity of charges—Summary judgment—Opposing affidavit filed by insurer precluded summary judgment in favor of medical provider on issues of reasonableness, relatedness and necessity of charges where affidavit created genuine issue of material fact on all issues raised—Further support for reversal is found in trial court's expressed confusion over what issues and evidence were before court, which was not clarified**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. FLORIDA CHIROPRACTIC & SPORTS REHAB CENTER, a/a/o Tyler Yagman, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-014383 (AP). L.T. Case No. COSO13-005588 (61). December 10, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Arlene S. Backman, Judge. Counsel: DeeAnn J. McLemore, Banker, Lopez, Gassler, P.A., St. Petersburg, for Appellant. Brian M. Rodier, Rodier & Rodier, P.A., Hallandale, for Appellee.

**OPINION**

(HENNING, J.) State Farm Mutual Automobile Insurance Company ("State Farm") appeals a final judgment in favor of Florida Chiropractic & Sports Rehab Center ("Florida Chiropractic"). Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **REVERSED** as set forth below.

Tyler Yagman was injured in an automobile accident on October 27, 2008. He first presented to Florida Chiropractic Sports & Rehab Center ("Florida Chiropractic") for treatment for his injuries on November 26, 2008. It should be noted that he was involved in another automobile accident on November 25, 2008. Florida Chiropractic later submitted a bill for payment for services rendered to State Farm Mutual Automobile Insurance Company ("State Farm"), which paid a reduced amount. For this reason, Florida Chiropractic filed suit against State Farm to recover personal injury protection (PIP) benefits, claiming breach of contract pursuant to an assignment of benefits by Tyler Yagman. Thereafter, Florida Chiropractic filed a motion for summary judgment regarding the reasonableness, relatedness, and medical necessity of the two charges in dispute. After a hearing, the county court granted summary judgment in favor of Florida Chiropractic. Final Judgment was also entered in favor of Florida Chiropractic. This appeal followed.

Under Florida law, the movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. *Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979). In support of its summary judgment motion, Florida Chiropractic relied on the affidavit of Dr. Matthew Cooper to demonstrate the reasonableness, relatedness, and medical necessity of its treatments and charges. State Farm relied upon the affidavit of Dr. Matthew Mathesie to challenge the motion. In his affidavit, after citing specific examples and reasons, Dr. Mathesie opined that treatment was not medically necessary; was not consistent with generally accepted principles of medical practice; was not done in a manner that was clinically appropriate in terms of type, frequency, extent, site, and/or duration; and was rendered without regard to the convenience of the patient, treating physician, or healthcare provider. In addition, Dr. Mathesie stated that, based upon his review of the medical records, the insured did not receive services for numerous CPT codes billed.

In this Court's *de novo* review of the evidence presented to the lower court, we find that the Mathesie affidavit clearly created genuine issues of material fact precluding the granting of summary judgment on any issues raised.

Further support for reversal is that during the hearing, the trial judge candidly admitted to being confused over what issues were before the court for determination and what evidence was actually considered for the ruling. Without seeking true clarification or taking the matter under consideration for ruling at a later time, the Court after changing its ruling more than once, ultimately granted Summary Judgment for Florida Chiropractic on all issues.

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. Appellant's Motion for Attorneys' Fees is hereby conditionally **GRANTED** as to appellate attorney's fees, contingent on the county court's determination that Appellant's proposal for settlement complies with the requirements of law and Appellant ultimately prevailing in the case. Further, Appellee's Motion for Attorney Fees is hereby **DENIED**. (SINGHAL and LEDEE, JJ., concur in result only.)

* * *

**Insurance—Personal injury protection—Inconsistent jury verdict—Trial court erred in denying insurer's objection to inconsistent verdict finding more treatments to be related and medically necessary than were shown in medical records—Failure of trial court to send matter back to jury to correct verdict requires new trial**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. SUNRISE CHIROPRACTIC & REHABILITATION CENTER, INC., a/a/o Michel Saint Sauveur, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE15-016091 (AP). L.T. Case No. CONO11-014147. January 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Jill K. Levy, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, for Appellant. Russel Lazega, Florida Advocates, Dania Beach, for Appellee.

**OPINION**

(PER CURIAM.) State Farm Mutual Automobile Insurance Company ("State Farm") appeals a final judgment in favor of Sunrise Chiropractic & Rehabilitation Center, Inc. ("Sunrise"). Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**, in part, and **REVERSED**, in part, as set forth below:

In the proceedings below, Sunrise filed suit to recover personal injury protection benefits from State Farm for breach of contract pursuant to an assignment of benefits from Michel Saint Sauveur (the "Insured"). On June 9, 2015, a jury trial commenced on the issues of relatedness and medical necessity of several ,CPT codes and dates of service as well as the reasonableness of the charges. As to the contested treatments for the dates of service and CPT codes, the jury found in favor of Sunrise. State Farm filed an Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial ("Amended Motion") on June 23, 2015, which was denied on July 21, 2015. Final Judgment was entered in favor of Sunrise on August 11, 2015.

State Farm argues, *inter alia,* that the verdict form utilized by the county court caused confusion and resulted in an inconsistent verdict. "A jury's verdict in a civil case is generally clothed with a presumption of regularity." *Coba v. Tricam Industries, Inc.*, 164 So. 3d 637, 643 (Fla. 2015) [40 Fla. L. Weekly S257a] (internal punctuation omitted). "Thus, an appellate court will not disturb a final judgment if there is competent substantial evidence to support the verdict on which the judgment rests." *Id.*

State Farm asserts that confusion arose because the form referred only to CPT codes rather than the treatment described and that the verdict form contained no information on the number of times Sunrise billed each CPT code, the amount it charged for each treatment, or whether the jury should award a global or per-treatment amount. (Appellant's Br., pg. 22). Counsel for State Farm objected based on the inconsistent verdict and requested that the court poll the jury. (R. 1639). The county court discharged the jury and overruled Mr. Hellman's objection to the inconsistent verdict. (R. 1639-1641). In *Coba,* the Supreme Court of Florida instructs,

> [w]hen a jury in a civil case returns with an inconsistent verdict and a party does not object before the jury is discharged, the well-established law has been that the party waives any objections to the inconsistent verdict . . . Consistent with our long-standing precedent, we hold that a party must timely object to an inconsistent verdict . . .or the issue is waived.

164 So. 3d at 638. Here, Dr. Mathesie provided his opinion as to what treatments were related and medically necessary. (R. 1416, 1427-1429). As it relates to CPT 97035, for example, State Farm points to the fact that, of the twenty-six treatments the jury determined to be related and medically necessary, Sunrise's medical records only show twenty-two treatments. This result is inconsistent, as contemplated by the court in *Coba.* This Court finds that the county court erroneously denied State Farm's objection. The county court's failure to send the matter back to the jury to correct the inconsistent verdict requires that this Court grant a new trial. *See Coba*, 164 So. 3d at 644 (instructing that if a party timely objects to an inconsistent verdict and the court erroneously denies the objection and discharges the jury, the correct remedy is to grant a new trial.)

State Farm raises several other evidentiary issues on appeal. "The standard of review for evidentiary rulings is abuse of discretion." *Holt v. Calchas,* LLC, 155 So. 3d 499, 503 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D296a] (citing *Salazar v. State,* 991 So. 2d 364, 373 (Fla. 2008) [33 Fla. L. Weekly S535a]). Upon careful review of the record, this Court determines that the county court did not abuse its discretion as to the issues raised. Therefore, the decisions of the county court are affirmed.

Accordingly, the final judgment entered in favor of Appellee is hereby **AFFIRMED**, in part, and **REVERSED**, in part. This case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellant's Motion for Appellate Attorney's Fees is hereby conditionally **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand, contingent on the county court's determination that State Farm's proposal for settlement complies with the requirements of law and State Farm ultimately prevailing in the case. Additionally, Appellee's Motion for Appellate Attorney's Fees is hereby **DENIED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. HOLLYWOOD DIAGNOSTIC CENTER, a/a/o Evelyn Fernandez, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-020511 (AP). L.T. Case No. COCE10-013980. January 23, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Giuseppina Miranda, Judge. Counsel: Kenneth P. Hazouri, Law Office of deBeaubien, Simmons, Knight, Mantzaris & Neal, LLP, Orlando, for Appellant. Joseph R. Dawson, Law Office 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**. Appellee's Motion for Attorney's Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

BRUCE VONZELL DAVIS, Appellant, v. HIGHLAND GARDENS APARTMENTS, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-020273 (AP). L.T. Case No. COCE16-007160. January 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Lisa Von Tefs, Judge. Counsel: Bruce Vonzell Davis, Deerfield Beach, Appellant. Michael D. Cirullo, Jr., Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, for Appellee.

**OPINION**

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979). (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

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# CIRCUIT COURTS—ORIGINAL

**Torts—Negligence—Automobile accident—Continuance—Motion to continue trial because plaintiff has not yet been determined to be at maximum medical improvement is denied—There is ample medical evidence regarding plaintiff's diagnosis and prognosis, and defendant would be prejudiced by continuance**

CHARLEY SCOTT, Plaintiff, v. GADSDEN COUNTY SCHOOL BOARD, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-802-CA. February 7, 2020. David Frank, Judge. Counsel: Michael D. Blank, Tallahassee, for Plaintiff. William B. Armistead, Tallahassee, for Defendant.

## ORDER DENYING PLAINTIFF'S MOTION FOR CONTINUANCE OF TRIAL

This cause came before the Court on plaintiff's motion for the continuance of the trial of this case, and the Court having reviewed the motion and affidavit submitted by the plaintiff, heard argument of counsel, and being otherwise fully advised in the premises, finds

### Factual and Procedural History

On October 19, 2018, plaintiff filed a personal injury lawsuit against defendant based on the alleged negligence of one of its bus drivers whose bus collided with plaintiff's vehicle on October 23, 2015.

Plaintiff's three-page complaint alleges that his injuries, sustained more than four years ago, "are either permanent in nature or continuing and the plaintiff will suffer these losses in the future." Presumably, in October of 2018, plaintiff had a good faith basis to allege the nature of his injuries.

This case was at issue on December 17, 2018. Defendant filed the notice for trial on April 11, 2019. Pursuant to a case management conference on December 17, 2019, and to accommodate the request of the parties, the Court issued its order setting the jury trial of this case for February 24, 2020. According to the court docket, there was no discovery after approximately May of 2019.

On January 30, 2020, the parties filed a joint pretrial stipulation with witness and exhibit lists for trial, in which they stated "none" for pending motions. The Court's *sua sponte* review of the court docket, however, showed that the plaintiff had filed an "unopposed" motion to continue the trial on January 20, 2020 on the single ground that the plaintiff "is still seeking treatment" and is "not at Maximum Medical Improvement ("MMI")."

The Court called up a hearing on the motion to continue on February 4, 2020. At the hearing, plaintiff did not provide a convincing explanation why four years was not enough time to assess plaintiff's very typical neck and back injuries, or why the trial, set to occur in two weeks, must be continued because plaintiff's physicians have not placed the plaintiff at "MMI." Rather than rule on the spot, the Court reserved ruling and gave plaintiff an opportunity to file an affidavit clarifying the MMI situation. Most importantly, whether a change of heart or simple miscommunication, defendant made it clear that it does indeed object to the continuance and it outlined the prejudice it would suffer if granted. The Court's order regarding the affidavit was the following:

> ORDERED that the Curt reserves ruling on the motion until Plaintiff provides an affidavit from one of the two primary treating physicians identified at the hearing: 1) advising that medical science, clinical expertise, and the amount of time treating injuries that occurred in 2015 are insufficient to assess whether the plaintiff has reached Maximum Medical Improvement ("MMI"); 2) opining when the plaintiff will be at MMI; and 3) listing what must occur between now and then to provide the information needed to assess MMI.
>
> IT IS FURTHER ORDERED that relevant medical records to support the three statements outlined above shall be attached to the affidavit.

On February 6, 2020, plaintiff filed the affidavit of Nurse Practitioner Kimberly Hagan, with 73 pages of medical records attached.

To begin, the purported affidavit apparently was signed by Dr. Parks' nurse practitioner. There are three problems with this. First, Dr. Parks is not one of the two physicians identified by plaintiff's counsel at the hearing. The physicians who were identified were Drs. Alexander and Lee. Second, she is not even Dr. Parks, she is a nurse. And third, the document is not even an affidavit. It is an unsworn typewritten note. The document does not comply with the Court's order. For this reason alone, the document should not be considered, and the motion should be denied.

Even if the note were not defective for its purpose, it does not support the rationale for a continuance. Nurse Hagan's statement does not expressly say the plaintiff is not at MMI, nor does it explain what is needed before that assessment can be accomplished. It simply says "the determination" of whether he is at MMI is "deferred" to the plaintiff's next appointment (which is scheduled to occur before the start of trial). For this additional reason alone, the purported affidavit fails, and the motion should be denied.

Moreover, the Court has reviewed all 73 pages of medical records. They contain a virtual plethora of medical evidence regarding the plaintiff's physical injuries, diagnoses, surgical procedures, non-surgical medical care, and prognosis. They also indicate that plaintiff's treating physicians and medical providers do in fact have a working knowledge of the extent of plaintiff's injuries and what he can expect in the future. The following is a treatment note from a May 9, 2019 visit with Dr. Alexander:

> The natural history of lumbar disc degeneration with anterolisthesis and postoperative sciatica has been discussed. Treatment options have been detailed and considered. Surgery is a consideration at this time. Prior to surgical consultation the patient will be referred to pain management for left L5 selective nerve block. Surgery would be a last resort option, and would most likely involve a fusion at that level and possibly at higher levels. All of the questions and concerns relating to the diagnostic assessment and treatment plan have been addressed to the patient's satisfaction.

### The Controlling Law and Procedure

> All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge. All motions for continuance shall be in writing unless made at a trial and, except for good cause shown, shall be signed by the party requesting the continuance. All motions for continuance in priority cases shall clearly identify such priority status and explain what effect the motion will have on the progress of the case.

Fla. R. Jud. Admin. 2.545(e).

> The following time standards are hereby established as a presumptively reasonable time period for the completion of cases in the trial and appellate courts of this state. It is recognized that there are cases that, because of their complexity, present problems that cause reasonable delays. However, most cases should be completed within the following time periods: . . . Civil Jury cases—18 months (filing to final disposition); Non-jury cases—12 months (filing to final disposition).

Fla. R. Jud. Admin. 2.250(a).

". . .[C]ontinuances are generally disfavored and require a showing of good cause." *HSBC Bank USA, N.A. v. Serban,* 148 So.3d 1287 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a].

The factors to be considered when ruling on a motion to continue

are: ". . .whether denial will create injustice for the movant, whether the cause for the request was 'unforeseeable by the movant' and whether the opposing party would suffer any prejudice as a result of a continuance. *Id.* The "persistent lack of resolution of the allegations" against the defendant is one form of prejudice. *Id.*

The Court has not found, and plaintiff has not provided, a single Florida opinion or ruling where the fact that plaintiff was not at MMI was acknowledged as an appropriate ground to continue a trial. It's understandable. The concept of MMI is to a large degree, "in the eye of the beholder." The criteria can vary depending on which medical professional is being asked the question. MMI could mean a patient has finished acute care and only needs palliative care. It could mean an injury healed. It could mean an injury will not get any worse or any better. What it is *not* is an element of any damages in a personal injury automobile case, to include the legal requirement of no fault permanency, which is a matter for the jury. *Chappell v. Clark,* 277 So.3d 723 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1825c], reh'g denied (Aug. 28, 2019), review dismissed, No. SC19-1671, 2019 WL 5887041 (Fla. Nov. 12, 2019).

As a general proposition, predicting the exact day an injury will heal, or what the exact prognosis will be at that point, has never been a required evidentiary foundation of future (personal injury) damages. *Nova University v. Katz,* 636 So.2d 729 (Fla. 4th DCA 1993) (denial of continuance upheld where appellee requested more time for his foot to heal so he could obtain a final diagnosis and prognosis of the injury to address future damages). Experts routinely rely on their medical training and clinical experience to express opinions regarding prognoses and future medical requirements and costs within a reasonable degree of medical probability given the best evidence available at the time.

The length of time a physician spends with a claimant, and the depth of the clinical care provided to a claimant, certainly go to the weight and credibility of the medical evidence, but it does not control the timing of the trial or outweigh the demands on our trial courts to administer justice in a timely manner. A plaintiff controls the prosecution of his or her case, to include when a lawsuit is filed and how diligently it is litigated. These matters are more akin to the tactics and strategies of trial practice than they are mechanisms for case management.

**Analysis**

The continuance sought in this case has no relation to any medical emergency or other unforeseen event that would make a party, an attorney, or a key witness unavailable. The plaintiff's injuries have followed a very common path of spine related surgical procedures and pain management. There appears to be plenty of evidence regarding their diagnosis and prognosis, even though a medical provider apparently has not ascribed to him the magic words, "Maximum Medical improvement." Plaintiff has not shown good cause.

The denial of the present motion will not cause an injustice to the plaintiff, the cause for the request was foreseeable, and the defendant would be prejudiced by a continuance.

Finally, the fact that the pendency of this case will soon exceed the maximum amount of time allotted for civil jury trials—18 months—and the fact that the plaintiff waited until the eve of the pretrial conference to file a motion, which had to be called up by the Court, do not favor a continuance.

Accordingly, it is

ORDERED and ADJUDGED that the motion is DENIED.

IT IS FURTHER ORDERED that defendant is precluded *in limine* from arguing or otherwise suggesting that plaintiff's medical evidence is deficient because plaintiff "is not at MMI." It would be unjust to consider defendant's objection to a continuance that sought more time to reach, or at least verify, MMI, and then permit defendant to attack the plaintiff's case because MMI was not reached or verified.

* * *

**Civil procedure—Expert witness fees—Amount**

MARCUS K. JOHNSON, an individual, Plaintiff, v. JOHNNY L. BAYS, JR., an individual; and M & J STRIPING, INC., a Florida corporation, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CA-004271, Division CV-E. February 11, 2020. Bruce Anderson, Judge. Counsel: Brian M. Flaherty, for Plaintiff. Linda M. Hester and Brian M. Pederson, for Defendants.

**ORDER ON DEFENDANTS' AMENDED MOTION TO DETERMINE DEFENSE OBLIGATION TO REIMBURSE PLAINTIFF FOR DEPOSITION OF DR. MARK K. EMAS**

THIS MATTER having come before the Court on Defendants' Amended Motion to Determine Defense Obligation to Reimburse Plaintiff for Depositions of His Expert Witnesses (the "Motion"), specifically with regard to the deposition of Dr. Mark K. Emas ("Dr. Emas"), the Court having reviewed the Motion, heard testimony offered on behalf of Dr. Emas, heard argument of counsel, and otherwise being fully advised in the premises, the Court finds as follows:

1. Shari Repka ("Ms. Repka"), Practice Administrator for Emas Spine & Brain Specialists (the "Practice"), testified that the Practice charges $1,400.00 per hour for the first hour for any deposition of Dr. Emas and $900.00 for each additional hour.

2. Ms. Repka also testified to the cost and disruption to the Practice resulting from Dr. Emas' removal from his duties to attend the deposition.

3. Defendants offered no evidence in support of their motion or in opposition to the testimony provided by Dr. Emas' office in this matter.

4. Based on the testimony presented, the Court finds the sums charged by the Practice for Dr. Emas' time are reasonable.

Based on the foregoing, it is ORDERED as follows:

1. Defendants' Motion is GRANTED, to the extent that the Court finds that Defendants are obligated to pay Dr. Emas for the time spent in his deposition at the rate of $1,400.00 for the first hour and $900.00 for each additional hour.

2. Defendants are ordered to make payment to Emas Spine & Brain Specialists for the time previously invoiced for the deposition taken in this matter within ten (10) days from the date of this Order.

* * *

**Corporations—Merger—Appraisal rights—Shareholders who did not own shares of company as of the designated record date of merger were not entitled to vote on the merger and, accordingly, were not entitled to assert appraisal rights—Statute clearly limits appraisal rights to minority shareholders who owned their interest in the company as of the designated record date—Shareholders who acquired shares after the designated record date did not become eligible to assert appraisal rights merely because they were included as defendants in suit filed by corporation under section 607.1330—Section 607.1330's dispute resolution protocol works in tandem with other provisions of Act and presupposes that shareholder is eligible to exercise appraisal rights and receive "fair value" as determined by court**

PERRY ELLIS INTERNATIONAL, INC., a Florida corporation, Plaintiffs, v. BCIM STRATEGIC VALUE MASTER FUND, LP, a Cayman Island limited Partnership, GKC SV SMA I, LLC, a Delaware limited liability company, QUADRE INVESTMENTS, LP, a Delaware limited partnership, ARBITRAGE FUND, and WATER ISLAND MERGER ARBITRAGE INSTITUTIONAL COMMINGLED MASTER FUND, L.P., a Delaware limited partnership, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Litigation Division. Case No. 2018-42775 CA 01. February 3, 2020. Michael A. Hanzman, Judge. Counsel: Eugene E. Stearns, Carlos J. Canino, Albert D. Lichy, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, for Plaintiffs. Kendall B. Coffey, Kevin C. Kaplan, Scott A.

Hiaasen, John E. Thornton, Jr., Miami, for BCIM Strategic Value Master Fund LP and GICC SVSMA1, LLC, Defendants. Lawrence A. Kellogg, Victoria J. Wilson, Levine Kellogg Lehman Schneider & Grossman LLP, Miami, for BCIM Strategic Value Master Fund, LP, GICC SVSMA 1, LLC, Quadre Investments L.P., Arbitrage Fund and Water Island Merger Arbitrage Institutional Commingled Master Fund, L.P., Defendants.

**FINAL SUMMARY JUDGMENT**

**I. INTRODUCTION**

Plaintiff, Perry Ellis International, Inc. ("Plaintiff" or "Perry Ellis"), through its "Corrected Second Amended Complaint" (SAC), asks this Court to declare that Defendants, BCIM Strategic Value Master Fund, LP ("BCIM") and GKC SV SMA I, LLC ("GKC"), lack standing to exercise appraisal rights pursuant to the Florida Business Corporation Act, ("Act"), codified at Chapter 607, et. seq.[1] Alternatively, and in the event the Court disagrees with the standing argument, Perry Ellis requests that it determine "the fair value, as defined by Florida Statute 607.1301(4), of the shares of Perry Ellis common stock owned by Defendants as of the time immediately before the Effective Date of the Transaction [*i.e.*, merger], excluding price appreciation in anticipation of the Transaction," together with other ancillary relief. SAC pp. 16-17.

Defendants BCIM and GKC, through their "Amended Answer," acknowledge that they delivered a written notice of intent to assert appraisal rights pursuant to the Act, thereby representing that they were "eligible to assert appraisal rights." Answer ¶ 37. These Defendants also admit that they were not shareholders of Perry Ellis as of the close of business on August 16, 2018, the designated record date of the merger, Answer ¶ 46, as they acquired *all* of their shares after that date. Answer ¶ 47.[2] They do not, however, acknowledge that their lack of share ownership as of August 16, 2018 renders them ineligible to exercise appraisal rights with respect to their later acquired common stock. Rather, they insist that they had the right to purchase the shares after the record date and thereafter seek a judicial determination of "fair value." (*i.e.*, appraisal rights).

Plaintiff, through its "Amended Motion and Memorandum of Law" ("Motion"), now seeks final summary judgment, claiming that "[t]here is no genuine issue of material fact that Defendants [BCIM and GKC] do not have standing to assert appraisal rights as to their shares of Perry Ellis common stock." Mot. p. 1. This is so, according to Plaintiff, because these parties acquired their shares "40 days after the record date" and, as a result, they were not "entitled to vote on the merger"—a statutory *sine qua non* to an entitlement to "appraisal rights." *See* Fla. Stat. § 607.1302(1)(a) (2002). The Court agrees.

**II. FACTS**

**A. The Merger**

On February 6, 2018, Perry Ellis' founder, George Feldenkreis, made an offer to the shareholders of the company to acquire their common stock for $27.50 per share. On June 5, 2018, a special committee of the company's Board of Directors that had been formed to evaluate that offer, as well as other prospective bids, concluded that Mr. Feldenkreis' tender at $27.50 per share was "fair, advisable, and in the best interest of the company and [its] unaffiliated shareholders." That same day the committee agreed to submit the proposed transaction to a vote of all unaffiliated Perry Ellis shareholders, and the company entered into an "Agreement and Plan of Merger" with an entity controlled by Mr. Feldenkreis.

On August 16, 2018, the Board of Directors executed a unanimous written consent adopting the close of business on that day [August 16, 2018] as the voting record date for the proposed merger. Florida Statute § 607.0707 (1) (1997) contains only two restrictions on a board's ability to set a "record date" used to "determine the shareholders entitled . . . to take any . . . action," such as voting on a merger. First, a record date fixed by the board may not "be a date preceding the date upon which the resolution fixing the record date was adopted." *Id.* § 607.0707(1). Second, a record date "may not be more than 70 days before the meeting or action requiring a determination of shareholders." *Id.* § 607.0707(5). Both of these requirements were satisfied here.

On September 11, 2018 the Company publicly posted and mailed to all shareholders a "Definitive Proxy Statement" which disclosed, in no uncertain terms, that *only* record shareholders as of the close of business on August 16, 2018 were entitled to vote on the proposed merger or seek statutory appraisal rights. So did the notice of the October 18, 2018 special meeting that was sent to shareholders on September 10, 2018. In both the Definitive Proxy Statement and the notice of Special Meeting, shareholders were advised that for each matter to be voted upon, including the proposed merger, "you have one vote for each share of Company Common Stock that you owned as of the close of business on August 16, 2018." The Definitive Proxy Statement also advised that only "[s]hareholders of Company Common Stock as of the record date are entitled to appraisal rights under the act," and cautioned that a shareholder's failure "to adhere strictly to the requirements of Florida law in any regard will cause a forfeiture of any appraisal rights."

At the October 18, 2018 Special Meeting, 91% of the votes cast by unaffiliated shareholders were in favor of the merger.

**B. Defendants Acquisition of Shares and Demand for Appraisal**

Neither BCIM nor GKC held a single share of Perry Ellis stock until late September 2018. After their initial acquisition, both BCIM and GKC continued to buy hundreds of thousands of shares daily through early October, thereby enabling selling shareholders to receive the tender price (or slightly more or less) in advance of the merger's closing. On November 2, 2018, and after the merger closed, BCIM and GKC submitted an appraisal election form demanding payment of over $110 Million—approximately $70 Million over and above the merger consideration payable for their shares in the aggregate. This, not surprisingly, caused Plaintiff to request "the dates on which [BCIM and GKC] acquired their shares and information regarding the seller[s] of those shares"; information BCIM and GKC insisted they were "under no legal obligation" to provide and which, in their view, was "not relevant to their demand for appraisal."

**C. Plaintiff's Filing of this Action**

When the Defendants refused to provide the requested information regarding their purchases, the Company was faced with a situation where these "shareholders" had made demands for payment which remained "unsettled," thereby triggering, in its counsel's view, an obligation to "commence a proceeding within 60 days after receiving the payment demand and petition the Court to determine the fair value of the shares and accrued interest." Fla. Stat. § 607.1330(1) (2004). The statute requires that "[a]ll shareholders . . . whose demands remain unsettled shall be made parties" to that proceeding. *Id.* Thus, in compliance with its view of the statute, Plaintiff named BCIM and GKC as Defendants in this case, which again asked the Court to declare them *ineligible* to exercise appraisal rights or, *in the alternative*, determine the "fair value" of their shares. *See* SAC.

**III. ANALYSIS**

The parties agree that the issue presented by Plaintiff's Motion is one of pure statutory interpretation and, as result, presents a question of law. *See, e.g., Townsend v. R.J. Reynolds Tobacco Co.*, 192 So. 3d 1223, 1225 (Fla. 2016) [41 Fla. L. Weekly S269a]; *Daniels v. Fla. Dep't of Health,* 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a]; *State v. Glatzmayer,* 789 So. 2d 297, 301 n. 7 (Fla. 2001) [26 Fla. L. Weekly S279a]. The Court will therefore begin by discussing the pertinent provisions of the Act. It will then recite the law govern-

ing the interpretation of those provisions and conclude by applying those settled principles of statutory construction.

**A. The Act's Appraisal Provisions**

Appraisal rights are a creature of statute, and a shareholder attempting to exercise those rights bears the burden to "demonstrate strict compliance with the statute's provisions." *Rodriguez-Cespedes v. Creative Leasing, Inc.*, 728 So. 2d 811, 813 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D647a]. The Act's appraisal rights provisions are intended to protect minority shareholders "from oppression at the hands of the majority shareholders," and many states enacted dissenter/appraisal rights statutes as "the law shifted away from requiring unanimous approval" for "actions that changed the fundamental nature of a corporation." *Erp v. Erp*, 976 So. 2d 1234, 1238 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D891b]. *See also* Douglas K. Moll, *Shareholder Oppression and "Fair Value": Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L. J. 293, 310 (2004); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 *Duke Law Journal* 613-716 (1998). Put simply, these types of laws were enacted "to provide certain rights to the minority shareholders in exchange for [their] loss of veto power," and "[t]oday, the appraisal remedy 'serves a minority shareholder protection role . . . operating to protect minority shareholders who are cashed out of their investment." *Erp,* 976 So. 2d at 1238 (internal citation omitted).

Appraisal rights statutes come in many shapes and sizes, and different jurisdictions impose distinct requirements that must be met before a shareholder is eligible to exercise these rights. The question of what requirements must be satisfied in order to invoke appraisal rights is one of public policy. Some legislative bodies may conclude, as BCIM and GKC argue, that appraisal arbitrageurs perform "a vital public function" because the prospect of institutional buyers acquiring large positions in a company *after* a merger is announced, and then seeking a judicial appraisal, keeps companies and suitors "honest" in setting the share price or, as Defendants put it, discourage "unfair mergers in the first place." Defs' Memo p. 19. *See, e.g.*, Boone, Audra and Broughman, Brian J. and Macias, Antonio J., *Merger Negotiations in the Shadow of Judicial Appraisal* 62 J.L. Econ. 281, 283 (2019).

Other legislative bodies might see it differently and—like Perry Ellis—believe that appraisal arbitrageurs are nothing more than extortionists who buy litigation in the hopes of extracting from the company an above market return or, absent that, persuading a court that the agreed upon share price is "unfair." So depending upon a particular jurisdiction's policy choice, some may (and have) decide[d] to prevent post-merger announcement purchasers from exercising appraisal rights, while others may (and have) elect[ed] to encourage this practice.

The question here, of course, is where the Florida Legislature stood on this issue in 2018,[3] for "[w]hen the legislature has spoken, and declared one interest superior to another, a court must subordinate her personal belief to that so declared." Benjamin Cardozo, *The Paradoxes of Legal Science*, 38 Yale L. J. 405 (1928). This is because "the making of social policy is a matter within the purview of the legislature . . ." *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) [22 Fla. L. Weekly S682a], and this Court's duty is to apply the governing statutes, as written. *See, e.g., L.P. v. Dep't of Children & Family Services*, 962 So. 2d 980, 982 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1830b] (". . . it is our duty to say what the law is, and not what it should be").

Turning to the statutes at issue here, the Court finds them to be clear and cohesive. Section 607.1302(1)(a) begins the statutory appraisal scheme by dictating who is entitled to exercise appraisal rights. It provides that:

> (1) A shareholder of a domestic corporation is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:
>
> (a) Consummation of a conversion of such corporation pursuant to s. 607.1112 if shareholder approval is required for the conversion and the shareholder is entitled to vote on the conversion under ss. 607.1103 and 607.1112(6) or the consummation of a merger to which such corporation is a party if shareholder approval is required for the merger under s. 607.1103 *and the shareholder is entitled to vote* on the merger or if such corporation is a subsidiary and the merger is governed by s. 607.1104.

*Id.* (emphasis added). These two conjunctive requirements are straightforward. First, in order for a shareholder to exercise appraisal rights, the merger must have required shareholder approval under § 607.1103, a statute which specifies the circumstances under which shareholder approval must be secured in order to adopt a "plan of merger or [a] plan of share exchange . . . ." *Id.* There is no doubt here that shareholder approval was required in order to adopt this merger and, as a result, the first statutory condition of § 607.1302 is met. Second, in order to be "entitled to appraisal rights," the statue mandates that "the shareholder [be] entitled to vote on the merger. . ." *Id*.

Assuming a shareholder meets the gateway criteria of § 607.1302(1)(a), § 607.1321 then sets forth certain procedural steps a shareholder must take to perfect their appraisal rights. To perfect a right for payment of "fair value" the shareholder must, within a specific time period, "deliver to the corporation . . . written notice of the shareholder's intent to demand payment if the proposed . . . action is effectuated," and "[m]ust not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed corporate action." Fla. Stat. § 607.1321(1)(a)-(b), (2004). "A shareholder . . . who does not satisfy" these requirements "is not entitled to" exercise appraisal rights. *Id.* § 607.1321(4).

While § 607.1321 imposes certain obligations on a shareholder seeking to exercise appraisal rights, § 607.1322 correspondingly imposes certain obligations upon the corporation including, but not limited to, an obligation to "deliver a written appraisal notice and form" to shareholders requesting specific information and offering "each shareholder who is entitled to appraisal rights to pay the corporation's estimate of fair value" of the shares. Fla. Stat. § 607.1322(2)(b) 4, (2003). A shareholder "who does not sign and return" that form "shall not be entitled to payment . . . ." Fla. Stat. § 607.1323(3) (2003). And if a shareholder "is dissatisfied with the corporation's offer" (*i.e.*, its estimate of "fair value"), she must notify the corporation of her "estimate of the fair value of the shares and demand payment of that estimate plus accrued interest." Fla. Stat. § 607.1326(1) (2003). A failure to provide this notice and demand "waives the right to demand payment under [§ 607.1326(1)]" and allows the corporation to tender "only to the payment offered . . . pursuant to s. 607.1322(2)(b)4." § 607.1326(2).

Once the preceding steps are completed, § 607.1330 addresses what must occur in order to resolve any remaining disagreement. Section (1) mandates that "[i]f a shareholder makes demand for payment under s. 607.1326 which remains unsettled" (*i.e.*, the parties do not agree on "fair value"), the corporation "shall commence a proceeding within 60 days after receiving the payment demand [*i.e.*, the shareholder demand for estimate of "fair value"] and petition the court to determine the fair value of the shares and accrued interest . . ." Fla. Stat. § 607.1330(1) (2004). The statute requires that "[a]ll shareholders . . . whose demands remain unsettled shall be made parties to the proceeding as in an action against their shares."

Finally, subsection (5)—which is at issue here—instructs that "[e]ach shareholder made a party to the proceeding is entitled to

judgment for the amount of the fair value of such shareholder's shares, plus accrued interest, as found by the court." *Id*.

These provisions are each part of a comprehensive statutory scheme containing both substantive and procedural components. Section 607.1302 again dictates who is "entitled to appraisal rights," and section 607.1322 then dictates what steps the corporation must take in order to enable those shareholders to perfect that right (*i.e.*, "deliver a written approval notice and form to all record shareholders who may be entitled to assert appraisal rights"). Sections 607.1321 and 607.1323 then dictate what an eligible shareholder must do in order to assert and perfect appraisal rights (*i.e.*, "deliver notice of the shareholder's intent to demand payment" and execute and return the form received by the corporation). And finally, § 607.1330 provides the mechanism to be employed when a shareholder's demand "remains unsettled" (*i.e.*, when the parties cannot agree on "fair value"). These statutes work in tandem, not in isolation.

**B. The Parties' Positions**

As previously mentioned, Plaintiff's position is simple. Section 607.1302(1)(a) provides, in no uncertain terms, that in order to be entitled to appraisal rights one must be "entitled to vote on the merger." *Id.* The appraisal statute itself does not dictate which shareholders are "entitled" to vote so, in Plaintiff's view, the Court must look to § 607.0707 which authorizes a corporation, through its by-laws, to "fix" the "record date" used in "determining shareholders entitled to . . . vote" on any corporate matter and—in the absence of a controlling by-law—permits the board of directors to "fix the record date," so long as: (a) that date does not precede the date upon which the resolution fixing the record date is adopted; and (b) the record date fixed is no more than 70 days before the meeting or actions requiring a determination of shareholders. § 607.0707(1)(5).

Pursuant to this statutory authority, Plaintiff's board of directors "fixed" the record date to vote on this merger as August 16, 2018. At that time neither of these Defendants owned a single share of Perry Ellis stock and, as a result, neither was "entitled to vote on the merger." § 607.1302(1)(a). This, according to Plaintiff, inexorably leads to the conclusion that neither of these Defendants is "entitled to appraisal rights," § 607.1302(1), thereby mandating that the Court enter summary judgment on its claim for declaratory relief (Count I).

Defendants advance two arguments in opposition. First, they insist that the phrase "the shareholder is entitled to vote on the merger" contained in § 607.1302 (1)(a) really does not mean "the shareholder" (*i.e.*, the person or entity owning the shares), but rather is intended to refer to the class of stock owned by the shareholder demanding appraisal. Defs.' Mem. pp. 6-7. In other words, Defendants ask the Court to replace the words "the shareholder" with the words "the class of shares owned by the shareholder," and conclude that as long as a shareholder owns a class of stock that was entitled to vote, that shareholder may secure appraisal rights even if they themselves were not entitled to vote on the transaction.

Second, Defendants seize upon subsection (5) of § 607.1330 in isolation, and claim that because Perry Ellis "made" them a party to the proceeding, they are *ipso facto* "entitled to judgment for the amount of the fair value" of their stock, plus interest." *Id.* In other words, reading this provision literally and in isolation, Defendants insist that because the company brought (and named them in) this action, they are now entitled to appraisal rights even if they do not meet the criteria of § 607.1302, and that once it filed this case Perry Ellis became "barred from challenging their entitlement to the fair value of their shares." Defs.' Mem. p. 7.

**C. Governing Law**

In matters of statutory construction it is fundamental that "legislative intent is the polestar by which the court must be guided. . . ." *State v. Webb,* 398 So. 2d 820, 824 (Fla. 1981); *Princeton Homes, Inc. v. Morgan,* 38 So. 3d 207, 210-11 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1293a]. To ascertain that intent, courts consider a variety of factors "including the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters." *Badaraco v. Suncoast Towers V Assocs.,* 676 So. 2d 502, 503 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1546g] (citing *Am. Bakeries Co. v. Haines City,* 131 Fla. 790, 180 So. 524, 532 (1938)); *see also Bautista v. State,* 863 So. 2d 1180, 1185 (Fla. 2003) [28 Fla. L. Weekly S849a] ("[t]o discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute").

The first and cardinal rule of statutory construction is to read the statute, then read it again, for "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) [37 Fla. L. Weekly S439a]. As our appellate court recently put it, "[t]he Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 317 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1615a]. So if the "language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. . . ." *Id.* (quoting *A.R. Douglass, Inc. v. McRainey ,* 137 So. 157, 159 (Fla. 1931); *see also Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 66 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] (same).

That does not, however, mean that parts—or in this case subparts—of a statute should be read in isolation. Rather, "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 455 (Fla. 1992) (quoting *Fleischman v. Dep't of Prof'l Regulation,* 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983)). The principle that a statute must be read "in the context of its surrounding sections," *BellSouth Telecomm., Inc. v. Meeks,* 863 So. 2d 287, 290 (Fla. 2003) [28 Fla. L. Weekly S775b], applies with equal force in instances where a part of the statute standing alone may appear to be clear and unambiguous:

> If a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the *same statute* or others in *pari materia,* the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent.

*Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1265-66 (Fla. 2008) [33 Fla. L. Weekly S493a] (citing *Fla. State Racing Comm'n v. McLaughlin,* 102 So. 2d 574, 575-76 (Fla. 1958) (emphasis added)); *see also Hazen v. Allstate Ins. Co.*, 952 So. 2d 531 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D219a]. In other words, it is a court's duty to examine a statute as a "cohesive whole," *Palm Beach Cnty. Canvassing Bd. v. Harris,* 772 So. 2d 1273, 1287 (Fla. 2000) [25 Fla. L. Weekly S1126a], so as "to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Jones v. ETS of New Orleans, Inc.,* 793 So. 2d 912, 914-15 (Fla. 2001) [26 Fla. L. Weekly S549a] (quoting *Acosta v. Richter,* 671 So. 2d 149, 153-54 (Fla. 1996) [21 Fla. L. Weekly S29a]).

Finally, "a literal interpretation of the language of a statute need not

be given when to do so would lead to an unreasonable or ridiculous conclusion." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (citing *Johnson v. Presbyterian Homes of Synod of Fla., Inc.,* 239 So. 2d 256 (Fla.1970)); *see also Vrchota Corp. v. Kelly,* 42 So. 3d 319, 322 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1834a] ("The legislature is not presumed to enact statutes that provide for absurd results."); *Badaraco,* 676 So. 2d at 503 ("Where focusing on literal statutory language leads to absurd or unreasonable conclusions . . . a court will look beyond the ordinary meaning of the statutory language.") (citing *Weber v. Dobbins,* 616 So. 2d 956 (Fla. 1993)); *Maddox v. State*, 923 So. 2d 442 (Fla. 2006) [31 Fla. L. Weekly S24a].

**D. The Relevant Statutes**

**i. §607.1302(1)(a)**

Turning to the relevant statutory provisions, § 607.1302(1)(a) could not be any clearer. A shareholder possesses appraisal rights only if "the shareholder is entitled to vote on the merger"—plain and simple. This phrase leaves no play in the joints or room for judicial tweaking. Rather, it conveys "a clear and definite meaning" and, as a result, "there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Atwater v. Kortum*, 95 So. 3d 85, 89 (Fla. 2012) [37 Fla. L. Weekly S439a] (quoting *Holly*). Put another way, because this "statute is clear [the Court] will not look behind [its] plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Paul v. State*, 129 So. 3d 1058, 1064 (Fla. 2013) [38 Fla. L. Weekly S228a].

Despite the clarity of this provision, Defendants insist that "the shareholder entitled to vote language" was intended to ensure that "holders of classes or series of shares entitled to vote" on a merger are "entitled to appraisal of those shares." Defs.' Mem. p. 13. In other words, they posit that so long as a shareholder owns stock that is within a class that was entitled to vote, he is entitled to appraisal rights even if he himself was not entitled to vote. The statute says no such thing, and if the Legislature wanted to tie the right to appraisal to mere ownership of a "class" of stock that was entitled to vote it could have easily said so, as it clearly knew how to grant rights to "shares" as opposed "shareholders." *See, e.g.,* Fla. Stat. § 607.0704(1); 607.0721(2); 607.0725(1) and (5). It did not. Rather, it instead elected to condition eligibility to exercise appraisal rights on "the shareholder [being] entitled to vote on the merger . . . ." Fla. Stat. § 607.1302(1)(a). That phrase is as clear as the proverbial bell. *See, e.g., Covey v. Shaffer*, 277 So. 3d 694, 697 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1713a] (". . . the definite article, *the*, used before a noun specifies a definite and specific noun, as opposed to any member of a class").

Acceptance of Defendants' invention to "interpret" this clear provision would constitute a judicial rewrite of the statute and permit anyone who acquired voting shares before approval of a merger to exercise appraisal rights, regardless of whether they were legally permitted to vote on the transaction, thereby abrogating legislative power. This the Court cannot do, as it is "without power to construe an unambiguous statute in a way which would extend, modify, or *limit,* its express terms or its *reasonable and obvious implications." Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1380a]; *see also Florida Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) [26 Fla. L. Weekly S422a] ("[u]nder fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so").

Nor does applying § 607.1302, as plainly written, lead "to an unreasonable result or a result clearly contrary to legislative intent." *Paul v. State*, 129 So. 3d 1058, 1064 (Fla. 2013) [38 Fla. L. Weekly S228a]. This exception to the rule requiring application of a statute as clearly written, often referred to as the "absurdity doctrine," is reserved for cases where applying a statute's plain meaning would yield "an absurd result totally incongruous with the will of the people," *Plante v. Smathers*, 372 So. 2d 933, 937 (Fla. 1979), or a result which would, as Justice Cannady once put it, "border on irrationality." *Maddox* at 452. *See also State v. Lewars*, 259 So. 3d 793, 800 (Fla. 2018) [43 Fla. L. Weekly S612a] (the absurdity doctrine "is not to be used as a freewheeling tool for courts to second-guess and supplant the policy judgments made by the Legislature").

Here, applying the statute as plainly written leads to a completely rational result, as it limits appraisal rights to minority shareholders who owned their interest in the company as of the record date, thereby protecting those whom appraisal rights were intended to protect; namely, minority shareholders (particularly those owning shares in closely held corporations) forced to involuntarily divest themselves of ownership—not speculators who go into the market and acquire shares *after* a merger has been announced. Put simply, the Legislature had a rational basis to limit shareholders who may secure appraisal rights to those who were "entitled to vote on the merger," and its decision to do so was no outlier. *See, e.g., Magner v. One Sec. Corp.*, 574 S.E. 2d 555 (Ga. Ct. App. 2002); *Gilman v. Davis*, 138 Idaho 599, 67 P. 3d 78 (2003); *Borne v. Gonstead Advanced Techniques, Inc.*, 667 N.W. 2d 709 (Wis. Ct. App. 2003); *Roscigno v. DeVille*, 1992 WL 884708 (Va. Cir. Ct. June 1, 1992).

In sum, § 607.1302(1)(a) says what it means and means what it says. And it says, in plain English, that in order to be "entitled to appraisal rights" the "shareholder" must have been "entitled to vote on the merger." These Defendants were not so entitled and, *a fortiori*, possess no appraisal rights.[4]

**ii. § 607.1330(5)**

This brings the Court to Defendants' second argument: that because Plaintiff "made" them a party to this case they are, *ipso facto*, entitled to the "fair value of their shares," as determined by the Court, even if they do not meet the statutory criteria for exercising appraisal rights. This is so, according to Defendants, because §607.1330(5), read in isolation and literally, mandates that "[e]ach shareholder made a party to the proceeding is entitled to judgment for the amount of the fair value of such shareholder's shares, plus accrued interest, as found by the court." Fla. Stat. § 607.1330(5). Seizing upon a literal reading of this single subsection, Defendants insist that by filing this lawsuit, and "making" them a party, Plaintiff bestowed upon them appraisal rights they did not otherwise possess. The Court rejects this argument.

As the Court pointed out earlier, "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts," *Forsythe* at 455, meaning that a statute must be read "in the context of its surrounding sections," *BellSouth* at 290, and examined as a "cohesive whole," *Palm Beach* at 1287, so as "to give effect to every clause in it, and to accord meaning and harmony to all of its parts," *Jones* at 914-15. The Act's comprehensive appraisal rights scheme, read as a "cohesive whole," operates sequentially, logically, and hand-in-glove.

Section 607.1302—titled "Right of Shareholders to Appraisal"—again kicks the process off by telling us which shareholders are "entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares" in the event of a merger. *Id.* If a shareholder does not fit the statute's criteria he or she is not "entitled" to "obtain payment of the fair value" of his or her shares and the inquiry is over. Then, assuming a shareholder meets the statutory criteria, he or she must timely deliver "notice of intent to demand payment" in compliance with § 607.1321 and "perfect" those rights in compliance with § 607.1323. If the shareholder exercising those rights is "dissatisfied" with the corporate offer of "fair value," he or she must then "estimate

. . . the fair value of the shares and demand payment of that estimate plus accrued interest." Fla. Stat. § 607.1326(1).

Assuming a shareholder is statutorily eligible to receive "fair value," *and* the process results in a dispute between the company and the shareholder over what that "fair value" is, § 607.1330 provides the statutory mechanism for resolving that dispute. The statute again mandates that when a shareholder's demand for payment (*i.e.*, a demand for her estimate of "fair value") "remains unsettled," the Corporation shall "commence a proceeding" and "petition the court to determine fair value of the shares . . . ." *Id.* And if the corporation fails to do so, a shareholder who has made a demand may "commence a proceeding in the name of the corporation*." Id.*

Section § 607.1330's dispute resolution protocol works in tandem with the other provisions contained in the Act, not in isolation. It presupposes that the shareholder is eligible to exercise appraisal rights and receive "fair value" as determined by a court. It does not supplant § 607.1302's "eligibility" criteria or eviscerate a shareholder's need to comply with § 1321 and § 1323, and enable a shareholder who is not entitled to exercise appraisal rights to receive "fair value," as judicially determined, simply because he or she is "made" a party to the proceeding by the company. The statute again assumes that the shareholder is entitled to exercise appraisal rights and that he or she has complied with the procedural requirements necessary to perfect those rights. In other words, the statute, as part of a cohesive statutory scheme, provides the method for resolving disputes over "fair value" between a corporation and a shareholder *entitled* to be paid "fair value" (*i.e.*, entitled to invoke appraisal rights). The statute does not, by itself, enshrine an entitlement to appraisal upon shareholders who do not satisfy § 607.1302's eligibility criteria or comply with the other requirements imposed by the Act.

What Defendants ask this Court to do is precisely what the Fourth District, in an opinion authored by this Court, refused to do in *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n, Inc.*, 125 So. 3d 846 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D820a]—read a single subsection of a statute "in isolation," untethered to the statutory scheme of which it is a part. But just as was the case in *River Manor,* an isolated and literal reading of § 607.1330(5) "does not reflect the intent of the [Act] when consideration is given to the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters." *River Manor* at 853 (refusing to read literally, and in isolation, a sub-paragraph within the Condominium Act which, when read literally, obligated insurers to provide specific coverage). While subsection (5), standing alone, may appear unambiguous, it must be read in *pari materia* with not only § 607.1330 as a whole, but with the Act's appraisal scheme, for as our Supreme Court has again cautioned:

> If a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the *same statute* or others in *pari materia,* the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent.

*Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1265-66 (Fla. 2008) [33 Fla. L. Weekly S493a]. And when the appraisal provisions in the Act are read in *para materia,* it is obvious that the Court should not, through a "hyperliteral" reading of § 607.1330(5), permit this single subsection to swallow and displace the Act's carefully calculated regulatory scheme. *See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012) [23 Fla. L. Weekly Fed. S328a].

Applying a literal and isolated reading of § 607.1330(5) would also penalize corporations that comply with their statutory obligation to commence proceedings "within 60 days after receiving payment demand," by precluding them from proving that a shareholder lacked standing to assert appraisal rights, or failed to perfect those rights, simply because they invoked the procedure statutorily required in order to resolve "fair value" disputes. And under Defendants' literal reading of §607.1320(5), even if a corporation did not comply with the statute and timely commence an action out of fear of automatically admitting "entitlement," it would still be unable to assert these threshold defenses because: (a) if the corporation fails to bring the case "any shareholder who has made a demand . . . may commence the proceeding in the name of the corporation;" and (b) subsection (5)—read literally—entitles each shareholder "made a party" to the proceeding to judgment in the amount of the "fair value of such shareholder's share," not just shareholders "made a party" by the corporation. So under Defendants' view, if Perry Ellis had failed to bring the case, and if Defendants brought the case themselves in the name of Perry Ellis and named themselves as defendants, they would still be entitled to "fair value" for the shares because they would have been "made a party to the proceeding." Thus, the consequence of accepting Defendant's argument would be that all complaining shareholders would eventually be entitled to appraisal rights regardless of statutory eligibility—an obviously absurd result. *See In re Rouss*, 116 N.E. 782, 785 (1917) (undesirable "[c]onsequences cannot alter statutes, but may help to fix their meaning").[5]

Even putting aside the matter of statutory interpretation, in *this* case Perry Ellis did not simply "commence a proceeding . . . and petition the court to determine the fair value of [Defendant] shares and accrued interest." Rather, it brought its § 1330 claim in the *alternative* to its request that the Court declare Defendants ineligible for appraisal rights, asking that the Court determine "fair value" if, and only if, it rejected the contention that these Defendants did not meet the criteria imposed by § 1302(1)(a). And *these* Defendants intentionally refused to disclose the date(s) of their purchases, while at the same time insisting that Perry Ellis was "obligated to petition the court to determine fair value." By withholding information needed in order for the company to determine their appraisal rights (or lack thereof), while at the same time insisting that it commence this case, Defendants attempted to set up their argument that once the case was filed, and they were "made a party," they would inherit a substantive right they did not possess. This type of "gotcha" will not be countenanced by this Court. *See, e.g., Berkman v. Foley*, 709 So. 2d 628, 629 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D975a] ("[t]he courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed."); *see also Chatmon v. Woodard,* 492 So. 2d 1115, 1116, n. 2 (Fla. 3d DCA 1986) ("[w]e cannot accept a 'gotcha' type stratagem like this one.").

In sum, the Court categorically rejects Defendants' bewilderingly circular argument that Plaintiff, by the act of filing this case challenging their standing to exercise appraisal rights, somehow bestowed upon them those precise rights, regardless of whether they satisfied the requirements of § 607.1302(1)(a).[6]

**IV. CONCLUSION**

These Defendants, after obtaining knowledge of the merger (and all of its terms), went on a buying spree on the open market and acquired millions of shares of Perry Ellis common stock in the hopes of extracting from the Company a price significantly higher than that agreed upon in the merger or, if unable to do so, persuade a court that the merger's share price was "unfair." Many jurisdictions, including perhaps Florida today, permit this type of appraisal arbitrage.[7] But unfortunately for these Defendants, the statutory scheme in place in 2018 did not allow parties to exercise appraisal rights unless they were "entitled to vote on the merger." These Defendants were not, and they likely knew it, which is why they steadfastly refused to disclose any information regarding the specifics of their purchases until forced to do so by compulsory process. So they gambled on an ability to

leverage a buy out from Perry Ellis at a price above the merger consideration, or persuade a court that: (a) they were eligible to invoke appraisal rights, and (b) the agreed upon share price was substantially below "fair value." They lost that gamble.

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

1. The Court grants Plaintiff's Amended Motion for Final Summary Judgment on Count I of its Corrected Second Amended Complaint and declares that Defendants do not have appraisal rights with respect to any of their shares of Perry Ellis. Final Summary Judgment is therefore entered in Plaintiff's favor on this count.

2. Count II of Plaintiff's Corrected Second Amended Complaint, seeking alternative relief determining the fair value of the shares in Perry Ellis owned by the Defendants, is dismissed as moot.

3. The Court retains jurisdiction to entertain any authorized post-judgment matters including, but not limited to, authorized motions for attorney's fees and costs.

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[1]The lawsuit initially also named Quadre Investments, L.P., Arbitrage Fund, and Water Island Merger Arbitrage Institutional Commingled Master Fund, L.P., as additional Defendants. Plaintiff's claims against these Defendants were dismissed with prejudice pursuant to two Stipulations of Voluntary Dismissal. *See* November 24, 2019 and December 4, 2019 Stipulations and Orders of Dismissal.

[2]Defendants acquired their shares in the open market commencing on September 26, 2018 and continuing through early October 2018. At the time they began acquiring their shares the proposed merger, and its terms, had been publicly disclosed through the filing of a Proxy Statement; a filing that made clear that only shareholders as of the record date (August 16th, 2018) were eligible to vote on the transaction and exercise appraisal rights. These Defendants, however, routinely engage in the practice of "appraisal arbitrage," described as "purchasing shares after the record date and filing appraisal petitions with the goal of receiving an award greater than the deal price as well as statutory interest." Cornerstone Research, Appraisal Litigation in Delaware: Trends in Petitions and Opinions 5 (Feb. 13, 2019). That is precisely what these institutional investors did here. The question now presented is whether Florida law, as it existed at the relevant time, granted appraisal rights to parties who were not eligible to vote on the merger because their shares were acquired post record date.

[3]Though Chapter 607 was recently revised, the parties do not dispute that the version of each statue referenced herein is the controlling provision which was in effect on the dates in question.

[4]Because the requirements for exercising appraisal rights are dependent upon the statute enacted by a particular jurisdiction, both parties are able to cite out of state precedent which, in their view, supports their cause. Plaintiff relies on cases where the appraisal statutes in those states are, or were, substantially similar to the effective Florida statute. *See, e.g,. Roscigno,* 1992 WL 884708 (considering VA ST § 13.1-730—Right to Appraisal—which, until 2005, contained the requirement that a "shareholder is entitled to vote" in order to assert appraisal rights); *Magner,* 574 S.E. 2d 555 (considering GA ST § 14-2-1302—Right to Dissent—which contains the requirement that the "shareholder is entitled to vote on the merger" as a condition to assert appraisal rights); *Gilman,* 67 P. 3d 78 (considering Idaho Code § 30-1-1302(1)—Right to Appraisal—which, until 2019, conditioned appraisal rights on the shareholder being "entitled to vote" on the merger). Defendants rely on cases interpreting the Delaware appraisal statute. *See, e.g., In re Appraisal of Tanskaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch. May 2, 2007); *Lewis v. Corroon & Reynolds Corp*., 57 A.2d 632 (Del. Ch. 1948); *Merion Capital LP v. BMC Software, Inc*., 2015 WL 67586 (Del. Ch. Jan. 5, 2015) (all applying Del. Code Ann. Tit. viii § 262(a), (d) (1). The Delaware Statute, however, provides that "[a]ny shareholder of a corporation of this State who holds shares of stock on the date of the making of a demand. . .shall be entitled to an appraisal by the Court. . .of the fair value of the stockholder's shares" and the "demand" is to be delivered prior to the vote on the merger. The Delaware cases cited are therefore not instructive, as that jurisdiction does not impose a requirement that "the shareholder be eligible to vote." *See Regalia Beach Developers, LLC v. MVW Mgmt. LLC*, 24 Fla. L. Weekly Supp. 286a (11th Jud. Cir. June 30, 2016) (Hanzman, J.) (acknowledging that Florida courts "regularly look to Delaware precedent when interpreting Florida corporate law and establishing their own doctrines", but noting that "if Florida statutory law were "*materially* different. . .the Court would be required to apply that law—as opposed to Delaware's").

[5]Defendants make much of the fact that a prior version of this statute directed the Court to "also determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination (*i.e.*, each shareholder who the corporation requests that "the value of their shares be determined") is entitled to receive payment for his or her shares. Fla. Stat. § 607.1320(7) (2002). This version of the statute thus obligated the court to address entitlement issues, regardless of whether raised by the corporation. But eliminating the court's affirmative obligation to determine each shareholder's entitlement to payment hardly precludes the corporation from raising threshold eligibility/perfection issues. Defendants simply read too much—indeed far too much—into this benign amendment.

[6]In support of the claim that subsection (5) of § 1330 should be applied literally and in isolation, Defendants direct the Court to *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 17 CVS 7086, 2019 WL 2387028 (N.C. Super. June 4, 2019), a case where the court determined that "evidence relating to Defendants' perfection of appraisal rights [was] irrelevant" because "the plain language of section 55-13-30 [similar to § 607.1330 (5)] does not contain a requirement that dissenting shareholders prove their perfection of appraisal rights, but instead states such shareholders are entitled to a specific judgment in a proceeding commenced under the statute." *Id.* The court noted, however, that unlike the case here, the company had not sought "a declaration concerning Defendants' entitlement to judicial appraisal by way of a claim for some other request for relief. *Id.* To the contrary, Reynolds America attempted to inject this issue into this case two months prior to trial. Moreover, the issue the company belatedly tried to argue was not whether the shareholders were "eligible" to exercise appraisal rights, but rather whether these rights, which admittedly existed, had been properly "perfected." *Id.* The question of whether § 1330(5) forecloses a corporation, which makes a shareholder a party to the case, from raising a lack of "perfection" defense is not squarely before the Court. But, to the extent the *Reynolds America* court applied North Carolina's analogous statutory provision literally and in isolation, this Court obviously disagrees with the opinion.

[7]Had this action accrued in 2020, the Defendants may have fared better. The Legislature in 2019 (effective January 1, 2020) removed the language "and the shareholder is entitled to vote on the merger" from § 607.1302. The recent version of § 607.1302 provides that:

> (1) A shareholder of a domestic corporation is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions. . . .
>
> (b) Consummation of a merger to which such corporation is a party:
>
> 1. If shareholder approval is required for the merger. . . .except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remains outstanding after consummation of the merger where the terms of such class or series have not been materially altered. . . .

Fla. Stat. § 607.1302(1)(b) 1 (2020). This amendment represents a shift in policy and now permits a shareholder who was not entitled to vote on a merger to exercise appraisal rights. This new law brought the Act into alignment with "the approach of the ABA's Model Business Corporation Act." Fla. Bar Business Law Section, *Modification to Chapter 607 of the Fla. Stat. and Certain Sections of Other Fla. Entity Statutes* at 473 (June 20, 2019). This legislative amendment confirms what was already obvious: the prior version of the statute, in effect at the time of this transaction, meant what it said and said what it meant. *See Hill v. State*, 143 So. 3d 981, 986 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1464b] ("It is a well-established presumption that the legislature intends to change the law when it amends a statute.").

* * *

**Insurance—Homeowners—Coverage—Affidavit and report of insured's expert is insufficient to preclude entry of summary judgment in favor of insurer that denied coverage for alleged windstorm damage to roof where affidavit and report, which are conclusory and lack any supporting evidence or tests performed to support conclusions, fail to meet admissibility standards outlined in *Gonzalez v. Citizens Property Insurance Corporation***

JOZSEF BASCO, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-001602-CA-01, Section CA15. January 16, 2020. Jose Rodriguez, Judge. Counsel: Jesus Goatache, Mario Serralta & Associates, Miami Lakes, for Plaintiff. Michael J. Kranzler, Goldstein Law Group, P.A., Fort Lauderdale, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT**

**THIS CAUSE** having come to be heard before the Court on Defendant's Motion for Final Summary Judgment, and the Court having considered the record, having heard counsel and being otherwise advised in the Premises, finds as follows:

**I. STATEMENT OF UNDISPUTED FACTS**

1. This lawsuit is premised upon a claim for homeowner's insurance benefits allegedly due and owing to the Plaintiffs after their property incurred damages from a roof leak occurring on or about December 1, 2015.

2. The Plaintiffs reported the claim to the Defendant on February 1, 2016, two months after the claimed date of loss.

3. During the investigation of the Plaintiffs' claim, the Defendant's field adjuster inspected the subject property on February 8, 2016, at

which point the field adjuster stated that there was no evidence of any peril-created opening for which coverage would apply. The Defendant subsequently denied the Plaintiffs' claim in full in a letter dated April 21, 2016. The instant lawsuit ensued, with the Plaintiffs alleging breach of contract.

4. The Defendant took the deposition of the Plaintiff, Joszef Basco, on August 9, 2017. At that time, the record reflects that Mr. Basco testified that he did not know why the roof was damaged, and that he did not observe any holes in the roof.

5. The Plaintiffs offered, in support of their claim, photographs and an estimate from a public adjuster. However, there are no photographs of the roof from the public adjuster, and Mr. Basco acknowledged during his deposition that he does not know if the public adjuster ever even went onto the roof. The Plaintiffs have offered no testimony or evidence to suggest otherwise.

6. The Defendant subsequently filed its Motion for Final Summary Judgment on February 23, 2018, arguing that the Plaintiffs failed to carry their burden to demonstrate the existence of a peril-created opening, and set the same for a hearing to occur on June 8, 2018. Attached as an exhibit to the Defendant's Motion for Final Summary Judgment was an affidavit from its corporate representative attesting to the facts and documents relevant to the initial denial of the Plaintiffs' claim, including that the co-Plaintiff, Mrs. Perez, similarly failed, in a recorded statement given during the claims investigation process, to offer any evidence or testimony as to the existence of a storm-created opening in the roof at the subject property for which coverage would apply.

7. On May 30, 2018, as the hearing on Defendant's Motion for Final Summary Judgment was approaching, the Plaintiffs filed their Response to Defendant's Motion for Final Summary Judgment, arguing that the affidavit and report of their retained expert, Grant Renne, P.E., which had not been previously produced, created a genuine issue of material fact which should preclude summary judgment.

8. Mr. Renne's affidavit stated, in pertinent part, as follows:

*6. I reviewed the roof covering and interior finish damage at 4360 NW 205th Street, Miami Gardens, FL 33055.*

*7. Based on my observations, I conclude that the circular granular loss on the shingles roof covering documented during the site study were due to air-borne debris impacts (indirect wind damage)*

*8. Furthermore, the seam failures on the low slope roof covering were due to pressure differential caused by high wind loading (direct wind damage).*

*9. Statements made by the insured and a review of historic NOAA weather data support the opinion that the severe storm event that occurred on/about December 1, 2015 was the probable storm event that caused the initial roof damage resulting in the internal moisture damage.*

*10. Lastly, it is my professional opinion that the interior moisture finish damage was due to multiple upgradient moisture penetrations in the roof covering caused by wind-borne debris impacts and uplift pressures (storm induced openings) associated with the weather event on the reported date of loss.*

9. While Mr. Renne's affidavit references NOAA weather data and statements made by the Insured, no such documents related to such data or statements are included as exhibits to Mr. Renne's affidavit, nor are they included or specifically referenced in any form in Mr. Renne's formal report, which was also included as an exhibit to the Plaintiffs' Response to Defendant's Motion for Final Summary Judgment.

10. Rather, Mr. Renne's report spends its first three and a half pages reciting general engineering and building code concepts that are not at all specific to the subject property or the loss at issue, and then immediately proceeds onto six bullet-pointed conclusions, with no documents, evidence, tests, or discussion to support such conclusions.

11. Upon receipt of the Plaintiffs' Response to Defendant's Motion for Final Summary Judgment, the Defendant cancelled the pending hearing on its upcoming Motion for Final Summary Judgment to investigate Mr. Renne's newly-disclosed claims.

12. On June 27, 2019, the Defendant propounded its Second Expert Witness Interrogatories, asking the Plaintiff to state, in pertinent part and with respect to each and every "expert" witness that the Plaintiffs had retained for any purpose, 1) "the dates of each and every in-person inspection performed at the subject property relative to this loss" and 2) "the specific tests performed by each 'expert' in coming to his conclusions." The Plaintiffs filed their Answers to the Defendant's Second Expert Witness Interrogatories on July 30, 2019.

13. With respect to the Defendant's first Expert Witness Interrogatory stated in paragraph 12, *supra,* the Plaintiffs responded as follows: *No inspection has been done at this time.*

14. With respect to the Defendant's second Expert Witness Interrogatory stated in paragraph twelve, *supra,* the Plaintiffs responded as follows: *Please refer to the attached report of Grant W. Renne, P.E.'s findings and testing.*

15. The attached report referenced in the Plaintiffs' Answers to Defendant's Second Expert Witness Interrogatories was the same report previously provided by the Plaintiffs as an exhibit to their Response to Defendant's Motion for Final Summary Judgment. No such tests were disclosed or referenced in that report.

16. The Defendant subsequently re-set its Motion for Final Summary Judgment for hearing, which took place before this Court on October 30, 2019.

17. On October 22, 2019, in the final days before the hearing on Defendant's Motion for Final Summary Judgment, the Plaintiffs submitted an "Amended" Affidavit from Mr. Renne. This Amended Affidavit made superficial changes, such as stating that his conclusions are "within a reasonable degree of engineering certainty." There were no exhibits or attachments to Mr. Renne's Amended Affidavit, such as any report, data upon which he relied, or notes related to any statements from the Insured. There were no substantive changes to Mr. Renne's opinions. The Plaintiffs did not file any amended Response to the Defendant's Motion for Final Summary Judgment prior to the October 30, 2019 hearing.

**II. ANALYSIS**

As a threshold matter, this Court holds that the affidavit of the Defendant's corporate representative, filed as an exhibit to the Defendant's Motion for Final Summary Judgment, was sufficient to meet the Defendant's prima facie burden of proof It therefore became the burden of the Plaintiffs, as the Party opposing the Defendant's Motion for Final Summary Judgment, either to (1) file an affidavit indicating they needed additional time to take identified discovery, pursuant to Florida Rule of Civil Procedure 1.510(f); or (2) file "summary judgment evidence on which the adverse party relies," pursuant to Florida Rule of Civil Procedure 1.510(c). In filing the affidavits of Grant Renne, P.E., the Plaintiffs chose the second option. In this situation, the law of Florida shifts the burden to present evidence from the movant to the party opposing summary judgment. *See Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782-83 (Fla. 1965). It is not enough for the non-moving party to merely assert that an issue does exist. *Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979).

The record evidence demonstrates that Mr. Renne came to his conclusions without ever performing an in-person inspection of the subject property. He simply refers, in his affidavit and report, to NOAA weather data which is not attached or in any way specifically referenced, as well as unspecified "statements made by the insured" which are similarly not attached or in any way specifically referenced.

In support of its Motion for Final Summary Judgment, the Defendant relies on *Yosvani Gonzalez and Yenisleidy Perez v. Citizens Property Insurance Corporation,* 273 So. 3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a]. In that matter, the majority created an exception to the general rule that "[i]f there is disputed evidence on a material issue of fact, summary judgment must be denied and the issue submitted to the trier of fact." *Id.* at 1035 (*quoting Perez-Gurri Corp. v. McLeod,* 230 So. 3d 347, 350 (Fla. 3d DCA 2016) [42 Fla. L. Weekly D2487c] (internal citations omitted)). Rather, the *Gonzalez* court stated that "affidavits opposing summary judgment must identify admissible evidence that creates a genuine issue of material fact," and "[t]he focus is on whether the affidavits show evidence of a nature that would be admissible at trial." *Gonzalez* at 1036. In creating this exception, the appellate court cited to the principle that "no weight may be accorded [to] an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." *Id.* at 1037 (*quoting Div. of Admin. v. Samter,* 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981)).

The record is clear that Mr. Renne's report and affidavit are simply bereft of any "discernible, factually-based chain of underlying reasoning." Mr. Renne's report and affidavit are conclusory and lack any supporting evidence or tests performed in order to come to his conclusions. This is magnified by the Plaintiffs' own admission that Mr. Renne never even personally inspected the property before coming to his conclusions. It is evident that, based upon the record before the Court at the summary judgment stage, that Mr. Renne's affidavit and report, the Plaintiffs' sole evidence in opposition to the Defendant's Motion for Final Summary Judgment, simply fails to meet the standard of admissibility for expert evidence as laid out in *Gonzalez. See, e.g., Panzera v. O'Neal,* 198 So. 3d 663, 665 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D2661a] (purely speculative opinion testimony is not admissible evidence and cannot be relied on to create a material issue of fact to defeat summary judgment).

The question now becomes whether or not these deficiencies in Mr. Renne's affidavit and report are so significant that it fails to create a genuine issue of fact to defeat summary judgment. It is this Court's opinion that summary judgment is not the time to weigh the admissibility of expert witness testimony. In that regard, this Court prefers to subscribe to the dissent by Judge Suarez in *Gonzalez,* which states that he would have left the issues of the expert testimony's admissibility for the finder of fact to determine at trial. *Id.* at 1039. Given the choice, this Court would similarly prefer to leave the issues before it as it pertains to the admissibility of Mr. Renne's testimony for trial, or at least for a formal pre-trial *Daubert* hearing. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993).

However, this Court's opinions do not override the law, and the law which binds the Court is the opinion held by the majority in *Gonzalez.* To the extent that this Court remains bound by the majority in *Gonzalez,* the Court does find the instant case to be analogous. The Plaintiffs rely entirely in opposition to summary judgment on Mr. Renne's report and affidavits, which simply lack the discernible, factually-based chain of underlying reasoning to overcome what is otherwise entirely speculative and conclusory opinion testimony. The Court therefore finds that Mr. Renne's report and affidavits fail to reasonably meet the admissibility requirements outlined in *Gonzalez.* While the Court may have its own personal disagreement with the reasoning underlying the Third District Court of Appeal's majority holding, it is obligated to follow the law and established appellate precedent. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Final Summary Judgment is hereby **GRANTED**.

2. Final Judgment is hereby entered in favor of the Defendant, Citizens Property Insurance Corporation, and against the Plaintiffs, Joszef Basco and Dayami Perez. The Plaintiffs shall take nothing by this action and the Defendant shall go hence without day.

3. The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees, as well as any other timely motion for entitlement to attorney's fees and costs as is just and proper.

* * *

**Trusts—Irrevocable—Residual beneficiary's third-party action brought by son against father's mistress to whom father allegedly gave money and other assets during his wife's life in violation of marital agreement prohibiting spouses from dissipating joint estate while they both lived and agreeing to transfer all joint assets to trust upon death of first spouse to die—Avoidance of fraudulent transfers—Motion for summary judgment on count for avoidance of allegedly fraudulent transfers made by father to his mistress is denied where allegations that father suffered from profound loss of cognitive function raise issue of fact as to whether father had ability to form requisite intent to defraud his wife and trust beneficiaries—Constructive trust—Motion for summary judgment on count of complaint seeking imposition of constructive trust on assets transferred by father to his mistress is denied where there is dispute of material fact as to whether father was victimized by fraud, misbehavior, or mistake perpetrated by his mistress—Mistress's motion for summary judgment as to her right to retain money given to her by father prior to his wife's death and with wife's alleged consent is denied where there exists dispute of material fact as to whether wife knew of and consented to gifts—Mistress's motion for summary judgment as to money that she allegedly returned is denied where son filed affidavit stating that mistress tried to repay money but bank advised that she had insufficient funds to honor check**

IN RE: MILTON AND PATRICIA WALLACE IRREVOCABLE TRUST AGREEMENT DATED FEBRUARY 7, 2011. COMPREHENSIVE PERSONAL CARE SERVICES, INC., as guardian of person and property of HARDY WALLACE, incapacitated, Petitioner, v. MILTON WALLACE, MARK WALLACE, REBECCA SPINALE, Respondents. MARK WALLACE, Third-Party Plaintiff, v. YANELIN TORRES RODRIGUEZ, Third-Party Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2016-2767-CP-02. February 3, 2020. Milton Hirsch, Judge.

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Third-party plaintiff Mark Wallace has pleaded four claims against third-party defendant Yanelin Torres Rodriguez. He now moves for partial summary judgment as to count two, which seeks the avoidance of fraudulent transfers; and count four, which seeks the imposition of a constructive trust. Ms. Torres Rodriguez cross-moves for summary judgment as to "various gifts that were given to [her] by Milton [Wallace] prior to 2016, and two gifts in 2016 that were returned." *Third-Party Defendant Yanelin Torres Rodriguez's Motion for Partial Summary Judgment* ("Rodriguez Mtn.") p. 1.

I. Facts

All agree that Milton Wallace had a long and successful business career, building up by his intelligence and his labor a fortune exceeding $50 million. He was married throughout his adult life to Patricia, with whom he has two children: Mark, the third-party plaintiff here; and Hardy. At the time of the events giving rise to this litigation Milton was near, or well into, his 80's.[1]

Given their age and wealth, in 2011 Milton and Patricia undertook an extensive program of estate planning. That planning included the execution, on or about June 2, 2011, of a "Marital Agreement to Fund Joint Trust" ("Marital Agreement"). The Marital Agreement acknowledged that at the time, the Wallaces held virtually all of their assets jointly. Marital Agreement p. 1 § 1. It then referenced another feature of the Wallaces' estate planning, the Milton and Patricia Wallace Irrevocable Trust Agreement, as to which the Marital

Agreement provided as follows:

> We are entering into this Marital Agreement to create a legally binding and enforceable contractual obligation upon the survivor of us to transfer all assets of any nature . . . that we own jointly upon the death of the first one of us to die to the trustee or trustees who are then serving under the Trust Agreement. We intend this Marital Agreement to be legally binding upon each of us and our estates, and to allow the . . . beneficiaries under the Trust Agreement to be able to bring whatever legal proceedings may be necessary to require the survivor of us to convey all of our jointly owned assets to the [trust].

Marital Agreement, pp. 1-2 § 1. Mark is a residual beneficiary of the trust. By operation of the foregoing language, he is empowered to bring suit to compel the funding of the trust according to the Marital Agreement. *See also Id.* p. 3 § 5.

The Marital Agreement goes on to provide that, "Upon the death of the first one of us to die, the survivor of us agrees (and will be legally obligated) to transfer all assets of any nature . . . that were jointly owned by the two of us . . . to the [trust]." *Id.* p. 2 § 2. Patricia died on May 3, 2016. A literal reading of the Marital Agreement compels the conclusion that, from and after that date, Milton was obliged "to transfer all assets of any nature" formerly held in some form of joint ownership with Patricia to the trust.

Prior to Patricia's death Milton was under no such obligation. At that time all that was required of him was that he "not . . . take any action or cause or allow any action to be taken . . . with respect to any assets owned . . . jointly without the direct and personal joinder of both [himself and his wife] while we are both alive and legally competent, which would . . . devise any such assets to anyone other [than] the trustee or trustees then serving." *Id.* p. 2 § 3. Milton could not dissipate the joint estate while Patricia lived; but he was not required to convey that estate to the trust until she died.

The terms of the Marital Agreement are in some respects unusual. Strictly construed, the agreement seems to provide that while both spouses lived, neither spouse could buy so much as a cup of coffee "without the direct and personal joinder" of the other spouse; such a purchase would cause joint assets—the money spent on the coffee—to be unavailable to be devised to the trust at a future date. And strictly construed, the agreement seems to provide that after one spouse died, the surviving spouse was obliged to convey everything but the shirt on his back to the trust; after which he would presumably need the trustee's permission to buy a cup of coffee. Mark urges such a strict construction, or one very like it, in support of his motion for summary judgment.

This dry tale of estate-planning minutia takes on the vivid passion of a Leoncavallo opera in about 2007. It was in or before that year that Milton met, and began a Paphian relationship with, Yanelin Torres Rodriguez.

This relationship is at the core of Mark's third-party claim. In Mark's view, as his pleadings make abundantly clear, Yanelin was and is an unprincipled sexual adventurer. In Mark's view, as his pleadings make abundantly clear, Milton, as he entered his ninth decade of life, was a vulnerable and intellectually-debilitated creature, easily taken advantage of and manipulated by an attractive and unscrupulous young woman. It is uncontroverted that Milton gave Yanelin money—a very great deal of money—and other valuable gifts. It is to that money and those gifts that Mark's third-party complaint is directed. The pending cross-motions for summary judgment can be reduced to a single question: Was it lawful, given the various estate-planning arrangements to which Milton was a party, for Milton to give, and Yanelin to accept, that money and those gifts?

"Was it lawful?" is the question. "Was it moral?" is not. Elderly men have been foolishly infatuated with women too young for them since at least the time of King David and Abishag the Shunammite.[2] Mark, understandably, places the blame for what he sees as a parasitical relationship not on his father but on Yanelin, whom he unhesitatingly and repeatedly characterizes in his pleadings as a "prostitute." But the cross-motions before me do not invite me to delve into the morality or immorality, the wisdom or unwisdom, of Milton's dealings with Yanelin. I am to concern myself with the legal consequences, and only the legal consequences, of those dealings.

It seems to be undisputed that in 2012 Milton gave Yanelin a million dollars, and that in 2015 he gave her another million dollars. On two occasions after Patricia's death, Milton attempted to give Yanelin $300,000, but she claims to have returned the money.[3] Rodriguez Mtn. ¶¶18 and 19 (citing deposition transcripts). There may have been other valuable gifts as well. Mark insists that the money given to Yanelin during Patricia's lifetime was given without Patricia's knowledge or consent, *Third Party Plaintiff Mark Wallace's Motion for Summary Judgment* ("Mark's Mtn.") p. 5 ¶3; p. 6 ¶6, and thus in contravention of the provision of the Marital Agreement appearing at p. 2 § 3. For her part, Yanelin insists that Patricia knew of her relationship with Milton and tacitly consented to that relationship, including the gifts that Milton gave. Rodriguez Mtn. ¶¶5 ("Patricia Wallace was aware that Milton was engaging in an extramarital relationship with Yanelin") (citing deposition transcripts); 6 ("Milton provided monetary gifts to Yanelin, and the only record evidence is that Patricia knew of it") (citing deposition transcripts); 8; 9 (referring to Patricia's "oral consent").

II. Analysis

"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. 3d 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]).[4]

A. Mark's summary judgment motion

1. As to Count II—Avoidance of Fraudulent Transfers

Count II of Mark's Amended Complaint of January 20, 2017, alleges that during the time from the execution of the Marital Agreement on June 2, 2011, to the time of Patricia's death on May 3, 2016, any money or property given by Milton to Yanelin constituted "fraudulent transfers of marital assets." Amended Complaint p. 58 ¶19. "The transfers made by Milton Wallace were fraudulent as to Patricia Wallace, Mark Wallace," and others. *Id.* Mark demands that Yanelin return the money and property she received during the demised period. In making this demand he relies upon Fla. Stat. § 726.105(1), which identifies certain transactions as fraudulent if undertaken "[w]ith actual intent to hinder, delay, or defraud." *See also* Amended Complaint p. 58 ¶20 ("The transfers were made by Milton Wallace . . . with actual intent to hinder, delay, or defraud Patricia Wallace, Mark Wallace" and others). The issue as thus framed by Mark is Milton's actual intent.

That issue, however, is made difficult of resolution on motion for

summary judgment by Mark's own pleadings. Mark insists, not once but repeatedly, that at all times material Milton suffered from profound loss of cognitive function. *See, e.g.,* Amended Complaint p. 8 ¶5 (not later than 2010 Milton "had been diagnosed with Alzheimer's/degenerative brain disease"); p. 13 ¶26 (Milton's "cognitive function worsened after execution of the Marital Agreement"); p. 13 ¶28 (referring to Milton's "deteriorating medical condition . . . instability, mental disability and cognitive diminishment"); p. 54-55 ¶9 ("Before and after Patricia Wallace's death, Milton Wallace was suffering from Alzheimer's disease, dementia and degenerative brain disease which impaired Milton Wallace's judgment and diminished cognitive capabilities"); Mark's Mtn. p. 2 ("advanced dementia"); *id.* p. 4 ("Milton suffers from severe frontotemporal dementia, a degenerative brain disease that affects, *inter alia,* memory and judgment"). More specifically:

> In 2009 and 2010, Patricia Wallace and Mark grew concerned that Milton (now 84 years old) began to exhibit memory loss and erratic behavior. They arranged for Milton to be examined and treated by Dr. Ranjan Duara, the Medical Director of the Wien Center for Alzheimer's Disease & Memory Disorders at Mount Sinai Medical Center in Miami Beach, Florida, who diagnosed Milton with frontotemporal dementia. . . . "Frontotemporal dementia" is a neurodegenerative brain disease that atrophies the frontal and temporal lobes of the brain and progressively diminishes capacity, executive function, memory, and judgment. It is progressive, irreversible, and incurable.

Mark's Mtn, pp. 2-3. Thus the conundrum: for Milton's transfers of assets to Yanelin to be fraudulent on his part, they must have been undertaken with actual intent to defraud. But given the present state of the record, replete as it is with Mark's assurances that his father's loss of cognitive function began sometime before 2010 and became progressively more severe with the passage of time, can it be said that as of 2012 and 2015—the years in which Milton gave a million dollars to Yanelin—there exists no material dispute of fact as to his ability to form the intent to defraud?

The matter is made even more difficult because it is presented as a motion for summary judgment. "The issue of fraud is not ordinarily a proper subject for summary judgment." *Sanders Farm of Ocala, Inc. v. Bay Area Truck Sales, Inc.,* 235 So. 3d 1010, 1012 (Fla. 2d DCA 2017) [43 Fla. L. Weekly D73a] (citing *Graef v. Hegedus,* 698 So. 2d 655, 656 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2107a]). "Ordinarily, the issue of fraud is not a proper subject of a summary judgment. Fraud is a subtle thing, requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud." *Automobile Sales, Inc. v. Federated Mutual Implement and Hardware Insurance Co.,* 256 So. 2d 386, 386 (Fla. 3d DCA 1972).

Most nearly on point is *Gorrin v. Poker Run Acquisitions, Inc.,* 237 So. 3d 1149 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D265a]. Gorrin had guaranteed a loan for a real-estate development project, *Gorrin,* 237 So. 3d at 1151. Poker Run filed suit to collect on the guarantees. On May 26, 2009, the court granted judgment to Poker Run. *Id.* On August 8 of that same year Gorrin created a trust, naming his mother and brother as trustees and his wife and children as beneficiaries, and proceeded to transfer his entire interest in the property securing the loan guarantees to the trust. *Id.* Poker Run sought to set aside the August 8 transfer, and moved for summary judgment as to that issue. *Id.* In so doing, Poker Run relied, as Mark does here, on the presumption of fraud created by Fla. Stat. § 726.105. *Id.*

Section 726.105(2) provides that fraudulent intent may be presumed from the presence of so-called "badges of fraud."[5] *See, e.g., Beal Bank SSB v. Almand & Assocs.,* 780 So. 2d 45, 60 (Fla. 2001) [26 Fla. L. Weekly S106a]. *See also* Mark's Mtn. pp. 11 *et. seq.* As the *Gorrin* court explained:

> In its motion for summary judgment, Poker Run asserted that Gorrin's actions met [nearly] all the [statutory] factors as: (a) Gorrin transferred the assets for his family's benefit; (b) Gorrin retained his manager status after the transfer; (c) the transfer was concealed using the Trust as a vehicle; (d) Gorrin was sued one year and two months before the transfer; (g) Gorrin used the Trust to disguise and conceal assets; and (j) the transfer occurred both before and after Gorrin incurred a substantial debt.

*Gorrin v. Poker Run Acquisitions, Inc.,* 237 So. 3d at 1154. And yet despite the presence of these many statutory "badges of fraud," a genuine issue of material fact remained: "whether Gorrin's transfer of his 95% ownership interest in Lacross to the Trust was fraudulently made with the intent to protect Gorrin's assets from execution." *Id.* at 1155.

By how much does the case at bar out-Gorrin *Gorrin.* Of the various statutory badges of fraud, half-a-dozen were clearly present in Gorrin's case. Here, it would be difficult to make an argument for more than one or two.[6] There is no suggestion that Gorrin suffered from any loss of mentation such that he would have had difficulty forming the very particular and specific intent required to defraud. Here, Mark himself asserts repeatedly and forcibly that his father's once-formidable intellect was, at all times material to the cross-motions at bar, ensnared in the clutches of a severe and advanced dementia.

The *Gorrin* court cautioned that, "Summary judgment is rarely granted in fraudulent transfer cases, as the determination of intent often presents a genuine issue of material fact." *Gorrin v. Poker Run Acquisitions, Inc.,* 237 So. 3d at 1155 (citing *Rosen v. Zoberg,* 680 So. 2d 1050, 1051 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2095c]; *Yaralli v. Am. Reprographics Co., LLC,* 165 So. 3d 785, 789 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1240a]). Surely that admonition applies with double force to someone circumstanced as Mark says Milton was. *See also Stephens v. Kies Oil Co., Inc.,* 386 So. 2d 1289 (Fla. 3d DCA 1980).

Whether the gifts made by Milton to Yanelin were the product of Milton's "actual intent to . . . defraud Patricia Wallace, Mark Wallace" and others, as Mark alleges in his Amended Complaint p. 58 ¶20; or the product of Milton's "advanced age, his Alzheimer's/dementia and degenerative brain disease, [and] his gullible infatuation with a woman who he believes is in love with him," as Mark alleges in his Amended Complaint p. 39 ¶43; is a material question of fact that cannot be resolved on summary judgment on this record. Accordingly, Mark's Motion for Summary Judgment as to Count II of his Amended Complaint is respectfully DENIED.

2. As to Count IV—Constructive Trust

In Count IV of his Amended Complaint Mark seeks the imposition of a constructive trust as to money given by his father to Yanelin.[7] He avers that "[a] confidential relationship existed" between Milton and Yanelin, pursuant to "which confidence was reposed in [Yanelin] and betrayed and under which influence was acquired by [Yanelin] and abused." Amended Complaint p. 63 ¶34. As to this count he seeks summary judgment.[8]

All agree that the elements of a claim for constructive trust are a promise, express or implied; transfer of property in reliance on that promise; a confidential relationship; and unjust enrichment. *See* Mark's Mtn. p 15 n. 9; Rodriguez Mtn. p. 15; both citing *Abreu v. Amaro,* 534 So. 2d 771 (Fla. 3d DCA 1988). *See gen'ly Steinhardt v. Steinhardt,* 445 So. 2d 352 (Fla. 3d DCA), *rev. denied* 456 So. 2d 1181 (Fla. 1984); *Mills v. Holcomb,* 389 So. 2d 223 (Fla. 5th DCA 1980), *rev. denied,* 399 So. 2d 1143 (Fla. 1981). In *Von Mitschke-Collande v. Kramer,* 869 So. 2d 1246 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D859b], the heirs of one Siegfried Otto "alleged in their complaint that Kramer occupied a position of trust [as] to Otto," *Von*

*Mitschke-Collande v. Kramer,* 869 at 1249, in that Kramer was Otto's son-in-law and sometime financial advisor. They further alleged "that Kramer breached that trust by using Otto's funds to acquire property for himself; and that pursuant to Kramer's [prior] agreement with Otto and [a foreign] judgment enforcing it, Kramer is obligated to return all funds or assets derived from those funds to" Otto's heirs, including certain demised real property. "These allegations state a viable claim for imposition of a constructive trust." *Id.* (citing *Quinn v. Phipps,* 113 So. 419, 422 (1927) ("a court of equity will raise a constructive trust and compel restoration where one, through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for himself which in equity and good conscience he should not be permitted to hold")); *Socarras v. Yaque,* 452 So. 2d 992, 994 (Fla. 3d DCA 1984).

The closest that Mark comes to identifying a promise, express or implied, in reliance upon which Milton gave money to Yanelin is in his Amended Complaint, p. 64 ¶35: "Milton Wallace was dependent on Rodriguez for her love and affection and, as a result, placed his trust and confidence in Rodriguez, which Rodriguez expressly or impliedly agreed not to abuse." In Mark's view, then, the promise made by Yanelin to Milton was to provide him with love and affection; it was in reliance on that promise that Milton was moved to shower his inamorata with money and other gifts. There is at least circumstantial evidence that Milton believed that Yanelin, far from abusing his "trust and confidence," was zealously honoring her promise to provide love and affection: he persisted in his relationship with her for more than a dozen years, expressing no desire to terminate or alter the nature of that relationship. True, the amount of money that Milton gave Yanelin might strike the detached observer as excessive, even grossly excessive; and undoubtedly the principal purpose of a constructive trust is to avoid an unjust enrichment. *Collinson v. Miller,* 903 So. 2d 221 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D952f]; *Bauman v. Rayburn,* 878 So. 2d 1273 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1796a]; *Saporta v. Saporta,* 766 So. 2d 379 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1828a]; *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. But it is not unimaginable that a self-made man, a man who by dint of his own labor had accumulated more than $50 million, might think it worthwhile and more than worthwhile to give away four or five percent of his fortune to a young woman who brought warmth to a life growing cold and light to a life growing dark. Whether that is so or not is the antithesis of the sort of question that can be resolved on summary judgment.

In *Arwood v. Sloan,* 560 So. 2d 1251 (Fla. 3d DCA 1990), the Third District adopted the order of the trial court below, reciting that Plaintiff Frank Arwood and Decedent Vaughn Dee Robinson "cohabited . . . for many years . . . without benefit of matrimony." *Arwood v. Sloan,* 560 So. 2d at 1251. Over the course of the years a piece of real property, as well as various sums of money, were transferred by Mr. Arwood into Ms. Robinson's name. *Id.* When Ms. Robinson died, Atwood "filed a claim against [her] probate estate, claiming that the real property, funds in the bank, and other assets in Decedent's name, were his." *Id.* He sought the imposition of a constructive trust. But "[t]here can be no constructive trust, as a constructive trust requires fraud, misbehavior, or mistake," and there was no showing of any of those things. *Id.*

The court's particular turn of phrase—"fraud, misbehavior, or mistake"—is instructive. Arguably, Mr. Arwood and Ms. Robinson did engage in misbehavior. The court's delicate description of their living arrangements—they "cohabited . . for many years . . . without benefit of matrimony"—suggests a certain distaste for comportment that once upon a time was both illegal and immoral. But the misbehavior required to establish constructive trust—like the fraud or mistake required for that purpose—is not general misbehavior but misbehavior by the person as to whom the constructive trust is sought directed against the person who seeks it. Ms. Robinson did not "misbehave" toward Mr. Arwood; she played the role, although she lacked the title, of a wife. An analogy, however imperfect, can be made to the relationship between Milton and Yanelin. A disinterested observer might say—and Mark, who is an interested observer, *does* say—that the relationship between Milton and Yanelin was based entirely upon fraud and characterized exclusively by misbehavior and mistake. But for purposes of the imposition of a constructive trust, the question is whether Milton, and no one else, was victimized by fraud, misbehavior, or mistake perpetrated by Yanelin and no one else. I suspect, on the basis of the present record, that Milton would answer that question with an emphatic "no."[9] I cannot say, on the basis of the present record, that there exists no material dispute of fact as to the answer to that question. Mark's Motion for Summary Judgment as to Count IV of his Amended Complaint is respectfully DENIED.

In denying this claim, I well recognize that, in Mark's view, the money that Milton gave Yanelin was, by operation of the Marital agreement, not his to give away. But that is not the issue on a motion for summary judgment as to constructive trust. There is, on the record before me, a material dispute of fact whether Yanelin defrauded or cozened Milton to obtain the monetary and other gifts that he gave her; and a material dispute of fact whether Yanelin was merely enriched, or unjustly enriched, by those gifts. Such material disputes of fact preclude summary judgment.

B. Yanelin's Summary Judgment Motion

Yanelin seeks summary judgment as to two categories of gifts: the millions of dollars given to her during Patricia's lifetime, and $300,000 dollars allegedly given to her but allegedly returned by her after Patricia's death, Both categories of gifts can be dealt with readily.

As discussed *supra,* the Marital Agreement contemplated that neither spouse would dispose of joint assets without the consent of the other spouse. Perhaps that feature of the Agreement was never intended to extend to the purchase price of a cup of coffee. But surely that feature of the Agreement was intended to extend to the millions of dollars given by Milton to his mistress. Yanelin seeks summary judgment, however, arguing that the only limitation on the disposition of joint assets by one spouse was the consent of the other; and that Patricia—incredible as it seems—consented to Milton giving Yanelin millions of dollars. (The notion that Patricia not only turned a blind eye to Milton's frolics with Yanelin, but also "directly and personally joined" in Milton's conveyance of millions of dollars to his partner in frolicking, is a notion that may challenge the credulity of even the credulous. But at summary judgement, the incredible must be credited.)

As to this issue, Yanelin's motion for summary judgment is clear beyond cavil:

> Patricia Wallace was aware [of] and consented to the monetary gifts provided to Yanelin by Milton. (Ex. AA, MJW Depo Tr. March 29, 2017, Vol. I., 50:25-51:14, 63:12-64;22; Ex. BB, MJW Depo Tr. March 30, 2017, Vol. II, 240: 5-23, 243:1-3, 11-30; Ex. CC, Spinale Depo. Tr. Vol I, 124:21-127:16 (P. Wallace was aware of the 2012 transfers)).

Rodriguez Mtn. p. 5 ¶14. Mark, of course, is equally adamant in his pleadings that Patricia neither knew of nor consented to these gifts. Mark's Mtn. p. 5 ¶3; p. 6 ¶6.

It is a principle of the law of summary judgment too well-settled to require citation to authority that where there exists a material dispute of fact such as this one, I am not to make credibility determinations, but must simply deny relief. This portion of Yanelin's motion is therefore respectfully DENIED.

On August 9, 2016, a Motion for Temporary Injunction was filed by Petitioner herein, appended to which as Exhibit A was an affidavit by Mark, identified in the motion as the "Wallace Declaration." It provides, at pp. 4-5 ¶¶17-18, that although Yanelin attempted on July 19, 2016, to repay the $300,000 given to her by Milton, Mark was "advised by the bank that Ms. Rodriguez had insufficient funds to honor the check and to try again on July 20th." The Declaration does not indicate whether Yanelin's check was ever re-submitted for payment; and if so, whether it cleared.

I realize that this is a slender reed upon which to deny summary judgment; but for purposes of summary judgment, it is enough. Yanelin's motion is respectfully DENIED.

III. Conclusion

The dueling motions for summary judgment are denied as more fully set forth above.

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[1]Following the example of all counsel in their various pleadings, I refer to the *dramatis personae* by their first names, not in a casual or disrespectful manner, but simply because most of them share the same last name.

[2]*See* I Kings 1:4.

[3]It appears that Mark's summary judgment motion is directed solely to any gifts, monetary or otherwise, given to Yanelin during Patricia's lifetime. Yanelin's present motion, however, seeks summary judgment as to, *inter alia,* "the two gifts in 2016 that were returned."

[4]The standard for the granting of summary judgment is exacting, and trial courts must be chary in finding that standard to be met. That said, 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,* ___ So. 3d at ___ (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,* ___ So. 3d at ___ (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,* ___ So. 3d at ___ (Logue, J., concurring).

[5]The factors making up the "badges of fraud" are: (a) the transfer or obligation was to an insider; (b) the debtor retained possession or control of the property transferred after the transfer; (c) [whether] the transfer or obligation was disclosed or concealed; (d) before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit; (e) the transfer was of substantially all the debtor's assets; (f) the debtor absconded; (g) the debtor removed or concealed assets; (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation incurred; (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[6]Admittedly the transfer by Milton to Yanelin of millions of dollars was concealed, *see* Fla. Stat. § 726.105(2)(c), (g). Whether "[t]he value of the consideration received by" Milton, *see* Fla. Stat. § 726.105(2)(h), "was reasonably equivalent to the value of the assets[s] transferred" is something I decline to consider.

[7]The Amended Complaint makes reference, not to money, but to "assets." Amended Complaint p. 65140 and a. Mark's Mtn. identifies with particularity stock shares and real property that Mark claims was either given by, or is directly traceable to money given by, Milton to Yanelin. Yanelin's motion for summary judgment is silent on the question whether those stock shares, and those items of real estate, were in fact given by, or derived directly from money given by, Milton to her. That question is critical. "The essence of the equitable remedy of constructive trust is whether specific property or funds can be identified as the *res* upon which a constructive trust should be imposed." *Frieri v. Capital Investment Services, Inc.,* 194 So. 3d 451, 455 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1189a] quoting *Bank of Am. v. Bank of Salem,* 48 So. 3d 155, 158 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2577a] (in turn quoting *Gersh v. Cofman,* 759 So. 2d 407, 409 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2079a]).

[8]Mark's motion announces that it seeks summary judgment as to this count. Mark's Mtn. p. 1. It contains, however, no separate section arguing the merits of this summary judgment claim. The closest it comes to asserting arguments for summary judgment as to constructive trust is on pp. 15-17, which purports to be a rebuttal of an affirmative defense appearing in Yanelin's answer to the Third-Party Complaint.

[9]*NB* that, "Arwood purchased [the] house, and supplied all of the consideration for the purchase. . . . [T]hey [subsequently] executed a warranty deed to the decedent alone, the consideration being recited as 'love and affection'." *Arwood* v. *Sloan,* 560 So. 2d at 1252 (Cope, J., dissenting). Apparently that consideration was sufficient to defeat a claim for constructive trust.

* * *

**Criminal law—Arson—Exploitation of elderly— Evidence—Statements of defendant—Statement/proffer made in connection with plea negotiations—Where defendant exhibited actual subjective expectation to negotiate plea at time of statement/proffer and expectation was reasonable given totality of circumstances, statement/proffer is not admissible into evidence as admission in state's case-in-chief—Where neither proffer agreement nor transcript of proffer agreement meeting includes any mention of protections afforded defendant by section 90.410 and rule 3.172(i), any waiver of those protections by defendant was not knowingly, voluntarily or intelligently made—Motion to suppress is granted**

STATE OF FLORIDA, Plaintiff, v. VICTOR HAWKINS, Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case Nos. 2018-CF-1397, 2018-CF-3156. February 12, 2020. Frederick P. Mercurio, Judge. Counsel: Melissa A. Gould, Office of the State Attorney, and George C. Bedell, III, Office of the State-Wide Prosecutor, for Plaintiff. Mark Adams, Assistant Public Defender, for Defendant.

**ORDER GRANTING MOTION TO SUPPRESS**

**This Cause** came before the Court on February 10, 2020 on defendant's Motion To Suppress Statements, Admissions or Confessions (filed January 31, 2020). Melissa A. Gould, Esq., (Office of the State Attorney) and George Bedell, Esq. (Office of the State-Wide Prosecutor) represented the State and Mark Adams, Esq. appeared on behalf of the Defendant.

The Court having heard argument of counsel, testimony, reviewed exhibits and pertinent portions of the electronic court files, and being otherwise duly advised in the premises does hereby find as follows:

**1.** Defendant was arrested on May 3, 2018 in Hillsborough County, Florida for charges pending in Manatee Circuit Court case # 2018-CF-1397 (arson). As part of the continuing arson investigation facts became known that led to defendant's arrest on October 3, 2018 for Manatee Circuit Court case # 2018-CF-3156 (exploitation of the elderly).

**2.** Shortly after his arrest in May 2018 Defendant made it known that he wished to speak to law enforcement. Law enforcement officers met with the Defendant on May 7, 2018. Law enforcement monitored the defendant's jail calls. Law enforcement was interested in learning who, if anyone else, assisted the Defendant in the commission of the arson.

**3.** Defendant has been represented by counsel throughout these proceedings. At various times he was represented by the Office of the Public Defender, private counsel James S. Garbett, and is currently represented by at least two members of the 12th Judicial Circuit Public Defenders Office, Mark Adams and Hannah Ibanez.

**4.** At some point, either during representation from Assistant Public Defender Wernicke or private counsel James S. Garbett, Defendant received oral communication from counsel as well as viewed e-mail correspondence between the State and defense counsel regarding resolving his cases. Defendant testified he thought there were some general parameters for a plea agreement of between ten to twenty years in prison followed by probation to pay restitution.

**5.** Attorney Garbett scheduled a proffer meeting to take place at the Manatee County Jail on April 30, 2019. For whatever reason, that proffer meeting did not occur.

**6.** In August 2019 attorney Garbett moved to withdraw from representation with the defendant's consent and the Office of the Public Defender was re-appointed to represent the Defendant. Assistant Public Defenders Adams and Ibanez entered notices of

appearance as defense counsel.

**7.** A new Proffer meeting was scheduled for August 29, 2019.

**8.** Prior to the April scheduled proffer meeting the State circulated a STATE ATTORNEY PROFFER AGREEMENT to attorney Garbett. Defendant testified he had seen the agreement during that relevant time period.

**9.** The State drafted the Proffer Agreement.

**10.** At no time prior to nor since the August 29, 2019 proffer meeting did the Defendant enter a plea to any of the charges in either of the above referenced cases.

**11.** On August 29, 2019 the Defendant with counsel—Adams and Ibanez—met with Assistant State Attorney Gould, Assistant Statewide Prosecutor Bedell, ATF Special Agent Balos, Special Agent Cannizarro and Detective Precious. The Defendant was in custody. The meeting took place at the Manatee County Jail, was recorded and lasted approximately one hour and forty minutes. A CD of the recording as well as a transcript of the recording were admitted into evidence at the hearing as State's exhibits 2 and 3.

**12.** This statement/proffer was clearly not one made in fulfillment of a plea agreement since the Defendant never entered a plea to any charge in either case. The Court must then consider whether the statement/proffer was made to induce or enhance plea negotiations and is therefore a statement/proffer made in connection with a plea for purposes of Florida law. See Florida Statute 90.410, Florida Rule of Criminal Procedure 3.172(i). *See also Richardson v. State,* 706 So. 2d 1349, 1353 (Fla. 1998) [23 Fla. L. Weekly S54a], *Nunes v. State,* 988 So. 2d 636 (Fla 2d DCA 2008) [33 Fla. L. Weekly D1503b], *Anderson v. State,* 420 So. 2d 574 (Fla. 1982) and *Davis v. State,* 842 So. 2d 989 (Fla. 1st DCA 2008) [28 Fla. L. Weekly D988b].

**13.** At the start of the proffer, ASA Gould read the agreement to the Defendant. After reading the agreement, ASA Gould asked the Defendant if he has any questions. The Defendant responded that he did not. A conversation then ensues about additional state charges and ASA Gould states "Any additional charges that could possibly come from today—state level, I'm not interested in pursuing based on anything that you just say here today." Defendant then asks "What about federal?" A conversation ensues and ASA Gould states, "I can't speak for the Feds. I mean, there is a federal representative here and I don't think he has any intention to do that." ATF Federal agent Balos then says, "So there's no federal prosecution, uh, for the arson or the arson fraud." (See page four of the proffer transcript). The Defendant is assured there will not be any additional federal charges as to those issues. The Defendant, his counsel and all others present except Special Agent Cannizarro then signed the Proffer Agreement (hearing exhibit 1). (Issues of ineffective assistance of counsel are left for another day). At no time after that are there any plea or charge bargaining discussions in the proffer. The proffer/statement of the Defendant is unsworn.

**14.** The Proffer agreement speaks for itself. Since the Proffer agreement was drafted by the State, any ambiguities will be construed in favor of the Defendant.

**15.** Defendant testified at the hearing that he made the proffer/statement as an effort to continue plea discussions and hopefully receive a better offer as is evidenced in paragraph three of the Proffer Agreement.

**16.** The Court finds paragraphs 2 and 3 of the Proffer agreement to be ambiguous. Paragraph two states:

> VICTOR HAWKINS understands this opportunity to engage in a free talk is not a plea discussion with regard to the State charges, and that no specific plea discussions will occur until after the State of Florida has had an opportunity to evaluate the statements at this meeting.

The Court finds the language ambiguous because it tells the Defendant that specific plea discussions will take place after the State has evaluated statements made during the proffer. Without the Defendant making statements there would be nothing to evaluate and no further plea discussions.

Paragraph 3 states:

> No understandings, promises, agreements and/or conditions have been entered with respect to the proffer or with respect to any future disposition of the charges pending against VICTOR HAWKINS other than those expressly set forth in this Agreement and none will be entered unless in writing and signed by all parties. VICTOR HAWKINS understands the evidence against him and it is his hope that providing this proffer will potentially affect his sentence and/or the charges against him.

The last sentence of paragraph 3 clearly states that this proffer is in furtherance of plea negotiations. The State recognized this and said the Defendant hopes that providing this proffer will potentially affect his sentence and/or the charges against him. That is the definition of plea and/or charge bargaining.

**17.** Outside the four corners of the proffer agreement was a separate agreement that if the Defendant provided a proffer the State would stipulate to modify a condition of his release prohibiting him from having contact with his wife. The Defendant provided the proffer. On or about September 10, 2019 the parties executed a stipulation to modify conditions of release and the Court subsequently entered an order Modifying the Conditions of Release on September 10, 2019 to permit the Defendant to have contact with his wife.

**18.** The Defendant, Mr. Hawkins, argues that his statement/Proffer of August 29, 2019 was made in connection with plea negotiations and is therefore not admissible into evidence as an admission. See Florida Statute 90.410, Florida Rule of Criminal Procedure 3.172(i). *See also Richardson v. State,* 706 So. 2d 1349, 1353 (Fla. 1998) [23 Fla. L. Weekly S54a], *Nunes v. State,* 988 So. 2d 636 (Fla 2d DCA 2008) [33 Fla. L. Weekly D1503b], *Anderson v. State,* 420 So. 2d 574 (Fla. 1982) and *Davis v. State,* 842 So. 2d 989 (Fla. 1st DCA 2008) [28 Fla. L. Weekly D988b].

In *Richardson,* the Florida Supreme Court citing *United States v. Robertson,* 582 F.2d 1356 (5th Cir. 1978) and *Groover v. State,* 458 So. 2d 226 (Fla. 1984) set forth the following analysis for determining whether statements should be excluded as made in connection with a plea offer.

At issue is Florida Rule of Criminal Procedure 3.172(h), which states that:

> Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.
>
> In construing which statements fall within the ambit of the exclusion, we have adopted the two-tiered analysis used in *United States v. Robertson,* 582 F.2d 1356 (5th Cir. 1978). . . . In the first step of the analysis, the trial court must determine "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion." *Robertson,* 582 F.2d at 1366. In applying the first prong, the trial court must carefully distinguish between the accused's admissions and the accused's attempts to negotiate a plea bargain. In other words, the trial court "must appreciate the tenor of the conversation." *Id.* at 1367. From there, the trial court must then discern "whether the accused's expectation was reasonable given the totality of the circumstances." *Id.* at 1366. *See Davis v. State,* 842 So. 2d 989, 991 (Fla. Dist. Ct. App. 2003) [28 Fla. L. Weekly D988b].

**19.** The Court finds based on the totality of the circumstances as well as the defendant's testimony that Mr. Hawkins exhibited an actual subjective expectation to negotiate a plea at the time of the statement/proffer. The Court further finds that Mr. Hawkins expecta-

tion was reasonable given the totality of the circumstances.

**20.** The State argues that the Proffer Agreement was a contract between the State and the Defendant and further that the Defendant has the ability to waive constitutional protections as well as other protections the law provides criminal defendants. Specifically the right to waive the protections of Florida Statute 90.410, Florida Rule of Criminal Procedure 3,172(i) and the Florida case law cited above. The State cites *Chames v. DeMayo,* 972 So. 2d 850 (Fla.2007) [32 Fla. L. Weekly S820a]. The Florida Supreme Court recognized that a trend has developed permitting the waiver of constitutional rights, especially rights given to criminal defendants. The Court went on to state that they have emphasized, however, that such waivers must be made knowingly, voluntarily and intelligently.

**21.** The Court in reviewing the proffer agreement notes that it is completely silent as to the protections afforded the Defendant when engaging in plea discussions. Additionally, in reviewing the entire transcript of the proffer agreement, there is no discussion contained therein that would lead this Court to believe the Defendant knowingly, voluntarily and intentionally waived the protections afforded him by Florida law. There is no citation to Florida Statute 90.410, Florida Rule of Criminal Procedure 3.172(i) or the case law interpreting those statutes and rules.

**22.** The Court therefore finds that if—the proffer agreement is considered a waiver of the protections afforded the Defendant in Florida Statute 90.410, Florida Rule of Criminal Procedure 3.172(i) and the case law interpreting them—that the defendant's waiver was not knowingly, voluntarily or intelligently made.

Accordingly, the Court determines the statement/proffer was made in connection with plea negotiations and is therefore not admissible into evidence as an admission during the State's case in chief. If, however, the Defendant testifies and makes a statement inconsistent with his statement/proffer, he is subject to being impeached with the proffered statement as a prior inconsistent statement. It is therefore

**ORDERED** that the defendant's Motion To Suppress Statements, Admissions or Confessions is ***Granted as set forth above.***

* * *

**Attorney's fees—Insurance—Homeowners—Motion to strike request for attorney's fees pursuant to section 627.428 in action brought by assignee of homeowners property insurance is stricken —Attorney's fees in such actions have been controlled by section 627.7152(10) since May 24, 2019**

ISLAND ROOFING AND RESTORATION, LLC (a/a/o Michael Linihan and Susan Linihan), Plaintiff, v. ASI PREFERRED INSURANCE CORPORATION, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County. Case No. 11-2019-CA-000932-0001-XX, Civil Division. February 10, 2020. Hugh D. Hayes, Judge. Counsel: Matthew Grable, Arnesen Webb, P.A., Boca Raton, for Plaintiff. Joseph G. Murasko, Law Offices of Deidrie A. Buchanan, Fort Lauderdale, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO STRIKE ATTORNEY FEE CLAIM IN AMENDED COMPLAINT**

THIS CAUSE having come on to be heard on Defendant's Motion to Strike Attorney's Fees, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Plaintiff filed an amended complaint on July 19, 2019 premised upon a document of assignment of Home-owners property insurance benefits which materially differs from the document of assignment attached to the original complaint. The amended complaint contains a request for attorney's fees pursuant to Fla. Stat. Sec. 627.428. However, attorney's fees in an action by an assignee of Home-owners property insurance policy benefits are subsumed by Fla. Stat. Sec. 627.7152(10). The aforementioned subsection became effective upon becoming a law when signed by the Governor on May 24, 2019. This order is without prejudice.

* * *

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# COUNTY COURTS

**Insurance—Personal injury protection—Motion for more definite statement regarding alleged breach of PIP policy is granted**

UNIVERSITY PHYSICAL MEDICINE, INC., as assignee for Tracy Benjamin, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2019 SC 002675. February 3, 2020. J. Layne Smith, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Christina M. Saad and James C. Rinaman, III, Dutton Law Group, Jacksonville, for Defendant.

## ORDER ON DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT

THIS MATTER, having come before this Court on Defendant's Motion for a More Definite Statement, and the Court being otherwise duly advised in the premises, it is hereby,

ORDERED and ADJUDGED that:

1. The Defendant's Motion for More Definite Statement is hereby GRANTED.

2. In the context of a PIP claim, a more definite complaint will benefit all parties.

3. Plaintiff shall amend its Complaint within thirty (30) days from the date of this Hearing.

4. Plaintiff shall amend to provide specificity as to what is accused of being breached, such that defendant will know which dates of service are at issue and what it is defending;

5. Defendant shall have Ten (10) days from the date of service of the Amended Complaint to file a responsive pleading to the Amended Complaint.

* * *

**Criminal law—Boating under influence—Search and seizure—Detention—Deputy did not have reasonable suspicion to detain defendant by requiring him to board patrol boat and travel to marina for field sobriety exercises where, at the time of detention, the only evidence of impairment was odor of alcohol and defendant's admission to consuming four beers over unknown period of time—Motion to suppress is granted**

STATE OF FLORIDA v. CHAD CRAGO, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. 19-08343 MMANO-G. January 7, 2020. Kathleen T. Hessinger, Judge. Counsel: Alexis Wilt, for State. J. Kevin Hayslett, Carlson, Meissner, Hart & Hayslett P.A., for Defendant.

## ORDER GRANTING MOTION TO SUPPRESS

This Cause came to be heard before this Court on Defendant's Motion to Suppress with Assistant State Attorney, Alexis Wilt, Esq., present with Defendant present, represented by counsel, Kevin Hayslett, Esq., and this Court having heard testimony, received evidence, and being otherwise advised of the premises, it is hereby **Ordered and Adjudged** as follows,

1. On May 25, 2019, Defendant was charged with boating under the influence.

2. On August 12, 2019, Defendant filed a Motion to Suppress alleging the deputy unlawfully stopped the boat and lacked reasonable suspicion to detain Defendant for a BUI investigation. At the time of the hearing on the Motion to Suppress, Defendant focused the issue only on the lack of reasonable suspicion to detain Defendant for the BUI investigation.

### Facts

3. The State called Deputy Jimmy Nettles from the Pinellas County Sheriff's Office to testify and then the Defendant testified.

4. **Deputy Nettles** testified that he has been a deputy for 20 years, 16 years with the Nassau County Sheriff's Office and 4 years with the Pinellas County Sheriff's Office. He is currently assigned to the Marine and Environmental Land Unit.

a. On May 25, 2019, Deputy Nettles was on marine patrol, with Corporal Randy Hart, patrolling the intercoastal waterway between Dunedin Marina and the Dunedin Causeway. He testified that this was a busy holiday weekend. During his patrol, he observed a boat floating between the channel markers, near the west side of the markers. When he first observed the boat, he saw a female "mount" another female at the back of the boat and then a male "mount" the second female. Upon the deputy turning his patrol boat around, to approach the floating boat, the deputy testified that he observed the male get off the female and go to the helm of the boat to power it up to move it away.

b. Deputy Nettles testified that he stopped the boat as a boat cannot float in the channel unless a mechanical or medical problem exists, pursuant to §327.44(2), Fla. Stat. He further testified that approximately 20-30 boats were in the vicinity of this boat. He stated that outside the channel markers the water was between two (2) to five (5) feet depending on the tide at the time. He could not remember the status of the tide at the time of this incident. Deputy Nettles testified that he approached the boat due to it floating in between the channel markers. He needed to determine if any person on the boat had a medical problem or whether the boat had a mechanical issue.

c. Upon tying the patrol boat to the floating boat, the deputy spoke with the person at the helm of the boat: that person was identified as the Defendant in this matter. Upon speaking with the Defendant, the deputy testified that the Defendant had slurred speech and watery bloodshot eyes. He asked the Defendant if he had been drinking and he advised yes, four (4) beers. The deputy also saw an open can of alcohol near the Defendant. The deputy did not notice any issues with the Defendant's balance; the deputy testified that the Defendant's balance was not terrible considering the rocking of the boat from the wake of the other boats. Upon making sure no medical or mechanical issues existed, the deputy began a safety inspection of the boat.

d. The deputy testified that he asked Defendant if he owned the boat; the Defendant responded that he owned the boat. The deputy further testified that the Defendant had a hard time locating the requested items for the safety inspection. The deputy requested the vessel registration, the horn or whistle, life jackets, and "throwables." The other people on the boat were trying to help him locate the items, but the deputy told them they could not do so.

e. Deputy Nettles testified that based on his observations of the Defendant, he was concerned that Defendant was possibly impaired. He had the Defendant step onto the patrol boat to isolate him from the other passengers as the other three (3) adults also appeared impaired; the two (2) children on the boat were not impaired. Upon isolating the Defendant from the other passengers, the deputy noted a strong odor of alcohol on the Defendant. Deputy Nettles testified that he performed HGN on the Defendant when he brought him onto the patrol boat; the Defendant had clues of impairment. At this time, the deputy towed Defendant's boat to the Dunedin Marina as none of the adults on the boat were capable of operating the boat, based on their impairment, and he could not leave the boat in the channel. At the marina, the deputy performed field sobriety exercises in the parking lot of the marina. The field sobriety exercises were performed at the marina as the deputies had a camera to video tape the exercises.

f. On cross-examination, Deputy Nettles testified that he stopped the boat at approximately 3:00 p.m. Defendant's boat was facing south and the deputy was patrolling north when he observed the Defendant's boat floating in the channel. He did not write a citation for the violation of §327.44(2), Fla. Stat. The deputy confirmed that he stopped the boat solely to find out if the boat was anchored in the

channel or had a mechanical issue. He further confirmed that when he pulled his patrol boat up to Defendant's boat that Defendant was in the back of the boat and then walked to the helm of the boat. The Defendant was not at the helm of the boat when the deputy initially past the boat. At this time, the Defendant's counsel showed Deputy Nettles a photo of the two ladies and one man lying on top of each other. The deputy then agreed that the man lying on top of the ladies was not the Defendant, it was a different man. He confirmed that the person at the helm of the boat was the Defendant and agreed he could not have seen the Defendant get off the ladies and walk to the helm of the boat as the Defendant was not the male laying on the ladies. At the time of the stop, the deputy did identify the driver of the boat as Chad Crago, the Defendant.

g. Deputy Nettles further agreed, according to his report, that when he made contact with the driver of the boat, he immediately detected an odor of alcohol and Defendant admitted to four (4) beers. Deputy Nettles agreed that, at that point, the odor of alcohol and the four (4) beers is what he had as signs of impairment prior to Defendant being detained on the patrol boat. The report reflects that the deputies then towed the boat to the Dunedin Marina wherein the full criminal investigation was conducted. Deputy Nettles agreed that his report reflects that the criminal investigation, at the marina, began at 1700 hours, 5:00 p.m. The report reflects the HGN, the one leg stand, and the walk and turn field sobriety exercises were performed at the marina. The field sobriety evaluation form reflects signs of impairment of bloodshot, glassy eyes, slurred speech, and odor of alcohol.

h. On cross-examination, the deputy was then asked what occurred between 3:00 p.m. and 4:30 p.m. as the deputy initially stated that the stop was at 3:00 p.m. The deputy then advised that the stop was at 5:00 p.m. He testified that the safety check lasted 5 minutes and the marina was one (1) mile away: thus, the tow took about 20 minutes. The criminal investigation began at approximately 5:30 p.m. and the field sobriety exercises concluded at about 5:45 p.m.

i. Deputy Nettles then confirmed that the signs of impairment he noted at the time the Defendant was on the boat was odor of alcohol and four (4) beers. He agreed that no other signs of impairment were noted before the dock. He further agreed the odor of alcohol is not a sign of impairment. He also agreed that drinking alcohol is not a sign of impairment and he did not ask how long the Defendant had been drinking.

5. The State did not call any other witnesses, so then the Defendant testified.

6. The Defendant testified that the boat involved in this matter belongs to his fiancée. Throughout his testimony, wife and fiancée were being used interchangeably.

a. The Defendant testified that the boat was not between the channel markers when the marine patrol stopped the boat. The Defendant testified that the boat was on the outside of the channel markers about 100 yards to the west. He stated that the ladies had to use the restroom, so he went outside the channel markers, turned off the motor and the ladies went into the water. The tide was at high tide and the boat was floating. As the ladies returned on the boat, one lady laid down and the other lady jumped on top of her. Immediately thereafter, the other man on the boat jumped on top of the two of them; they were rough housing. A photo was taken of the three laying on top of each other right before they noticed the marine patrol approach. The Defendant testified that he was sitting in the captain's chair with it turned facing to the back of the boat. He testified that he never saw the patrol boat approach, so he never got up to walk to the helm, he was already seated as described. The photo does not show any channel markers, but it does show that the wake from another boat is quite a bit off the backside of the boat at issue in this matter.

b. When the deputies pulled up to the boat, the Defendant testified that the deputy told him to shut down the boat and he advised the deputy that the boat was not running. The Defendant testified that he was not operating the boat; he spun around in the chair when the deputies approached the boat. He further advised that he never told the deputy he was operating the boat and his fiancée advised the deputy that the boat was her boat.

c. The Defendant further testified that the boat is a 23-foot boat and, prior to the Defendant being brought on the patrol boat, he was never within 5 feet of the deputy. Moreover, May 25, 2019 was a bright sunny day and he had sunglasses on when the deputies approached the boat. Another photo was introduced into evidence showing that the other three adult passengers were wearing sunglasses and the day was bright and sunny, no clouds in the sky. The Defendant further testified that he was told to board the patrol boat, to leave his sunglasses with his fiancée, and the deputy handcuffed him prior to boarding the patrol boat.

7. This Court finds inconsistencies exist between the testimony of the deputy and the police report prepared by the deputy. It appears that the deputy did not fully review his police report and field sobriety exercise evaluation form prior to testifying in this matter. Based on the direct examination and the cross examination of the deputy, this Court finds that the **competent, substantial evidence** proves that the deputy noticed the odor of alcohol on Defendant while Defendant was on the boat and the Defendant advised the deputy that he had four (4) beers. This Court finds the Defendant's testimony that he was wearing sunglasses is credible based on the photo of the clear, bright, sunny day. Moreover, no evidence exists of any "bad" operating of the boat. The evidence proved that the Defendant was not the person roughhousing on the back of the boat. The photo of the location of the boat in relation to the channel markers is not dispositive of whether the boat was within or outside of the markers; however, the boat is clearly on the far side of the channel. Based on the credibility of the evidence presented, this Court cannot find that the State presented competent, substantial evidence that the Defendant's boat was floating within the channel markers. The evidence proves that no field sobriety exercises were performed on the Defendant while he was on the patrol boat, including HGN. The deputy's testimony, after his review of his report, reflects the HGN, one leg stand, and the walk and turn field sobriety exercises occurred at the parking lot of the marina. The deputy testified that the Defendant had a difficult time finding the safety inspection items requested by the deputy, but he did not testify as to whether he believed that was a result of Defendant being impaired. He actually agreed, on cross examination, that the only two signs of impairment he observed of the Defendant on the boat was the odor of alcohol and the admission to four (4) beers.

**Legal Analysis**

Although the Defendant does not agree that his boat was unanchored within the channel markers, he is not contesting the stop in this matter as the marine patrol has a much lower legal standard for stopping a boat then a street patrol officer has for making a stop of a vehicle. The question herein is whether Deputy Nettles had the legal basis to detain the Defendant to conduct a boating under the influence investigation. The Defendant was detained upon the deputy requiring him to board the patrol boat and travel in the patrol boat to the marina for field sobriety exercises. The competent substantial evidence proves that the Deputy's evidence of impairment as to the Defendant consisted of the odor of alcohol and the admission of consuming four (4) beers over an unknown period of time.

In *Ameqrane v. State,* 39 So. 3d 339 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b], the Court addressed the requisite reasonable suspicion an officer must have in order to detain a driver to perform field sobriety exercises to determine whether probable cause exists to arrest for driving under the influence. In *Ameqrane,* an officer stopped

the defendant for speeding at 4:00 a.m. Upon speaking with the defendant, the officer detected alcohol on his breath, and noticed that his eyes were bloodshot and glassy. The defendant also admitted he consumed alcohol. The officer had the defendant exit his vehicle and performed the HGN test on him. The HGN test reflected that the defendant's eyes were "bouncing everywhere" depicting that the defendant was under the influence of alcohol. The officer then requested the defendant perform additional field sobriety exercises. *Id.* at 340. The defendant filed a motion to suppress alleging the officer lacked reasonable suspicion that he was impaired in order to request he perform the HGN or any other field sobriety exercise. *Id.* The Court held that 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. *Id.* at 341. The purpose of a DUI investigation is to either confirm or deny whether there is probable cause for a DUI arrest. *Id.* The *Ameqrane* Court held that the speeding at 4:00 in the morning, the signs of impairment, and *the HGN results* provided sufficient reasonable suspicion to ask the defendant to perform additional field sobriety exercises. (emphasis added) *Id.* at 342.

In *Taylor v. State,* 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b], the defendant drove at a high rate of speed, staggered upon exiting his vehicle, had a strong odor of alcohol on his breath, exhibited slurred speech, and had watery, bloodshot eyes. The *Taylor* Court ruled that these signs of impairment were more than enough to provide the officer with reasonable suspicion that a crime was committed, i.e. DUI. *Id.* at 703. The Court held that the officer was entitled to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. *Id.* As such, the officer's request that the defendant perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights. *Id.* at 703-704.

*Liefert v. State,* 247 So. 2d 18 (Fla. 2d DCA 1971) also addressed the signs of impairment required to compel the driver to perform field sobriety exercises. In *Liefert,* the officer observed the defendant driving his panel truck in a weaving fashion across two lanes of traffic and pull over. When the defendant exited the truck, the officer approached him and asked for his driver's license and noticed an odor of alcoholic beverage. The officer then asked the defendant to perform field sobriety tests for which he agreed. *Id.* at 19. The issue raised on appeal was whether the officer was required to advise the defendant that he had a right to either take the physical tests or refuse to take the tests. *Id.* The Court held that the officer, after having observed the defendant drive in a weaving fashion and then noticing the smell of alcohol on his breath, had sufficient cause to believe that the defendant committed a crime in the operation of the motor vehicle and could require him to take part in such physical sobriety tests. *Id.*

The competent substantial evidence in this matter proves that prior to the Defendant being detained on the patrol boat, the deputy noted an odor of alcohol on Defendant's breath and Defendant admitted to consuming four (4) beers. The deputy did not question Defendant as to what period of time he drank the four (4) beers. Based on the deputy's testimony at the suppression hearing, he was initially confused as to whether he stopped the Defendant's boat at 3:00 p.m. or 5:00 p.m.; however, the evidence appears to prove the stop was at 5:00 p.m. As such, the evidence proves, at some point throughout the day, the Defendant consumed four (4) beers. Based on the competent, substantial evidence this Court set forth in its factual findings and without any additional signs of impairment, the deputy did not have reasonable suspicion to detain the Defendant to perform field sobriety exercises.

It is therefore **Ordered and Adjudged** that Defendant's Motion to Suppress is **GRANTED.**

* * *

**Criminal law—Sexual offenders—Violation of residency restrictions—Convicted sex offender cannot be lawfully prosecuted for violation of residency restrictions when he has express permission of regulating authority to reside at his location, notwithstanding presence of playground within 1000 feet of his location, where playground has not been specifically designated as such within GIS mapping system—Residency restriction statute does not give local law enforcement authority to override permission to live in particular location that has been granted by regulating authority**

STATE OF FLORIDA v. WILFRED R. BREUER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 300472MMDB. January 27, 2020. Belle B. Schumann, Judge. Counsel: McKenna Mundy and Spencer Hathaway, Office of the State Attorney, Daytona Beach, for Plaintiff. Steven J. Guardiano and Victoria C. Zinn, Zinn & Guardiano, P.A., Daytona Beach, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This case comes before the Court on the Defense Emergency Motion to Dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)4, on January 22, 2020, with the hearing held January 24, 2020. The undisputed facts establish that on January 11, 2020, the date of this alleged offense, the Defendant, a sexual offender, was living in the only permanent address approved by the regulating authority, the Volusia County Sheriff's Department, and so he cannot be lawfully prosecuted for the misdemeanor offense of violation of residency restrictions for a convicted sex offender. The privately owned playground stipulated to be within 1000 feet of his registered permanent address was not "specifically designated" as required by statute because it was not included in the statewide database maintained by law enforcement to regulate sexual predators and offenders. Unless and until the permission to reside at his permanent residence is withdrawn, that is the only lawful place he can live.

FACTS:

For the purposes of this motion, the facts are undisputed.[1]

Defendant Wilfred Breuer was convicted of a federal crime which requires him to register as a sex offender as a condition of probation. As required by statute, Mr. Breuer registered his home address with the Volusia County Sheriff's Office. On December 30, 2019, Mr. Breuer received permission to reside at 3891 Esplanade Avenue, Port Orange, FL. (Exhibit C, Corrected Emergency Motion to Dismiss, received in evidence without objection, hereinafter Ex. C) This registration issued to Mr. Breuer approved him to reside at this location as his permanent address. If Mr. Breuer resides anywhere other than this address for longer than three days, he is required to inform the Volusia County Sheriff's Office within 48 hours.[2] The failure to report any such movement or reside anywhere else subjects Mr. Breuer to criminal penalties.

Detective Chuck Lee of the Volusia Sheriff's Office testified that he was responsible for supervising the 1400 registered sex offenders and predators living within Volusia County. To accomplish this task, Detective Lee relies upon the GIS mapping system. This mapping system receives data from several agencies and private entities including DCF, schools, and the property appraiser's office, regarding the location of schools, daycare facilities, parks and playgrounds. Detective Lee testified that the owners of privately owned parks or playgrounds are responsible for inputting data in the GIS mapping system, or alternatively, the municipality wherein they are located can report their existence for inclusion into the GIS mapping system The playground within Mr. Breuer's neighborhood was not designated in the GIS mapping system, even though it was built in 2007.[3] Detective Lee or the sheriff's department had no knowledge of the playground. He relies upon agencies or entities to input data into the GIS mapping system.

To fulfill the notification requirements of the registration statute,

Detective Lee notified the Port Orange Police Department that Mr. Breuer was registered to live at his residence on Esplanade Avenue, as of December 30, 2019.

On January 9, 2020, at about 6 p.m., Detective Kenney of the Port Orange Police Department (and former next door neighbor of Mr. Breuer) served Mr. Breuer a letter signed by the Chief of Police informing Mr. Breuer that he was in violation of the residency restrictions for persons convicted of certain sex crimes. (Ex. D) The letter told Mr. Breuer that he had 24 hours to vacate his residence. (Ex. D)

On January 11, 2020, at 7:38 a.m., Mr. Breuer was arrested for violation of the residency restrictions for sex offenders by the Port Orange Police Department. At first appearance the following day, the Court did not find probable cause for the arrest, but instead found probable cause undetermined, and gave the State 72 hours to provide further evidence. In reply, the State filed an information on January 16, 2020, charging Mr. Breuer with violation of section 775.215(3), Florida Statutes, a first degree misdemeanor. The information alleges that Mr. Breuer resided within 1000 feet of a playground, on January 11, 2020.

At the hearing held on January 24, the State introduced photographs of the playground, which indicate that it is fenced, contains at least one or more play structures, and is reserved for residents of the neighborhood. The signage posted at the playground does not specify that it is "designated solely for children" as required by statute, but that deficiency is not dispositive.

CONCLUSIONS OF LAW:

The issue in this case is whether, as a matter of law, Mr. Breuer can be lawfully prosecuted for violating the residency restrictions placed upon a sex offender when he has the express permission of the regulating authority to reside at the location. This in turn requires the Court to determine what it means for a park or playground to be "specifically designated" as defined by section 775.215, Florida Statutes (2019). Detective Lee testified that the county's legal conclusion was that a playground must be "specifically designated" as such in the GIS mapping system. The City of Port Orange takes the position that notwithstanding the permission granted by the regulating authority, if there is a playground "specifically designated" as such through signage or usage, then they may override the permission granted to the duly registered offender and require him to move under penalty of criminal prosecution. This Court agrees with the Sheriff's interpretation.

The polestar of statutory interpretation is legislative intent. *McCloud v. State,* 260 So. 3d 911 (Fla. 2018) [43 Fla. L. Weekly S658a]. If a statute is clear and unambiguous, then the court does not look beyond the plan language or employ rules of statutory construction. *Id.* The fact that two legal entities, the county and the city, have reached opposite conclusions on the meaning of this statutory language as applied to the undisputed facts of this case demonstrates that it is ambiguous.

Legislative intent must be determined primarily from the language of the statute itself. *See, McLaughlin v. State,* 721 So. 2d 1170 (Fla. 1998) [23 Fla. L. Weekly S631a]. Related statutory provisions must be read together to determine legislative intent, so that "if from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." *Golf Channel v. Jenkins,* 752 So. 2d 561, 564 (Fla. 2000) [25 Fla. L. Weekly S31a], *citing, Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 454 (Fla. 1992). Closely related statutes must be construed together "so that they illuminate each other and are harmonized." *McGhee v. Volusia County,* 679 So. 2d 729, 730 n. 1 (Fla. 1996) [21 Fla. L. Weekly S293a]. Remedial statutes should be liberally construed in favor of granting access to the remedy provided by the Legislature. *Golf Channel v. Jenkins,* 752 So. 2d at 566.

Mr. Breuer is a sexual offender, not a sexual predator. The residency requirements for sex offenders are defined in section 775.215, Florida Statutes:

(1) As used in this section, the term:

. . .(b) "Park" means all public and private property *specifically designated* as being used for recreational purposes and where children regularly congregate.

(c) "Playground" means a *designated* independent area in the community or neighborhood that is designated solely for children and has one or more play structures... . .

(3) (a) A person who has been convicted of an offense in another jurisdiction that is similar to a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, ... .may not reside within 1,000 feet of any school, child care facility, park, or playground. However, a person does not violate this subsection and may not be forced to relocate if he or she is living in a residence that meets the requirements of this subsection and a school, child care facility, park, or playground is *subsequently established* within 1,000 feet of his or her residence. (emphasis added)

To discern the legislative intent, this statute must be read in conjunction with the preceding statute, which was passed at the same time, the Florida Sexual Predator's Act, even though Mr. Breuer is a sexual offender, not a sexual predator. This statute explains the registration procedure in great detail. This statute states the legislative intent as follows:

775.21 (3) Florida Sexual Predator's Act

(b) The high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

... .3. Requiring the registration of sexual predators, with a requirement that *complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public.* (Emphasis added)

The Staff Analysis of House Bill 119, filed March 26, 2010, indicates that prior to October 1, 2004, there was no prohibition on where a sexual predator or offender who was no longer under supervision could live. Nor were there any residency restriction on persons like Mr. Breuer who had been convicted of an offense in another jurisdiction that is substantially similar to those offenses listed in the statute. Section IV of this staff analysis states that amendments to the bill were made to "add legislative intent language regarding sexual offender residency restrictions," and to define the terms "park" and "playground." Strengthening the registration requirements, including maintaining a central database, were adopted in a strike-all amendment to the bill.

It is apparent that the registration requirements were imposed to further the intent that complete and accurate information be available to law enforcement and the public. Under this statutory scheme, the offender is ordered to immediately register with the *sheriff's department,* not the local authorities.

775.21(6) Registration

A sexual predator shall register with the department through the *sheriff's office*... . .

(e) 1. If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections or is not in the custody of a private correctional facility, the sexual predator shall register in person:

At the *sheriff's office* in the county where he or she establishes or maintains a residence within 48 hours after establishing or maintaining a residence in this state... . .

The sheriff's office, in conjunction with FDLE, is statutorily required to maintain a database for sexual predators and offenders once they are registered.

> 775.21(k) 1. The department is responsible for the online maintenance of current information regarding each registered sexual predator. The department shall maintain hotline access for state, local, and federal law enforcement agencies to obtain instantaneous locator file and offender characteristics information on all released registered sexual predators for purposes of monitoring, tracking, and prosecution.

Therefore, to further the stated intent to maintain complete and accurate collection and maintenance of a database, the offender must register with the sheriff. FDLE and the sheriff are responsible for maintaining the database. If a playground, park or school is not included in the database, there is no way for the sheriff to fulfill its statutory responsibilities to determine if a particular house constitutes a lawful location for an offender to reside. Interpreting the statute to require "designation" of a park or playground in the GIS mapping database fulfills this legislative intent of a complete and accurate database to monitor sexual offenders and predators.

It is true that the statute requires the sheriff to notify local law enforcement authorities when a sexual offender or predator is permitted to live within their jurisdiction. However, the purpose of this notice is so that the local authorities can perform their duty of notifying the public. The statute gives local law enforcement the ability to verify the address of the sexual predator, but does not give municipalities the authority to override the permission to live in a particular location that has been granted by the regulating authority specified in the statute, to wit: the sheriff. Instead, the statute provides that local law enforcement "shall report to the department" any irregularities it perceives with the residency or registration requirements.

> 775.21(8) Verification.—The department and the Department of Corrections shall implement a system for verifying the addresses of sexual predators... . County and local law enforcement agencies, in conjunction with the department, shall *verify the addresses* of sexual predators who are not under the care, custody, control, or supervision of the Department of Corrections, and may verify the addresses of sexual predators who are under the care, custody, control, or supervision of the Department of Corrections. *Local law enforcement agencies shall report to the department any failure by a sexual predator to comply with registration requirements.* (Emphasis added)

Pursuant to this statutory language, the City of Port Orange could have "reported to the department" through the sheriff the existence of the playground, and their concern that the sexual offender was not "complying with registration requirements." Instead, the city arrested Mr. Breuer even though he had properly registered his residence and received permission to permanently reside there.

The definition of "playground" requires that it be "specifically designated." §775.215, Fla. Stat. (2019). That phrase must have some meaning consistent with the balance of the statutory registration scheme. When a statute is amended in some material way like adding definitions, courts presume that the legislature intended the amendment to have substantive effect. *Crews v. State,* 183 So. 3d 329, 335 (Fla. 2015) [40 Fla. L. Weekly S653a]. Every word in a statute should be given effect, and constructions should be avoided that would render any words superfluous. *Id.* By interpreting the definition of a park or playground so that it must be "specifically designated" as requiring that specific designation to be made to the sheriff for inclusion into the database required by statute fulfills the legislative intent of having a single repository of information to monitor sexual offenders and predators.

Since Mr. Breuer has the express permission of the regulating authority, the sheriff's office, to live at his house as his permanent residence on January 11, 2020, that was the only lawful place he could live. Therefore, the undisputed facts do not establish a prima facie case of guilt against the defendant and this charge must be dismissed. *State v. Kalogeropolous,* 758 So. 2d 110 (Fla. 1999) [25 Fla. L. Weekly S360a].

Although the foregoing analysis draws to a close the resolution of the issue before the Court, this controversy is not over. Once the HOA or the city properly registers the playground by ensuring its inclusion in the GIS mapping database, whether or not Mr. Breuer can continue to reside there depends on whether the playground was "established" when it was built in 2007, or rather, when it was ultimately designated in the database. Any discussion of that issue would be *dicta* beyond the case or controversy before the Court. Nevertheless, the fact remains that unless and until the permission to reside at his permanent residence is withdrawn by the sole regulating authority, the sheriff's department, that is the only lawful place he can live.

WHEREFORE, based on the foregoing authority, the Motion to Dismiss the criminal charge in this case is hereby GRANTED.

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[1]The State waived any objection to the form of the motion including the fact that it was unsworn, and agreed to proceed under 3.190(c)4. No traverse was filed.

[2]This is why the Motion is designated without objection as an "emergency."

[3]Although not specifically proven at the hearing, the parties agree that the playground in question is less than 1000 feet from Mr. Breuer's approved residence.

* * *

**Insurance—Complaint—Amendment—Where insurer confessed judgment based on amount sought in original complaint and plaintiff accepted the confession of judgment by cashing the check, matter was settled, leaving nothing left for court to determine other than reasonable attorney's fees and costs—Medical provider's motion to amend complaint is denied**

ADVANTACARE OF FLORIDA LLC, a/a/o Mitchell Licht, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2017 14250 CODL, Division 71. January 13, 2020. Angela A. Dempsey, Judge. Counsel: Brooke Boltz, Boltz Legal, Oviedo, for Plaintiff. Ashley Wright, Law Office of Kelly L. Wilson, Orlando, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF CONFESSED JUDGMENT

THIS CAUSE has come before the Court upon Defendant's Motion For Entry of Confessed Judgment. The Court being fully advised in the premises, finds as follows:

Plaintiff filed the instant case, alleging damages "not exceeding $100.00" on December 29, 2017. The parties engaged in litigation of this case for approximately eighteen (18) months. On May 29, 2019, Defendant confessed judgment in the amount of $111.34, and stipulating to Plaintiff's entitlement to reasonable attorney's fees and costs. Plaintiff received Defendant's confession and the check on June 5, 2019. On June 11, 2019, the Defendant filed a Notice of Confession of Judgment with the Court, and on the very same day, Plaintiff filed a Motion for Attorney's Fees and Costs based upon the Confession of Judgment. Defendant's check to Plaintiff was cashed on or about July 9, 2019.

On September 26, 2019, Plaintiff filed a Motion to Amend its Complaint. Defendant then filed its Motion for Entry of Confessed Judgment on October 10, 2019.

This Court finds that the Defendant confessed judgment in the amount sought by Plaintiff's Complaint, with interest; Plaintiff accepted the Defendant's confession of judgment by cashing the check; the matter was settled and the Court notified. Plaintiff even filed their motion for attorney's fees based on their settlement with Defendant (i.e. the confession of judgment). There is nothing left for this Court to determine, other than reasonable attorney's fees and costs. *See Geico Cas. Co. v. Barber*, 147 So.3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a].

It is therefore ORDERED AND ADJUDGED that Defendant's Motion for Entry of Confessed Judgment is GRANTED. Plaintiff's Motion to Amend the Complaint is MOOT.

* * *

**Insurance—Personal injury protection—Coverage—Emergency medical condition—Where PIP policy provided that benefits were limited to $2,500 if a provider determined that injured person did not have an EMC, PIP insurer that did not have a determination that insured did not have an EMC was not permitted to limit benefits to $2,500—Insurer's limitation of benefits based on fact that medical records did not contain words "emergency medical condition" was erroneous under terms of policy, and also in light of fact that emergency room records submitted by medical provider indicated that providers qualified to make EMC determination treated the insured and advised her to immediately follow up with her primary care physician**

PASCO-PINELLAS HILLSBOROUGH COMMUNITY HEALTH SYSTEM d/b/a FLORIDA HOSPITAL, WESLEY CHAPEL, as assignee of Alma L. McKinney, Plaintiff, v. DEPOSITORS INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-SC-008734-O. February 10, 2020. Elizabeth Starr, Judge. Counsel: K. Douglas Walker, Bradford Cederberg, P.A., Orlando, for Plaintiff. Nancy Saint-Pierre, Law Office of David S. Lefton, Plantation, 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 this Honorable Court on Plaintiff's and Defendant's competing Motions for Final Summary Judgment, and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, it is hereby, ordered and adjudged as follows:

### PARTIES

This is a claim for Personal Injury Protection ("PIP") benefits brought by Pasco-Pinellas Hillsborough Community Health System d/b/a Florida Hospital Wesley Chapel, as assignee of Alma L. McKinney (hereinafter "Florida Hospital" or "Plaintiff"). Florida Hospital filed the instant breach of contract action against Depositors Insurance Company (hereinafter "Depositors" or "Defendant").

### UNDISPUTED FACTS

Alma L. McKinney was involved in an automobile accident on November 28, 2017. Ms. McKinney was rear-ended while she sat in her car at a stoplight. At the time of accident, Ms. McKinney was seventy-two (72) years old.

Immediately after the accident, Ms. McKinney went to the emergency room at Florida Hospital Wesley Chapel complaining of back pain. Ms. McKinney received treatment in the emergency room, which included emergency services and care provided by Plaintiff. The total charge for the treatment rendered by Plaintiff to Ms. McKinney was $4,890.51.

Defendant received Plaintiff's charges on December 4, 2017 via facsimile transmission. Plaintiff faxed its charges on a UB-04 billing form, also providing an itemized bill, the crash report, and five (5) pages of "Emergency Room Records" detailing the condition of, and treatment rendered to Ms. McKinney on November 28, 2017.

Two other emergency medical providers also submitted charges for emergency services and care rendered to Ms. McKinney in the emergency room. Tampa Bay Emergency Physicians ("TBEP") submitted charges totaling $1,025.00 to Defendant on a CMS-1500 billing form, which was received by Defendant on December 18, 2017; and Sheridan Radiology Services of West Florida ("Sheridan") submitted charges totaling $414.00 on a CMS-1500 billing form, which was received by Defendant on December 21, 2017. Each of the emergency medical providers who submitted bills to Defendant, including Plaintiff, submitted charges for only one (1) date of service—November 28, 2017, which was the same date Ms. McKinney's car was rear-ended while at a stoplight.

The five (5) pages of Emergency Room records provided to Defendant indicate Ms. McKinney, a seventy-two (72) year old woman, came to the emergency room with her daughter after being rear-ended while sitting at a stoplight and thereafter complaining of back pain. While at the Emergency Room, Ms. McKinney was ordered to undergo a CT Scan of her lumbar spine, and she was subsequently advised to immediately follow up with her primary care physician within one or two days.

Defendant processed the three bills received for the treatment rendered to Ms. McKinney as follows: Defendant allowed TBEP's $1,025.00 bill in full and paid $820.00 (80% of the allowed amount) in PIP Benefits; Defendant allowed Sheridan Radiology's $414.00 bill in full and paid $331.20 (80% of the allowed amount) in PIP Benefits; Defendant allowed Florida Hospital's $4,890.51 bill at $1,686.00 paid $1,348.80 (80% of the allowed amount) in PIP Benefits. Florida Hospital's bill was only partially paid because Defendant limited Ms. McKinney's PIP coverage to $2,500.

At the time of the accident and emergency room visit, Ms. McKinney was insured by a policy of insurance underwritten by Defendant, Depositors Insurance Company. The declarations page states Ms. McKinney paid a six-month premium of $95.24 to Depositors for "Personal Injury Protection $10,000 Full Coverage." For this particular claim, however, Depositors limited Ms. McKinney's PIP Benefits to $2,500.00 by invoking the following provision within the policy of insurance:

> 7. Medical Benefits reimbursement for services and care payable pursuant to the **Personal Injury Reimbursement** and **Personal Injury Referrals** provisions are limited to $2,500 if a provider described in the **Personal Injury Reimbursement** and **Personal Injury Referrals** provision of this policy determines that the injured person did not have an **emergency medical condition**.

*See Policy of Insurance* at page 12 of 25 (bold font is contained in the original, and indicates terms which are defined elsewhere in the policy); *see also* (Torres Dep., 21:14-20, Oct. 30, 2018) (Defendant's Corporate Representative testifying the $2,500 limitation was imposed pursuant to "Number 7" on "Page 12 of 25" of the subject insurance policy). The policy also defines "Emergency Medical Condition" as follows:

> [A] medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that absence of immediate medical attention could reasonably be expected to result in any of the following:
> (a) Serious jeopardy to patient health;
> (b) Serious impairment of bodily functions; or
> (c) Serious dysfunction of any bodily organ or part.

*Id.* at page 10 of 25.

Defendant's policy does not otherwise indicate *how* a provider must submit its determination that an insured suffered from an "Emergency Medical Condition" as defined.

At the time PIP Benefits were limited to $2,500, Defendant was in possession of each of the emergency medical providers' bills and the five (5) pages of Emergency Room records. (Torres Dep., 24:4-12, Oct. 30, 2018). Defendant's Corporate Representative, Nicole Torres, testified that Ms. McKinney's "$10,000 full coverage" of PIP Benefits were limited to $2,500 because Defendant "didn't receive any documents confirming an emergency medical condition." (Torres Dep., 20:14-16, Oct. 30, 2018). There is also no dispute that but for the

$2,500 limitation of Ms. McKinney's PIP Benefits, Plaintiff's bill would have been paid in accordance with the statutory fee schedule (80% of 75% of Plaintiff's charges). (Torres Dep., 34:3-8, Oct. 30, 2018).

When determining whether Ms. McKinney's Emergency Medical Condition was documented in the bills and records provided to Defendant, Defendant testified it is looking for "[t]he words [Emergency Medical Condition], the definition, or anything similar." (Torres Dep., 31:4-15, Oct. 30, 2018). In this instance, Defendant determined there was no "affirmative determination from any of the doctors" as to whether Ms. McKinney did or did not suffer from an emergency medical condition. (Torres Dep., 21:3-13, Oct. 30, 2018). In other words, Defendant concedes it does not have an affirmative determination that Ms. McKinney **did not** suffer from an "emergency medical condition." Instead, Defendant capped Ms. McKinney's PIP Benefits at $2,500 because Defendant found the bills and records submitted to Defendant were not sufficient to demonstrate a qualified provider determined Ms. McKinney **did** suffer from an "emergency medical condition," as defined in the policy of insurance, when Ms. McKinney presented to the emergency room.

Plaintiff moved for Final Summary Judgment alleging, in part, Defendant's limitation of Ms. McKinney's PIP Benefits to $2,500 was improper based on the records submitted to Defendant, and especially in light of the policy language drafted and invoked by Defendant in this instance. This Court agrees with Plaintiff, and finds Defendant's limitation of Ms. McKinney's PIP Benefits to $2,500.00 was improper.

ANALYSIS AND RULING

"[T]he intent of [Florida's] No-Fault Law is 'to provide a minimum level of insurance benefits . . . .' " *Menendez v. Progressive Exp. Ins. Co.,* 35 So. 3d 873, 877 (Fla. 2010) [35 Fla. L. Weekly S222b] (quoting *United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82, 85 (Fla. 2001) [26 Fla. L. Weekly S747a]). While insurers are not permitted to provide less coverage than the minimum level of insurance coverage required by statute, "they are free to provide more coverage than the statute requires." *Eckols v. 21st Century Centennial Ins. Co.,* 260 So. 3d 1123, 1125 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D2710a] (citing *Universal Underwriters Ins. Co. v. Morrison,* 574 So. 2d 1063, 1065 (Fla. 1990)). When determining the amount of coverage available to an insured, "the language of the policy, not the statute, determines the coverage provided." *Wright v. Auto-Owners Ins. Co.,* 739 So. 2d 180, 181 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2033a]; *see also DCI MRI, Inc. v. Geico Indem. Co.,* 79 So. 3d 840, 842 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D170e] ("[W]hen the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control."); *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 68 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] ("These cases . . . confirm that when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control.").

Even if an exclusion or limitation is available under Florida's No-Fault statutory schema, "in order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." *Geico v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 157 (Fla. 2013) [38 Fla. L. Weekly S517a] (citing *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 36 (Fla. 2000) [25 Fla. L. Weekly S211a]). When interpreting an insurance contract, this Court is also bound by the plain meaning of the contract's text. "[I]f the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used. . . ." *Id.* (*citing State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]). Another basic rule of contract interpretation is that "the interpretation of the contract should be consistent with reason, probability, and the practical aspect of the transaction." *Iniguez v. Am. Hotel Register, Co.* 820 So. 2d 953, 955 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1054a].

In this instance, according to the insurance policy's declarations page, Ms. McKinney contracted with Defendant to receive "$10,000 full coverage" of PIP Benefits in exchange for payment of a six-month premium of $95.24. Defendant limited Ms. McKinney's PIP Benefits to $2,500 for this claim, however, based on the following provision found on page 12 of 25 of the insurance policy:

> 7. Medical Benefits reimbursement for services and care payable pursuant to the Personal Injury Reimbursement and Personal Injury Referrals provisions are limited to $2,500 **if a provider** described in the Personal Injury Reimbursement and Personal Injury Referrals provision of this policy **determines that the injured person did not have an emergency medical condition** (emphasis added).

This Court finds this language to be clear and unambiguous—PIP Benefits "are limited to $2,500 **IF** a provider . . . . determines that the injured person **DID NOT** have an emergency medical condition." (emphases added). In other words, Depositors' contract conditions the $2,500 limitation on PIP Benefits upon a qualified provider determining Ms. McKinney "**DID NOT** have an emergency medical condition." (emphasis added). This Court is bound by the plain language of this limiting provision. *See Virtual Imaging,* 141 So. 3d at 157 ("If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used . . . .").

There is no dispute Defendant does not have any determination Ms. McKinney "did not have an emergency medical condition," (Torres Dep., 21:8-11, Oct. 30, 2018) (Q. Right. So do you have an affirmative determination that Ms. McKinney did not suffer from an EMC? A. No."). Defendant nevertheless limited Ms. McKinney's PIP Benefits based upon this policy provision[1] that purports to limit the $10,000 in PIP Benefits to $2,500. Defendant, however, clearly and unambiguously conditioned that limitation upon a determination from a qualified provider that its insured "did not have an emergency medical condition." There being no genuine issue regarding the fact that Defendant had no determination from a qualified provider that Ms. McKinney "did not have an emergency medical condition," this Court is bound by the clear and unambiguous language drafted by Defendant, which does not permit the $2,500 limitation in light of the undisputed facts of this case.

Going further, however, Defendant's policy also defines "Emergency Medical Condition," and defines this term as follows:

> [A] medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that absence of immediate medical attention could reasonable be expected to result in any of the following:
> (a) Serious jeopardy to patient health;
> (b) Serious impairment of bodily functions; or
> (c) Serious dysfunction of any bodily organ or part.

Neither Defendant's policy, nor section 627.736 of the Florida Statutes indicates exactly *how* a provider must submit its "Emergency Medical Condition" determination. *See Lorraine v. Enterprise Leasing Co. of Orlando,* 22 Fla. L. Weekly Supp. 943a (Orange Cnty., Dec. 8, 2014) ("There is nothing to suggest . . . that there is a requirement of any particular form or 'magic words' that a provider must submit to the Defendant to show its [EMC] determination."). In *Lorraine,* the Court determined the undisputed facts contained in the medical records submitted by the treating physician were sufficient to satisfy the definition of "Emergency Medical Condition."

As in *Lorraine,* Depositors was provided with medical records from providers qualified to render an EMC determination. The

contents of those records are not disputed, Plaintiff argues these records, along with the billing forms, and totality of facts available to Defendant at the time PIP Benefits were limited to $2,500, were sufficient to document Ms. McKinney's emergency medical condition pursuant to policy's definition of that term. Defendant contends, however, the records do not contain the words "Emergency Medical Condition" or any other affirmative EMC determination from a qualified provider. Defendant, therefore, contends it may cap Ms. McKinney's $10,000 in PIP benefits at $2,500 until Defendant receives an affirmative emergency medical determination from a qualified provider. Defendant's want for further "magic words" documenting Ms. McKinney's emergency medical condition has no valid basis in the law, and specifically this contract of insurance. *Cf. Lorraine,* 22 Fla. L. Weekly Supp. 943a.

The undisputed facts before this Court are drawn from the Emergency Room records and documents submitted to Defendant: The seventy-two (72) year-old insured, Alma L. McKinney, was rear-ended as she sat at a stoplight. She then came to the emergency room with her daughter complaining of back pain. At the emergency room, Ms. McKinney, received emergency services and care from Florida Hospital (Plaintiff), Tampa Bay Emergency Physicians, and Sheridan Radiology. While at the emergency room, the attending physician(s) ordered Ms. McKinney to immediately undergo an CT Scan of her lumbar spine. The total charges for Ms. McKinney's treatment, on this one date of service in the emergency room, was $6,329.51.

Under these facts, Ms. McKinney's insurer improvidently limited her PIP Benefits to $2,500 for want of some "magic words" indicating Ms. McKinney's emergency medical condition. Applying the undisputed facts in this case to the policy's definition of "emergency medical condition," Defendant's limitation of PIP Benefits to $2,500 was improper.[2]

Defendant also argues this Court is not one of the providers authorized to render an EMC determination. This Court is not rendering an EMC determination. This Court is, however, finding the medical records, submitted by providers who are authorized to render an EMC determination, are sufficient to meet the policy's definition of "emergency medical condition." Therefore, an EMC determination was rendered by the emergency medical providers authorized to render said determination.

Again, these records clearly and indisputably indicate Ms. McKinney, at seventy-two (72) years old, was rear ended as she sat at stoplight. She came to the emergency room, accompanied by her daughter, complaining of back pain. Providers who are authorized to render an EMC determination examined and treated Ms. McKinney in the emergency room, and based on their examinations ordered her to immediately undergo a CT Scan of her lumbar spine.

These doctors did not suggest Ms. McKinney get a CT Scan of her lumbar spine in a week, in a few days, or if she did not start feeling better; the treating emergency physicians ordered further tests and medical attention, including the CT Scan of Ms. McKinney's lumbar spine, to occur *immediately* while Ms. McKinney was in the Emergency Room. When Ms. McKinney was ultimately discharged, she was also advised to *immediately* follow up with her primary care physician within one or two days.

Applying the Policy's definition of "emergency medical condition" to the undisputed facts within the medical records: These qualified providers, who are presumed to have acted reasonably, ordered Ms. McKinney receive "immediate medical attention" to identify potential (a) serious jeopardy to patient health; (b) serious impairment of bodily functions; **and** (c) serious dysfunction of her back—a bodily organ and part. Even after her CT Scan and evaluation, Ms. McKinney was advised by these qualified providers to seek additional medical attention "immediately"—within a day or two.

All of this, along with the totality of the bills[3] and Emergency Room records received by Defendant, indicate to this Court that a provider qualified to render an EMC determination did in fact document that Ms. McKinney suffered from "a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that absence of **immediate medical attention** could reasonably be expected to result in any of the following: (a) Serious jeopardy to patient health; (b) Serious impairment of bodily functions; **or** (c) Serious dysfunction of any bodily organ or part." These records—submitted by providers qualified to render an EMC determination—satisfy the policy's definition of "Emergency Medical Condition." Accordingly, applying the undisputed facts of this case to the terms of the policy of insurance, Defendant should have provided Ms. McKinney with the full $10,000 in PIP Benefits.

CONCLUSION

Defendant improperly limited Ms. McKinney's PIP Benefits to $2,500 in this instance. Ms. McKinney contracted with Defendant for "$10,000 full coverage" of PIP Benefits, and paid a six month premium of $95.24 in exchange for that coverage. After the seventy-two (72) year old Alma McKinney was injured in an automobile accident, she went to the emergency room and received emergency services and care from Florida Hospital (Plaintiff), Tampa Bay Emergency Physicians, and Sheridan Radiology. The total charges for the treatment rendered to Ms. McKinney for her emergency department visit was $6,329.51. Defendant subsequently limited Ms. McKinney's PIP Coverage to $2,500 by invoking a provision in its policy that states the $10,000 in PIP Benefits are limited to $2,500 "if a provider . . . . determines that the injured person did not have an emergency medical condition." The plain language of this limiting provision within the contract contains an explicit and unambiguous condition precedent prior to benefits being limited to $2,500—a provider *must* determine Ms. McKinney *did not* suffer from an emergency medical condition. There being no dispute no such determination was never made in this case, Defendant breached the contract, and Plaintiff is entitled to a judgment as a matter of law.

Additionally, the totality of the facts in this case—including the five (5) pages of "Emergency Room Records"—sufficiently indicate a qualified provider determined Ms. McKinney did suffer from an Emergency Medical Condition on November 28, 2017. The treating physicians who authored the records clearly indicate Ms. McKinney came to the emergency room immediately after being involved in an automobile accident. Ms. McKinney was seventy-two (72) year old at the time, and reported having back pain following the car accident. Ms. McKinney was examined in the emergency room, and ordered to immediately undergo a CT Scan of her lumbar spine. Upon further examination by the emergency room physicians, Ms. McKinney was discharged with instructions to immediately follow up with her primary care physician within one or two days. Defendant, with full knowledge of these facts, capped PIP Benefits at $2,500 for want some "magic words" explicitly stating the words "emergency medical condition" or explicitly stating the definition of "emergency medical condition." Neither section 627.736 nor the policy of insurance requires a provider to submit these "magic words." To be clear, this Court is not rendering its own emergency medical condition determination. This Court is, however, and as a matter of contract interpretation and application, finding the bills and Emergency Room Records in Defendant's possession were sufficient to satisfy the policy's definition of "Emergency Medical Condition." Because of this, Ms. McKinney is entitled to the "$10,000 full coverage" in PIP Benefits, for which she paid a premium.

Based on the foregoing, the Court concludes there is no genuine issue of material fact, and Plaintiff is entitled to a final judgment as a

matter of law.

**It is therefore ORDERED AND ADJUDGED:**

1. Plaintiff's Motion for Final Summary Judgment is **GRANTED.**

2. Defendant's Motion for Summary Judgment is **DENIED.**

3. Plaintiff is hereby awarded a Final Judgment against Defendant, for the sum of $1,585.50[4] of contractual PIP benefits, plus interest, which is calculated at 5.53% from the date Defendant received Plaintiff's bill (December 4, 2017), through the date of this Final Judgment, for which sum let execution issue. Post judgement interest of 6.83% per annum shall accrue on this judgment pursuant to section 55.03, Florida Statutes.

4. The Court finds Plaintiff is entitled to its reasonable attorneys' fees and costs.

5. The Court reserves jurisdiction to determine the amount of attorneys' fees and costs to Plaintiff pursuant to sections 627.736, 627.428, and 57.041, Florida Statutes.

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[1]Defendant argues the policy language tracks section 627.736 of the Florida Statues, which would permit Defendant to default to the $2,500 in PIP Benefits even without a determination its insured "did not have an emergency medical condition." This Court is not persuaded by Defendant's argument on this issue. *See Menendez,* 35 So. 3d at 877 ("[T]he intent of [Florida's] No-Fault Law is "to provide *a minimum level* of insurance benefits . . . .") (emphasis added); *Eckols,* 260 So. 3d at 1125 (noting insurers "are free to provide more coverage than the statute requires"); *Wright,* 739 So. 2d at 181 (Fla. 2d DCA 1999) ("[T]he language of the policy, not the statute, determines the coverage provided."); *DCI MRI, Inc.,* 79 So. 3d at 842 ("[W]hen the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control."); *Kingsway Amigo Ins. Co.,* 63 So. 3d at 68 ("These cases . . . confirm that when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control."); *Virtual Imaging,* 141 So. 3d at 157 ("[I]n order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result.").

[2]Applying the basic rule of contract interpretation requiring "the interpretation of the contract should be consistent with reason, probability, and the practical aspect of the transaction," this Court rejects Defendant's argument that the facts of this case should not fall under the contract's definition of "emergency medical condition." *See Iniguez,* 820 So. 2d at 955; *see also* PINNACLE ACTUARIAL RESOURCES, Impact Analysis of HB 119, at p. 25 (Aug. 20, 2012) ("In order to determine which claims are non-emergency under this definition and therefore limited to $2,500, Pinnacle . . . removed all claims that included emergency room treatment based on the assumption that these claims would be considered emergency medical care under the new statute.") (available at https://www.floir.com/siteDocuments/HB119ImpactAnalystFINAL08202012.pdf)

[3]Defendant also received a CMS-1500 form from both TBEP and Sheridan Radiology, each with a "Y" in Box 24C, titled "EMG." *see Phoenix Emergency Med. of Broward, LLC a/a/o Victoria Ehr v. USAA Cas. Ins. Co.,* 26 Fla. L. Weekly Supp. 119a (Orange Cnty., Jan. 23, 2018) (finding Box 24C on a CMS-1500 form constitutes an "emergency indicator," which is used to notify insurers whether the treatment is for an "emergency" as defined in the contract for insurance); TBEP's bill, which Defendant allowed in full, billed CPT Code 99284—which Defendant recognized by way of its Explanation of Review as constituting an "Emergency Department Visit High/Urgent Severity."

[4]$4,890.51 (charged amount) x 75% (amount allowed pursuant to the schedule of maximum charges) = $3,667.88 x 80% (amount payable under PIP) = $2,934.30 (amount due to Plaintiff without the $2,500 limitation) - $1,348.80 (amount previously paid to Plaintiff by Defendant) = **$1,585.50**.

* * *

**Civil procedure—Discovery—Failure to comply—Sanctions**

CREDIT CORP SOLUTIONS, INC., Plaintiff, v. JOHN JOHNSON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019-SC-1619. October 10, 2019. Gabrielle N. Sanders, Judge. Counsel: Joseph Rosen, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE AND FOR SANCTIONS

THIS CAUSE came before the Court on September 25, 2019, upon Defendant's Motion to Enforce and for Sanctions. The Court has reviewed the Motion together with the court file and is otherwise fully advised in the premises. Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Enforce and for Sanctions is **GRANTED**, for the following reasons:

On July 16, 2019, this Court entered an Agreed Order Granting Plaintiff's Motion for Extension of Time to respond to Defendant's pending discovery requests ("Agreed Order"). Pursuant to the Agreed Order, Plaintiff was required to furnish responses and responsive documents to Defendant's pending discovery within twenty (20) days from date of the Agreed Order, or August 5, 2019. Plaintiff received a copy of the Agreed Order and possessed the ability to comply. Plaintiff failed to furnish its responses on or before this deadline and said responses had not been furnished as of the date of the hearing on this matter, in knowing and willful derogation of the Agreed Order. Moreover, Plaintiff did not file for or otherwise request an extension to comply with the Agreed Order.

Any and all objections to Defendants First Request for Production and First Interrogatories, other than privilege, have been waived, by virtue of the Plaintiff's failure to lodge any timely objections. *American Funding, Ltd. v. Hill,* 402 So. 2d 1369 (Fla. 1st DCA 1981); *Insurance Co. of North America v. Nova,* 398 So. 2d 836 (Fla. 5th DCA 1981); *LVNV Funding, LLC v. Hiram Rivera,* 27 Fla. L. Weekly Supp. 181a (Fla. 9th Cir. 2019, Hon. Gabrielle Sanders).

Accordingly, Plaintiff is ordered to furnish responses and responsive documents to Defendant's pending discovery, without asserting objections, within thirty (30) days from date of this Order.

It is **FURTHER ORDERED** that Defendant's request for sanctions because of Plaintiff's failure to comply with the Agreed Order is **GRANTED**. After having considered the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, this Court awards Defendant $ 1,295.00 in sanctions, which must be tendered by Plaintiff to counsel for Defendant within ten (10) days from date of this Order. *See LVNV Funding, LLC v. Hiram Rivera* 27 Fla. L. Weekly Supp. 394a (Fla. 9th Cir. 2019, Hon. Gabrielle Sanders) (awarding Defendant[1] $1,400.00 in sanctions based upon affidavit reflecting 4.0 hours of attorney time billed at $350.00 per hour.)

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[1]Mr. Hiram Rivera was represented by Bryan A. Dangler, Esq., whom is counsel for Defendant in this matter.

* * *

**Civil procedure—Discovery—Failure to comply—Where plaintiff has failed to comply with enforcement order requiring it to provide discovery responses without asserting objections and paying sanctions to defendant, motion to enforce and for additional sanctions is granted**

CREDIT CORP SOLUTIONS, INC., Plaintiff, v. JOHN JOHNSON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019-SC-1619. November 6, 2019. Gabrielle N. Sanders, Judge. Counsel: Joseph Rosen, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE AND FOR SANCTIONS

THIS CAUSE came before the Court on November 6, 2019, upon Defendant's Motion to Enforce and for Sanctions. The Court has reviewed the Motion together with the court file, heard argument from counsel, and is otherwise fully advised in the premises. Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Enforce and for Sanctions is **GRANTED**, for the following reasons:

On October 10, 2019, this Court entered an Order Granting Defendant's Motion to Enforce and for Sanctions ("Enforcement Order") [27 Fla. L. Weekly D1035a], requiring the Plaintiff to furnish responses and responsive documents to Defendant's pending discovery requests, without asserting objections, within thirty (30) days from date of the Enforcement Order. The Enforcement Order also awarded Defendant sanctions in the amount of $1,295.00 for

Plaintiff's failure to comply with this Court's prior Agreed Order and required Plaintiff to tender payment to Defendant's counsel on or before October 21, 2019. Plaintiff received a copy of the Enforcement Order, knew it was required to comply, and possessed the ability to comply. However, Plaintiff failed to tender payment to Defendant's counsel within the deadline required in knowing and willful derogation of the Enforcement Order.

As of the date of the hearing on this matter, Plaintiff did not request an extension to comply with the Enforcement Order, nor did it file any response to Defendant's enforcement motion. Importantly, this is the second Court Order in this case that Plaintiff has knowingly and willfully failed to comply with.

Accordingly, Plaintiff shall not be afforded any extensions to its discovery response deadline set forth in the Enforcement Order and must furnish responses and responsive documents to Defendant's pending discovery requests on or before November 10, 2019.

It is **FURTHER ORDERED** that Defendant's request for sanctions because of Plaintiff's willful failure to comply with the Enforcement Order is **GRANTED**. After having considered the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, this Court awards Defendant $ 910.00 in sanctions, which must be remitted by Plaintiff and delivered to counsel for Defendant within five (5) days from date of this Order.

It is **FURTHER ORDERED** that as a result of Plaintiff's gross indifference to Orders of this Court, Plaintiff shall be subject to additional sanctions in the amount of $ 100.00 per day, beginning the day after this Order is entered and continuing every subsequent day until this Court enters an Order that it has found Plaintiff to be in full compliance with all prior Orders in this case. Plaintiff shall pay these sanctions to counsel for Defendant and deliver the weekly total of the *per diem* sanctions to Defendant's counsel every Monday until this Court orders otherwise. *See Mercer v. Raine,* 443 So.2d 944 (Fla. 1986) (The Florida Supreme Court holding that a deliberate and contumacious disregard of the court's authority will justify application of the severest of sanctions, as well bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.)

Lastly, let the record reflect that Plaintiff failed to appear at the hearing.

* * *

**Insurance—Personal injury protection—Confession of judgment—Where insurer confessed judgment for maximum jurisdictional amount demanded in statement of claim, motion for entry of confessed judgment is granted—Demand letter for greater amount attached to statement of claim does not negate cause of action asserted so as to control over amount demanded in statement of claim and preclude entry of confessed judgment**

MD DIAGNOSTIC SPECIALISTS LLC, a/a/o Kono De Garcia Kazuco, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-016009-O. January 15, 2020. Tina L. Baraballo, Judge. Counsel: Olivia Hock Miller, Chad Barr Law, P.A., Altamonte Springs, for Plaintiff. Ayana Barrow, Law Office of Kelly L. Wilson, Orlando, for Defendant.

**ORDER ON DEFENDANT'S MOTION FOR ENTRY OF CONFESSED JUDGMENT**

This action came before the Court on 01/08/2020 upon Defendant's Motion for Entry of Confessed Judgment. The following procedural history is relevant:

- Plaintiff filed suit on 09/18/2016 alleging an action for damages of less than $100.00. Attached to the Statement of Claim was a demand letter dated 07/08/2016 seeking payment of $542.62 plus interest, postage and a penalty.
- Defendant filed its answer on 03/29/2017 and did not address the discrepancy in the amount set forth in the attachment and that in the Statement of Claim.
- Thereafter the parties engaged in discovery.
- On 08/16/2019 Defendant moved for entry of a confessed judgment by paying the $100.00 demanded in the statement of claim and interest and recognizing Plaintiff's entitlement to attorney's fees.
- The Court heard the Defendant's Motion on 01/08/2020 and requested the parties provided additional case law regarding the issue of the conflict of the exhibit to the allegation of amount in the Statement of Claim.

The case law is clear that "[i]f an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss." *Fladell v. Palm Beach Cty. Canvassing Bd.,* 772 So. 2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b] (citation omitted). It is also undisputed that "exhibits attached to the pleading are 'considered a part thereof for all purposes.' " *Glen Garron, LLC v. Buchwald,* 210 So. 3d 229, 233 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D308a]. Indeed, a court may look to the exhibits to determine the jurisdictional amount in controversy as well as appropriate venue. *See Baldwin Sod Farms, Inc. v. Corrigan,* 746 So. 2d 1198, 1203 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2771a] and *Nicholas v. Ross,* 721 So. 2d 1241, 1243 (Fla. 4th DCA 1998) [24 Fla. L. Weekly D24b].

In this case, the exhibit did not negate the cause of action pled, jurisdiction or venue. The matter would still have proceeded in small claims and within this Court's jurisdiction. In fact, the exhibit is not wholly inconsistent with Plaintiff's choice to sue for damages of less than $100.00. Plaintiff had the most knowledge of its claim at the time of filing and in the three years following the institution of this action and this Court assumes the Plaintiff acted in good faith. At no point did Plaintiff amend the statement of claim to request an increased amount or otherwise put the Defendant on notice that additional damages were being sought. Defendant was justified in relying on Plaintiff's three year strategic decision to sue for damages of less than $100.00 and confessing judgment by paying the maximum jurisdictional amount demanded.

Plaintiff must accept both the risk and reward of the minimum jurisdictional amount pled. The reward being the reduced filing fee and the risk, of course, being Defendant would confess judgment by paying the jurisdictional amount demanded.

Accordingly, Defendant's Motion for Entry of Confessed Judgment is GRANTED. The Court reserves jurisdiction to determine Plaintiff's reasonable attorney's fees and costs.

* * *

**Insurance—Complaint—Amendment—Where insurer confessed judgment based on jurisdictional limits in original complaint, court lacks jurisdiction to grant medical provider's motion to amend complaint to increase amount in controversy**

ADVANCED 3D DIAGNOSTICS INC. a/a/o Willie Massey, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-004899-O. November 13, 2019. Eric H. DuBois, Judge. Counsel: Tricia Neimand, Jason B. Giller, P.A., Miami, for Plaintiff. Jennell Loper, Law Office of Kelly L. Wilson, Orlando, for Defendant.

**ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND**

This cause came on for consideration by the undersigned on the Plaintiff's Motion for Leave to Amend, a hearing was held November 8, 2019, and the court having heard argument and considered the motion the Court finds:

1. The Defendant filed its Notice of Confession of Judgment based on the jurisdictional limits of the Plaintiff's complaint on April 2, 2018.

2. Immediately after the Notice of Confession of Judgment was

filed, the Plaintiff filed its Motion to Tax Fees and Costs on April 4, 2018.

3. The Plaintiff then on June 28, 2018 filed its Motion for Leave to Amend to increase the amount in controversy to exceed the amount paid by the confession.

4. The Plaintiff then set its Motion to Tax Fees and Costs for Hearing which was eventually cancelled just prior to the Hearing.

5. The Plaintiff in its Motion to Tax Fees and Costs, stated that as a result of the Defendants Confession of Judgment all issues were resolved with the exception of attorney fees and costs.

6. The Court relies on *Geico Cas. Co. v. Barber,* 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a], which held that upon a confession of judgment, the trial court lost jurisdiction.

**ORDERED AND ADJUDGED:**

The Plaintiff's Motion for Leave to Amend Complaint is Denied.

* * *

**Landlord-tenant—Public housing—Eviction—Notice—Defects—Seven-day notice to cure noncompliance is fatally defective for lacking specificity and lacking notice of right to respond to notice and request hearing—Complaint dismissed without leave to amend**

AMERICAN APARTMENT MANAGEMENT CO., INC. d/b/a LAKE WALES VILLAS, Plaintiff, v. THERESA CORNELISON, Defendant. County Court, 10th Judicial Circuit in and for Polk County, Civil Division. Case No. 2019CC-372. July 1, 2019. Bob Grode, Judge. Counsel: C. William Ouellette, Jr., Lake Wales, for Plaintiff. Ariana Gonzalez-Boulos, Florida Rural Legal Services, Inc., Lakeland, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL BASED ON DEFECTIVE NOTICES**

THIS CAUSE came before the Court for Trial on June 10, 2019 upon the Plaintiff's Eviction Complaint. Present before the Court were the Plaintiff's representative, Patty Hunter, Property Manager; counsel for Plaintiff, C. William Ouellette, Jr.; the Defendant, Theresa Cornelison; and counsel for Defendant, Ariana Gonzalez-Boulos, Esq. of Florida Rural Legal Services, Inc. The Court, after having received the testimony of witnesses and exhibits introduced into evidence by the Plaintiff, having heard argument of counsel, and having heard the Defendant's oral Motion for Involuntary Dismissal of the case, and otherwise being fully informed in the premises, the Court does hereby make the following findings of fact and conclusions of law:

1. The Defendant, Theresa Cornelison is a tenant at Lake Wales Villas, under a United States Department of Agriculture Rural Development Housing Program (USDA-RD).

2. Plaintiff filed an Eviction Complaint on January 18, 2019 predicated upon Plaintiff's delivery to Defendant of a Seven Day Notice to Cure Noncompliance dated November 2, 2018 and a Seven Day Notice of Noncompliance without Opportunity to Cure dated January 4, 2019.

3. According to Plaintiff's Seven Day Notice to Cure Noncompliance dated November 2, 2018, such action was being taken due to the Defendant violating, "page 7 section 28 part M, denying the right to peaceful enjoyment of the co-Resident of the household, people coming and going at all hours of the day and night, slaming doors, people staying overnight."

4. Plaintiff's notice is fatally defective as it lacks the specificity required under Section 83.56 of the Florida Statutes, 7 C.F.R. 3560.159, and applicable lease provisions.

5. Plaintiff's Seven Day Notice to Cure Noncompliance dated November 2, 2018 is also defective as it does not provide for the right to respond to the notice within 10 calendar days after the date of notice and the right to request a hearing in accordance with 7 C.F.R. 3560.160 (f), as required in 7 C.F.R. 3560.160(e) and applicable USDA issued guidance.

6. Due to Plaintiff's Seven Day Notice to Cure Noncompliance dated November 2, 2018 being defective, Plaintiff's Seven Day Notice of Noncompliance without Opportunity to Cure dated January 4, 2019 failed to terminate the rental agreement fails to properly terminate the tenancy.

7. The Plaintiff has failed to provide the Defendant with proper notices pursuant to § 83.56, Florida Statutes, 7 C.F.R. 3560.159, 7 C.F.R. 3560.160 and applicable lease provisions; thus, Plaintiff has failed to meet the prerequisites necessary to the filing of the Complaint for Tenant Eviction herein.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. Defendant's Motion for Involuntary Dismissal is GRANTED;

2. Plaintiff's Complaint is dismissed without leave to amend.

3. All of the monies in the court registry are to be dispersed to Plaintiff, American Apartment Management Co., Inc. d/b/a Lake Wales Villas c/o C. William Ouellette, Jr., Esq., 151 E. Central Avenue, Lake Wales, FL 33853; and

4. The Court retains jurisdiction over the issue of attorney's fees and costs.

* * *

**Insurance—Personal injury protection—Cancellation of policy—Notice—Although insurer represented throughout discovery that one-page document was entire certificate of mailing of notice of cancellation of policy, when actual certificate was more than 300 pages long, and insurer destroyed complete document during litigation, motion to strike insurer's pleadings is denied—Trial court is reluctant to find that destruction was malicious—Even if destruction were inadvertent, document was relevant evidence material to insured's ability to counter insurer's cancellation defense, and insured was prejudiced by its destruction—Certificate of mailing is stricken**

FEIJOO, MANUEL V. (MD), Plaintiff, v. GEICO INDEMNITY CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-013139-SP-25, Section CG01. November 13, 2019. Linda Diaz, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Vivian Lasaga, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S PLEADINGS OR IN THE ALTERNATIVE TO STRIKE DEFENDANT'S CERTIFICATE OF MAILING**

This cause having come before the Court on November 1, 2019, on Plaintiff's Motion to Strike Defendant's Pleadings or in the Alternative to Strike Defendant's Certificate of Mailing, and the Court having reviewed the motion and having carefully considered the arguments of counsel as well as all matters of record, it is hereby ordered and adjudged as follows:

Plaintiff seeks to recover unpaid medical bills due and owing under an insurance policy issued by Defendant. While Defendant concedes that the claimed medical bills are reasonable, related to the subject accident, and medically necessary, Defendant denied payment alleging that the subject insurance policy was canceled for non-payment of an insurance premium. Specifically, Defendant claims that on August 9, 2006, it mailed a notice of cancellation to the named insured advising that the policy would be canceled effective August 20, 2006 unless it received payment from the insured.

After Plaintiff filed this action, Defendant asserted an affirmative defense that the policy was canceled for non-payment of the policy premium. During the litigation that followed, Plaintiff sought to prove that Defendant failed to comply with Florida law relative to sending a cancellation notice to a policy holder.

When an insurer seeks to cancel an automobile insurance policy for non-payment of an insurance premium, it must comply with Florida

Statute 627.728(5), which provides:

> *(5) United States postal proof of mailing or certified or registered mailing of notice of cancellation, of intention not to renew, or of reasons for cancellation, or of the intention of the insurer to issue a policy by an insurer under the same ownership or management, to the named insured at the address shown in the policy shall be sufficient proof of notice.*

Pursuant to Fla Stat. 627.728(5), the Defendant had the option of sending the Notice of Cancellation to its insured via one of three ways; (1) Certified Mail, or (2) Registered Mail, or (3) United States Postal 'proof of mail.' There is no dispute that Defendant did not utilize Certified Mail, nor Registered Mail, and so Plaintiff sought to discover facts surrounding Defendant's use of United States Postal Proof of Mail / Certificate of Mailing.[1]

In *Boman v. State Farm*, 505 So. 2d 445 (Fla. 1st DCA 1987), the court discussed the reasoning behind Fla. Stat. 627.728(5) and why ordinary mailing is insufficient when it comes to canceling an insurance policy. Section 627.728(5), as amended, limits the presumption of sufficient notice to mailings made in conformance with the statutory requirements, and that less restrictive policy provisions regarding any kind of mailing do not take precedence over, and thus do not relax the statutory requirements. "Its purpose is analogous to that of the statute of frauds. Written proof of mailing is a higher order of proof and gives far better assurance that actual mailing has occurred than does proof based on usual custom and practice or often-unreliable recall testimony. Moreover, we would have to shut our eyes to the reality of experience not to recognize that the reliability of mail delivery in recent years has often left much to be desired. The restrictive methods of mailing now specified by the statutory change are more likely to assure actual delivery to, and thus receipt by, the insured. This statutory change indicates a legislative intent that the act of mailing will no longer be treated as sufficient proof of notice to the insured unless accomplished in the specified manner. Since the statutory amendment has effectively left the risk of non-delivery with the insurer when notice is not mailed in conformity with the statute, it follows that inconsistent policy provisions providing that mere mailing is sufficient are rendered invalid and thus ineffective to shift the risk of non-delivery to the insured." See, *Boman*, supra.

During the litigation in the instant case, Plaintiff served multiple discovery requests seeking to discover information and documents surrounding Defendant's policy cancellation defense and the materials relied upon by Defendant as its proof of mail or 'Certificate of Mailing.' In fact, Plaintiff repeatedly requested that Defendant produce a 'complete copy' of its Certificate of Mailing upon which Defendant is relying to prove its policy cancellation defense. Below is a list of the relevant discovery requests served by Plaintiff, along with the materials requested.

| Date | Title | Documents Request |
|---|---|---|
| 8/25/11 | First Request for Production | #3. Contents of the insurance policy file. |
| 8/6/12 | Second Request for Production | #1. Any and all proof of mailing Notice of Cancellation of the subject policy |
| 10/13/14 | Third Request for Production | #1. Any and all Certificate of mailing and proof of mail for the Defendant's Notice of Cancellation inclusive of all pages.<br>#10. Complete copy of the list of names and addresses referenced in the Defendant's Certificate of Bulk Mailing or U.S. Postal Proof of Mail. |
| 6/21/18 | Fourth Request for Production | #1. Any and all Certificate of mailing and proof of mail for the Defendant's Notice of Cancellation inclusive of all pages. |

The Court's review of the docket reveals more than one dozen court orders between 2011 and 2019 compelling Defendant to respond to Plaintiff's discovery requests, including orders compelling Defendant to produce the complete Certificate of Mailing to the Plaintiff.

On July 31, 2012, this Court ordered Defendant to produce the documents responsive to item #3 of Plaintiff's First Request for Production (contents of the insurance policy file). In response, Defendant produced an un-redacted single sheet of paper which defendant referred to as its "Certificate of Mailing.' This document did not contain a postage stamp nor a signature or acknowledgement from anyone in the spaces provided.

On August 12, 2015 this Court overruled Defendant's objection to item #10 of Plaintiff's Third Request for Production seeking a 'complete copy of the list of names and addresses referenced in the Defendant's Certificate of Bulk Mailing or U.S. Postal Proof of Mail. Three years later, on June 26, 2018, the Defendant served its Amended Response to Plaintiff's Third Request for Production and reasserted the exact same objection (overbroad. vague, etc.) that this Court had previously over-ruled. Defendant thereafter produced the same single sheet of paper it had previously produced and represented that the single sheet of paper was its complete Certificate of Mailing as requested by Plaintiff.

Each and every time Plaintiff requested the complete Certificate of Mailing with all pages, names and addresses, Defendant responded by claiming that the one-page document had already been produced, or Defendant would simply produce another version of the same one-page document. Over the course of this litigation, Defendant eventually produced 3 or 4 iterations of the same one-page document (some included a postage stamp while others did not; some included a stamped name while others did not; some were redacted while others were not; and some were dated August 9, 2006 and at least one was dated August 8, 2006). Notwithstanding the different versions of the same document, Defendant steadfastly maintained that the Certificate of Mailing upon which it was relying to support its policy cancellation defense consisted of a single page. Defendant's responses to Plaintiff's second set of admissions confirms that Defendant's Certificate of Mailing consisted of a single piece of paper listing just 15 persons designated to receive mail from Defendant.

On January 8, 2018, Defendant filed its motion for summary judgment seeking to establish that it canceled the subject insurance policy for non-payment of the premium. Attached to Defendant's motion as Exhibit 'B' was a redacted version of the one-page Certificate of Mailing dated Aug. 8, 2006 (not Aug. 9, 2006), which did not include a postage stamp nor a signature or acknowledgement of anyone. Defendant later supplemented its motion for summary judgment with the Affidavit of Christopher Smith, which included a different version of the one-page Certificate of Mailing, followed by the Affidavit of Donna Truslow which is nearly identical to the certificate attached to the Smith affidavit.

Irrespective of which version of the one-page Certificate of Mailing Defendant relies upon, it is undisputed that at all times material, Defendant always represented to Plaintiff and to the Court that there were no other pages; that the certificate consisted of a single page with just 15 names of persons destined to receive a cancellation notice from Geico. See Defendant's responses to Plaintiff's multiple Requests for Production of the Certificate of Mailing, coupled with Defendant's Responses to Plaintiff's Second Request for Admissions, referenced above.

On October 16, 2019, Plaintiff deposed Ms. Donna Truslow, Defendant's Output Manager, who testified that the one-page document which had been bandied about throughout this litigation as Defendant's full and complete Certificate of Mailing was actually a one-page *excerpt* taken from a much larger document, which

consisted of more than 300 pages. Apparently, the complete Certificate of Mailing was more than 300 pages and contained the names of thousands of policy holders who's policies Geico sought to cancel. It now appears that Plaintiff and the Court have been misled about the nature of Defendant's Certificate of Mailing. Worse, Ms. Truslow testified that the full 300+ page document which comprised Defendant's complete Certificate of Mailing was destroyed by Defendant during the pendency of this litigation.

The Court finds that the destruction of the complete 300+ page document has prejudiced Plaintiff by effectively eliminating Plaintiff's ability to conduct a meaningful cross-examination and impeachment of Defendant's witnesses and evidence. Without the complete document, Plaintiff has been denied the opportunity to demonstrate that the number of pieces of mail allegedly mailed by Defendant on August 9, 2006 (or Aug. 8, 2006) is inconsistent with the number of pieces of mail acknowledged as having been received by the United States Post Office.

In *State Farm Mut. Auto. Ins. Co. v. Resnick*, 636 So.2d 75 (Fla. 3rd DCA 1994), the jury found that the insurer failed to mail a cancellation notice to the policy holder because the computer printout of policyholders designated to receive cancellation notices showed that 1,655 cancellation notices were issued by the insurer, but the postmaster only verified that 1,587 envelopes were actually delivered to the post office and mailed. Again, in *Aries Ins. Co. v. Cayre*, 785 So.2d 656 (Fla 3rd DCA 2001) [26 Fla. L. Weekly D1413a], there was evidence that a postal employee placed a postmark on the computer printout and charged postage verifying that only 12 of the 27 names that were on the insurer's list were actually provided to the postal employee. Hence, the 300+ page Certificate of Mailing destroyed by Defendant during pendency of this this action was a critical piece of evidence needed by Plaintiff to rebut Defendant's defenses.

Defendant contends that its destruction of the 300+ page document is harmless and that the complete document is irrelevant because the single page document attached to its motion for summary judgment (or one of the other versions attached to the Smith affidavit or the Truslow affidavit) is the only relevant portion of the 300+ page document since that is the only page that referred to the named insured. For the reasons espoused in *Aries* and *Resnick*, above, the Court rejects Defendant's argument.

In *Rockwell International Corp. v. Menzies*, 561 So.2d 677 (Fla. 3rd DCA 1990), the 3rd DCA affirmed the trial court's order striking a saw manufacturer's pleadings in a products liability case when the saw manufacturer altered or destroyed the saw. The court found that the plaintiff could no longer rebut the testimony of the saw manufacturer's expert and thus the degree of sanctions was related to the degree of prejudice. *Id.*

In *Sponco Mfg., Inc. v. Alcover,* 656 So.2d 629 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1566c], the defendant destroyed critical evidence and suffered a court-ordered default as a result. In affirming the entry of a default as a sanction, the District Court held that the setting of an appropriate sanction for the destruction of evidence in the custody of a litigant depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice.

Dismissal of claims or defenses may be appropriate where there has been willful or malicious destruction of relevant evidence, but less drastic measures are ordinarily appropriate where relevant evidence was inadvertently destroyed. *Metropolitan Dade County v. Bermudez*, 648 So.2d 197 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D44b]. Fashioning an appropriate sanction for when a party fails to preserve evidence in its custody depends on the willfulness or bad faith of the conduct (if any) of the party responsible for the loss of evidence, the extent of prejudice suffered by the other party, and what is required to cure the prejudice. *Id.* In *Nationwide Lift v. Smith*, 832 So. 2d 824 (Fla 4th DCA 2002) [27 Fla. L. Weekly D2453b], the court found that where evidence is destroyed intentionally or inadvertently, it is still a discovery violation involving the application of Fla.R.Civ.P. 1.380 under which sanctions are reviewed for abuse of discretion. See, *Fed. Ins. Co. v. Allister Mfg. Co.*, 622 So.2d 1348 (Fla. 4th DCA 1993). In *Nationwide Lift*, the court struck the defendant's pleadings even though the destruction was deemed inadvertent because the plaintiff was unable to proceed absent the destroyed evidence.

In the instant case, although the Plaintiff repeatedly requested Defendant's full and 'complete' Certificate of Mailing with all names and pages; and although Defendant was ordered by this Court to produce the entire document to the Plaintiff; and although Defendant represented that the complete document was just one page when it was actually more than 300 pages; and although Defendant destroyed the document during this litigation, the Court is reluctant to find that the destruction of the document was malicious on the record presented thus far. Accordingly, the Court hereby denies Plaintiff's motion to strike Defendant's pleadings at this time.

However, even if the destruction of the evidence was inadvertent, Court finds that the complete copy of the Defendant's Certificate of Mailing is relevant evidence which was material to Plaintiff's ability to counter Defendant's policy cancellation defense and that Defendant's actions prejudiced the Plaintiff. The Court finds that Defendant should not benefit from the destruction of relevant and material evidence and in endeavoring to craft an appropriate sanction which is proportional to the prejudice sustained by Plaintiff, the Court finds that striking Defendant's Certificate of Mailing is an appropriate sanction under the facts and circumstances of this case and is necessary to cure the prejudice caused to Plaintiff. Thus, Plaintiff's Motion to Strike Defendant's Certificate of Mailing is Granted. Defendant's Certificate of Mailing (all versions) is hereby stricken and shall not be used by the Defendant at trial or in summary judgment, for any purpose.

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[1]Defendant denied item #2 of Plaintiff's Second Request for Production, which states: "Admit that the Defendant contends that ti mailed a notice of cancellation of the policy and that the Defendant did so via United States Postal Proof of Mail."

* * *

**Insurance—Homeowners—Insurer violated section 627.70131(5)(a) by failing to pay or deny claim for homeowners insurance benefits within 90 days—Where insurer confessed judgment by paying claim after suit was filed, plaintiff water remediation company is entitled to attorney's fees and costs**

FLORIDA DRY SOLUTIONS, LLC, a/a/o Evert Aguilar, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-004497-CC-05, Section CC04. February 3, 2020. Diana Gonzalez-Whyte, Judge. Counsel: Dahlene K. Miller-Almodovar, Font & Nelson, PLLC, Ft. Lauderdale, for Plaintiff. James Suarez, Stone, Glass & Connolly, Palmetto Bay, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT**

This cause came before this Court on September 24, 2019 on Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment. The court having reviewed all the filings and case law hereby finds that the Defendant's Motion for Summary Judgment is DENIED, and Plaintiff's Cross-Motion is GRANTED.

Wherefore the court finds that there are no genuine issues of material fact, that the Defendant did not comply with the requirements under law. The court finds that the insured and the Defendant were in a legally binding contract for homeowner's insurance which was in full force and effect on September 10, 2017; that the Defendant

violated *Fla. Stat.* § 627.70131(5)(a) by failing to pay or deny the Plaintiff's claim within 90 days; that the Defendant confessed judgment by issuing payment of the claim after suit was filed; and that the Plaintiff is entitled to attorney's fees and costs pursuant to *Fla. Stat.* §§627.428 and 57.041.

The facts demonstrate that the Defendant did not make a pre-suit demand for appraisal and waited more than four (4) months after suit was filed to ask for an appraisal. The Defendant insured the Plaintiff's property and that within the insurance period on or about September 16, 2017 the Defendant was placed on notice of the loss and claim number 001-00-124366 was assigned. The Defendant does not contest that they insured Evert Aguilar from October 21, 2016 through October 21, 2017; that Mr. Aguilar partially assigned his rights to Florida Dry Solutions. The Plaintiff filed the present action against Citizen's Property Insurance on February 27, 2018.

The Defendant's Motion for Summary Judgment acknowledges in paragraph 5 that the Plaintiff submitted an invoice in the amount of $6,314.95 for services at the insured's property and references paragraph 7 of their supporting affidavit. The very next occurrence is not until June 27, 2018 when, according to their supporting affidavit, "Citizens extended coverage for the loss under the aforesaid policy and accordingly issued payment of $3,024.78"

The Defendant also acknowledges in its affidavit that it received a claim for damage at the insured property on September 16, 2017 and that it assigned claim number 001-00-124366.

The Plaintiff filed multiple exhibits demonstrating that it sent notices and an invoice to the Defendant multiple times. Plaintiff's Exhibit B is an email sent to "claims.communications@citizens-fla.com" on "Thu, Oct 5, 2017 at 10:10 AM." Said email informs the Defendant that the work will exceed $3,000.00." and request, "that the Defendant inform them if the Defendant did not wish for the Plaintiff to continue the remediation work at said risk". The email advised the Defendant that, "Otherwise—we will continue to complete the remediation works as normal." The Plaintiff further alleges that the Defendant did not respond.

Exhibit C is the Plaintiff's Certificate of Completion and Satisfaction. Exhibit D was sent by Plaintiff on "October 24, 2017" at "10:59 PM" to: claims.communications@citizensfla.com." Plaintiff submitted its invoice to the Defendant in the amount of $6,314.19 on October 24, 2017, the invoice was never paid, and a response was not sent. Once again on December 17, 2017 Plaintiff sent Exhibit E to the Defendants and yet again the Defendant failed to respond or issue payment. The Plaintiff filed suit on February 27, 2018 more than five months after the final bill had been sent to them. It was not until March 10 and 29, 2018 that the adjuster for the Defendant requested copies of the estimate.

On June 27, 2018, the Defendant sent partial payment and the Defendant invoke appraisal. This was now more than nine (9) months after the date of loss and more than four (4) months after the filing of the lawsuit.

Furthermore, *Fla. Stat.* § 627.70131 states in pertinent part that:

> (1)(a) Upon an insurer's receiving a communication with respect to a claim, the insurer shall, within 14 calendar days, review and acknowledge receipt of such communication unless payment is made within that period of time or unless the failure to acknowledge is caused by factors beyond the control of the insurer which reasonably prevent such acknowledgment. If the acknowledgment is not in writing, a notification.

The Loss in the instant case took place on September 10, 2017. It was not until March 10 and 29, 2018 that the adjusters for the Defendant requested copies of the estimate.

There is no evidence that the Defendant demanded appraisal prior to the filing of the lawsuit or otherwise issued payment despite having knowledge for more than eight months. The only evidence that Defendant has ever requested appraisal is Plaintiff's Exhibit H a letter dated June 27, 2018 four months after the lawsuit was filed and nine months from the date of loss. In fact, the appraisal was not conducted until March 13, 2019 after the court stayed the case to allow an appraisal.

The Defendant failed to deny or pay Plaintiff's claim within ninety days after the Defendant received notice of the claim. Due to the Defendant's failure to comply with *Fla. Stat.* § 627.70131 (1)(a) the Plaintiff had no choice but to initiate the present lawsuit and seek relief from the court. Pursuant to Fla. Stat. §627.428 the suit was properly initiated. The court has granted the Plaintiff's cross motion for summary judgment and the court finds that pursuant to *Fla. Stat.* §627.428 the Plaintiff is entitled to attorney's fees and costs. The granting of the Plaintiff's Cross-Motion for Summary Judgment resolves all the issues in the case except for attorney's fees and costs. It is therefore a final summary judgment.

* * *

**Insurance—Personal injury protection—Coverage— Application—Material misrepresentation defense fails where application was ambiguous as to whether insured was required to disclose adult household resident who did not hold driver's license and had never driven insured vehicle—Ambiguity could not be overcome by assertion that insurance agent explained to insured that she was required to disclose anyone living at the same address 14 years or older**

PHYSICIANS GROUP, L.L.C., a/a/o Kayla Garcia, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2018 SC 006610 NC. January 21, 2020. David L. Denkin, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff.

**ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court for hearing on December 18, 2019 upon Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Final Summary Judgment and Response in Opposition to Defendant Motion for Summary Judgment. The Court, having reviewed the motions, the Court file, the case law presented, and having heard arguments of counsel and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

1. The Court was presented with question of whether Kayla Garcia ("Ms. Garcia"), made a material misrepresentation on her insurance policy application by failing to disclose her grandfather, Salustiano Garcia ("Mr. Garcia"). [See D.E. 82].

2. On or about March 21, 2017, Ms. Garcia executed an application for insurance with the Century-National Insurance Company ("Defendant"). In response, the Defendant issued an automobile insurance policy under policy number: PGA060568-01, to Ms. Garcia for a 2008 Chevrolet Malibu, which was effective from September 22, 2017 through March 22, 2018 (the "Policy").

3. On or about February 09, 2018, while the insurance policy was in full force and effect, Ms. Garcia, was involved in an automobile accident in the State of Florida while operating her insured 2008 Chevrolet Malibu.

4. The Defendant's insurance application provides:

> 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.*
> *[Policy Application page 1 of 6][Emphasis added]*

5. Beneath this language the application provides a table that includes (in pertinent part) columns with the following titles:

> Name of Driver (Exactly as shown on Driver's License); "License Number"; and "State"
> *[Policy Application page 1 of 6][Emphasis added]*

6. In the table beneath the "DRIVER INFORMATION" section Ms. Garcia only disclosed herself.

7. The Court notes that the application does not provide a section or table that references or requests an applicant to disclose "household member(s)", "family member(s)" or make any similar distinctions for persons which would not be designated as "children" and that are not "drivers".

8. The Court also notes that the sentence structure of the application's DRIVER INFORMATION section reveals that the phrase "all drivers in household", "children" and "persons" are not separate independent clauses. As drafted, the phrase "all drivers in household", "children" and "persons" appears to be subject to the phrase "that use the vehicles." Therefore, it appears that "use of the insured vehicle" is the underlying crux of the question.

9. Following the aforementioned section in the insurance application, there is a section titled "AGREEMENT TO EXCLUDE NAMED PERSONS" which contains the following language:

> "In consideration of the premium charged, it is hereby understood and agreed that only Personal Injury Protection Coverage and Property Damage Liability Coverage in the minimum amount necessary to meet the Florida Financial Responsibility requirement, and in the event this policy is certified as proof of financial responsibility in the State of Florida, Bodily Injury Liability Coverage in the minimum amount necessary to meet the Florida Financial Responsibility requirement, shall be afforded when any vehicle covered under the policy or any continuation, renewal or replacement of such policy, is used or operated by an excluded person named below."
> *[Policy Application page 5 of 6]*

10. Ms. Garcia wrote "N/A" below the "AGREEMENT TO EXCLUDE NAMED PERSONS" section.

11. On the last page of the application, there is a section titled "CERTIFICATION OF APPLICANT", which asks the applicant to initial next to seven (7) statements. This section does not include an area for the applicant to disclose any additional information; it only allows the applicant to initial next to each statement. *[Policy Application page 6 of 6]*.

12. The third statement from the top in the "CERTIFICATION OF APPLICANT" section reads:

> ***I hereby certify that I have listed all persons in the household and all drivers of the vehicles, whether in my household or not, as well as all children whether living with me or not.*** I understand that no coverage will be provided for drivers that are not listed on my policy whether they are in the household now or enter it later. I understand it is my responsibility to make the Company aware of any changes in drivers, vehicles or coverages. I certify that the garaging address listed is the actual address where my vehicle(s) are garaged the majority of the time and I am aware that any change in the mailing or garaging address of any vehicle must be reported to the Company immediately. *[Emphasis added, in part]*.

13. Ms. Garcia placed her initials next to all of the seven (7) statements in the "CERTIFICATION OF APPLICANT" section of the policy application, including the one described above.

14. At the time the insurance application was completed, Ms. Garcia resided with her grandfather, Mr. Garcia.

15. Based upon the evidence presented it is undisputed that Mr. Garcia does not currently have, nor has he had, a driver's license since 2013; and he has never driven the insured vehicle.

16. On or about February 09, 2018, Ms. Garcia was involved in an automobile accident in the State of Florida. As a result of the injuries sustained in the February 09, 2018 motor vehicle accident, Ms. Garcia sought medical treatment from the Plaintiff. The Plaintiff is the assignee of Personal Injury Protection ("PIP") Insurance benefits, which were assigned by Ms. Garcia in exchange for the medical treatment provided by Plaintiff. Ms. Garcia sought and received medical treatment for the injuries sustained in the February 09, 2018 motor vehicle accident from Plaintiff.

17. The Plaintiff timely submitted its medical bills for Ms. Garcia for dates of service: February 13, 2018 through March 19, 2018. The Defendant timely received and authenticated Plaintiff's medical bills from February 23, 2018 through April 02, 2018. The Defendant denied those bills alleging that Ms. Garcia committed a material misrepresentation by failing to disclose Mr. Garcia as a household member on her policy application; and unilaterally attempted to rescind the Policy on or about May 03, 2018.

18. On November 06, 2018, the Plaintiff brought this suit against the Defendant for its failure to pay PIP benefits. As its sole affirmative defense, the Defendant alleged that Ms. Garcia committed a material misrepresentation on the insurance application by not disclosing Mr. Garcia.

19. The Defendant moved for summary judgment based on its material misrepresentation affirmative defense. In support of its motion, the Defendant filed an affidavit from insurance agent Martina Skipper. The affidavit set forth in pertinent part:

> It is my custom and normal business practice to ask all insurance applicants about all household members 14 years and older . . . I asked Kayla Garcia to disclose anyone living in the same address 14 years and older, and Kayla Garcia did not disclose Salustiano Garcia . . . Kayla Garcia did not disclose any other household members and certified that she listed all persons in her household and all drivers of the vehicles, whether in her household or not, as well as all children, whether living with her or not . . . Had Kayla Garcia disclosed Salustiano Garcia . . . as a household member, then I would have excluded them as drivers on the application for insurance.

20. The Plaintiff filed a cross-motion for final summary judgment and response in opposition to Defendant's summary judgment motion, arguing that the insurance application did not require the disclosure of Mr. Garcia because he does not have a driver's license and has never driven the insured vehicle. The Plaintiff argued that the insurance application is inconsistent, in conflict and ambiguous in context. The Plaintiff also presented to the Court, Judge Miranda's opinion in *Ocean Ridge Chiropractic, Inc. a/a/o Bertrand Acelouis v. Century-National Insurance Company,* 27 Fla. L. Weekly Supp. 753a (Broward Cty. Ct. August 7, 2019) which is factually similar to the case at hand.

21. Florida law requires that a contract be interpreted against the drafter when the contract contains ambiguous terms. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store,* 369 So.2d 938, 942 (Fla.1979). Any ambiguity, inconsistency, or conflict is construed in favor of the insured. See *U.S. Fidelity & Guaranty Co., v. Rood Investments, Inc.,* 410 So.2d 1373, 1374 (Fla. 5th DCA 1982). "Policy language is considered to be ambiguous . . . if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage." *Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a] (quoting *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 570 (Fla. 2011) [36 Fla. L. Weekly S469a]).

22. The Court's agrees with the rational of Judge Miranda's opinion in *Ocean Ridge Chiropractic, Inc. a/a/o Bertrand Acelouis v. Century-National Insurance Company,* 27 Fla. L. Weekly Supp. 753a (Broward Cty. Ct. August 7, 2019).

23. The Court finds that under the facts of this case and evidence presented, the application for insurance is ambiguous, as a matter of law. If the Defendant intended to require disclosure of such individuals from applicants on the application, it was incumbent upon the Defendant to choose language that clearly and unambiguously communicated that intention. The Court agrees that "use of the insured vehicle" is the underlying crux of the question in the "DRIVER INFORMATION" section. As such, the "DRIVER INFORMATION" section of the application is reasonably interpreted as only requiring disclosure of licensed individuals who, in fact, drive the insured vehicle.

24. Courts should not attempt to resolve a contractual ambiguity by examining extrinsic evidence. See *Ruderman,* 117 So. 3d at 945. Therefore, the Court agrees with Judge Miranda, and finds that insurance agent, Martina Skipper's assertion in her affidavit, that she "explained" the ambiguous provision of the application to the applicant fails as a matter of law. An ambiguity cannot be overcome by such assertion.

25. Lastly, the Defendant argued that under *Redland Ins. Co. v. CEM Site Constructors, Inc.,* 86 So. 3d 1259, 1261 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1115a], summary judgment was improper. The Court disagrees. Summary judgment is appropriate where "the state of the evidence is such that the nonmoving party will not be able to prevail at trial as a matter of law." *Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC,* 75 So.3d 865, 868 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2764c].

26. In *Redland,* the court distinguished *Great Oaks,* based upon disputed issues of facts surrounding the circumstances of McLeod III's driving and employment, when he completed the application, and what effects, if any, was there prior dealings between the parties on the understanding of the terms of the application. In the case at hand, there is no record evidence of any disputed issues of fact as it pertains to Mr. Garcia or Ms. Garcia. Therefore, summary judgment is appropriate.

Accordingly, it is hereupon ORDERED and ADJUDGED, as follows:

1. The Defendant's Motion for Summary Judgment is **DENIED**.

2. The Plaintiff Cross-Motion for Final Summary Judgment is **GRANTED**.

3. The parties are directed to submit a proposed final judgment within thirty (30) days.

* * *

**Insurance—Automobile—Windshield repair— Appraisal— Prohibitive cost doctrine—Where repair shop contests insurer's motion to compel appraisal of windshield repair claim on grounds of prohibitive cost doctrine, evidentiary hearing is required on shop's ability to pay appraisal fees and costs, expected cost differential between appraisal and litigation, and whether cost differential is so substantial as to deter bringing claims**

AUTO GLASS AMERICA, LLC, a/a/o Glenda Thompson, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-024653, Division H. December 9, 2019. Raul Palomino, Judge. Counsel: Kevin R. Richardson, Emilio W. Stillo, and Andrew B. Davis-Henrichs, Stillo & Richardson P.A., Davie, for Plaintiff. Holli Carrol Wares, Law Offices of Robert J. Smith, for Defendant.

**ORDER**

THIS CAUSE came before the Court on November 25, 2019, on Defendant's Motion to Dismiss Complaint, Demand for Appraisal, and Motion for Protective Order Regarding Discovery, and Plaintiff's Motion for Evidentiary Hearing, and the Court, having reviewed the relevant legal authorities, and having heard argument of counsel, hereby finds as follows:

1. Defendant's Motion to Dismiss Complaint, Demand for Appraisal, and Motion for Protective Order Regarding Discovery, is ABATED until such time as the Evidentiary Hearing is concluded.

2. Plaintiff's Motion for Evidentiary Hearing is GRANTED.

3. Defendant has filed its Motion to Dismiss Complaint, Demand for Appraisal, and Motion for Protective Order Regarding Discovery. Plaintiff has contested the Defendant's Motion by raising several legal arguments in response thereto, including the Prohibitive Cost Doctrine. Additionally, Plaintiff has filed its Motion for Evidentiary Hearing. The Prohibitive Cost Doctrine stems from *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), which recognizes that the costs of arbitration can be prohibitive and render an agreement unenforceable by denying a plaintiff access to the forum. The applicability of the Prohibitive Cost Doctrine must be made on a case by case basis and requires an evidentiary showing of individualized prohibitive expense. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin,* 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (citing *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F. 3d 549 (4th Cir. 2001)); *FI-Tampa, LLC v. Kelly-Hall,* 135 So. 3d 563, 567 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D748a].

4. In so much as Plaintiff argued in its Motion that it is entitled to an Evidentiary Hearing, the parties are hereby directed to set an evidentiary hearing on the issue of the application of the Prohibitive Cost Doctrine. Per *Zephyr Haven Health & Rehab Center,* the evidentiary hearing shall focus on Plaintiff's ability to pay the appraisal fees and costs, the expected cost differential between appraisal and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims. *Id.* at 922 (citing *Bradford,* 238 F. 3d at 556); *see also FI-Tampa, LLC,* 135 So. 3d at 567.

5. The parties and their counsel shall be permitted to conduct discovery limited to the issues pertaining to the issue of appraisal, including but not limited to Plaintiff's defenses to enforceability of the instant appraisal agreement.

* * *

**Insurance—Automobile—Appraisal—Prohibitive cost doctrine—Where plaintiff contests insurer's motion to compel appraisal of claim on grounds of prohibitive cost doctrine, evidentiary hearing is required on plaintiff's ability to pay appraisal fees and costs, expected cost differential between appraisal and litigation, and whether cost differential is so substantial as to deter bringing claims**

HILLSBOROUGH INSURANCE RECOVERY CENTER, LLC, a/a/o Kimberly Karl, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-030459, Division H. February 5, 2020. James S. Moody, Judge. Counsel: Kevin W. Richardson, Emilio R. Stillo, and Andrew B. Davis-Henrichs, Stillo & Richardson, P.A., Davie, for Plaintiff. Chad Guzzo, Progressive PIP House Counsel, Tampa, for Defendant.

**ORDER**

THIS CAUSE came before the Court on November 19, 2019, on Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal and Plaintiff's Motion for Evidentiary Hearing, and the Court, having reviewed the relevant legal authorities, and having heard argument of counsel, hereby finds as follows:

1. Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal, is DENIED without prejudice.

2. Plaintiff's Motion for Evidentiary Hearing is GRANTED.

3. Defendant has filed its Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal. Plaintiff has contested the Defendant's Motion by raising several legal arguments in response thereto, including the Prohibitive Cost Doctrine. Additionally, Plaintiff has filed its Motion for Eviden-

tiary Hearing. The Prohibitive Cost Doctrine stems from *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which recognizes that the costs of arbitration can be prohibitive and render an agreement unenforceable by denying a plaintiff access to the forum. The applicability of the Prohibitive Cost Doctrine must be made on a case by case basis and requires an evidentiary showing of individualized prohibitive expense. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin*, 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (citing *Bradford v. Rockwell Semiconductor Systems, Inc*., 238 F. 3d 549 (4th Cir. 2001)); *FI-Tampa, LLC v. Kelly-Hall*, 135 So. 3d 563, 567 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D748a].

4. In so much as Plaintiff argued in its Motion that it is entitled to an Evidentiary Hearing, the parties are hereby directed to set an evidentiary hearing on the issue of the application of the Prohibitive Cost Doctrine. Per *Zephyr Haven Health & Rehab Center*, the Evidentiary Hearing shall focus on Plaintiff's ability to pay the appraisal fees and costs, the expected cost differential between appraisal and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims. *Id*. at 922 (citing *Bradford*, 238 F. 3d at 556); *see also FI-Tampa, LLC*, 135 So. 3d at 567.

5. The parties and their counsel shall be permitted to conduct discovery limited to the issues pertaining to the issue of appraisal, including but not limited to Plaintiff's defenses to enforceability of the instant appraisal agreement.

6. The parties will be permitted to perpetuate discovery deposition testimony of witnesses at Plaintiff's upcoming Evidentiary Hearing regardless of the witnesses' availability under the Florida Rules of Evidence and/or Florida Rules of Civil Procedure.

* * *

**Insurance—Automobile—Windshield repair—Appraisal— Prohibitive cost doctrine—Where repair shop contests insurer's motion to compel appraisal of windshield repair claim on grounds of prohibitive cost doctrine, evidentiary hearing is required on shop's ability to pay appraisal fees and costs, expected cost differential between appraisal and litigation, and whether cost differential is so substantial as to deter bringing claims**

FLORIDA MOBILE GLASS a/a/o Rhonda Mills, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-29459, Division K. January 3, 2020. Jessica G. Costello, Judge. Counsel: Kevin W. Richardson, Emilio R. Stillo, and Andrew B. Davis-Henrichs, Stillo & Richardson, P.A., Davie, for Plaintiff. Eric A. Hogrefe, Progressive PIP House Counsel, Tampa, for Defendant.

**ORDER**

THIS CAUSE came before the Court on December 3, 2019, upon Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal and Plaintiff's Motion for Evidentiary Hearing. The Court, having reviewed the relevant legal authorities, having heard the argument of Counsel, and the Court being otherwise advised in the premises, finds as follows:

Defendant has filed its Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal. Plaintiff has contested the Defendant's Motion by raising several legal arguments in response thereto, including the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine stems from *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), which recognizes that the costs of arbitration can be prohibitive and render an agreement unenforceable by denying a plaintiff access to the forum. The applicability of the Prohibitive cost Doctrine must be made on a case by case basis and requires an evidentiary showing of individualized prohibitive expense. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin,* 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (citing *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F. 3d 549 (4th Cir. 2001)); *FI-Tampa, LLC v. Kelly-Hall,* 135 So. 3d 563, 567 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D748a].

In so much as Plaintiff argued in its response that it is entitled to an evidentiary hearing, the parties are hereby directed to set an evidentiary hearing on the issue of the application of the Prohibitive Cost Doctrine. Per *Zephyr Haven Health & Rehab Center,* the evidentiary hearing shall focus on Plaintiff's ability to pay the appraisal fees and costs, the expected cost differential between appraisal and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims. *Id.* at 922 (citing *Bradford,* 238 F. 3d at 556); *see also FI-Tampa, LLC,* 135 So. 3d at 567.

Defendant's Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal, is ABATED until such time as the Evidentiary Hearing is concluded.

* * *

**Insurance—Automobile—Windshield repair—Appraisal— Prohibitive cost doctrine—Where repair shop contests insurer's motion to compel appraisal of windshield repair claim on grounds of prohibitive cost doctrine, evidentiary hearing is required on shop's ability to pay appraisal fees and costs, expected cost differential between appraisal and litigation, and whether cost differential is so substantial as to deter bringing claims**

HILLSBOROUGH INSURANCE RECOVERY CENTER (a/a/o) Steven Davis, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE CO., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-30484, Division K. January 3, 2020. Jessica G. Costello, Judge. Counsel: Kevin W. Richardson, Emilio R. Stillo, and Andrew B. Davis-Henrichs, Stillo & Richardson, P.A., Davie, for Plaintiff. Eric A. Hogrefe, Progressive PIP House Counsel, Tampa, for Defendant.

**ORDER**

THIS CAUSE came before the Court on November 25, 2019, upon Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal and Plaintiff's Motion for Evidentiary Hearing. The Court, having reviewed the relevant legal authorities, having heard the argument of Counsel, and the Court being otherwise advised in the premises, finds as follows:

Defendant has filed its Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal. Plaintiff has contested the Defendant's Motion by raising several legal arguments in response thereto, including the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine stems from *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), which recognizes that the costs of arbitration can be prohibitive and render an agreement unenforceable by denying a plaintiff access to the forum. The applicability of the Prohibitive cost Doctrine must be made on a case by case basis and requires an evidentiary showing of individualized prohibitive expense. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin,* 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (citing *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F. 3d 549 (4th Cir. 2001)); *FI-Tampa, LLC v. Kelly-Hall,* 135 So. 3d 563, 567 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D748a].

In so much as Plaintiff argued in its response that it is entitled to an evidentiary hearing, the parties are hereby directed to set an evidentiary hearing on the issue of the application of the Prohibitive Cost Doctrine. Per *Zephyr Haven Health & Rehab Center,* the evidentiary hearing shall focus on Plaintiff's ability to pay the appraisal fees and costs, the expected cost differential between appraisal and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims. *Id.* at 922 (citing *Bradford,* 238 F. 3d at 556); *see also FI-Tampa, LLC,* 135 So. 3d at 567.

Defendant's Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal, is ABATED until such time as the Evidentiary Hearing is concluded.

* * *

**Insurance—Personal injury protection—Interest—Where insurer twice denied payment for PIP benefits to which insured was entitled because of medical provider's failure to submit signed report from initial evaluation, made partial payment of benefits once signed report was received and paid additional benefits after receipt of demand letter, insurer owes provider interest from date that it received initial written notice of covered loss—Neither PIP statute nor policy requires provider to provide signed initial report as condition precedent to payment**

FLORIDA SPINE AND REHABILITATION, LLC, as assignee of Yvette Gurick, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 17-008266 CONO 70. January 22, 2020. Steven P. DeLuca, Judge. Counsel: Cris Evan Boyar and Frank T. Noska III, for Plaintiff. Jeffrey C. Hagans, for Defendant.

## ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/SUMMARY DISPOSITION

THIS CAUSE came before the court on January 22, 2020, on Defendant's Motion for Summary Judgment/Summary Disposition. The court finds as follows:

### Background Facts

On 6/1/17, Yvette Gurick was injured in a motor vehicle accident while in a vehicle insured by the Defendant. The policy of insurance issued by the Defendant provided $10,000 in No-Fault (PIP) benefits in compliance with F.S. 627.736. Following the accident Gurick treated with the Plaintiff medical provider and incurred bills for her care and treatment. The Plaintiff submitted bills and records to the Defendant for dates of service 6/5/17 to 6/14/17. The Plaintiff provided the Defendant with a timely, properly filled out and signed CMS-1500 forms, a signed disclosure and acknowledgment form, and daily treatment notes that included the date of the crash, the doctor's full name, credentials and license number. The treatment note for the first date did not contain a handwritten signature above the doctor's typed name and credentials. The Defendant received these documents on 6/23/17.

The Defendant determined Gurick would be entitled to PIP benefits but denied payment for this set of bills on 7/7/17. The Defendant's Explanation of Review, for these dates of service, stated "*Please submit a signed report from the initial evaluation*." Thereafter, the Defendant received a detailed initial report that included the doctor's full name and credentials but it was *unsigned* (no handwritten signature) on 7/24/17 and a detailed initial report *signed* (handwritten signature included) on 7/31/17 and the Defendant paid a portion of the bills, without interest on 8/10/17.

The Defendant received a pre-suit demand letter and paid additional amounts but did not pay the appropriate amount of interest. There is no dispute as to medical necessity, related, timely submission of the bills, or coverage.

The court finds these facts are not in dispute.

### The Dispute

The issue to be decided by this court is whether the Defendant would owe the appropriate amount of issue as of:

a. the date the Defendant received the bills, the disclosure and acknowledgment form and treatment notes on 6/23/17;

b. the date the Defendant received an unsigned (no handwritten signature) detailed initial report on 7/24/17; or

c. the date the Defendant received a signed (handwritten signature) detailed initial report on 7/31/17.

The Defendant seeks Summary Judgment/Summary Disposition as to whether the Defendant owes interest under F.S. §627.736.

### Analysis

The court begins its analysis with the PIP statute. The statutory provisions under Florida's No-Fault laws will be construed liberally in favor of the insured. See *Farmer v. Protective Cas. Ins.* Co., 530 So.2d 356 (Fla. 2d DCA 1988). "The assurance of swift and virtually automatic provision of PIP benefits is accomplished through the requirements of section 627.736(4)(b), which provides that PIP insurance benefits shall be overdue if not provided within thirty days after the insurer is furnished written notice of a covered loss and of the amount of same." *State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So. 2d 1067, 1082 (Fla. 2006) [31 Fla. L. Weekly S358a]. The terms of a statute must be given their plain meaning. *Crooks v. State Farm Mut. Auto. Ins. Co.,* 659 So. 2d 1266 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1984a].

F.S. §627.736(4)(b) states:

> Personal injury protection insurance benefits paid pursuant to this section are overdue if not paid within 30 days *after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.* However:
>
> 4. Notwithstanding the fact that written notice has been furnished to the insurer, payment is not overdue if the insurer has *reasonable proof* that the insurer is not responsible for the payment.
>
> (d) All overdue payments bear simple interest at the rate established under s. 55.03 or the rate established in the insurance contract, whichever is greater, for the quarter in which the payment became overdue, ***calculated from the date the insurer was furnished with written notice of the amount of covered loss.*** Interest is due at the time payment of the overdue claim is made.

The court must decide if the lack of a hand signed initial report is "reasonable proof" the Defendant is not responsible for payment. The court recognizes that an insurer may define "reasonable proof" *in its policy* and may request information that will aid it in the investigation of a claim. *Amador v. United Auto. Ins. Co.,* 748 So. 2d 307, 308 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a]. However, not all requests and requirement are reasonable or in compliance with Florida law.

According to the adjuster, nowhere in the policy does it state that a doctor has to create an initial evaluation report, signed or unsigned, (page 31-35). Nowhere in any of Florida's No-Fault laws does it require a medical provider to provide a hand signed initial report as a condition precedent to payment.

Fla. Stat. §627.736(6)(b) allows an insurer to make a timely written request of additional documentation or information from a medical provider pre-suit and if the provider does not provide a response the insurer would have extra time before payment would be due. Notwithstanding, the Defendant did not avail itself of a F.S. 627.736(6)(b) request in this case. (Page 34).

PIP cases have been actively litigated for many years and there is not one published order or opinion that would stand for the proposition that a PIP insurer can demand a hand signed initial report as a condition precedent to payment of medical bills as the exclusive reason to deny a medical bill. Further, the PIP Statute states at §627.736 (5)(d) a provider may submit a bill to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form. This form, timely submitted and signed by the treating doctor, is in the record and there is no allegation the form was not substantially filled out.

The Defendant's unilateral decision to demand a hand signed initial report from the Plaintiff is not supported by State law, Federal Law, or the policy of insurance. In the adjuster's deposition transcript she stated the request for this signed initial evaluation was made by the initial adjuster (page 32). No specific reason was provided in the record.

Florida law is replete with examples of insurers **improperly** denying claims by demanding documents, forms or information as a condition of payment of a PIP benefit.

In *USAA Casualty v. Pembroke Pines,* 31 So.3d 234 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D613b] the court held an MRI provider did not have to include a MRI license number on the claim form as a condition precedent to payment. In *United Auto v. Professional Medical,* 26 So.3d 21 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a] the court held a medical provider did not have to provide his medical license number on the CMS 1500 form as a condition precedent to payment. In *Crooks v. State Farm Mut. Auto. Ins. Co.,* 659 So. 2d 1266 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1984a] the court held a PIP insurer could not extend the thirty-day period for paying PIP benefits by requiring claims to be submitted only on specified in-house claims forms as a condition precedent to payment. See also *Superior Ins. Co. v. Libert,* 776 So. 2d 360 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D381a]. In *Martinez v. Fortune Ins. Co.,* 684 So. 2d 201 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2229b] the court held that the no-fault statute required PIP insurer to pay claimed benefits within 30 days of receipt of claim, rather than within 30 days of receipt of medical verification of claim. In *Fortune Ins. Co. v. Pacheco,* 695 So. 2d 394 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1076a] the court held that insured could not be required to submit all supporting medical records before 30—day period for payment began to run. In *Star Casualty v. U.S.A. Diagnostics,* 855 So.2d 251(Fla.4th DCA 2003) [28 Fla. L. Weekly D2274a] the court held the patient did not have to counter sign the CMS 1500 form as a condition precedent to payment. In *Thompson v. Garrison,* 27 Florida Law Weekly Supp. 758a (Fla. Broward County Court 2019) this court held an insurer cannot demand a patient's social security number as a condition precedent to payment of medical bills). See also *Coulson v. Fortune,* 5 Florida Law Weekly Supp. 45a (Fla. 11th Cir. Court 1997) (insurer cannot demand medical records before issuing payment); *Merrick v. Fortune,* 8 Florida Law Weekly Supp. 503b (Fla. Sarasota County Court 2001)(insurer cannot demand a medical authorization before issuing payment); *Emergency Physicians v. State Farm,* 16 Florida Law Weekly Supp. 114a (Fla. Seminole County Court 2008)(a CMS 1500 claim form is sufficient to put the Defendant on notice of the claim); *New Hampshire Indemnity v. Pinnacle Medical,* 4 Florida Law Weekly Supp. 753a (Fla. 9th Cir. Court 1997)(HCFA form is sufficient to provide the PIP insurer on written notice under 627.736(4)(b). In *Florida Medical v. Progressive,* 29 So.3d 329 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D215b] the court found an insurer cannot deny payment if the disclosure and acknowledgment form was not properly filled out.

Further, the Defendant is precluded from challenging the quality or sufficiency of the daily treatment note from the first date of service as a basis to deny a claim. See *South Florida Pain & Rehabilitation. Inc. (a/a/o Kirt Godfrey) vs. United,* 16 Fla. L. Weekly Supp. 981b (Fla. Broward Cty Court 2012)(record keeping is not an issue in the case). *Raymond Ali v. McCarthy,* 17 Fla. L. Weekly Supp. 661a (Fla. 18th Cir. 2010); *Douglas Rapid v. United,* 21 Fla. L. Weekly Supp. 816a (Fla. Broward Cty Court 2014, Schiff). *Sims v. Brown,* 574 So.2d 131 (Fla. 1991)(Record keeping is not an issue when a hospital was sued). *Right Choice v. State Farm,* 21 Fla. L. Weekly Supp. 181 (Fla. Dade Cty Court 2011)(inadequate record keeping is not a lawful basis for non payment or affirmative defense. See also *Nob Hill v. State Farm,* 21 Fla. L. Weekly Supp. 195a (Fla. Broward County Court 2013). *State Farm v. CMI,* 21 Fla. L. Weekly Supp. 239a (Fla. 17th Cir. Court 2013)(a provider's documentation is deficient without offering anything more does not create an issue of material fact to avoid Summary Judgment).

In *Christian v. Department of Health,* 161 So.3d 416 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D537a] where the court held

> Although Section 460.413(1)(m) requires that a chiropractor keep medical records that justify the course of treatment, it does not require that the chiropractor justify that course of treatment on every single visit where treatment is being provided as part of an ongoing treatment plan. Likewise, rule 64B2-17.0065(3) also provides that a chiropractor must keep a medical record that justifies the course of treatment. We conclude that, in context, the plain meaning of the term medical record refers to the record *taken as a whole* and not that the notes for a particular day must again justify the treatment provided. This is made abundantly clear when the rule is read together with rule 64B2-17.0065(6), which delineates what must be specifically documented in the daily record once a treatment plan has been established. This rule does not require redundant justification for any ongoing treatment.

More minimal record keeping cases include *Weston v. United,* 21 Florida Law Weekly Supp. 306b (Fla. 11th Cir. Court 2013); *Bedford v. Allstate,* 27 Florida Law Weekly Supp. 180a (Fla. Orange Cty Court 2015); *Nob Hill v. State Farm,* 21 Florida Law Weekly Supp. 195a (Fla. Broward Cty Court 2013); *Douglas Rapid v. United,* 21 Florida Law Weekly Supp. 816a (Fla. Broward Cty Court 2014); *Martinez v. United,* 21 Florida Law Weekly Supp. 820a (Fla. Broward Cty Court 2014); *American Health v. United,* 23 Florida Law Weekly Supp. 615b (Fla. Broward Cty Court 2015); *B & A Diagnostic v. Progressive,* 24 Florida Law Weekly Supp. 851a (Fla. Dade Cty Court 2013); *Dr. John Calvanese v. State Farm,* 26 Florida Law Weekly Supp. 239b (Fla. Broward County Court 2017); Coast *Chiropractic v. State Farm,* 26 Florida Law Weekly Supp. 327a (Fla. Broward Cty Court 2018. Benson); *Michael Delesparra D.C., P.A. v. MGA,* 19 Florida Law Weekly Supp. 854c (Fla. Broward County, Judge Lee 2012); *Priority Medical v. State Farm,* 21 Florida Law Weekly Supp. 201b (Fla. Broward Cty Court 2013, Judge Lee).

Accordingly this court will not rewrite or interpret the statute as requested by the Defendant to require a hand signed initial report or certain information that must be contained in the initial report as basis for a PIP insurer to delay or deny payment. Had the Florida legislature wanted PIP insurers to require this document as part of the claims process the Florida Legislature would have included it in the PIP Statute. The court cannot rewrite the No-Fault Statute. In *Thrivent Fin. for Lutherans v. State, Dept. of Fin. Services,* 145 So. 3d 178, 182 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1636a] the court held ". . . .this Court may not rewrite statutes contrary to their plain language." *Hawkins v. Ford Motor Co.,* 748 So.2d 993, 1000 (Fla.1999) [24 Fla. L. Weekly S480a]. "[P]olicy concerns . . . must be addressed by the Legislature." *Id.*

The Plaintiff asks the court to interpret the statutes strictly as drafted and not include any additional requirements or provisions not contemplated by the Florida legislature as argued by the Defendant in this case. In Florida, statutes will not *be* interpreted in a manner that leads to an unreasonable or ridiculous result *or a result obviously not intended by the legislature.* See *Drury v. Harding,* 461 So.2d 104 (Fla. 1984); *Palm Springs General Hospital, Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co.,* 218 So.2d 793 (Fla. 3d DCA 1969), affirmed, 232 So.2d 737 (Fla. 1970).

Nor can the court rewrite a policy of insurance to allow an insurer demand this information as a condition of payment for medical benefits especially where insurance policies must be approved by the State of Florida. See *Pol v. Pol,* 705 So. 2d 51, 53 (Fla. 3d DCA 1997) [23 Fla. L. Weekly D75a] ("It is well established that a court cannot rewrite the clear and unambiguous terms of a voluntary contract.").

Conclusion

For the foregoing reasons the Defendant's Motion for Summary Judgment/Summary Disposition is hereby denied.

The court hereby finds statutory interest is calculated from the date the insurer was furnished with written notice of the amount of a covered loss and this is 6/23/17 which is the undisputed date it

received the CMS-1500 forms and other documentation. Florida law does not permit a PIP insurer to require a hand signed initial report, or a medical report of any kind, as a condition precedent of payment of medical bills or as a reasonable basis to deny a medical claim.

* * *

**Insurance—Personal injury protection— Coverage— Application— Material misrepresentation defense fails where application was ambiguous as to whether insured was required to disclose adult household resident who did not hold driver's license and had never driven insured vehicle—Ambiguity could not be overcome by assertion that insurance agent explained to insured that he was required to list all persons in his household who are 15 years of age or older, whether licensed or not**

IMAGING CENTER OF WEST PALM BEACH, LLC (As Assignee of Bertrand Acelouis), v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE 16-008883 (56). February 3, 2020. Betsy Benson, Judge. Counsel: Tara L. Kopp and Eric C. Hayden, Schuler, Halvorson, Weisser, Zoeller, Overbeck, P.A., West Palm Beach, for Plaintiff. William J. McFarlane, Coral Springs, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR FINAL SUMMARY JUDGMENT**

THIS CAUSE having come before the Court for hearing on January 23, 2020 upon Defendant's Motion for Summary Judgment and Plaintiff's Memorandum in Opposition of Defendant's Motion for Summary Judgment and Incorporated Cross-Motion for Final Summary Judgment and the Court, having reviewed the motions, the Court file, the case law presented, and having heard argument of counsel and being otherwise fully advised in the premises, it is hereupon ORDERED and ADJUDGED, as follows:

1. Bertrand Acelouis applied for automobile insurance with Defendant, Century-National Insurance Company, on April 28, 2015. Mr. Acelouis applied in-person at Insurance World of Delray Beach, an insurance agency, with the assistance of insurance agent Mr. Evan Sheiman.

2. The insurance application contains the following language on page 1 of 6: "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." Underneath this language the application provides a table that includes columns with the following titles: "Name of Driver (Exactly as shown on Driver's License)"; "License Number"; and "State".

3. In the table underneath the "DRIVER INFORMATION" section Mr. Acelouis disclosed himself.

4. On page 5 of 6 of the insurance application, there is a section titled "AGREEMENT TO EXCLUDE NAMED PERSONS" which contains the following language:

> "In consideration of the premium charged, it is hereby understood and agreed that only Personal Injury Protection Coverage and Property Damage Liability Coverage in the minimum amount necessary to meet the Florida Financial Responsibility requirement, and in the event this policy is certified as proof of financial responsibility in the State of Florida, Bodily Injury Liability Coverage in the minimum amount necessary to meet the Florida Financial Responsibility requirement, shall be afforded when any vehicle covered under the policy or any continuation, renewal or replacement of such policy, is used or operated by an excluded person named below."

5. Bertrand Acelouis wrote "N/A" below the "AGREEMENT TO EXCLUDE NAMED PERSONS" section.

6. On the last page of the application, page 6 of 6, there is a section titled "CERTIFICATION OF APPLICANT" that asks the applicant to initial next to seven (7) statements. This section does not include an area for the applicant to disclose any additional information; it only has an area for the applicant to initial next to each statement.

7. One of the statements in the "CERTIFICATION OF APPLICANT" section reads:

> "I hereby certify that I have listed all persons in the household and all drivers of the vehicles, whether in my household or not, as well as all children whether living with me or not. I understand that no coverage will be provided for drivers that are not listed on my policy whether they are in the household now or enter it later. I understand it is my responsibility to make the Company aware of any changes in drivers, vehicles or coverages. I certify that the garaging address listed is the actual address where my vehicle(s) are garaged the majority of the time and I am aware that any change in the mailing or garaging address of any vehicle must be reported to the Company immediately."

8. Mr. Acelouis initialed next to all of the "CERTIFICATION OF APPLICANT" statements, including the one described above.

9. Century-National issued Mr. Acelouis a policy of insurance that included $10,000.00 in personal injury protection ("PIP") coverage.

10. At the time that Bertrand Acelouis completed the insurance application he resided with his girlfriend, Maude Charles. It is undisputed that Charles did not have a driver's license, had never driven the insured vehicle, and had never driven a vehicle in the United States.

11. On May 14, 2015 Bertrand Acelouis was involved in a motor vehicle accident while driving the insured vehicle and, as a result thereof, suffered injuries. Mr. Acelouis sought and received medical treatment for these injuries from Plaintiff, Imaging Center of West Palm Beach, LLC.

12. Mr. Acelouis assigned his PIP benefits to Imaging Center, and Imaging Center submitted bills to Century-National which were denied.

13. Imaging Center brought this suit against Century-National for failure to pay PIP benefits. As its sole affirmative defense, Century-National alleged that Mr. Acelouis committed a material misrepresentation on the insurance application by not disclosing Charles as follows:

> "The insured to whom the insurance policy was issued is guilty of one or more material misrepresentations on the application for insurance resulting in the insurance policy being void ab initio. In particular, the named insured failed to disclose household member, Maude Charles, at the time of the application for insurance. Had the named insured disclosed Maude Charles, it would have resulted in a premium difference or material change in terms of the agreement to provide insurance. Such a material misrepresentation is grounds for rescission of the agreement and is in breach of the terms of the insurance contract."

14. Century-National moved for summary judgment based on its material misrepresentation affirmative defense.

15. In support of its motion, Century-National filed an affidavit from the insurance agent Evan Sheiman. The affidavit set forth in pertinent part:

> "As is my custom and normal business practice, during Mr. Acelouis' application process, I asked Mr. Acelouis to list all persons in his household who are 15 years of age or older, whether licensed or not and all drivers of the vehicles, whether in his household or not. Mr. Acelouis did not disclose any household members over the age of 15 as reflected in Exhibit A [the insurance application]. Had Mr. Acelouis disclosed any household members over the age of 15, then I would have added said household members either on the first page of the application and/or listed them as excluded on page 5 of the application."

16. Imaging Center filed a memorandum in opposition to Century-National's summary judgment motion, and its own cross-motion for final summary judgment, arguing that the insurance application did not require the disclosure of Maud Charles since Ms. Charles was not a "driver" and that the insurance application was ambiguous.

17. The interpretation of insurance contracts, including the determination of ambiguities in such insurance contracts, is a matter of law to be decided by the courts. *See San Sandron Corp. v. Utica Mut. Ins. Co.,* 360 So. 2d 477, 479 (Fla. 3rd DCA 1978); *Gaulden v. Arkwright-Boston Mfrs. Mut. Ins. Co.,* 358 So. 2d 267 (Fla. 3rd DCA 1978).

18. Ambiguities in insurance contracts should be construed liberally in favor of the insured and strictly against the insurer. *Flores v. Allstate Ins. Co.,* 819 So. 2d 740, 744 (Fla. 2002) [27 Fla. L. Weekly S499a]; *see also Union Am. Ins. Co. v. Maynard,* 752 So. 2d 1266 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D648a]. Language in an insurance contract is ambiguous where it is susceptible to more than one reasonable interpretation. *Id.*

19. The Court finds that the insurance application is ambiguous, as a matter of law, regarding whether an adult household resident who does not hold a driver's license and has never driven the insured vehicle must be disclosed.

20. If Century-National had intended for such individuals to be disclosed on the application, it could certainly have chosen application language that more clearly communicated that intention. A reasonable interpretation of the application is that it was only asking for individuals who would be driving the insured vehicle, especially in light of the title "DRIVER INFORMATION", the fact that the phrase "persons that use the vehicle" is not defined, and the column titles of the table appear to pertain to licensed drivers. Therefore, the application is ambiguous.

21. The Court's finding that the insurance application is ambiguous is in line with other Florida county courts addressing the same or similar insurance applications. *See Ocean Ridge Chiropractic, Inc., (a/a/o Bertrand Acelouis) v. Century-National Insurance Co.,* 27 Fla. L. Weekly Supp. 753a (Fla. Broward County Ct. August 7, 2019) (Addressing the same insurance application, same defendant insurance company, same material misrepresentation defense, same claimant, and same affidavit from the insurance agent, the court, in granting the plaintiff's cross-motion for summary judgment, found the application to be ambiguous.); *Colonial Medical Center, Inc. (a/a/o Daunte Draper) v. Century-National Insurance Co.,* 27 Fla. L. Weekly Supp. 71a (Fla. Orange County Ct. March 1, 2019) (Addressing the same insurance application from the same defendant insurance company and a similar material misrepresentation defense, the court found the application to be ambiguous as it pertains to "drivers" and ruled for coverage in the plaintiff's favor.); *Physicians Group, LLC a/a/o Kayla Garcia v. Century-National Insurance Company,* Case No.: 2018-SC-006610-NC (Fla. Broward County Ct. January 21, 2020) [27 Fla. L. Weekly Supp. 1040a; this issue] (the court finding that the same insurance application at issue here was ambiguous as it pertained to "drivers.").

22. The Eleventh Circuit in its appellate capacity addressed a substantially similar insurance application with a similar material misrepresentation defense. It found the application to be equivocal and ambiguous as it pertained to "drivers" to be listed, and ruled for coverage in the plaintiff's favor. *Jose Gallardo v. Executive Insurance Company,* 9 Fla. L. Weekly Supp. 15a (11th Jud. Cir. (Appellate) for Miami-Dade County November 6, 2001).

23. The Fourth DCA has also addressed a similar insurance application and found it to be ambiguous. *See Great Oaks Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co.,* 530 So. 2d 1053 (Fla. 4th DCA 1988) (The Fourth DCA, in addressing a similar insurance application with a similar material misrepresentation defense, found the application to be ambiguous as it pertains to "drivers" and resolved the ambiguity in the plaintiff's favor.)

24. The Court further finds that, as a matter of law, the ambiguous language in the insurance application cannot be overcome by an assertion that the insurance agent "explained" the information the application was seeking to uncover. Therefore, Century-National's material misrepresentation affirmative defense fails despite Mr. Sheiman's affidavit in which he asserted that "[a]s is my custom and normal business practice" he asked Mr. Acelouis to disclose "all persons in the household who are 15 years of age or older, whether licensed or not."

25. Since the insurance application has been deemed to be ambiguous, extrinsic evidence such as Mr. Sheiman's affidavit cannot be considered as part of the Court's analysis. The Florida Supreme Court has held that Florida law requires an ambiguous insurance policy to be construed in favor of coverage "without resort to consideration of extrinsic evidence." *Wash. Nat'l Ins. Corp.. v. Ruderman,* 117 So. 3d 943, 952 (Fla. 2013) [38 Fla. L. Weekly S511a].

26. Further, Sheiman's affidavit cannot cure the ambiguity in the insurance application. At best, the affidavit creates another reasonable interpretation of the language, rendering the application ambiguous. Sheiman's affidavit is insufficient in that it does not assert that he "explained" the ambiguity in the application to Mr. Acelouis. The affidavit lacks specificity, as it does not state that Mr. Sheiman has personal knowledge of his interaction with Mr. Acelouis, only knowledge of his "custom and normal business practice."

27. Plaintiff, Imaging Center of West Palm Beach, LLC's cross-motion for final summary judgment is hereby GRANTED, and Defendant, Century-National Insurance Company's, motion for summary judgment is DENIED.

* * *

**Insurance—Insured's action against insurer—Indispensable parties—Insurer's motion to dismiss, for failure to join indispensable party, an action alleging breach of contract brought by a plaintiff who was one of two persons the policy named as covered and insured, is denied—Failure to join a potential joint obligee is insufficient to dismiss instant litigation because of outstanding factual issues that must be determined, including whether the other named insured's interest is adverse to that of plaintiff's interest under an agency theory or whether the other named insured has any objection to case proceeding without him**

ADELAIDA PEREZ, Plaintiff, v. SAFEPOINT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-19583 COCE 53. February 17, 2020. Robert W. Lee, Judge. Counsel: Natalie Fernandez, Coral Gables, for Plaintiff. Cecile M. von Batemberg, Coral Gables, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

THIS Cause came before the Court on January 17, 2020 for hearing of the Defendant's Motion to Dismiss Plaintiff's Complaint, 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 finds as follows[1]:

*Background*: On August, 07, 2019 Plaintiff, ADELAIDA PEREZ ("Perez"), filed a complaint against Defendant, SAFEPOINT INSURANCE COMPANY ("Safepoint") claiming breach of contract. Defendant Safepoint timely filed its Motion to Dismiss on September 25, 2019. A hearing on the Motion to Dismiss was held on January 17, 2020. At the hearing, Defendant's counsel relied on the insurance policy which was the basis of Plaintiff's claim. The insurance policy named two persons as covered and insured, Adelaida

Perez and Vicente Medina. The grounds for Defendant's Motion to Dismiss is based on a failure to join an indispensable party. Fla. R. Civ. P. 1.140(b)(7). The court reserved ruling pending receipt of supporting case law from the parties within seven days. Neither party, however, provided any additional authority although being provided time to do so.

*Conclusions of Law*: Failure to join an indispensable party may be raised in a motion to dismiss. Fla. R. Civ. P. 1.140(b)(7). Indispensable parties are any necessary parties that absent their participation would cause a "final decision [. . .] rendered without their joinder" to effect "either that party's interests or the interests of another party in the action*." Hertz Corp. v. Piccolo,* 453 So.2d 12 (Fla. 1984); *Diaz v. Impex of Doral, Inc.*, 7 So. 3d 591 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D601a]. Generally, "[a]ll parties united in interest, or whose interests are involved in the matter to be adjudicated in a suit on an insurance policy must be joined." 46A C.J.S. *Insurance* § 2146 (2020). *See also* 39 Fla.Jur.2d *Parties* § 13 (2019).

In *Martinez v. Balbin*, the judgment creditor sought a claim against a decedent's estate. Trustee, an heir at law for the estate, subsequently "assigned all right, title and interest in the estate to the other heirs as a purported gift." 76 So.2d 488 (Fla. 1954). Plaintiff then sought a placement of a trust in Plaintiff's favor. *Id.* The Florida Supreme Court held, all heirs at law who received from the trustee must be included as "indispensable parties." *Id.* However, *Martinez* is distinguishable because there the parties sought to be joined were additional defendants while the instant case seeks to join additional plaintiffs. Moreover, in the instant case, the defendants have not shown that Perez's interest risks "inconsistent judgment" or would lead to "multiple recoveries." See *Wilson v. EverBank, N.A.*,77 F.Supp.3d 1202 (S.D. Fla. 2015) (holding that failure to join a spouse as an indispensable party is insufficient to grant an order for motion to dismiss when the spouses' "interests are aligned and their legal claims are the same" and "the current composition of the parties [. . .] does not risk any inconsistent judgment or multiple recoveries).

The case of *Phillips v. Choate* is more on point. 456 So.2d 556 (Fla. 4th DCA 1984). In *Phillips*, the Fourth District Court of Appeal held,

> To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts that matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him

456 So.2d at 557-58 (quoting *Provident Tradesmens B & T Co. v. Patterson*, 390 U.S. 102, 119 (1968)). The proper issue then is whether "a lawsuit [. . .] can proceed without a particular joint obligee." *Id.*

In holding that a missing plaintiff with a similar interest to other plaintiffs was not an indispensable party, the court concluded there were only two plausible scenarios in continuing with the case, and neither would prejudice the defendant. *Id.* First, the defendant's claim might prevail and the defendant might "face subsequent litigation by" the missing plaintiff "on substantially the same claim." *Id.* at 558. The court found this risk insufficient to prevent litigation from moving forward because "a court ought not dismiss an action on the grounds of failure to join an indispensable party if dismissal would foreclose the claim of the present plaintiffs and the only adverse result of failure to dismiss is a possible subsequent action against the defendant by the missing party." *Id.* The court reasoned a lower court "might condition maintenance of this action" on present plaintiff's "indemnifying" the defendant "upon a successful defense against a substantially similar claim" from claims an absent plaintiff "might make at some future date." *Id.* Alternatively, the plaintiff could prevail and the court can direct the defendant "to pay into the registry of the court whatever percentage the entire [. . .] interest in the proceeds of the sale is." *Id.* at 559. This Court agrees that failure to join a potential joint obligee in this case is insufficient to dismiss the instant litigation because of the outstanding factual issues that must be determined. *See Ultra Contractors, LLC v. Federated Nat'l Ins. Co.*, 26 Fla. L. Weekly Supp. 363a, ¶17 (10th Cir. 2018) (case should not be dismissed for failure to have a spouse joined as a co-plaintiff when factual issues remain). In the instant case, it remains to be seen whether Medina's interest is truly adverse to that of Perez under an agency theory or otherwise, or whether Medina has any objection to this case proceeding without him. Accordingly, it is hereby

ORDERED and ADJUDGED that the Defendant's Motion to dismiss is DENIED. The Defendant shall *file* an *answer* within 15 days of the date of this Order.

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[1]The Court thanks Nova Southeastern University judicial intern Jesus Caro for his research assistance on the issues raised in this Motion.

* * *

**Insurance—Personal injury protection—Demand letter—Sufficiency—By attaching itemized statement to demand letter, medical provider satisfied statutory condition precedent of section 627.736(10)—PIP statute does not require that demand letter state exact amount owed by insurer—Demand letter is not invalid for stating amount that differs from jurisdictional amount set forth in statement of claim of later-filed suit**

ALLIANCE SPINE & JOINT II, INC., a/a/o Dante McFarlane, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-002862 COSO (62). February 5, 2020. Terri-Ann Miller, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Staci Burton, for Defendant.

**ORDER**

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED, as follows:

Plaintiff's Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense is hereby Granted. The Court finds that Plaintiff's Demand Letter substantially complies with Florida Statute 627.736 and qualifies as a valid Demand Letter.

Notwithstanding the foregoing and even if Plaintiff's clerical error in addressing the Demand Letter to "USAA General Indemnity Ins. Co." as opposed to "United Services Automobile Association" constituted a fatal error, which this Court does not so find, the Court finds that the Defendant sustained no prejudice as a result of the foregoing and therefore the Plaintiff should not be prevented from pursuing this action.

> "a plaintiff need only substantially comply with conditions precedent." *Id*. at 61 (citing *Fed. Nat'l Mortg. Ass'n v. Hawthorne*, 197 So.3d 1237, 1240 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1800a]). "Substantial compliance or performance is 'performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez v. JPMorgan Chase Bank*, 187 So.3d 343, 345 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D595b] (quoting *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971)). "Moreover, a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice. . . . Even if we concluded that the required notice was mailed to an incorrect address, the Bank correctly points out that the defective notice did not prejudice the Borrowers, as they did not attempt to cure the default.

*Citigroup Mortg. Loan Tr. Inc. v. Scialabba,* 238 So. 3d 317, 319-20

(Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a].

> Additionally, section 627.736(5)(b)1.d., Florida Statutes (2004), states that an insurer is not required to pay a claim or charges "[w]ith respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d)." Accordingly, based upon the statute's plain language, a bill or statement need only be "substantially complete" and "substantially accurate" as to relevant information and material provisions in order to provide notice to an insurer.

*United Auto. Ins. Co. v. Prof'l Med. Grp., Inc.,* 26 So. 3d 21, 24 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a].

Regarding Defendant's contention that the Demand Letter:

> fails to reduce the amount claimed to be due and owing in accordance with the applicable fee schedules. It also seeks the balance of the bills at 100% when the subject policy does not contain Medical Payments benefits. Moreover, it seeks reimbursement for charges which were false and misleading and unbundled.

the Court finds that the Demand Letter included a copy of the original HICF that was submitted to the insurance carrier and that this satisfies the Plaintiff's obligation to include an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court adopts the reasoning set forth by Judge Guzman in *Saavedra v. State Farm,* 26 Fla. L. Weekly Supp. 664a (Dade Cty. Ct. 2018) where he held:

> this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount owed. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible.1 The Court is not free to edit statutes of add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So.2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c1.
>
> Moreover, this Court is also aware of its constitutional duty to allow litigants access to the courts. When examining conditions precedent, they must be construed narrowly in order to allow Florida citizens access to courts. *Pierrot v. Osceola Mental Health*, 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131 a]. "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System*, 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. For this Court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostolico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to deny access to courts on the basis of technicalities") (emphasis added), citing, *Archer v. Maddux*, 645 So.2d 544 (Fla. 1st DCA 1994).

As to Defendant's last contention that the Demand Letter asked for an amount that was inconsistent with the jurisdictional amount set forth in the Statement of Claim this Court finds that Florida Statute 627.736 does not set forth that a Demand Letter is invalid if a later filed suit contains a jurisdictional amount that differs from the amount requested in the Demand Letter. See *Nunez v. Geico Gen. Ins. Co.,* 117 So. 3d 388, 398 (Fla. 2013) [38 Fla. L. Weekly S440a] (holding that conditions or denials of payment that are contrary to the terms of section 627.736 are invalid.).

* * *

**Insurance—Personal injury protection—Demand letter—Insured failed to comply with condition precedent to filing suit by serving demand letter before claims became overdue—Because defective demand letter cannot be cured by passage of time, complaint must be dismissed without prejudice, not abated**

RACHEL WATERMAN, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE17006392, Division 51. January 13, 2020. Kathleen Mccarthy, Judge. Counsel: Michael J. Cohen, Cohen Legal Group, P.A., Weston, for Plaintiff. Kyle J. Phipps and Brian S. Goldstein, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION IN PART AND GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT IN PART**

THIS CAUSE having come before the Court for consideration, on Defendant's Motion for Reconsideration of this Court's ruling on Defendant's Motion for Final Summary Judgment, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motions be, and the same are hereby GRANTED IN PART. This Court finds that Plaintiff failed to comply with a condition precedent to filing this action because its pre-suit demand letter was sent prior to when the claims at issue became overdue under section 627.736(4)(b), Florida Statutes, and in violation of section 627.736(10)(a), Florida Statutes. This Court also finds that Defendant did not waive this defense because Plaintiff did not timely file a Reply as required by Florida Rule of Civil Procedure 1.100(a), and there is binding authority holding to the contrary.[1] Finally, this Court finds that Plaintiff's defective pre-suit demand letter cannot be cured merely by the passage of time because in order to pursue the claims at issue, Plaintiff would need to serve a new compliant pre-suit demand letter so that Defendant has a legally sufficient opportunity to avoid litigation of those claims, and to avoid subjecting Defendant to the risk that any payment of those disputed claims would constitute a confession of judgment. As such, this Court finds that dismissal, and not abatement, is the proper remedy in this case.[2]

Therefore, it is further ORDERED AND ADJUDGED that this case is hereby DISMISSED without prejudice. Plaintiff shall serve a pre-suit demand letter in compliance with section 627.736(10), Florida Statutes, prior to filing any new action for the claims at issue in this case.

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[1]*See State Farm Mut. Ins. Co. v. Douglas Diagnostic Center, Inc.,* 25 Fla. L. Weekly Supp. 942b (17th Cir. Appellate, Broward County, 2017) (holding that trial court erred in ruling that insurer waived its right to assert demand letter defense when insurer continued to assert the defense in its answer and summary judgment motion).

[2]*See Progressive Express Ins. Co., Inc. v. Menendez,* 979 So.2d 324, 333 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D811a] (holding that where a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy); *City of Coconut Creek v. City of Deerfield Beach,* 840 So.2d 389 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D760a] (recognizing that other courts have repeatedly affirmed that failure to comply with a statutory condition precedent requires dismissal, absent waiver or estoppel); *James D. Shortt, M.D., P.A. a/a/o Betty Coyle v. State Farm Fire and Casualty Co.,* 23 Fla. L. Weekly Supp. 769a

(12th Cir., Sarasota County, 2015) (holding that abatement of PIP action is not the proper remedy when the Plaintiff would be required to serve a new pre-suit demand letter); *Richard W. Merritt, D.C., P.A. a/a/o Eileen Mendenhall v. Auto Club South Ins. Co.,* 22 Fla. L. Weekly Supp. 734b (10th Cir., Polk County, 2014) (denying Plaintiff's Motion to Abate when its defective pre-suit demand letter could not be cured merely by the passage of time).

* * *

**Insurance—Personal injury protection—Coverage—Rental vehicle involved in accident outside of Florida—Where claimant was involved in accident in rental vehicle driven by her resident relative outside of Florida, renter was not titled owner of vehicle, and vehicle was not subject of lease with option to purchase or security agreement, rental company is not required to provide PIP coverage to renter or passengers under PIP statute's limitations on coverage for accidents occurring outside state**

RICHARD A. HENRY, DC, P.A., a/a/o Charlotte Oliver, Plaintiff v. ENTERPRISE LEASING COMPANY OF FLORIDA, LLC, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE17014936, Division 54. June 27, 2019. Florence Barner, Judge. Counsel: Susan Guller, Law Office of Justin G. Morgan, P.A., Weston, for Plaintiff. Alejandra Jay, McFarlane Dolan & Prince, Coral Springs, for Defendant.

**ORDER ON MOTION FOR FINAL SUMMARY JUDGMENT**

**THIS CAUSE** having come before the Court on May 23, 2019 upon Plaintiff's and Defendant's Motions for Final Summary Judgment, and the Court having considered the Motions, having heard argument of counsel, having reviewed the Court record, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED as follows:

I. **BACKGROUND**

Shandera Woodside rented a vehicle from Enterprise Leasing Company of Florida, LLC. (d/b/a Alamo Rent-A-Car) at the Miami International Airport on November 22, 2016. Pursuant to the rental agreement Ms. Woodside was scheduled to return the rental vehicle on November 29, 2016. Pursuant to Fla. Stat. 627.7263, the rental agreement provided in bold type on the first page that the driver's policy would be primary for the limits of liability and PIP coverage required by Fla. Stat. 324.021(7) and 627.736[1].

There is no record evidence indicating that Ms. Woodside or any of her passengers owned a vehicle or resided with relatives that owned a vehicle, for which security was required by Florida Law.

On *November 27, 2016,* Ms. Woodside was operating the rental vehicle with 6 passengers, including the assignor Charlotte Oliver[2], when Ms. Woodside was involved in a motor vehicle accident in Georgia. As a result of the motor vehicle accident in Georgia, Ms. Oliver sought medical care and treatment in Florida from Plaintiff, Richard A. Henry, D.C., P.A. The Plaintiff submitted a claim for reimbursement of PIP benefits to the Defendant.

The Defendant denied PIP coverage and the instant lawsuit for PIP benefits ensued.

In the instant suit, competing Motions for Summary Judgment were filed. Both parties agree that the only issue to be determined is whether Ms. Woodside, who had rightful possession of the rental vehicle at the time of the accident, is considered an "owner" of the vehicle for purposes of Florida's PIP Statute.

I. **DEFENDANT'S ARGUMENT**

**Defendant argues that Fla. Stat. 627.736(4)(e) 2. and 3. limits reimbursement of PIP benefits for accidents that occur outside the State of Florida, only when the insured is occupying either a vehicle owned by the insured or a vehicle owned by the insured's resident relative. Defendant further argues that pursuant to the definition of "owner" found in Fla. Stat. 627.732(5), the renter Ms. Woodside is not the "owner" of the rental vehicle, and passenger Ms. Oliver, was not a resident relative of the owner of the rental vehicle. As such, Defendant maintains it is not obligated to provide PIP coverage to the renter or passengers as the accident occurred outside of Florida.**

**In support of its Motion, the Defendant relies on the rental agreement, the terms and conditions of the rental agreement, and the legal title of the rental vehicle which all identify the owner of the rental vehicle as the Defendant. The Defendant also cites to *Harris v. Cotton States Mut. Ins. Co*., 821 So.2d 1211 (Fla. 1st DCA 2002)** [27 Fla. L. Weekly D1681c] **to support the position that Defendant is not obligated to provide PIP benefits for renters of its vehicles or passengers in its rental vehicles, for injuries in motor vehicle accidents that occur outside of Florida.**

II. **Plaintiff's Argument**

Plaintiff argues that pursuant to Fla. Stat. 627.736(1), the Defendant is obligated to provide PIP coverage to any persons occupying the rental vehicle, and that where the accident occurred is irrelevant.

In addition, Plaintiff argues that pursuant to the definition of "owner" found in Fla. Stat. 627.732(5), any lessee "having the right to possession" of the vehicle is deemed an owner of the vehicle, and since Ms. Woodside had rightful possession of the rental vehicle, she must be considered an "owner" of the vehicle. The Plaintiff also cites to Fla. Stat. 320.01(3) which defines "owner" as "any person, firm, corporation, or association controlling any motor vehicle or mobile home by right of purchase, gift, lease or otherwise."

In the alternative, Plaintiff argues that an issue of fact remains regarding whether the rental agreement at issue was a security agreement, thereby precluding entry of summary judgment.

I. **ANALYSIS**

Pursuant to the terms of Florida's PIP Statute, 627.736(4)(e), PIP benefits are due as follows:

**(4) Payment of benefits.**

**(e) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:**

**2. *Accidental bodily injury sustained outside this state*, but within the United States of America or its territories or possessions or Canada, *by the owner while occupying the owner's motor vehicle*.**

**3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., if the relative at the time of the accident is domiciled in the owner's household and is not the owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405.**

Despite Plaintiff's argument that the location of the accident is irrelevant, a plain reading of 627.736(4)(e) 2. and 3. indicates that there is no PIP coverage for injury to an insured outside of Florida, unless the insured is occupying a vehicle *owned* by the insured or a vehicle *owned* by the insured's resident relative.

Pursuant to Fla. Stat. 627.732, titled "**Definitions**," an owner of a vehicle is defined as:

**(5) "Owner" means a person who holds the legal title to a motor vehicle; or, in the event a motor vehicle is the subject of a security agreement or lease with an option to purchase with the debtor or lessee having the right to possession, then the debtor or lessee shall be deemed the owner for the purposes of ss. 627.730-627.7405.**

Plaintiff refers the Court to other statutory definitions of "owner." However, the Court finds that Fla. Stat. 627.732 specifically defines the term at issue, and therefore, there is no need to go to definitions contained in other Florida Statutes in addressing how "owner" is defined when used in Florida's PIP Statute. See *State Farm Mutual Automobile Ins. Co. v. Lincoln General Ins*. Co., 21 Fla. L. Weekly

Supp. 617a (9th Jud. Cir., Orange Cty, Feb 17, 2014).

Concerning the first part of the definition of an "owner" found in section 627.732(5), the record evidence is undisputed that Defendant's parent corporation holds legal title of the rental vehicle.

Concerning the remainder of the definition, the Plaintiff urges the Court to read section 627.732(5) as defining "owner" as any lessee who has "right to possession" of the rental vehicle. While there is no dispute that at the time of the motor vehicle accident, Ms. Woodside had rightful possession of the rental vehicle, Plaintiff's argument ignores the prior language in the definition, which clearly states that "in the event a motor vehicle is the subject of . . . lease with an option to purchase with the debtor or lessee having the right to possession," then the lessee is considered an "owner." There is nothing in the rental agreement or the terms and conditions of the rental agreement, which indicates that Ms. Woodside signed a "lease with an option to purchase" the rental vehicle. In fact, by the terms of the rental agreement, Ms. Woodside was obligated to return the rental vehicle within one week.

Plaintiff also argues that an issue of fact remains as to whether the rental agreement at issue is a security agreement, as Ms. Woodside was obligated to "secure" the rental with a monetary deposit. However, this argument fails as a plain reading of the rental agreement and the terms and conditions at issue, reveals that the rental agreement was not a security agreement as it did not impose any requirements on the renter indicative of a security interest or indicating that the renter would own the rental vehicle upon compliance of the rental agreement. *See Fla. Stat. 671.201 (38)*; *see also*, *UC Leasing, Inc. v. Barnett Bank*, 443 So. 2d 384 (Fla. 1st DCA 1983)(finding that a contract for rental equipment was not just a lease, but a security agreement as it imposed requirements on the lessee indicative of ownership, such as the lessee had to pay taxes on the equipment, secure insurance for the equipment, maintain and repair the equipment and the contract contained an option to purchase the equipment.)

The Court finds that pursuant to the statutory definition of "owner" found in Fla. Stat. 627.732(5), the renter, Ms. Woodside, was not the "owner" of the vehicle at issue. Therefore, because the accident occurred outside of Florida, pursuant to Florida's PIP Statute, 627.736(4)(e) 2. and 3., the Defendant is not obligated to provide PIP coverage to the renter or to the passengers in the rental vehicle.

The Court is persuaded by the opinion in *Harris v. Cotton States Mut. Ins. Co.,* 821 so.2d 1211 (Fla.1st DCA 2002) [27 Fla. L. Weekly D1681c]. In *Harris*, the First District Court of Appeal affirmed the lower court's entry of summary judgment finding that pursuant to a policy endorsement providing there was no PIP coverage for injuries outside of Florida unless the insured was occupying a vehicle owned by the insured, Cotton States was not obligated to provide PIP coverage as the accident sued upon occurred in a rental vehicle outside of Florida. In holding as such, the First District Court of Appeal examined the Cotton States PIP endorsement language and found that it was "entirely consistent" with the requirements of the PIP Statute.

Wherefore, based on the foregoing, this Court grants summary judgment in favor of the Defendant on the issue of ownership, and finds that the renter, Ms. Woodside, is not an owner of the rental vehicle for purposes of Florida's PIP Statute and therefore, the renter and passengers in the Defendant's rental vehicle are not entitled to Florida PIP benefits from Defendant for a motor vehicle accident that occurs in the State of Georgia

**THEREFORE, IT IS HEREBY ORDERED:** The Court enters Final Summary Judgment in favor of the Defendant. Plaintiff shall take nothing by this action and shall go hence forth without day.

The Court reserves jurisdiction to determine Defendant's entitlement to reasonable attorneys' fees and costs.

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[1]The record evidence confirms that the Defendant holds a certificate of self-insurance with the State of Florida, pursuant to Fla. Stat. 324.171.

[2]There is no dispute that at the time of the loss, the renter Ms. Woodside and passenger Ms. Oliver, were resident relatives.

* * *

**Insurance—Evidence—Motion in limine—Mere mention of claim handling process at trial would not be prejudicial or, if so, would not be so prejudicial that it could not be cured—Motion in limine seeking to preclude any reference to insurer's claim handling procedures is denied without prejudice to making appropriate objection at trial—Discussion of motions in limine**

ASAP RESTORATION CORP. (a/a/o Elaine Miller), Plaintiff, v. CITIZENS PROPERTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 18-17697 COCE (53). March 17, 2020. Robert W. Lee, Judge. Counsel: Aaron Silvers, Fort Lauderdale, for Plaintiff. Eric K. Gressman, Miami, for Defendant.

## ORDER ON DEFENDANT'S AMENDED THIRD MOTION IN LIMINE

THIS CAUSE came before the Court for consideration of the Defendant's Amended Third Motion in Limine, and the Court's having reviewed the Motion and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was filed August 2, 2018. The case is in a jury trial posture. A pretrial conference was set for January 23, 2020, and then continued to January 27, 2020. Thereafter, the case was set for jury trial for March 24, 2020. Since the time the case was set for pretrial conference, the parties have flooded the docket with motions—as of the date of this Order, the Plaintiff has filed 13 Motions, and the Defendant has filed 7 Motions. These numbers do not include the numerous "Responses" that the parties have filed to each other's Motions.

One of these Motions is the Defendant's Amended Third Motion in Limine, which is the subject of this Order. The Defendant filed this Motion in its original form on February 9, 2020. This Motion triggered the Court's Order on Defendant's Third Motion in Limine dated March 10, 2020. In it, the Court required the parties to make a good faith effort to resolve the matter without judicial intervention. The next day, the Defendant filed the instant Amended Third Motion in Limine, asserting that counsel attempted to resolve the matter with opposing counsel but there still is a dispute as to the scope of testimony permitted at trial. The subject matter of the Motion is any reference to the Defendant's claim handling procedures. Although the Defendant was aware that this case was proceeding to jury trial, it waited until a trial date was set to file this Motion (as well as the others) and seek a hearing on it. The Defendant now seeks a hearing on the Motion.

The purpose of a motion in limine is to seek a pretrial ruling on evidentiary matters the "mere mention of which at trial would be prejudicial" and could not be cured. *See Buy-Low Save Centers, Inc. v. Glinert*, 547 So.2d 1283, 1284 (Fla. 4th DCA 1989); *Petion v. State*, 48 So.3d 726, 737-38 (Fla. 2010) [35 Fla. L. Weekly S597a]; *M.A. v. State*, 384 So.2d 740, 742 (Fla. 2d DCA 1980). Additionally, motions in limine should not be used to address evidentiary matters which are merely speculative in nature. Rather, the moving party should have some good faith basis to believe that the opposing party actually intends to do the things for which the moving party seeks relief. The Court's experience in presiding over insurance jury trials has demonstrated few if any cases in which the issue raised in the Motion is actually brought up during trial. Whether the Plaintiff will actually raise the Defendant's claim handling procedures is clearly nothing more than mere speculation at this point.

Nevertheless, getting to the substance of the matter raised in the

Defendant's Motion, the Court finds that the "mere mention" of the claims handling process at trial would not be prejudicial or if so, would not be so prejudicial that it could not be cured. Therefore, as to the Defendant's claim handling procedures, the Plaintiff's request for an in limine ruling is DENIED without prejudice to making the appropriate objection at trial if desired.[1]

[1]The Court's ruling should in no way be read as a determination that the issue of the Defendant's claim handling process would be relevant or other admissible at trial.

* * *

**Civil procedure—Discovery—Failure to comply—Sanctions**

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. RICELLE FELIX, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019-SC-2893. January 6, 2020. James J. DeKleva, Judge. Counsel: Joseph Rosen, Pollack & Rosen, Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE AND FOR SANCTIONS**

THIS CAUSE came before the Court on January 6, 2020, upon Defendant's Motion to Enforce and for Sanctions. The Court has reviewed the Motion together with the court file, heard argument by counsel, and is otherwise fully advised in the premises. Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Enforce and for Sanctions is **GRANTED,** for the following reasons:

On November 4, 2019, this Court entered an Agreed Order Granting Plaintiff's Motion for Extension of Time to respond to Defendant's pending discovery requests ("Agreed Order"). Pursuant to the Agreed Order, Plaintiff was required to furnish responses and responsive documents to Defendant's pending discovery on or before November 22, 2019. Plaintiff received a copy of the Agreed Order and possessed the ability to comply. Plaintiff failed to furnish responses on or before the deadline imposed by the Agreed Order and said responses had not been furnished as of the date of the hearing on this matter, in knowing and willful derogation of the Agreed Order. Moreover, Plaintiff did not file for or otherwise request an extension to comply with the Agreed Order.

Any and all objections to Defendants First Request for Production, other than privilege, have been waived by virtue of the Plaintiff's failure to lodge any timely objections. *American Funding, Ltd. v. Hill,* 402 So. 2d 1369 (Fla. 1st DCA 1981); *Insurance Co. of North America v. Nova,* 398 So. 2d 836 (Fla. 5th DCA 1981); *LVNV Funding, LLC v. Hiram Rivera,* 27 Fla. L. Weekly Supp. 181a (Fla. 9th Cir. 2019, Hon. Gabrielle Sanders).

Accordingly, Plaintiff is ordered to furnish responses and responsive documents to Defendant's pending discovery requests, without asserting objections, within twenty (20) days from date of this Order.

It is **FURTHER ORDERED** that Defendant's request for sanctions because of Plaintiff's failure to comply with the Agreed Order is **GRANTED**. After having considered the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, this Court awards Defendant $ 945.00 in sanctions, which must be tendered by Plaintiff to counsel for Defendant within ten (10) days from date of this Order. *See LVNV Funding, LLC v. Hiram Rivera,* 27 Fla. L. Weekly Supp. 394a (Fla. 9th Cir. 2019, Hon. Gabrielle Sanders) (awarding Defendant sanctions based upon affidavit reflecting 4.0 hours of attorney time billed at $350.00 per hour.)

* * *

**Criminal law—Driving under influence—Evidence—Refusal to submit to urine test—Where law enforcement did not seek or obtain search warrant prior to requesting that defendant submit to urine test, motion to suppress refusal to submit is granted—Horizontal gaze nystagmus test—Motions in limine with regard to HGN tests are granted, except that state may present evidence regarding defendant's ability to follow instructions during test administration—State is required to produce field sobriety testing manual**

STATE OF FLORIDA, Plaintiff, v. TIMOTHY STUART DEGRANGE, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019-MM-004753-A. December 11, 2019. Frederic M. Schott, Judge. Counsel: Sha-Kiah Bryan, Office of the State Attorney, Sanford, for Plaintiff. Matthews R. Bark, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS/MOTION IN LIMINE WITH REGARD TO REFUSAL TO SUBMIT TO URINALYSIS / ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE WITH REGARD TO HORIZONTAL GAZE NYSTAGMUS TEST / ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE WITH REGARD TO HORIZONTAL GAZE NYSTAGMUS TEST II / ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO PRODUCE FIELD SOBRIETY TESTING MANUAL**

THIS CAUSE came on to be heard for Hearing before the undersigned County Court Judge on the 9th day of December, 2019, upon the Defendant's Motion to Suppress/Motion in Limine with regard to Refusal to Submit to Urinalysis; Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus; Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus II; and Defendant's Motion in Limine to Produce Field Sobriety Testing Manual. After carefully reviewing the Motions, after carefully reviewing and considering all of the evidence admitted at the Hearing, after carefully reviewing all of the applicable U.S. Constitutional Law, Florida Constitutional Law, Florida Statutes and applicable case law, as well as carefully considering the arguments raised by counsel for the State and by counsel for the Defendant, the Court makes the following findings of fact and conclusions of law:

1. That the Defendant's Motion to Suppress/Motion in Limine with regard to Refusal to Submit to Urinalysis is hereby GRANTED. The Defendant has not contested either the stop or arrest in this case. The State certainly presented competent, substantial evidence that Sgt. Lohri and Deputy Dubois had probable cause to believe that the Defendant was impaired on May 27, 2019, as a result of consuming marijuana based upon the totality of the evidence, and specifically the Defendant's admissions to having consumed marijuana, the Defendant's red, bloodshot, and glassy eyes, the Defendant's lethargic movements, the Defendant's failure to follow instructions, and the observations of the Defendant by Sgt. Lohri and Deputy DuBois during Field Sobriety Exercises other than the horizontal gaze nystagmus exercise. Consequently, Sgt. Lohri and Deputy DuBois had probable cause to request both a breath-alcohol test and a urine sample for testing on May 27, 2019.

This Court does not believe that a Defendant's privacy concerns for providing a urine sample rise anywhere near the level of intrusion for that of a blood sample. The taking of blood involves piercing of the skin and may result in substantial injury and harm to a defendant, unlike a urine sample involving voiding in a cup at least potentially in the privacy of a bathroom facility. In *Birchfield v. North Dakota,* the United States Supreme Court addressed the constitutionality of both warrantless blood and breath tests in the context of DUI cases. *Birchfield v. North Dakota.* __ U.S. __, 136 S.C. 2160, 195 L.Ed.2d 560 (2016) [26 Fla. L. Weekly Fed. S300a]. As for breath tests, the Court found that any violation of an individual's privacy rights is slight in comparison to the need for the states to use such testing absent a warrant in order to thwart impaired driving. *Id.* at 2184. The Court reached a different balance with blood tests, finding blood tests are significantly more intrusive and, absent exigent circumstances,

require a warrant. *Id.*

As set forth hereinabove, this Court does not find that a Defendant's privacy concerns for providing a urine sample rise anywhere near the level of intrusion for that of a blood sample. Nevertheless, applicable precedent constrains this Court to grant suppression of the Defendant's refusal to provide a urine sample for urinalysis in the instant case. In *Williams v. State,* the Fifth District Court of Appeal ruled, albeit in a footnote, that the search-incident-to-arrest exception to the warrant requirements found in both the Fourth Amendment of the United States Constitution and in Florida's Constitution does not apply to either blood or urine tests. *Williams v. State,* 210 So. 3d 774, 776 n.1 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D438a].

As the evidence was uncontroverted that neither Sgt. Lohri nor Deputy DuBois either sought or obtained a search warrant prior to requesting the Defendant to submit a urine sample for uninalysis testing, pursuant to the ruling in *Williams v. State,* this Court grants Defendant's Motion to Suppress.

2. That the Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus Test and Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus Test II are GRANTED IN PART AND DENIED IN PART. Defendant's Motions in Limine with Regard to Horizontal Gaze Nystagmus Test are granted with the limited exception that the State shall be permitted to present evidence on the Defendant's ability and/or inability to follow Deputy Dubois's instructions during the administering of the HGN.

3. That the Defendant's Motion in Limine to Produce Field Sobriety Testing Manual is hereby GRANTED. This document is reasonably calculated to lead to admissible evidence in this case. The State shall furnish Deputy DuBois's Field Sobriety Testing Manual within thirty (30) days of the date of this Order.

* * *

**Insurance—Personal injury protection—Coverage— Deductible—Where medical provider's bill fell within deductible, irrespective of whether insurer reduced bills by application of statutory fee schedule prior to applying resulting sum to deductible or applied total bill to deductible, provider was not damaged by insurer's initial erroneous calculation of amount to be applied to deductible**

SPECIALTY HEALTH ASSOCIATES LLC, a/a/o Tasha McDougald, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 19th Judicial Circuit in and for Martin County. Case No. 19000059SCAXMX. January 17, 2020. Jennifer Alcorta Waters, Judge. Counsel: Melissa Milford, Law Office of Jeffrey R. Hickman, West Palm Beach, for Defendant.

## ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before this Court on Defendant's Renewed Motion for Summary Judgment on January 14, 2020, and this Court, having heard argument of Counsel, and having reviewed the file, hereby finds as follows:

1. Plaintiff filed this action on or about January 11, 2019.

2. According to the Complaint, on or about November 22, 2016, Tasha McDougald was involved in a motor vehicle accident in which she sustained injuries.

3. This is an action for personal injury protection benefits under an automobile insurance policy issued by the Defendant, for medical services rendered by Plaintiff to Tasha McDougald.

4. The policy provided for $10,000 in PIP benefits, which became available only after the $1,000.00 deductible was paid[1].

5. Plaintiff rendered treatment services to Tasha McDougald commencing on November 29, 2016.

6. Plaintiff submitted a bill to Defendant, which, according to the Affidavit of Ashley Mobley, the PIP litigation adjustor for Defendant, was the first bill received[2]. The bill was for a total of $145.00

7. Defendant denied the claim as it was the first bill submitted, and the deductible was not met.

8. At the time that the claim was made, the Defendant calculated the reimbursable amount of the bills pursuant to 200% of the Medicare Part B Fee Schedule, which reduced the amount to $103.28, and applied the amount to the $1,000.00 deductible.[3] Because the amount was less than the deductible, Defendant denied the claims.

9. After the Florida Supreme Court decided *Progressive Select Ins. Co., v. Florida Hospital Medical Center,* SC18-278 (Fla. December 28, 2018) [44 Fla. L. Weekly S59a], the Defendant reevaluated the denial of benefits in this case, and applied the deductible in accordance with the new precedent from the Supreme Court, under the authority of *Ramon v. Aries Insurance Company,* 769 So. 2d 1053 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1830a], which permits an insurer to correct an error in payment of bills.

10. After the re-evaluation of the denial of benefits, Defendant then applied the deductible to 100% of the Plaintiff's bill, which totaled $145.00, also less than the $1,000.00 deductible amount.

11. Plaintiff's bill was the first received and fell within the applicable $1,000.00 deductible, regardless of the deductible methodology applied by Defendant.

12. Therefore, Plaintiff was not entitled to Personal Injury Protection benefit reimbursement by Defendant. Defendant is not responsible to Plaintiff for amounts within the deductible.

13. "The functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." *Int'l. Bankers Ins. Co. v. Arnone,* 552 So. 2d 908, 911 (Fla. 1989). The insured is responsible for the payment of the deductible amount. *Mercury Insurance Company of Florida v. Emergency Physicians of Central,* 182 So.2d 661, 667 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2364a].

14. Because the amount in controversy was less than the deductible amount, payment of the balance was the responsibility of the insured.

15. Plaintiff submitted no actual evidence that it had been damaged. Plaintiff has failed to establish any damages as a result of conduct by Defendant. Regardless of whether the bills at issue were applied to the deductible before the fee schedule, reduction or after, the bills would have been applied to the deductible in their entirety.

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant's Renewed Motion for Summary Judgment is GRANTED.

2. Plaintiff's Motion for Summary Judgment is DENIED.

3. Plaintiff, Specialty Health Associates, LLC (a/a/o Tasha McDougald) shall take nothing by this action, and Defendant, Geico Indemnity Company, shall go hence without delay.

4. This Court reserves jurisdiction to entertain any timely motions regarding an award of attorneys' fees and costs.

5. The trial scheduled for March 30, 2020 is hereby removed from the docket.

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[1]There were no affidavits filed which opposed the fact that the deductible on the policy was $1,000.00. The complete policy was attached as Exhibit "A" to the Affidavit of Ashley Mobley and filed in support of Defendant's Renewed Motion for Summary Judgment.

[2]There were no affidavits in opposition filed which opposed the fact that this was the first bill received by Defendant.

[3]Prior to the Florida Supreme Court decision in December of 2018, the 4th DCA's controlling precedent in the 19th Circuit permitted the reduction of the bills, even those applied to the deductible. *See State Farm Mutual Automobile Insurance Co. v. Care Wellness Center, LLC (Virginia Bardon-Diaz),* 240 So. 3d 22 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D573a]

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# MISCELLANEOUS REPORTS

**Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Work habits—Judge does not violate Code of Judicial Conduct by converting a dissertation into a published book and selling the book for compensation**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-1. Date of Issue: January 24, 2020.

## ISSUE

Whether a judge may publish the judge's dissertation as a book and receive compensation for sale of the book.

ANSWER: Yes.

## FACTS

With the support of two successive chief judges, the inquiring judge worked toward the completion of a doctoral degree in judicial studies. The doctoral degree required the judge to complete courses and a dissertation. Recently, the judge successfully defended his dissertation, and the dissertation committee members suggested the judge consider publishing the dissertation as a book.

The inquiring judge is "interested to know if I may publish and receive compensation" for publishing the dissertation as a book. "The book will be based on the dissertation but will be significantly edited for a broader audience." The judge states that "no judicial resources will be used to edit, publish, or market any book that results from the dissertation manuscript."

## DISCUSSION

Several times, including recently, we addressed inquiries asking whether a judge may write a book. *See* Fla. JEAC Op. 19-18 [27 Fla. L. Weekly Supp. 336a]. Our answer to that general question remains unchanged.

Multiple canons of the Florida Code of Judicial Conduct apply to this inquiry. Canon 1 provides: "A Judge Shall Uphold the Integrity and Independence of the Judiciary." Fla. Code Jud. Conduct, Canon 1. Canon 2A states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Fla. Code Jud. Conduct, Canon 2A. Similarly, Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others[.]" Fla. Code Jud. Conduct, Canon 2B. Finally, Canon 6 provides: "Fiscal Matters of a Judge Shall be Conducted in a Manner That Does Not Give the Appearance of Influence or Impropriety[.] . . ." Fla. Code Jud. Conduct, Canon 6.

These canons are clear that a judge must not advance private interests based on the prestige or resources of the judicial office. But, the judge states that "no judicial resources will be used to edit, publish, or market any book that results from the dissertation manuscript." As a result, we do not believe the Code of Judicial Conduct prohibits the judge from publishing and selling the book.

That said, our inquiry is limited to "contemplated judicial and non-judicial conduct" and we do not comment on prior actions of a judge or judicial candidate. *In re Comm. on Stds. of Conduct Governing Judges*, 698 So. 2d 834, 835 (Fla. 1997) [22 Fla. L. Weekly S552a]. As a result, we do not consider the judge's past actions or the preparation of the dissertation.

Of course, we caution the inquiring judge that his actions relating to the publishing and sale of the forthcoming book must comply with the Code of Judicial Conduct. *See, e.g., In re Hawkins*, 151 So. 3d 1200 (Fla. 2014) [39 Fla. L. Weekly S652a]. For example, in Fla. JEAC Op. 19-18, we explained that while "writing informative books and articles is encouraged," a judge "should be mindful of the issues created by taking any definitive positions." The judge must also make certain that the promotion and sale of the book does not intermingle with court related obligations. *Id*.

We also wrote that a judge is permitted to publish a book, "post a photo of the judge on the author page, participate in book signings and have it disclosed in a press release that the author is a judge." *Id*. (citing Fla. JEAC Op. 10-12) [17 Fla. L. Weekly Supp. 857a]. But we cautioned that a judge may not directly sell the book to a member of the bar. *Id*. (citing Fla. JEAC Op. 89-06). Nor may a judge allow his judicial assistant or immediate family members to do so. *Id*.

In conclusion, the judge may publish his dissertation as a book. But the judge should not use any additional judicial resources or time in doing so. Further, the judge must be mindful of his obligations under the Code of Judicial Conduct when promoting and selling the book.

## REFERENCES

*In re Hawkins*, 151 So. 3d 1200 (Fla. 2014) [39 Fla. L. Weekly S652a]
*In re Comm. on Stds. of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997)
Fla. Code of Jud. Conduct, Canons 1, 2A, 2B, and 6
Fla. JEAC Ops. 19-18, 10-12, 89-06.
Fla. R. Jud. Admin. 2.320, 2.230(e)

* * *

**Judges—Judicial Ethics Advisory Committee—Fundraising—Charitable fundraising and volunteering—Judge may not attend awards event recognizing advocates for children in which the attendance of elected officials and members of the judiciary was advertised and judge would be formally introduced where event is a fundraiser and organization is not solely law-related**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-2. Date of Issue: January 31, 2020.

## ISSUE

Whether a judge may attend an awards event recognizing advocates for children.

ANSWER: To the extent that this event is also a fundraiser for a civic organization and the judge will be specially introduced during the event, no.

## FACTS

The inquiring judge has been invited to attend a Florida's Children First special event that would honor three individuals as "true champions for children" (none of whom are the inquiring judge). According to its website, Florida's Children First "works to improve the government and private systems that exist to serve children. We do this in several ways: Executive Branch Advocacy, Legal Advocacy, Legislative Advocacy, Procedural Rule Advocacy, Support for Former Foster Youth, Training and Support of Attorneys."

The invitation the judge received from an event organizer stated "[w]e hope you can join us as we thank those who've given so much, and acknowledge leaders in our midst like yourself." The accompanying advertisement for the special event stated, "Join distinguished child advocates, members of the judiciary, elected officials, and civil leaders as they recognize . . . truly remarkable advocates for children." Tickets to this event are listed in the advertisement at $125 per person, as well as program book space starting at $500.

The inquiring judge wishes to know whether attendance at this event would be prohibited by the Code of Judicial Conduct.

## DISCUSSION

There are two judicial canons this inquiry appears to implicate. With respect to charitable or civic organizations, Fla. Code Jud.

Conduct, Canon 5C(3)(b)(iii) states "A judge . . . as a member or otherwise . . . shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation." Fla. Code Jud. Conduct, Canon 4D(2)(b), however, allows a "judge . . . as a member or otherwise" to "appear or speak at, receive an award or other recognition at, be featured on the program of, and permit the judge's title to be used in conjunction with an event of . . ." an organization "devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice." To answer the judge's inquiry, then, we must first answer two preliminary questions: (1) is this special event a fundraiser; and (2) if it is, what kind of organization is it raising funds for?

The answer to the first question, from the information we have, appears to be in the affirmative. Although there is no direct solicitation contained within the materials the inquiring judge has forwarded to our attention, nor does the advertisement for the special event explicitly state that fundraising will occur during the event, it seems very likely that fundraising will at least be a part of this event. The price of the tickets and availability of advertisement space are themselves suggestive of a fundraising component. *Cf.* Fla. JEAC Op. 05-02 [12 Fla. L. Weekly Supp. 406a] (noting that Knights of Columbus dinner did not appear to be fundraiser where there was no indication the organization intended to sell advertisements in a journal, hold a silent auction, or conduct a raffle and referring to journals, auctions and raffles as "indicia of fund-raising").[1] And in the experience of many members of this committee who have attended similar events, fundraising is frequently a feature (of varying degree) during programs such as these. Assuming that is the case with this special event, we must next ascertain whether Florida's Children First is a law-related organization, and if it is, whether this event could be said to concern the law, the legal system, or the administration of justice.

In 2008, the Florida Supreme Court amended Fla. Code Jud. Conduct, Canon 4D(2)(b)

> to permit a judge to "speak at, receive an award or other recognition at, be featured on the program of, and permit the judge's title to be used in conjunction with an event of [an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice]." However, if the event serves a fundraising purpose, the judge may participate "only if the event concerns the law, the legal system, or the administration of justice." This change is intended to allow judges to participate in a law-related organization's fundraiser only where the particular event serves a law-related purpose and the funds raised will be used for a law-related purpose. It will be the responsibility of the judge who wants to participate in a fundraising event to determine that the event meets the criteria of this Canon and that the organization intends to use the funds in a manner consistent with this Canon.

*See In re Amendments to the Code of Judicial Conduct—Limitations on Judges' Participation in Fundraising Activities*, 983 So. 2d 550, 552 (Fla. 2008) [33 Fla. L. Weekly S328a]. The commentary to Canon 4D(2)(b) was further amended to "caution[ ] that judges 'may not participate in or allow their titles to be used in connection with fund-raising activities on behalf of an organization engaging in advocacy if such participation would cast doubt on the judge's capacity to act impartially as a judge.' " *Id.*

Since the 2008 amendment, this Committee has construed the parameters of what constitutes a law-related organization on several occasions. *See* Fla. JEAC Op. 16-20 [24 Fla. L. Weekly Supp. 776a] (serving on committee responsible for raising funds for golf tournament raising funds for Guardian Ad Litem was impermissible because it "casts reasonable doubt on the inquiring [dependency] judge's capacity to act impartially as a judge," but attendance at the fundraising event was not prohibited by Canon 5); Fla. JEAC Op. 14-07 [21 Fla. L. Weekly Supp. 851a] (inquiring judge could participate as a model in Association of Women Lawyers' fashion show event whose proceeds would primarily benefit a free childcare facility inside the courthouse as well as help fund assistance to law students in financial need because the Association was an organization devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice and the courthouse childcare program "improves the administration of justice by decreasing continuances due to childcare issues and by making the courts more accessible to parents who would not otherwise be able to attend required court proceedings because of a lack of childcare options"); Fla. JEAC Op. 11-15 [18 Fla. L. Weekly Supp. 1207a] (finding Young Lawyers Section of the inquiring judge's local bar association was a fund-raising event of a law-related organization but the charity golf tournament at issue was not a "quasi-judicial" activity because the funds would not be used for a law-related purpose and concluding that the judge's participation as a "hole sponsor" at the event was authorized based on the commentary added by the Florida Supreme Court to Canon 5C(3)(b)); Fla. JEAC Op. 11-06 [18 Fla. L. Weekly Supp. 1062a] (determining that the Young Women Christian Association is not solely a law-related organization; "[t]o permit judges to fundraise for a nonprofit organization which is not solely law-related, but which develops programs that are law-related would undermine the intention of the Supreme Court when it amended Canon 4D in 2008"); Fla. JEAC Op. 10-32 [18 Fla. L. Weekly Supp. 134a] (concluding that participation in a program or skit for American Inn of Court competing for an award that included a monetary contribution to a charity of choice was "conduct that concerns the law and the legal system" and noting that the inquiry did not involve participation in fundraising because "[t]he participating judge is not actively involved in a fundraising activity and is not utilizing the prestige of the judge's office to promote fundraising. The judge is merely designating a recipient of funds already in the coffers of the organization."); Fla. JEAC Op. 10-31 [18 Fla. L. Weekly Supp. 133a] (inquiring judge's proposed letter of support for the "One Campaign" of The Florida Bar to members of the Florida Bar encouraging donations of pro bono services was permitted under Canon 4(D)(2)); Fla. JEAC Op. 09-15 [16 Fla. L. Weekly Supp. 1006a] ("A non-profit legal services corporation which provides legal services to indigent persons is a law-related organization under Canon 4D . . . ."); Fla. JEAC Op. 09-07 [16 Fla. L. Weekly Supp. 601a] ("ORT America is not an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice as required by Canon 4D. While an indirect result or by-product of its core goal of promoting better education may indeed be that those who are better educated will be less likely to break the law and thus lead to less crime, the inescapable conclusion is that this type of organization is not a law-related organization as contemplated by the amendments to Canon 4D."); Fla. JEAC Op. 08-23 [16 Fla. L. Weekly Supp. 121b] (concluding that "[a]lthough the Anti-Defamation League is a civic organization and the purpose of the luncheon is, in part, to raise funds for the organization, . . . the Committee concludes that as long as the purpose and ultimate use of the [inquiring judge's purchased advertisement] will be solely congratulatory, and neither the contribution by the judge nor the content of the advertisement will cast reasonable doubt on the judge's impartiality, interfere with the performance of judicial duties, or lead to frequent disqualification of the judge, the inquiring judge may purchase the proposed advertisement").

Based on the information we have about this organization (and given that our prior opinions appear to indicate that this determination is highly contextual), we are of the opinion that Florida's Children First would not be considered a law-related entity for purposes of Fla.

Code Jud. Conduct, Canon 4D(2)(b); and we are certain that this event is not one that solely "concerns the law, the legal system, or the administration of justice." According to the advertisement, the event is meant to honor individuals "who support the mission of Florida's Children First by making positive changes in the lives of abused, neglected and disadvantaged youth in or aging out of foster care." While that may touch upon the legal system and the administration of justice, it seems clear that the purpose for honoring these three individuals is because of a broader civic purpose: they have, in various ways, helped "mak[e] positive changes" in the lives of disadvantaged youth.

Having resolved these two preliminary questions, we can now turn to the issue at hand. Can the judge attend this event? More specifically, can the judge attend this event in the manner that appears to be contemplated—where the judge will be one of the advertised "members of the judiciary" who may be formally "acknowledged" (i.e., publicly introduced) at some point during the program. There is no indication from the information we have been provided that the inquiring judge will have any active participation in this special event. To the extent this judge would have any "role" in the event at all, we suspect it might comprise of nothing more than standing up to be recognized at some point in the program. We hesitate to liken what will probably be a momentary recognition of a judge's attendance at a fundraiser to a judge tacitly "permit[ing] the use of the prestige of judicial office for fund-raising or membership solicitation" proscribed under Fla. Code Jud. Conduct, Canon 5C(3)(b)(iii). That said, it seems more than likely that the organization is advertising the presence of members of the judiciary at this event—and perhaps introducing them as such—for that very purpose. Accordingly, erring on the side of caution, *see* Fla. JEAC Op. 19-07 [27 Fla. L. Weekly Supp. 99a] (noting that "Canon 2 of the Florida Code of Judicial Conduct calls for judges to avoid impropriety *and the appearance of impropriety* in all of the judge's activities"), we would recommend that the inquiring judge not attend this event as it has been advertised.

## REFERENCES

*In re Amendments to the Code of Judicial Conduct—Limitations on Judges' Participation in Fundraising Activities*, 983 So. 2d 550 (Fla. 2008)

Fla. Code Jud. Conduct, Canons 5C(3)(b)(iii); 4D(2)(b); 2

Fla. JEAC Ops. 19-07; 16-20; 14-07; 11-15; 11-06; 10-32; 10-31; 09-15; 09-07; 08-23; 05-02

[1]According to the advertisement, refreshments (presumably non-alcoholic) and light hors d'oeuvres will be served.

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**Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Domestic Violence Council—Judge may participate in panel discussion on human trafficking at event sponsored by a nonprofit organization that is not a fundraiser**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-3. Date of Issue: February 11, 2020.

## ISSUE

MAY A JUDGE PARTICIPATE IN A PANEL DISCUSSION ON HUMAN TRAFFICKING AT AN EVENT SPONSORED BY A NONPROFIT ORGANIZATION?

ANSWER: Yes.

## FACTS

The inquiring judge has been asked by a nonprofit 501(c)(3) organization to serve on a panel discussing the issue of human trafficking. The event is not a fundraiser.

## DISCUSSION

Few current issues currently facing our legal system are as compelling as the tragedy of human trafficking. We conclude that the inquiring judge's desire to participate in a panel discussion on this subject would be entirely appropriate because Florida judges are "encouraged to speak, write, lecture, teach, and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch [of] government." Code of Judicial Conduct, Canon 4B.

We do caution that Canon 4A places certain restrictions upon judges who may wish to speak out on legal issues. Among other things they should not conduct themselves in a manner than might "cast reasonable doubt on [their] capacity to act impartially as a judge," demean the judicial office, appear coercive, or interfere with the proper performance of their duties. In Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b] we provided a "laundry list" of "factors for a judge to consider when deciding whether to engage in an extrajudicial or quasi-judicial activity with or without compensation" and noting that "[i]f the answer to any one of the following eight questions is yes, then it is recommended the judge decline to engage in the activity". The eight factors are:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;
5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and
8. Whether the activity will lack dignity or demean judicial office in any way.

While these guidelines are self-explanatory, we add the following comments. Brief, one-time appearances on a panel such as the one contemplated by the inquiring judge should not detract from the judge's professional duties; factor 1 is aimed primarily at extensive service on committees, book tours, time-consuming teaching obligations, and similar activities. Running afoul of factor 5 also may be remote given that the judge will be appearing before a nonprofit organization without soliciting funds for same, and there appears to be minimal likelihood the organization will frequently engage in litigation (factor 7). Of course, if the judge determines otherwise, service on the panel should be reconsidered.

Factor 2 should not rear its head unless the judge goes beyond providing unbiased information to make comments as to how the judge might rule if faced with a human trafficking case. For example, in Fla. JEAC Op. 2012-34 [20 Fla. L. Weekly Supp. 190a], we expressed concern that critiquing a book by a famous attorney written about a famous case *could* "foreshadow how the judge might rule on a contested legal issue" and thus "cast reasonable doubt on the inquiring judge's capacity to act impartially as a judge or lead to frequent disqualification of the inquiring judge." Similarly, in Fla. JEAC Op. 1996-25 we found that a judge's potential arrangement to appear on a television station "to comment about, explain to, and educate the public concerning diverse legal matters including explaining and clarifying the proceedings during high publicity trials" would cast doubt on the judge's capacity to act impartially because "it

would be nearly impossible for the judge to avoid injecting his own legal opinion or foreshadowing how he might rule on a contested legal issue."

The judge did not identify (and may not know) the other persons who will participate in the panel discussion. Conceivably it could include legislators, prosecutors, law enforcement personnel, or others whose approach to the issue might be seen as other than totally neutral. However, if so, this fact standing alone should pose no problem for the judge. For example, in Fla. JEAC Op. 2018-01, the judge obtained approval to preside over a mock trial intended to aid police officers in becoming more familiar with courtroom procedures. The opinion cites to a number of others where judges wanted to teach at law schools, police academies, or seminars sponsored by advocacy groups. So long as those judges did not depart from strictly neutral approaches to the subject matter, we deemed there to be nothing improper about participating.

**REFERENCES**

Code of Judicial Conduct, Canons 4B.
Fla. JEAC Ops. 1996-25, 2012-34, 2018-01, 2019-02

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